Employment Relations and Labour Law: The Need for a Balanced Approach to Labour Legislation in Sri Lanka

Roshini N. Neluwapathirana*

Abstract

A healthy employment relationship is indispensable for the stability of organizations as well as for the economic, social and mental wellbeing of all the parties engaged in such relationship, including the employees, employers, and the state. At the national level, it also facilitates the economic and social development of the country. In this context, labour laws play a pivotal role in regulating the employment relationship, with the purpose of achieving a balance of interests among employers, employees, and the state. This paper analyses the role of labour law in Sri Lanka in balancing the interests of employers and employees, with special reference to three selected labour statutes governing employment relations in Sri Lanka. The study is normative in nature and a doctrinal methodology was adopted in carrying out the research to obtain a comprehensive knowledge of the existing legal regime. Qualitative data was gathered using primary sources viz. relevant statutes and case law as well as secondary sources viz. relevant journals, articles, websites, and textbooks. By examining the legal framework, the researcher recognizes several flaws in the existing legal framework in terms of balancing employer-employee interests in the labour market including the overprotective focus on the employees, lack of cohesion and uniformity in existing laws, obsolete provisions which hinder the employee productivity, negative impact on employment generation and investment climate, failure to introduce timely amendments to the existing law to address the requirements of the local and global challenges and thereby identifies the necessity of a balanced legislative framework for Sri Lanka to protect the interests of all parties engaged in the employment relationship.

***Key words**: EPF, Employment Relations, Employee Termination, Labour Law, Shop and Office Employees' Act, Workmen*

* M DM (AIM, Philippines), B Sc (SJP), LLB (OUSL), Attorney-at-Law, Assistant Registrar, University of Sri Jayewardenepura, Sri Lanka.

Introduction

The employment relationship refers to the legal link between employers and employees[1]. However, the real-world socio-economic disparities have given rise to unequal bargaining powers among the parties of this relationship which lead to circumstances where the weaker party has limited or no protection in case of a violation of his/her interests by the stronger party. Labour legislations have been introduced by modern welfare states as a mediation of achieving social justice in such circumstances, through state intervention. The main objective of labour law is to balance the inequality of bargaining power which is inherent in the employment relationship.[2]

State intervention in safeguarding the interests of stakeholders in the labour market is exercised in different ways by different countries, on par with their national policies. While some states seek to balance inequalities in bargaining power between parties through imposing legislations (i.e. protective theory), some states do not directly intervene in the industrial relationship but act as a facilitator for private decision making and market forces (i.e. economic rationalization theory).

Sri Lanka's legal framework governing employment relations has also been developed as a mode of state

[1] *International Labour Organization*
[2] O Kahn-Freund, *Labour and the Law* (Stevens and Sons 1972) 8.

intervention to achieve social justice. Most of the labour statutes enacted by the Sri Lankan government from time to time are subject to the criticism of being over lenient towards employees, claiming that they have resulted in hindering the labour productivity and lessening investments which in turn affect the development goals of the country. This paper evaluates whether the labour statutes of Sri Lanka are overly emphasized on employee protection rather than balancing the interests of all active stakeholders, i.e. employers, employees, and the state, by paying attention to some selected labour statutes that are in effect.–

Methodology

A doctrinal methodology, a two-part process which involves locating the sources of the law and then interpreting and analyzing the text as described by Hutchinson and Duncan[3], was adopted in carrying out the research. Qualitative data were gathered through reviewing primary sources such as relevant statutes and case law. Termination of Employment of Workmen (Special Provision) Act, Workmen Compensation Ordinance, The Shop and Office Employees' Act (Regulation of Employment and Remuneration) were the pieces of legislation to which special attention was drawn in the study. Relevant governmental publications, committee reports, journal articles, websites, and textbooks were also reviewed as secondary sources.

[3] Duncan, N. J. and Hutchinson, T. (2012). Defining and describing what we do: Doctrinal legal research. Deakin Law Review, 17(1), pp. 83-119.

Legal Framework governing the Employment Relationship in Sri Lanka

A number of labour statutes, regulations, and collective agreements are in effect in Sri Lanka through state intervention in order to safeguard and protect the interests of employees and employers who are the main parties of industrial relations. In addition, decisions made by labour courts and judicial writings also play a major role in the development of the field.

