

**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.

SC FR No. 178/2014

1. D. M. C. J. Dissanayaka,
Officer's Quarters,
Water Treatment Plant, Mulleriyawa.
2. W. K. Karannagoda,
308/MC/B01,
Quarters of Water Board,
Mount Clifford Estate, Magamma,
Homagama.
3. Hewa Balamullage Chandrathilaka,
Officer's Quarters,
Water Treatment Plant, Mulleriyawa.
Petitioners

Vs.

1. National Water Supply and Drainage Board,
Main Office, P. O. Box 14,
Rathmalana.
2. B. W. R. Balasooriya,
General Manager,
National Water Supply and Drainage Board,
Main Office, P. O. Box 14,
Mt. Lavinia.
- 2A. Thilina Wijethunga,
General Manager,
National Water Supply and Drainage Board,

Galle Road,
PO Box 14,
Mt. Lavinia

3. N. M. S. Kalinga,
Deputy General Manager (Production),
National Water Supply and Drainage
Board,
Main Office, P. O. Box 14,
Mt. Lavinia.

3A. G.K Iddamalgoda,
Deputy General Manager (HR)
National Water Supply and Drainage
Board,
Main Office, P.O Box 14,
Mt. Lavinia

3B. N.I.S Abeygunawardena,
Additional General Manager,
(Human Resources)
National Water Supply and Drainage
Board,
Main Office, P.O Box 14,
Mt. Lavinia

4. M. R. Nandawathie,
Assistant General Manager (Western
North),
National Water Supply and Drainage
Board,
Main Office, P. O. Box 14,
Mt. Lavinia.

4A. A.K.K.R Kannagara,
Assistant General Manager,
(Western North),
National Water Supply and Drainage
Board,

Main Office, P.O Box 14,
Mt. Lavinia

5. W. A. C. Sriyani,
Assistant General Manager
(Human Resources),
National Water Supply and Drainage
Board,
Main Office, P. O. Box 14,
Mt. Lavinia.

- 05A. M.A.S.S.K Chandrasiri,
Deputy General Manager,
(Human Resources),
National Water Supply and Drainage
Board,
Main Office, P.O Box 14,
Mt. Lavinia

6. B. D. M. L. Karunaratne,
Chief Accountant,
Ministry of Water Supply,
Lakdiya Madura,
Pelawatta, Battaramulla.

- 6A. B.D.M.L Kularatne,
Chief Accountant,
Ministry of Water Supply,
Lakdiya Madura,
Pelawattta,
Battaramulla

7. K. M. N. Perera

8. S. B. Weerasuriya

9. P. A. M. R. Sumanasekara

10. H. M. S. Bandara

11. D. A. M. S. Gunaratne

All c/o
National Water Supply and Drainage
Board,
Main Office, P. O. Box 14,
Mt. Lavinia.

12. The Secretary,
Human Rights Commission of Sri Lanka,
No. 165, Kynsey Road,
Colombo 8.

13. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

Before: B. P. Aluwihare PC, J.
Murdu N. B. Fernando PC, J.
Mahinda Samayawardhena J.

Counsel: Manohara de Silva PC with Harithriya Kumarage for the Petitioners
Ms. Viveka Siriwardane DSG for the 1st and 13th Respondents

Argued on: 24.03. 2021

Decided on: 09.11.2023

Judgement

Aluwihare P.C J.

This Fundamental Rights Application relates to the Petitioners' promotion to the post of Engineer – Class II of the 1st Respondent Board. The 1st Petitioner is presently in the post of Engineer Assistant-Special Class and the 2nd and 3rd Petitioners are presently in the post of Engineer Assistant – Class I of the 1st Respondent Board. The principal grievance of the Petitioners is that they were denied the opportunity to be promoted to the post of Engineer – Class II in violation of the Scheme of Recruitment and Promotion hence, the Petitioners' rights enshrined in Article 12(1) of the Constitution was breached by the arbitrary and/or unreasonable actions of the Respondents. On the 01.08.2014 the Court granted Leave to Proceed under Article 12(1) Constitution.

Service Record of the 1st Petitioner

The 1st Petitioner joined the Water Board on 10.08.1992 as an 'Electrician (Power) I' and obtained the National Certificate in Technology (Electrical) (hereinafter referred to as the NCT) on 24.02.1995. He was then appointed as 'Technical Assistant (Electrical)' on 15.05.1996. On 10.08.1997 he was promoted to 'Engineering Assistant-Class III' in consideration of his 5 years of service and the NCT qualification as well as his service as a "Technical Assistant" as per the Letter of Promotion 'P5' dated 13.01.1998. After 2 years as an 'Engineering Assistant-Class III' the Petitioner was promoted to "Engineering Assistant-Class II" with effect from 10.08.1999 as per the Letter of Promotion 'P6' dated 26.06.2000. Thereafter, upon the completion of 2 years in the aforesaid position, the Petitioner was promoted to "Engineer Assistant-Class I" on 10.08.2001 as per the Letter of Promotion 'P7' dated 29.08.2006.

