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இலங்கை மனித உரிமைகள் ஆணைக்குழு
HUMAN RIGHTS COMMISSION OF SRI LANKA

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திகதி }
Date } 08-02-2023

Dr. S.M Mohamed Ismail
No. 87, Lake Road,
Sammanthurai.

Complainant

Complaint No – HRC/2764/21

Vice Chancellor,
South Eastern University of Sri Lanka
P.O. Box 01,
University Park
Oluvil.

Respondent

The petitioner states in this compliant that he joined the South Eastern University of Sri Lanka in 1996 and served as Vice Chancellor for two terms from 2009 to 2015.

The petitioner resigned his post to contest the Parliamentary Election held in 2015 but he was not elected as a Member of the Parliament. Thereafter, he rejoined the University as per the letter of University Grants Commission No: UGC/HR/4/5/6 and dated 16th December 2015. Accordingly, the petitioner had been allowed to continue the same service and benefits enjoyed by him in his previous service. and rejoined the University.

Subsequently, the Applicant had been appointed as a National List Member of the Parliament in 2018 and served as National list Member of Parliament from 05.06.2018 to 02.02.2020. To accept the National List Member of the Parliament, the applicant had tendered his resignation again on 04.06.2018 from the post of Senior Lecturer (Grade-I) in Economics. After the completion of the above period as a National list Member of Parliament the Applicant had continuously requested the University to re-instate him in his previous post but no positive response was received from the University

The petitioner also states that he submitted his application for the evaluation of promotion to the post of Professor (on merit) on 15.12.2014 and no responds received despite of several reminders. Furthermore, the Applicant had made an appeal to the Chairman of the University Grants Commission requesting his intervention to expedite the evaluation of his application for the Post of Professor but no response received from the UGC.

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The petitioner also states that he applied for entitled sabbatical leave and it was not granted. The petitioner seeks as relief, to approve his sabbatical leave which is entitled to him according to UGC by its letter No: UGC/HR/415/6 dated 16.10.2015.

He then made the instant application to Human Rights Commission of Sri Lanka praying inter alia the following relief:

- (a) Denial purposely, the evaluation process of his Promotion (On Merit) to the Post of Professor. The petitioner seeks to rectify the purposely delayed evaluation process of his promotion to the post of Professor (on merit) applied on 15.12.2014.
- (b) Denial of his entailed earned sabbatical leave despite of the directions made by the UGC by its letter No. UGC/HR/4/5/6 dated 16.10.2015.
- (c) Failure to reply for his continuous request since August 2020 to re-instate him at the university. The petitioner seeks to reinstate him for the post of Senior Professor (cadre available) or to re-instate him with previous post of Senior Lecturer (Grade 1).

The Human Rights Commission (herein after referred to as HRCSL) called an observation on the petition of the petitioner Dr. S.M.M. Ismail by its letter dated 12th January 2022.

The observation of the Respondent, No: SEU/LD/HRC/2022/01 and dated 28th January 2022 received by the Commission on 10th February 2022.

The Respondent made a preliminary objection as petition of the petitioner should be dismissed in limine as per the section 13(1) of the Human Rights Commission of Sri Lanka Act, No: 21 of 1996. This objection is over ruled by the HRCSL since Section 13(1) is relevant to the petitioners those who have an intention to file fundamental rights application before the Supreme Court of Sri Lanka for the same cause of action which is in his / her complaint before HRCSL. When there is no such intention of a particular petitioner, the petition can be entertained by the HRCSL.

The Respondent states in item No: 2 of the observation that the University Council at its 1st meeting held on 25.07.2015 had accepted the petitioner's resignation and in terms of the section 4:5 of Chapter V of University Establishment Code. The petitioner by his letter dated 25.07.2015 acknowledged and accepted the consequences of his resignation that clearly specified condition as follows.