The historical development over decades indicates that the country's approach has been gradually shifted towards playing a protective role in favour of employees, particularly after becoming a member of the International Labour Organization (ILO) since 1948 and ratifying core labour standards. Sri Lanka's first piece of labour legislation, i.e. the Ordinance for the better regulation of servants, laborers, Journeymen and Artificers under Contract of Hire and Service of their employers, No. 5 of 1841 was promulgated highly in favour of safeguarding the interests of employers. The advent of Indian labour paved the way to promulgate new laws in the interest of the plantation sector. The Estate Labour (Indian) Ordinance No.13 of 1889 was passed in 1889 as a consolidated piece of legislation to govern Indian labour in Sri Lanka. A number of statutes related to employment relationship have been introduced subsequently covering a wide range of areas such as social security, employee welfare and well-being, occupational safety and health,

terms and condition of employment, labour relations, foreign employment, and the estate sector.

In analysing the role of labour law in balancing the interests of employers and employees, this study mainly focuses on following four labour statutes that are currently in force in Sri Lanka, covering the areas of labour relations, occupational safety and health, terms and conditions of employment, social security of employees, respectively.

I. Termination of Employment of Workmen (Special Provision) Act No.45 of 1971
II. Workmen's Compensation Ordinance No. 19 of 1934
III. Shop and Office Employees' Act (Regulation of Employment and Remuneration) No. 15 of 1954

Termination of Employment of Workmen (Special Provision) Act No. 45 of 1971 (hereinafter referred to as 'TEWA')

The Termination of Employment (Special Provisions) Act, No. 45 of 1971, as amended by Act No. 12 of 2003 includes provisions for employee termination on non-disciplinary grounds. No employer shall terminate the scheduled employment of any workman without the prior consent in writing of the workman; or the prior written approval of the Labour Commissioner unless the

termination is made on disciplinary grounds[4]. The Act is applicable only for the employers who have employed 15 or more employees on average at any time during the six months preceding the employee termination. There are certain exclusions as well. For instance, the Act does not apply for the employees with less than one year's service, government employees, those covered under collective agreements, voluntary resignations and retirements at the date specified in the letter of appointment.

The termination of an employee based on the grounds of inefficiency or incompetency is not considered as a disciplinary termination under the provisions of the Act. For instance, in *St. Anthony's Hardware Stores Ltd v. Ranjit Kumar*[5], the court held that the termination of a workman on the ground of inefficiency or incompetence was not a termination within the meaning of Section 2 of the Act as it could not be considered as a termination made on disciplinary grounds. This provision has laid down a highly disadvantageous ground for the employers in managing the firm's human resources for productivity goals.

Section 2 (2) (b) of the Act gives the absolute discretion to the Commissioner to grant or refuse such approval and such a decision is considered final and conclusive which cannot be questioned by any court, tribunal or any such entity[6]. This includes the discretion to decide all the terms

[4] Termination of Employment (Special Provisions) Act 1971, s (2) (1).
[5] (1978-79) 2 Sri LR 6.
[6] Termination of Employment (Special Provisions) Act 1971, s 2 (2) (f).

and conditions with regard to the termination, including gratuity and compensation. In *Samarasinghe v. De Mel*[7], when the petitioner had claimed to issue a writ of mandamus on Labour Commissioner directing him to order the respondent company to pay the payment of compensation, the courts recognized the statutory power granted to the labour commissioner to award gratuity or compensation or both and refused to issue a writ of mandamus.

According to Section 5 of the Act, a termination contrary to the provisions of the Act is illegal, null and void and in such cases, the commissioner may order the employers to reinstate the employee with back wages and other benefits entitled to him[8]. However, some courts have interpreted this provision as limiting the discretion of the Commissioner to grant compensation in lieu of reinstatement. In *Eksath Kamkaru Samithiya v. Commissioner of Labour*[9], the Court of Appeal accepted that the manifest purpose of Section 5 of the Act is to wholly protect the workman against the termination of his service contrary to provisions of the relevant Act and to keep the contract of employment intact notwithstanding such illegal termination. It also reminded the Commissioner that the duty to reinstate the workmen, as imposed upon him under Section 6 of the Act is mandatory and compulsory and that he has no option in the matter.

[7] *Samarasinghe v. De Mel* [1982] 1 Sri LR 7.
[8] Termination of Employment (Special Provisions) Act 1971, s 6.
[9] (2001) 2 Sri LR 137.

Section 6 (D) of the Act also provides that the amount of compensation must be computed according to a formula determined by the commissioner in consultation with the Minister, by Order published in the *Gazette*. Violations of these provisions are considered guilty of an offense which results in the imprisonment of the employee[10]. According to the Employers' Federation of Ceylon (EFC), the current compensation formula runs up to a maximum of 48 months' salary of the employee despite his/her efficiency/productivity. The provisions have led Sri Lanka to be the fourth highest severance paying country in the world for redundancy dismissal. Requirements of paying such huge compensation packages create major implications on attracting investors to the country.