According to the Scheme of Recruitment a person with 12 years of experience of which 3 years of experience as an Engineering Assistant – Class I are entitled to be promoted to Engineering Assistant – Special Class. It is asserted by the 1st Petitioner that he was entitled to be promoted to that post on 10.08.2004 but his promotion to the post of Engineering Assistant – Special Class was effected only on 04.06.2008 as per the Letter of Promotion 'P8' dated 01.02.2010. The 1st Petitioner states that in promoting the 1st

Petitioner, the 1st Respondent Board has failed to consider the 1st Petitioner's service as an Electrician and has only counted his service since he was promoted to a Technical Assistant in 1996. The 1st Petitioner's request to consider his service as an Electrician and backdate his appointment to the Special Class was rejected by the 1st Respondent Board by Letter dated 23.08.2011 marked 'P9'. Currently, the 1st Petitioner is covering duties in the post of Electrical Engineer as indicated by the letters dated 18.11.2011 and 14.06.2012 marked 'P10A' and 'P10B'.

Service Record of the 2nd Petitioner

The 2nd Petitioner obtained the NCT (Electrical) on 27.05.1992. He joined the 1st Respondent Board as an Electrician (Power) Grade 1 on 10.08.1992 and was confirmed in service with effect from the same date 'P12A' and 'P12B'. Thereafter, the 2nd Petitioner was promoted to the post of 'Technical Assistant (Electrical)-II' with effect from 15.03.1996 as per Letter of Appointment 'P13' dated 11. 03.1996. He was promoted to the post of 'Engineering Assistant (Electrical)-Class III' with effect from 27.05.1997 and then to the post of 'Engineering Assistant-Class II' with effect from 27.05.1999 as per the Letters of Appointment 'P14' and 'P15'. The 2nd Petitioner was promoted to the post of 'Engineering Assistant-Class I' with effect from 09.11.2007. Subsequently by letter dated 15.12.2008, the said promotion was backdated to 08.06.2007. True copies of the said letters dated 18.01.2008 and 15.12.2008 respectively, were marked 'P16A' and 'P16B'.

Service Record of the 3rd Petitioner

The 3rd Petitioner obtained the NCT (Electrical) on 27.06.1996 as evidenced by the certificate 'P17'. In addition to the aforesaid qualification, the 3rd Petitioner obtained the National Diploma in Engineering Technology (Electrical/Electronic Engineering) awarded by the University of Vocational Technology as indicated by 'P18'.

On 15.07.1996, the 3rd Petitioner joined the 1st Respondent Board as an 'Electrician (Power)-Grade I' as per the Letter of Appointment 'P19' and was promoted to the post of 'Technical Assistant (Electrical)' on 10.09.1999 as per the Letter of Appointment 'P20'. Thereafter, the 3rd Petitioner was promoted to the post of 'Engineering Assistant-Class III' with effect from 10.09.2002, and subsequently, to the post of 'Engineering Assistant-

Class II' with effect from 10.09.2004 as per the Letters of Appointment 'P21' and 'P22' respectively. The 3rd Petitioner was promoted to the post of 'Engineering Assistant-Class I' by Letter dated 15.12.2008 and the said promotion was subsequently backdated to 08.06.2007 by the said Letter dated 15.12.2008 marked 'P23'. The below table illustrates the employment history of the Petitioners at the 1st Respondent Board and the eligible dates for promotion to Engineer Class II as alleged by the Petitioners;

(Table 1)

	Electrician	Technical Assistant	Engineering Assistant Class III	Engineering Assistant Class II	Engineering Assistant Class I	Engineering Assistant Special Class	Eligible date for promotion as Engineer Class II
1 st Petitioner	10.08.1992	15.05.1996	10.08.1997	10.08.1999	10.08.2001	04.06.2008	10.08.2004
2 nd Petitioner	10.08.1992	15.03.1996	27.05.1997	27.05.1999	08.06.2007		10.08.2004
3 rd Petitioner	15.07.1996	10.09.1999	10.09.2002	10.09.2004	08.06.2007		15.07.2008

Promotion to the post of 'Engineer-Class II'

According to the Petitioners, the next promotion of the Petitioners is to the post of 'Engineer - Class II' as per the Scheme of Recruitment and Promotion marked 'P 1'. As per the Scheme of Recruitment and Promotion, applicants who possess the NCT and 12 years of experience of which 3 years of experience as an 'Engineering Assistant – Class I'

are eligible to be promoted to the post of ‘Engineer – Class II’. It appears from the service record that all three Petitioners fulfilled the requisite requirements.