- a) Dr. Ismail will have no rights to revert to his post thereafter;*
- b) Dr. Ismail will forfeit all claims for any benefits of his service in the Commission / Higher Educational Institution should be afterwards succeed in obtaining employment in the Commission / Higher Educational Institution;*
- c) If Dr. Ismail's resignation is accepted, any application to withdraw it later will not be considered.*

d) Respondent states in Item No.3 In this connection, Dr. Ismail had made a payment of Rs. 174,435.00 to the University on 30.07.2015 as a refund of their months' salary in lieu of three months' prior notice for his resignation. Subsequently Dr. Ismail was paid a Gratuity payment for the period of service he rendered to the University and he claimed his Employees Trust Fund too.

The Respondent also states that the petitioner requested the Vice Chancellor to consider continuing his service as a Senior Lecturer Grade I since he was not elected as a member of Parliament. The University sought a ruling of the University Grand Commission with regard to re-employment of the petitioner.

The respondent states in his observation continuously from Item No; 7 to 17 with regard to the petitioner's request after having the instruction from UGC as follows.

Item No;

- (6) The UGC by its response with reference No. UGC/HR/4/5/6 dated 16.10.2015 informed that
'The Commission at its 926th meeting held on 01.10.2015 approved the re-employment of Dr. S.M. Mohamed Ismail to the Post of Senior Lecture Gr. I, who resigned from the service to contest in the Parliamentary Election 2015, as per the section 2.2 and 2.3 of the Chapter XVII of the Universities Establishment Code of the UGC and HEIs
It was also decided that Dr. Ismail be placed at the last drawn salary step at the time of resignation with effect from the date of re-employment and be allowed to continue the same benefits enjoyed by him in his previous service.'
- (7) *Accordingly, Dr. Ismail was re-employed to the post Senior Lecturer Gr. I in Economics at the Department of Social Sciences, Faculty of Arts and Culture, SEUSL with effect from 28.11.2015.*
- (8) *Dr. Ismail has accepted this appointment with the terms and conditions stipulated in the letter of appointment. He assumed duties with effect from 07.12.2015.*
- (9) *Further, Dr. Ismail has been released to serve as the Chairman to the Board of Directors of the Sri Lanka Handicrafts (LAKSALA) on full time basis for a period of one year from 09.12.2015 to 08.12.2016 on national interest in terms of Section 02, Chapter 05 of the Establishment Code of the Universities and HEIs.*
- (10) *Meanwhile, Dr. Ismail by his letter dated 24.10.2016 requested the SEUSL to utilize his sabbatical leave with pay for a further period of one year with effect from 09.12.2016 to continue the position of Chairman of LAKSALA.*
- (11) *Subsequently, the SEUSL by its letter dated 27.12.2016 sought clarification of the UGC on Dr. Ismail's claim of sabbatical leave with pay.*
- (12) *The UGC by its letter dated 20.10.2017, responded that;*
'The commission at its 972nd meeting held on 21.09.2016, having considered the fact that Dr.SM Mohamed Ismail, who resigned from the service to contest in the Parliamentary

Election 2015, had been re- employed in the post of Senior Lecturer Gr. I but no reinstated, and the provisions of paragraph 27:4:3 of Chapter III of Establishment Code of the UGC and Higher Educational Institutions; decided to inform you that Dr. Ismail, Senior Lecturer Gr. I and not entitled to claim sabbatical leave for the period he rendered to the University prior to his resignation, since in terms of the re- employment, he will not be entitled to claim for seniority on account of his past services and his seniority will be determined only from the date of his re-employment. '