Section 17 of the Act requires the Commissioner to conduct the inquiries according to the principles of natural justice. However, it does not expressly require providing reasons for such decisions and as a result, different views were taken by the courts on a case by case basis. For example, in *Kusumawathie v. Aitken Spence & Co. Ltd*[11], the courts concluded that the Commissioner was not bound to give reasons, while in *Ceylon Printers (Ltd) v. Weerakoon*, the Supreme Court held that the Commissioner was under a duty of giving reasons; particularly when he is not the one who held the inquiry and recorded evidence. However, decisions without reasons may have adverse effects on balancing the

[10] Termination of Employment (Special Provisions) Act 1971, s 7 (1).
[11] 1996 (2) Sri LR 18.

interests of parties.

The time limits stipulated in Section 2 (2) of the above Act and consequently in the Industrial Disputes Act[12] in terms of granting approval by the Commissioner have been interpreted in some cases as directory rather than mandatory. For instance, in *Nagalingam v. De Mel*[13], it was held that non-compliance with the time limit stipulated by Section 2 (2) (C) does not render the order of the commissioner void. Such views are particularly prejudiced to employers who are waiting for the decision to implement structural adjustments to their businesses in response to rapidly changing market conditions.

By considering the statuary provisions and case law related to the TEWA, it can be clearly stated that the Act provides a greater protection over employees from arbitrary decisions taken by employers regarding termination of employment on a collective basis. However, the Act also restricts the freedom of the employer to make viable business decisions as they are required to comply with the statuary provisions even in the case of terminating redundant and incompetent employees which generates negative consequences on the employee productivity and investment culture.

Workmen's Compensation Ordinance No. 19 of 1934

This Act includes provisions for the payment of

[12] The Industrial Disputes (Special Provisions) Act No. 13 of 2003.
[13] *Nagalingam* v. *De Mel* 78 NLR 231.

compensation to workmen who are injured in the course of their employment. The Act was amended several times, while the last amendment took place in 2005[14]. According to the Act, an employee is entitled to compensation payable by his/her employer for personal injuries caused by accidents arising out of and in the course of his employment[15]. This relief is extended to the employee's dependents in case of the death of the employee by Section 2 (2). Part III of the Ordinance sets out the provisions applied in calculating the amount of compensation and Schedule IV includes different levels of compensation amounts payable by the employer according to employee's wage class and the degree of the disablement/injury.

However, not all employees working in all establishments are covered by this Ordinance. While the Ordinance expressly provides protection to all formal, contractual, out-workers, public or private employees employed in trades and businesses of any capacity, the liability for compensation is excluded in the following instances[16].

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days.

(b) in respect of any injury, not resulting in death, caused by an accident which is directly attributable to

[14] Workmen's Compensation (Amendment) Act No. 10 of 2005.
[15] Workmen's Compensation Ordinance No. 19 of 1934, s 3.
[16] ibid.

(i) the influence of drink or drugs, or
(ii) the willful disobedience to an order expressly given for the safely
(iii) the willful removal or disregard of any safety guard or other device

Further, some sectors such as members of police forces and armed forces[17] are excluded from the definition of the workman and no reference is made with regard to casual workers and domestic workers.

The term "occupational accident" has not been clearly defined under Section 3 of the Ordinance, therefore courts have taken different approaches in defining it, based on respective case facts. For instance, in *State Distilleries Corporation* v. *Mary Nona*[18], the court attempted to identify the occupational accident by looking at its connection with the nature of the employment. The employee's death was caused due to a heart attack. By considering his past medical records and medical evidences that the lorry drivers have a more vulnerability to get heart attacks, the court interpreted that the heart attack suffered by the employee as an "accident arising out of that particular employment" which falls under the coverage of the Ordinance[19].

In *Dhanuskodi* v. *Michael Fernando*[20], the employee's

[17] Workmen's Compensation Ordinance No. 19 of 1934, s 2 (1).
[18] (1981) 2 SLR 223.
[19] Workmen's Compensation Ordinance No. 19 of 1934, s 3.
[20] *Dhanuskodi* v *Michael Fernando* 49 NLR 169.

death was caused by an electric shock in his attempt to open a refrigerator which was not a duty arising out of or in the course of employment. However, dependents were entitled to compensation as the task was done by the employee with the knowledge of the employers.

Kelaart v. *Piyadasa*[21] is a case where the court gave a different judgment. In that case, the employee had been prohibited to get on to the scaffolding for work as he suffered from a hernia, but he had got on to it for chewing beetles, slipped off, and died. The court concluded that the appellants were not entitled to compensation as the accident had taken place out of the scope of his employment.