By a notice dated 19.03.2012 marked ‘P 24’ applications for the post of Engineer – Class II were called. The applicants were required to possess NCT and 17 years of experience in the 1st Respondent Board of which 3 years as an Engineering Assistant – Class I. According to the Petitioners, they informed the 1st Respondent Board that the Scheme of Recruitment and Promotion only requires 12 years of experience, meanwhile, the notice marked ‘P 24’ requires 17 years of experience. However, the Petitioners were informed that a decision was taken by the Board of Directors of the 1st Respondent Board to increase the number of years of experience to 17 years. The Petitioners contend that the decision was not communicated to the employees of the 1st Respondent Board. The Petitioners further alleged that the notice marked ‘P 24’ is based on a proposed Scheme of Recruitment and Promotion, which was not duly approved by the relevant authorities or as per the established procedure. The 2nd Respondent denies this averment and states that the respective trade unions of which the Petitioners are members, were informed of the change effected in the eligibility criteria. The 2nd Respondent admits that although a copy of the relevant board decision was communicated it was not accompanied by a covering letter. In their counter-affidavit, the Petitioners deny that the trade unions were informed and state that the Respondents have failed to submit any proof of informing the trade unions. Furthermore, it was submitted that not being a member of any trade union, the 3rd Petitioner could not have known of the said Board Decision even if it was informed to the trade unions.

In any event, the Petitioners applied for the said post in terms of the Letter marked ‘P 24’ and according to the Petitioners as of the closing date of the application which is 05.04.2012, they possessed the NCT and had experience at the 1st Respondent Board in the following manner;

(Table 2)

	Initial Appointment as Electrician	Eligible date for promotion as Engineer-Class II	Date of Appointment as	Total years of service as at

		(completion of 12 years)	Engineering Assistant-Class 1	closing date
1 st Petitioner	10.08.1992	10.08.2004	10.08.2001 -10 years as EA I	19 years 05.04.2012
2 nd Petitioner	10.08.1992	10.08.2004	08.06.2007 -4 years as EA I	19 years
3 rd Petitioner	15.07.1996	15.07.2008	08.06.2007 -4 years as EA I	15 years

The Petitioners stated that they were called for an interview and that they faced the interview. The Petitioners submitted, marked 'P25', the 'Recommended Marking Scheme for Internal Promotions to the post of Engineer (Board Grade VII)' for awarding marks at the interview. According to the Petitioners, the Petitioners themselves and the 7th to 11th Respondents and one A.L. Kapila Bandu were called to the interview. The said Kapila Bandu was not named as a Respondent to the present application as he did not present himself at the interview to the best of the knowledge of the Petitioners.

The Petitioners state that on or about 05.02.2013, they became aware that the 7th to 10th Respondents had been promoted to the post of 'Engineer-Class II' with effect from 1st February 2013, and that upon further inquiry they learned that the said Respondents had obtained the following marks.

- I. 7th Respondent - 66.5 marks
- II. 8th Respondent - 66.5 marks
- III. 9th Respondent - 61.5 marks
- IV. 10th Respondent - 72 marks

The 2nd Respondent states that these marks are inaccurate. The 2nd Respondent further states that no marks were given at the interviews for the respective periods of service and in any event the Petitioners did not meet the eligibility criteria. The Petitioners contend as per their counter – affidavits that the 2nd Respondent willfully suppressed the interview

marks schedule from this Court as the 2nd Respondent has not submitted the said schedule.

Regarding the marks awarded at the interview, the Petitioners submit that the 1st, 2nd and 3rd Petitioners, on the other hand, had been awarded only a total of 25 marks, 23 marks and 27 marks respectively. The Petitioners state that they made inquiries and discovered that no marks have been awarded to them for their service, although the 1st and 2nd Petitioners had 19 years of service and the 3rd Petitioner had 15 years of service at the closing date of applications. The Petitioners state that to the best of their knowledge, they have been denied marks for service on the basis that they are not eligible to apply, although the 1st and 2nd Petitioners have completed 19 years of service whereas the notice calling for applications requires only 17 years of service. Furthermore, the Petitioners contend that 'P24' is a proposed Scheme of Recruitment and Promotion, which requires 17 years of experience and is not duly approved by the relevant authorities. In contrast, the Approved Scheme of Recruitment 'P 1' requires 12 years of experience, hence, in the aforesaid circumstances, the Petitioners allege that the Interview Panel has acted arbitrarily in denying the Petitioners marks for seniority.

It was further contended that, even in the round of promotions to the post of 'Engineer-Class II' held in 2009 the 1st Petitioner's name was included in the waiting list indicating that the 1st Petitioner was duly awarded marks for his service in terms of the Approved Scheme of Recruitment. Therefore, there is no rationale on which the 1st Petitioner could be denied marks for service in the current round of interviews.

The Petitioners state that they would be entitled to be promoted if marks had been awarded for their service period, with the 1st Petitioner earning 70 marks, the 2nd Petitioner earning 63.5 marks and the 3rd Petitioner earning 50.5 marks. The Petitioners submitted in tabular form a calculation of the marks that they are entitled to receive according to the marking scheme as per their inquiries made at the 1st Respondent Board. The said table is produced below in the following manner however it should be emphasized by the Court that these marks are per the Petitioners' inquiries and no interview mark schedules were produced before the Court by the Respondents.