A certified copy of the UGC letter dated 20.10.2017 is annexed herewith

- (13) Accordingly, the SEUSL by its letter dated 28.10.2017 informed to Dr. Ismail that he was not entitled to claim sabbatical leave for the period he rendered to the University prior to his resignation and he was not entitled to claim seniority on account of his past services he tendered to the university.*
- (14) As per the request made by Dr. Ismail, The University approved to release Dr. to serve as the Chairman of LAKSALA till 08.12.2018. However, Dr. Ismail by his letter dated 01.06.2018 resumed duties as Senior Lecture Gr. I in Economics, Department of Social Sciences; Faculty of Arts & Culture of the SEUSL with effect from 01.06.2018.*
- (15) Once again, Dr. Ismail resigned on 04.06.2018 from the post of Senior Lecture Gr. I in Economics to sit in parliament as a nominated National List Member of the Parliament rom 05.06.2018 to 02.03.2020.*
- (16) Dr. Ismail by his letter dated 07.09.2020 has requested the University to re-instate to the post of Senior Lecturer Gr. I in Economics; grant sabbatical leave and promotion to the post of Professor (on merit) at SEUSL.*
- (17) It is paramount importance to note that the term of re-instatement is applicable only in cases of dismissal and vacation of post. In terms of chapter III of E-Code of the UGC and HEIs, the concession of re-instatement or re-employment is granted only once to any person.*

The Respondent totally refused to consider the petitioner's request pointing the fact that petitioner has no right to seek such relief after he resigned from the Senior Lecturer – Grade 1. With regard to the appeal made by the petitioner requesting second time to re-instate or re-employ or his Senior Lecturer position, respondent stated that such request cannot be considered because there is no provision according to the terms of chapter III of Establishment-Code of UGC and HEIs.

The Commission has decided to conduct an inquiry and sent summons to both, the petitioner and the respondent and due to fuel crisis and prevailed situation in the country at that time the inquiry conducted via Zoom Technology to facilitate the Respondent in a convenient manner while the petitioner and his Attorney-at-Law presented in person at the Commission on 16.05.2022.

Finally, the Commission has given time to the petitioner and the respondent to tender their submissions with all relevant credentials and documents.

The both parties' submissions were received by the Human Rights Commission.

The petitioner states in his submission that he had made an appeal to the Chairman of the University Grants Commission requesting intervention of the UGC to expedite the evaluation process of his application for the post of Professor and to apply the correct procedure in granting his sabbatical leave. Further the petitioner made an appeal to the UGC regarding his request his request of appointing him again to his substantive post of Senior Lecturer Grade I, but so far the petitioner did not receive an acknowledgement from UGC.

The petitioner's counsel states in Item No (6) paragraph (III) of his submission that it was clearly established at the inquiry held in HRCSL on 16th August 2022, neither the request made on 8th September 2020 had been tabled before the Governing Council, appointing and disciplinary authority of the Applicant, nor the answer dated 28th January 2022 was emanated from the Council of the University.

The Counsel of the petitioner also points out in Item No: 6 paragraph (v) that the HRCSL raised a question whether the University had considered the provisions made paragraph 2:1, 2:2, 2:3 of Chapter XVII, but no clear answer given by the Counsel appeared for the Vice Chancellor via Zoom Technology.

The paragraphs 2:1,2:2 and 2:3 as follows

Paragraph 2:1 *if a person employed in the Commission or any higher educational institute not qualified to seek election to parliament in terms of Article 91(1) (d) (viii) of the constitution intends to stand for such election and desires to make preparation for furthering his own candidature or for testing his chance at such election or intends to hand in his nomination papers for such election he should first resign his post in the Commission or the Higher Educational Institution in accordance with para 4 of chapter V before he takes any such action or sanctions any such action to be taken on his behalf.*

Paragraph 2:2 *such a person may later seek re- employment in the Commission or in the Higher Educational Institution if he so desires, and the Commission of Higher Educational Institution may re-employ him outside the scheme of recruitment if the vacancy created by his resignation still remains unfilled and the Chairman of the Commission in the case of persons from the Commission or the Vice Chancellor of the University in the case of persons from a University or a Campus or and thereto, or the a Director in the case of a University College agree to such re-employment.*

Paragraph 2:3 *Where it is agreed to re-employ the person seeking re-employment under para 2:2 above the prior sanction of the Commission in the case of persons from the Commission or the sanction of the respective Governing bodies of the Higher Educational Institution in the case persons from those Institutions should be obtained*

The Counsel for the petitioner also states in his submission in paragraph (vi) of Item No: 7, the Vice Chancellor had failed to table the request made by the petitioner to Governing Council of the University and the Chairman of the UGC too failed to take any step based on the request made by the petitioner or to take any inquiry.