(Table 3)

	1 st Petitioner	2 nd Petitioner	3 rd Petitioner
Additional qualifications	2 marks	4 marks	4 marks
Performance Evaluations	10 marks	9 marks	10 marks
Management Experience/ Special Skills	3 marks	2 marks	3 marks
Interview	10 marks	8 marks	10 marks
Total Marks Awarded by the Interview Panel	25 marks	23 marks	27 marks
Marks Entitled for Service	45 marks	40.5 marks	23.5 marks
Total Marks Entitled	70 marks	63.5 marks	50.5 marks

Petitioners further submitted that 7 vacancies were available at the time of calling for applications by the 1st Respondent Board. However, the 2nd Respondent in paragraph 16 of his affidavit states that there were only 6 vacancies available at the time. In any event, the Petitioners illustrate the order of their promotions in the following manner if there were 7 impugned vacancies and if they were awarded the purported entitled marks for their service period;

(Table 4)

	Name	Marks Awarded/ Entitled
1	H.M.S Bandara (10 th Respondent)	72 Marks
2	1 st Petitioner	70 Marks
3	K.M.N Perera (7 th Respondent)	66.5 Marks
4	A.S.B Weerasuriya (8 th Respondent)	66.5 Marks
5	2 nd Petitioner	63.5 Marks
6	P.A.M.R Sumanasekara	61.5 Marks
7	3 rd Petitioner	50.5 Marks

Inquiry Before the Human Rights Commission

On becoming aware of the promotion of the 7th to 10th Respondents to the post of 'Engineer-Class II' the Petitioners lodged a complaint on 15.02.2013 before the Human Rights Commission (marked 'P26A', 'P26B' and 'P26C') bearing No. HRC/605/2003. In respect of the said complaint, the Respondents filed Observations before the Human

Rights Commission 'P27' taking up the position that; at a meeting of the Board of Directors of the 1st Respondent Board held on 16.08.2010, the Scheme of Recruitment has been amended to require NCT and 17 years of experience as an Engineering Assistant including 3 years as a Board Grade 7 Engineering Assistant. Furthermore, regarding the 1st Petitioner, he was appointed as a Technical Assistant on 04.06.1996 and he completed 17 years of service on 04.06.2013, therefore has been considered by the Interview Panel as a candidate who has not fulfilled the required qualifications.

On 17.05.2013 the 1st Respondent Board filed Observations 'P28' with regard to the complaint made by the 2nd and 3rd Petitioners by which they took up the position that; the applications were called for the said post in terms of the Scheme of Recruitment **applicable at the time**, in terms of which the NCT and 12 years of experience of which 3 years' experience in a Board Grade 7 Engineering Assistant post was required, but the Board of Directors considered the representations made by Trade Unions that requiring 12 years of experience from both those possessing NCT and those possessing NDT (National Diploma in Technology) would have the effect of not giving the due recognition to the NDT qualification, and therefore increased the required number of years of service for NCT qualification holders to 17 years. The 2nd Respondent, in his objections, admitted these averments and further clarified that 12 years of experience was considered for applicants with NDT and that NCT cannot be equated with NDT.

A true copy of the purported Board Decision filed by the 1st Respondent before the Human Rights Commission 'P29' was submitted to this court by the Petitioners. The Petitioners, however, state that 'P29' is not a Board Decision as maintained by the 1st Respondent and merely a document containing the proposed Scheme of Recruitment and Promotion. The Petitioners point out that the document carries no indication that the Board of Directors of the 1st Respondent has approved the said proposed Scheme of Recruitment and Promotion. The Petitioners further state that the 1st Respondent failed to produce a certified copy of the purported Board Decision dated 16.08.2010 to the Human Rights Commission. In the circumstances, the Petitioners state that they verily believe that a decision to amend the Scheme of Recruitment was not taken.

In response, the 2nd Respondent states that the document 'P29' was consequent to a Board Decision dated 16.08.2010, a certified extract of which was submitted marked '2R1'. The contents of '2R1' are to the effect that the Board discussed the revision of the Scheme of Recruitment and Promotion with the General Manager and Deputy General Manager (Personnel and Administration) and approved to revise the tenure of experience of the NCT qualified personnel, as shown in the Annexures to the Board Paper when they apply for the posts of Engineering Assistants Class III-(Board Grade 10) and Engineering Assistants (Special)- (Board Grade 7) and Engineer Class II (Board Grade 7). The relevant annexure to '2R1' was submitted later by motion dated 10.02.2016 as the 2nd Respondent had failed to annex the same, along with the objections.

The Petitioners contend that the document '2R1' submitted by the Respondents purported to be the Board Decision to amend the Scheme of Recruitment and Promotion is not in a fit state to be accepted by the Court, stating that it is merely a paragraph printed on scrap paper with a handwritten date and bearing no signatures of the members of the Board of Directors or the Secretary of the Board.

The Petitioners state that the inquiry before the Human Rights Commission commenced on 02.08.2013 and was re-fixed for 16.09.2013. No representations were made on behalf of the 1st Respondent Board. The Petitioners state that thereafter, at the next date of inquiry 04.11.2013, an officer of the Personnel Department of the 1st Respondent Board appeared and admitted that the proposed revisions to the Scheme of Recruitment and Promotion contained in 'P29' have not been approved and that the approval of the Department of Management Services, Director General of Establishments and the then National Salaries and Cadre commission have not been obtained in respect of the same. The said officer is said to have further stated that 7 vacancies were available to the post in question at the time of calling for applications and that at the time of giving evidence at the inquiry three vacancies were remaining. However, as stated earlier the 2nd Respondent in his Statement of Objections denied these averments and maintained that there were only 6 vacancies.

The Petitioners state that these matters were recorded by the inquiring officer of the Human Rights Commission who advised the said officer of the 1st Respondent Board to

settle the matter and report any settlement to the Human Rights Commission within 2 weeks. According to the Petitioners, their complaint was not taken up for inquiry thereafter and to the best of the Petitioners' knowledge, the Human Rights Commission has not made any further recommendations. The 2nd Respondent states that the matter was thereafter referred to the Department of Labour.

The Petitioners contend that in terms of the circulars issued by the Ministry of Finance, the 1st Respondent Board, being a statutory Board, is required to effect all promotions in terms of the approved Schemes of Recruitment and Promotions and obtain the necessary approvals from the Department of Management Services and the Treasury. The copies of Management Services Circulars No. 28 dated 10.04.2006 and 28(II) dated 01.08.2006 were submitted marked 'P31' and 'P32'. The 2nd Respondent states that the restructuring of the National Water Supply and Drainage Board commenced in late 2011 under the supervision of the Department of Management Services and was required to prepare a new scheme of recruitment. Prior to the said restructuring the then scheme of recruitment was amended pursuant to Board decisions.

The Petitioners further state that the 1st Respondent has acted contrary to the direction given by the Attorney General by letter dated November 2011 'P33' that all promotions of the 1st Respondent Board should be made in terms of the approved scheme of recruitment and by conducting interviews duly. The said letter marked 'P33' relates to a settlement reached in SC FR 103/2007 that the Water Board should follow the eligibility criteria in the Scheme of Recruitment in awarding promotions. In response to this contention, the 2nd Respondent maintains that the interviews were duly conducted. The said letter marked 'P33' states as follows;

“ඉදිරියේදී ජාතික ජල සම්පාදන හා ජලාපවහන මණ්ඩලය මගින්, තම ආයතනය තුළ උසස්වීම් පිරිනැමීමේදී අදාළ තනතුරට බලපවත්වන උසස්වීම් පරිපාටියට අනුකූලව උසස්වීම් පිරිනැමිය යුතු අතර, ඒ සම්බන්ධයෙන් සම්මුත පරීක්ෂණ නිසි ආකාරයට පැවැත්වීමට අදාළ සම්මුත පරීක්ෂණ මණ්ඩලයෙන් වග බලාගත යුතු බවද මාගේ මතය වේ.”

Answering the 2nd Respondent's statement that no marks were given for the Petitioners' service as they had not met the eligibility criteria, the Petitioners point out that in paragraph 13 of his objections the 2nd Respondent has admitted that as the new Scheme

of Recruitment and Promotion had not come into force, the existing scheme of recruitment was adopted. Whereas the existing scheme of recruitment required only 12 years of service and the Petitioners were all possessed of more than 12 years of experience at the closing date of applications, they were eligible for promotion and therefore could not have been denied marks for service by the Respondents on the basis that the Petitioners were not eligible.

Furthermore, the Petitioners state that the 2nd Respondent's objections are self-contradictory as the existing scheme of recruitment was adopted since the new scheme of recruitment had not come into force, but paragraph 14 of the statement of objections, states that the Petitioners were not eligible for the promotion in terms of the existing Scheme of Recruitment. Therefore, if the existing Scheme of Recruitment was followed, as submitted by the 2nd Respondent, the Petitioners would have been eligible as they had the requisite experience required as per the existing scheme of recruitment. The Petitioners state that this points to arbitrary action by the Respondents in denying them marks for service on the basis that they are not eligible.

Moreover, the 2nd Respondent contended that the 1st Petitioner is not eligible to apply as he does not possess the requisite experience having assumed duties in the post of 'Technical Assistant' only on 15.05.1996. The 2nd Respondent has not set out the reasons as to why the 2nd and 3rd Petitioners would be ineligible for promotion to "Engineer-Class II' except to state that the next promotion of the 2nd and 3rd Petitioners is to the post of 'Engineer Assistant-Special Grade'.

The Petitioners point out that the 2nd Respondent has failed to file the purported Board Decision amending the Scheme of Recruitment and the purported amended Scheme of Recruitment. At the inquiries before the Human Rights Commission and the Department of Labour, the Respondents had produced 'P29' as the purported Board Decision.