The Respondent, Vice Chancellor of the University states in his lengthy report dated 02nd September 2022 in Item No: 12 That the UGC by its response with reference No. UGC/HR/4/4/6 dated 16.10.2015 informed that *The Commission at its 926th meeting held on 01.10.2015 approved the re-employment of Dr. S.M. Mohamed Ismail to the Post of Senior Lecturer Gr. I. who resigned from the service to contest in the Parliamentary Election 2015, as per the section 2.2 and 2.3 of the Chapter XVII of the Universities Establishment Code of the UGC and HEIs*

It was also decided that Dr. Ismail be placed at the last drawn salary step at the time of resignation with effect from the date of re-employment and be allowed to continue the same benefits enjoyed by him in his previous service.' accordingly, the petitioner was re-employed by the University the post of Senior Lecturer Grade I, and he was allowed to continue the same benefits. Cost of living allowance, academic allowance, research allowance, special allowance as enjoyed by him in his previous service.

The respondent points out in his report in Item No: 14, in terms of para 4:1 of chapter VI of E-code of the UGC and HEIs.

a person whose prior service with HEIs has been terminated by resignation will not be entitled to any salary benefit for any period or periods of service prior to that event. If he is subsequently appointed to the HEI.

The Respondent points out in Item No: 15, para 27:4:3 *if a person whose prior service have been terminated by resignation, Vacation of post, dismissal or by reason of unsatisfactory work and/or conduct, is re-employed he will not be entitled to any claims for seniority on account of his past services, and his seniority will be determined by the date of his re-employment.*

Again the petitioner was released to serve as the Chairman to the Board of Directors of Sri Lanka Handicraft (Laksala) on full time basis for 08.12.2016 and the period has been extended for further one year up to 08.12.2017 in terms of section 2-chapter V of E-code of the University.

The petitioner resumed duties at University with effect from 01.06.2018 and on the same day, the petitioner resigned (2nd time) from the post of Senior Lecturer Grade I with effect from 04.06.2018 as he was nominated as a member of Parliament through the National list.

The Respondent states in Item No: 20 of his report that the petitioner was informed the consequences of the resignation and the petitioner acknowledged and gave his consent for it.

The Respondent states that the petitioner's claim to utilize the sabbatical leave with pay was forward to UGC for clarification on entitlement of it that he earned in his previous service.

The Respondent also states that the petitioner is not entitled to claim sabbatical leave as per the clarification letter of UGC No: UGC/HF/4/9 dated 20th October 2017. And this was intimated to the petitioner by letter No: SEU/E3/1/08/PF and dated 28th October 2017.

The Respondent also states that request of the petitioner for promotion for post of Professor (on merit) automatically ceased due to the resignation of the petitioner from the post of Senior Lecturer Grade I.

With regard to the petitioner's claim for re-instatement to the post of Senior Lecturer Grade I again, the Respondent stated that the request of the petitioner was not considered based on the para 20:14 of chapter III. Accordingly, the provisions relating to reinstatement are not applicable for the petitioner. Further, the Respondent stated that Re-employment too cannot be considered outside the scheme of recruitment since the petitioner's resignation was not for the purpose of contesting in Parliamentary election under Section 2:1 of the chapter XVII of the E-code of the UGC but for sitting in the Parliament as a National List Member from 05.06.2018 to 05.03.2020.

The Respondent also stated that vacancy created by the resignation of the petitioner in the year 2018 was filled for the benefits of the student and according to Para 20:10 of chapter III of E-code of the UGC, the concession of re-employment outside the scheme of recruitment will be granted only once to any person and accordingly, the petitioner had already been granted the re-employment outside the SOR in the year 2015.