Although the 2nd Respondent states that the Petitioners were not eligible for the promotion, the Petitioners were called for the interview. According to the Petitioners, at the interview too they had not been informed that they were ineligible. Furthermore, the 1st Petitioner had even been appointed to cover the duties in the post of Electrical Engineer, as indicated by the documents 'P10A' and 'P10B' and was included in the

waiting list. In response to an appeal submitted by the Petitioner dated 10.08.2010 ('CA3') seeking to be promoted to the post of Electrical Engineer, the then General Manager (Personnel) of the 1st Respondent had informed the 1st Petitioner by letter dated 29.09.2010 ('CA4') that there were no vacancies for the post of Electrical Engineer and requested the 1st Petitioner to apply for the post in the next round of promotions. At no time was the 1st Petitioner informed that he was not eligible for promotion to the impugned post (*vide* 'CA1' and 'CA2' letters sent by the 1st Respondent Board dated 24.06.2009 and 07.05.2008 respectively calling the 1st Petitioner for interviews for the post of 'Electrical Engineer Class II').

Alleged Violation of Article 12(1) of the Constitution

Applications for the post of 'Engineer-Class II' were called under the purported new Scheme of Recruitment and not under the existing Scheme of Recruitment (*vide* 'P24' letter calling for applications dated 19.03.2012 which requires 17 years of experience including 3 years' experience in the post of 'Engineer Assistant-Class 1' from those with the NCT qualification). The 2nd Respondent has taken up contradictory positions in stating which Scheme of Recruitment was resorted to in selecting the Petitioners for the interviews for promotion. By paragraph 13 of his statement of objections the 2nd Respondent has verily accepted that the Scheme of Recruitment resorted to with regard to the Petitioners was the existing Scheme of Recruitment as the purported new Scheme of Recruitment had not come into force by then.

As the 2nd Respondent himself has accepted that the existing Scheme of Recruitment was resorted to regarding the Petitioners, it only remains for this Court to consider whether the Petitioners were in fact possessed of the requisite eligibility to apply for the post of 'Engineer-Class II'. The Court's inquiry is made easier by the fact that all three Petitioners were called for interview by the 1st Respondent Board. The Court is inclined to consider the said fact as a *prima facie* indication that the 1st Respondent Board considered the Petitioners eligible, contrary to the 2nd Respondent's contention that the Petitioners were not eligible to apply. As held by His Lordship Justice Fernando's statement in *Abeyasinghe v. Central Engineering and Consultancy Bureau (1996) 2 SLR 36, at page 47* "...the fact that he was invited for the interview does suggest that he was, *prima facie*, suitable..."

regarding a situation where the Petitioners were invited to attend an interview to select a candidate for appointment as Deputy General Manager of the CECB.

The Petitioners submits that at the round of promotions held in 2009, the 1st Petitioner was duly awarded marks for his service and included in the waiting list for the post of 'Engineer-Class II', which further supports the finding that the 1st Petitioner was eligible to apply for the said post. Although the Petitioners have not submitted specific proof that the 1st Petitioner was included in the waiting list, the letter 'CA3' sent by the 1st Petitioner to the Chairman of the Water Board dated 10.08.2010 seeking a promotion to the post of 'Engineer-Class II' mentions that the 1st Petitioner is included in the waiting list. The said position is not contradicted by the Respondents.

However, the Court is mindful that a candidate who was called for an interview may well be found unsuitable for the position following the due completion of the interview process. This could be due to the candidate failing to score the number of marks needed due to various deficiencies in their suitability. In *Abeyasinghe v. Central Engineering and Consultancy Bureau* (supra) it was observed that in certain circumstances even a candidate who possesses the requisite seniority and merit may be overlooked if it is demonstrated that such candidate does not possess the skills to meet the needs of the institution and the public.

“The principle of promotion by reference to seniority and merit does not mean that the needs of the Institution and the public, or the demands of the post in question, must be ignored (see Perera v. Ranatunga (1993) 1 SLR 39) Hence even if he had been given high marks, nevertheless the decision not to appoint him, to a post for which he was considered unsuitable, cannot be considered unlawful, unfair or unreasonable.”

Therefore, although the Court is convinced that the Petitioners are possessed of the requisite qualifications to be called for interview, the Court does not hold the preconception that the Petitioners would score sufficient marks for appointment into the post of 'Engineer-Class II'. If the Respondents were able to demonstrate that the Petitioners were found unsuitable consequent to the interview it would have to be accepted that the Petitioners were indeed unsuitable and were not subjected to unequal treatment. Except for stating that the Petitioners do not possess the requisite experience

for the post, the Respondents have submitted scant justification in support of their rejection of the Petitioners for the said post, leading to the conclusion that the Respondents were acting in an unreasonable and arbitrary manner by overlooking the Petitioners for promotion. Documents that can establish the *bona fides* of the interview process such as the mark sheets of the interviews and/or a marking scheme have not been submitted by the Respondents.

With regard to the period of experience, if the 'Recommended Marking Scheme' marked 'P25' was used to evaluate the Petitioners' suitability, the 2nd Respondent's contention, that marks were not awarded for the Petitioners' period of service, is untenable. It appears that the period of experience and period of service would mean one and the same when it comes to internal candidates of the 1st Respondent Water Board such as the Petitioners, as a specified number of marks are awarded for each year of experience in the respective posts of 'Technical Assistant', 'Engineering Assistant-Class II', 'Engineering Assistant-Class I' and 'Engineering Assistant Special Grade' with the possibility of earning a maximum of 50 marks for the period of experience. In that context, each of the Petitioners stands to earn a considerable number of marks given their service record in the Water Board, which was mentioned at the outset.

On the other hand, the Petitioners have not adduced evidence to demonstrate that the 7th to 10th Respondents possessed the same qualifications as the Petitioners, nor any *mala fides* on the part of the Respondents. The classification theory requires that a positive act of unequal treatment among subjects similarly circumstanced should be demonstrated, if a finding of unequal treatment is to be made. Despite its adoption by a Full Bench in *Elmore Perera v. Montague Jayawickrama* (1994) 2 SLR 90, this court has thereafter on many occasions sought to distance itself from the classification theory, in favour of the 'new doctrine' formulated in the Indian case of *Royappa v. State of Tamil Nadu* 1974 AIR SC 555. Relief is now freely granted in respect of arbitrary and *mala fide* exercise of executive power.

Although a trend of moving away from the classification theory emerged, the theory is not so faulty as to be completely discarded, given that it is not applied rigidly to mandatorily insist on evidence of differential treatment of similarly situate persons in all

and every occasion, for a finding of unequal treatment to be made. Having made this observation, in the present case, we consider it more appropriate to apply the ‘new doctrine’ which focuses on whether the impugned act was contrary to the rule of law and reasonableness. After *Shanmugam Sivarajah v. OIC, Terrorist Investigation Division* SC FR 15/2010, (SC Minutes of 27.06.2017), it is now settled that ‘classification’ is not the only basis for relief under Article 12(1) of the Constitution. As held by the Court at p.12,

“Rule of Law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal. It does not require positive discrimination or unequal treatment. An act that is prohibited by the law receives no legitimacy merely because it does not discriminate between people.”

In *Wickrematunga v. Anuruddha Ratwatte* (1998) 1 SLR 201, His Lordship Justice A.R.B. Amerasinghe held that *“Law” in Article 12 of the Constitution includes regulations, rules, directions, principles, guidelines and schemes that are designed to regulate public authorities in their conduct.*” Accordingly, the Scheme of Recruitment in question which sets out the manner of recruitment for ‘Technical Assistants/Engineering Assistants and Engineers’ falls within the umbrella of ‘law’ and should be followed as it is, without deviation by the Water Board.

Denying the Petitioners’ eligibility to apply and receive the promotion to ‘Engineer-Class II’ is accordingly, contrary to law and defeats equality before the law. As elaborated in *Royappa v. State of Tamil Nadu* (*supra*) *“From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in the Republic while the other, to the whim and caprice of an absolute monarch... They require that State action must be based on valid, relevant principles applicable alike to all similarly situate and must not be guided by any extraneous or irrelevant considerations because that would be denial of equality”*

Validity of the Purported New Scheme of Recruitment

It is noteworthy that although the call for applications ‘P24’ advertised the eligibility criteria introduced by the purported revised Scheme of Recruitment, the Respondents

were unable to satisfactorily establish that the said Scheme of Recruitment had entered into force. The purported Board decision '2R1' submitted by the 2nd Respondent appears to be a single paragraph excerpted from a larger document. As submitted by the Petitioners as well, the document does not carry a proper date and signature of approval. Had the document been submitted in its entirety with the requisite features that indicate authenticity, its validity could have been accepted.

The annexure to '2R1' submitted subsequently by way of a motion is a document seeking approval "*to revise the service of experience as 17 years instead of 12 years in the existing scheme of recruitment*". Nowhere in the document is it stated that the recommendation to revise the tenure of experience of the NCT qualified Engineering Assistants when applying for the post of Engineer has been approved. Therefore, it cannot be accepted as evidence of due approval of the purported new Scheme of Recruitment. Furthermore, it can be seen that 'P29' the purported Board Decision filed before the Human Rights Commission by the 1st Respondent Board and submitted to the Court by the Petitioners, contains the existing scheme and the proposed scheme side-by-side and is not a finalized revision of the Scheme of Recruitment. Therefore, the Board's Decision to amend the scheme of recruitment and the amended scheme of recruitment has not been submitted to the Court in a plausible manner.