Observations

Human Rights Commission is of the view that by enacting the Universities Act No.16 of 1978 had established autonomous Universities and the University Grants Commission. In terms of the provisions made under Section 15 (ix) read with Section 18 (2) (c) of the Act power has been vested with the UGC to issue the Schemes of Recruitment and promotions and it is mandatory, in terms of Section 71, for the Universities to make the appointments and promotions accordingly. Further, the Human Rights Commission observed the provisions and guidance given by the Establishment Code of the UGC published in 1983 that can be used to arrive at the recommendation of this investigation. As per the forward of the Establishment Code mentioned the Establishment Code can be utilized *only as a guide to the regulation of the administration of the Higher Educational Institutions*". Accordingly, the power has been vested in the Council of the University under and in terms of Section 45 (2) (xii)

of the Universities Act No 16 of 1978 to take a decision on the basis of the “guidance” (page 363 and 364) stated in paragraphs 2:1 , 2:2 , 2:3 of Chapter XVII of the said Establishment Code. It is of paramount importance to note that the only requirement is to obtain sanction from the UGC prior to implementation of the decision taken by the Council of the University.

The Human Rights Commission observed that the procedure adopted by the Vice Chancellor of the University for the request made by Dr. Ismail to reinstate him for the post of senior lecturer Gr. I in the University. The university followed the guidance given by the report of the UGC dated 16.10.2015. This report informed that *The Commission at its 926th meeting held on 01.10.2015 approved the re-employment of Dr. S.M. Mohamed Ismail to the Post of Senior Lecturer Gr. I. who resigned from the service to contest in the Parliamentary Election 2015, as per the section 2.2 and 2.3 of the Chapter XVII of the Universities Establishment Code of the UGC and HEIs.*

It was also decided that Dr. Ismail be placed at the last drawn salary step at the time of resignation with effect from the date of re-employment and be allowed to continue the same benefits enjoyed by him in his previous service.’ Accordingly, the petitioner was re-employed by the University the post of Senior Lecturer Grade I, and he was allowed to continue the same benefits. Cost of living allowance, academic allowance, research allowance, special allowance as enjoyed by him in his previous service. **This re-employment has been correctly done by the University and the same procedure has been adopted by the University system.** The University of Peradeniya and the University of Rajarata followed the same procedure for reinstating university lecturers after the General Election of 2010. It is also noted that after re-employing those lecturers, their services continue without any termination and considered the missing period as a special leave period. Therefore, there were no terminated period that has been taken in to consideration in calculating the service requirement for the promotion or sabbatical leave of those lecturers.

In view of the above precedents, the Human Rights Commission is of the view that the UGC violated its same stand by highlighting the para 27:4:3 i.e. *if a person whose prior service have been terminated by resignation, Vacation of post, dismissal or by reason of unsatisfactory work and/or conduct, is re-employed he will not be entitled to any claims for seniority on account of his past services, and his seniority will be determined by the date of his re-employment.* This clause cannot be applied to the University employees if they resign from the University to contest General Elections.

It was brought to the notice of the Human Rights Commission that the Appellant had tendered his application for promotion to the University whilst he was functioning as the Vice Chancellor in 2014 and as such there was no reason for the University not to commence evaluation process of his application for the promotion (on merit). It is also noted that the respondent stated that the request of the petitioner for promotion for post of Professor (on merit) **automatically ceased due to the resignation of the petitioner from the post of Senior Lecturer Grade I.** But this is a wrong argument due to two reasons; i. the professor application was lodged before his resignation ii. after the re-employment of the same position with service continuation, the process of the evaluation of the professor application should have to be continued. Therefore, the HRCSL is of the view that the

decision taken by the Vice Chancellor not to process petitioner's application for the merit promotion for the post of professor is a violation of the fundamental rights of the petitioner.

The petitioner also states that he applied for entitled sabbatical leave and it was not granted. The petitioner seeks as relief, to approve his sabbatical leave which is entitled to him according to UGC by its letter No: UGC/HR/415/6 dated 16.10.2015. The Human Rights Commission is of the view that the University sabbatical leave is an earned leave in nature and granting sabbatical leave is determined by the provisions given by the University Establishment Code. If a lecturer fulfills the prerequisite for the eligibility of sabbatical leave, he or she can be applied for such leave. However, the University turned down the request of sabbatical leave made by the petitioner, mentioning that the service period of the petitioner had been terminated in 2015 due to his resignation from the post to contest the General Election in 2015. The Human Rights Commission is of the view that this decision is irrational and unreasonable because of the petitioner re-employed in the service as per the directives given by the University Grant Commission based on the decision taken by its 926th meeting held in 01.10.2015. The University Grant Commission also *decided that Dr. Ismail be placed at the last drawn salary step at the time of resignation with effect from the date of re-employment and be allowed to continue the same benefits enjoyed by him in his previous service according to the section 2.2 and 2.3 of the Chapter XVII of the Universities Establishment Code of the UGC and HEIs and also.*

The petitioner had been appointed as a National List Member of the Parliament in 2018 and served as National List Member of Parliament from 05.06.2018 to 02.02.2020. After completion of the period from 05.06.2018 to 02.02.2020 as a Member of the Parliament, the petitioner requested the University to reinstate him in his previous post but no positive response was received from the University.

The Human Rights Commission observed that the Vice Chancellor of the South Eastern University refused to reinstate the petitioner for his former post of Senior Lecturer Gr.1 following the 20:10 of chapter III of E-code of the UGC, and HEIs. The Paragraph 20:10 of the chapter III of the Establishment Code of UGC says; *the concession of re-employment outside the scheme of recruitment will be granted only once to any person.* If the above directives applied in refusing the request of second time reinstatement made by the petitioner, the University should take such decision at the University Council since the power has been vested in the Council of the University under the Section 45 (2) (xii) of the Universities Act No 16 of 1978. In this regard The Human Rights Commission observed that, the Vice Chancellor had failed to table the request made by the applicant to the Governing Council of the University for its consideration and the Chairman of the UGC too failed to take any step based on the request made by the Applicant or to make any inquiry, in terms of powers vested in the UGC under Section 15 (xii) of the said Universities Act, from the University. Therefore, the Human Rights Commission is of the view that the respondent was unable to provide the evidence of taking the decision at the University Council related to the refusal of the appeal made by Dr. Ismail. It is also noted that the importance of obligatory responsibility of the University administration to follow the correct procedure involved in appointments in the University system.

Recommendation

On a careful consideration of the material placed before the Human Rights Commission of Sri Lanka, the Applicant has been successful in establishing that his Fundamental Rights, guaranteed under Article 12(1) and 14 (1) (g) of the Constitution, had been infringed by the South Eastern University of Sri Lanka.

In terms of the provisions in section 15(3) (e) of the HRCSL Act, it is recommended that the Human Rights Commission recommendation place before the Council and take suitable action to remedy the wrongful procedure that gave rights to the fundamental rights violations in the case.

In terms of the provisions in section 15(7) of the HRCSL Act, the respondent/s are requested to submit a report regarding the implementation of the recommendation/s to the Commission on or before 07.03.2023.

A Shanmuganathan

Anushuya Shanmuganathan
Commissioner

Human Rights Commission of Sri Lanka

Dr. Vijitha Nanayakkara

Dr. Vijitha Nanayakkara
Commissioner

Human Rights Commission of Sri Lanka

Ms. Anusuya Shanmuganathan
Commissioner

Human Rights Commissioner of Sri Lanka

Dr. Vijitha Nanayakkara
Commissioner

Human Rights Commission of Sri Lanka