Restrictions on the Promotion of Internal Candidates to 'Engineer-Class II'

With regard to the 1st Petitioner, without ambiguity, the next promotion available to him is to the post of 'Engineer-Class II' as he is in the 'Engineering Assistant-Special Class'. A perusal of the Scheme of Recruitment 'P1' indicates that although the 2nd Respondent's contention, that the next promotion of the 2nd and 3rd Petitioners could be only to the 'Engineering Assistant (Special) Grade', is incorrect, there are indeed certain restrictions as to how promotions to 'Engineer-Class II' can be made. Those possessing the NCT together with 12 years of experience, including 3 years of experience as an 'Engineering Assistant-Class I' in Board Grade 8, are eligible to apply for the post of 'Engineering Assistant-Special Class' (*vide* page 20 of 'P1') as well as to the post of 'Engineer-Class II' (*vide* page 10 of 'P1'). However, with regard to the post of 'Engineer-Class II' internal candidates with a Government Technical Officers' 3rd Examination

qualification together with experience in the relevant field in the NWSDB would have priority over candidates with the NCT qualification (per the note on page 10 of 'P1' and 'P24' Letter calling for applications dated 19.03.2012), whereas with regard to the 'Engineering Assistant-Special Class' there is no such priority explicitly stated. Furthermore, the note on page 20 of 'P1' which reads "*As internal promotions to the Grade of Engineer have been limited to 25% of the total cadre of Engineer-Class II (Board Gr. 7), Cadre of Engineer Assistant- Special Class is to be kept opened without any restriction*" evinces that only 25% of the Engineer-Class II vacancies can be filled with internal candidates, as submitted by the 2nd Respondent in his objections.

While it is evident that there are certain restrictions placed on the number of internal candidates that can be promoted to 'Engineer-Class II', the Respondents have not indicated that those restrictions were the cause for the Petitioners to be overlooked for the promotions.

Petitioners' Legitimate Expectations

It was contended by the Petitioners that their legitimate expectations were violated by the Respondents by subjecting the Petitioners to an ad hoc and unsanctioned Scheme of Recruitment and Promotion. In my opinion, the Petitioners had a legitimate expectation that the 1st Respondent Board would follow an established practice in the promotion of the applicants. This is not to state that public authorities cannot change their decisions or policies, but such changes must not be arbitrary or amount to an abuse of power. As His Lordship Justice Prasanna Jayawardena held in *Ariyaratne and Others v N.K. Illangakoon* (S.C F. R No. 444/2012, S.C Minutes 30.07.2019) at page 56;

"As evident from the principles I endeavoured to set out earlier, the first characteristic which will sustain a petitioner's claim that he has a substantive legitimate expectation the respondent public authority will act in a particular manner with regard to him, is that the petitioner must establish the public authority gave him a specific, unambiguous and unqualified assurance that it will act in that manner [or, alternatively, that the respondent public authority has followed an established and unambiguous practice which entitled the petitioner to have a legitimate expectation the public authority will

continue to act in that manner or that the facts and circumstances of the dealings between the public authority and the petitioner have created such an expectation].”

I am of the view that the Petitioners had a legitimate expectation that the promotions would be effected as per the approved Scheme of Recruitment and that they would be granted marks for their period of service. In my opinion, for the reasons stated above, the Petitioners’ legitimate expectations are violated.

Conclusion

For the reasons set above, I hold that the fundamental right of the Petitioners guaranteed by Article 12(1) of the Constitution was violated by the 1st and the 2nd Respondents. Regrettably, there is a lack of professional display by the Respondents in adhering to the applicable rules and regulations despite the communication of the Hon. Attorney General to the 1st Respondent Board way back in 2011. Needless to say, the 1st Respondent Board should adhere to approved Schemes of Recruitment and Promotions when awarding promotions. This Court observes that the 1st Respondent Board should firmly adhere to established schemes of promotion and requirements without subjecting applicants to arbitrary and ad hoc schemes. In my view, adherence to established schemes of recruitment and promotions is not a complicated task. Moreover, adherence to established schemes ensures a content public service as held by His Lordship Justice Kulatunga in *Perera and Another v Cyril Ranatunga, Secretary Defence and Others Sri L.R 1 (1993) 39* at page 60;

The service of most public officers is life-time and the guarantee of fair treatment to them enshrined in Article 12 (1) of the Constitution would, if properly enforced, also help in maintaining a contented public service which is vital for its efficient functioning.”

If the 1st Respondent Board is of the view that the Scheme of Retirement and Promotions should be streamlined, then it should be done in accordance and in compliance with the established procedure.

In those circumstances, I order the 1st Respondent Board that;

the Petitioners forthwith be appointed to the position of Engineer – Class II, in the event their promotions have not been granted. However if they had been promoted subsequent

to the filing of this application, their promotion should be back dated to the date on which promotions were granted to the 7th to the 10th Respondents to the post of Engineer- class II. The petitioners however, will not be entitled for any back wages.

We also direct the 1st Respondent Board to pay compensation in a sum of Rupees two hundred and fifty thousand to each of the Petitioners.

Application allowed

Judge of the Supreme Court

Murdu Fernando J.

I agree.

Judge of the Supreme Court

Mahinda Samayawardhena J.

I agree.

Judge of the Supreme Court