However, in *Alice Nona* v. *Wickremesinghe*[22], a bus driver's death was caused by an accident due to the ignition of petrol and it was identified as an accident arising in the course of employment according to Section 3 of the Ordinance, and the dependents were entitled to compensation.

There are many such instances in the case law that demonstrate the role played by the courts in determining the eligibility of employees for compensation, particularly with the aim of balancing the interests of both parties, i.e. employee and employer.

The state's objective of employee protection is clearly

[21] *Kelaart* v. *Piyadasa* 44 NLR 485.
[22] *Alice Nona v. Wickramasinghe* 38 NLR 408.

manifested in the provisions of the Ordinance, its amendments, and the judicial decisions. However, in practice, the ability of the Ordinance to provide complete protection over the employee in case of occupational accidents is questionable due to the following arguments.

Sri Lanka's current policy framework for employee injury compensation is far more incompatible with ILO standards. The level of protection and compensation benefits provided to workers is the lowest in the Asia-Pacific region. The lack of periodic payments for permanent disability and death, its lack of a mechanism to adjust for inflation, and its low ceiling on most benefits have generated such negative results. Therefore, practically in most cases employers attempts to reduce their costs using their bargaining power and workers and their families who experience permanent disability or death do not get adequate compensation to replace the lost wages and income.

The absence of provisions to cover psychological impairments associated with work, particularly in the service sector is a major backdrop in the Act which degrades the protection of the employee. although it is generally perceived that it is difficult to quantify the compensation payable for psychological damages, injuries such as work-related stress, 'anxiety', nervous debility, and 'depression' have become more common in today's work environments which affect job performance significantly, thus need to be addressed by the Act.

The Ordinance obligates all employers to inform the Commissioner of Labour in case of any fatal and non-fatal accidents occurred to their employees within seven days of such an incident[23] and to channel all compensations made in respect of a fatal accident through the commissioner. However, this does not happen in practice and the Commissioner has not established any procedures for submitting such information, so there is considerable under-reporting of work-related injuries and diseases in Sri Lanka.

The current system of employment injury benefits is purely burdened on the employers. There is no mandatory insurance clause in the statute that requires employers to be insured against employee injury risks which may also unfavourable for both parties in certain circumstances.

The Shop and Office Employees' Act (Regulation of Employment and Remuneration) No. 15 of 1954

This Act, with several amendments taken place so far up to the year 2021, plays a significant role in the field of labour law by acting as the authority for safeguarding the rights of the employees employed in establishments which come under the definition of "shops" and "offices" mentioned in the Act. Some of the salient features included in the Act can be taken into consideration to conclude whether the Act is over-protective of employees even at the expense of employers.

[23] Workmen's Compensation Ordinance No. 19 of 1934, s 57 (1).

The Act covers some major areas focused on employee health and welfare including:

- **Hours of employment[24]:** normal working hours are limited to 8 hours, excluding 1 hour for meals. A normal working week is limited to 45 hours. Overtime must be paid excess working hours which are limited to 12 hours per week by statute.

- **Holidays**
    - Weekly Holidays: An employee is entitled to one and half days' holidays with pay, on completion of 28 hours of work in a 'week'.[25]
    - Annual Holidays: in addition to weekly holidays, public holidays and full moon poya days[26], the employee is also entitled to 14 days of annual holidays per year, starting from the 2nd year of his employment[27].
    - Casual Leave: 7 days of casual leave is granted to be taken in case of a private matter or ill-health[28].
    - Maternity Leave: Female employees are entitled to 70 days of maternity leave in the case of delivery of a live child and 28 days of such leave for a still birth[29]. The Act also requires employing the female employee in

[24] Shop and Office Employees' Act No. 15 of 1954, s 3.
[25] ibid s 5 (1).
[26] ibid s 7 (a).
[27] ibid s 6 (1) (b).
[28] ibid s 6 (3).
[29] Shop and Office Employees (Amendment) Act No. 14 of 2018.

light work during the nearest three months before the confinement[30] and the Employment not to be terminated because of pregnancy or confinement or of illness in consequence thereof[31].

- **Salary payments and Deductions**[32]: The Act prevents the employer from making any deduction from the salary entitled by the employee, without his/her written consent.

- **Letter of Appointment**: The Act has made it a mandatory requirement for the employer to issue a letter of appointment stating the conditions of employment[33] which can be considered as a contract between the employer and employee. The particulars which must be included in the letter of appointment are also stipulated in the Act.

- **Employment of women in the night**: Certain time restrictions have been imposed in terms of employing female employees in night work, as follows[34].
    - females should not be employed before 6 am or after 6 pm on any day
    - Females over 18 may be employed in a hotel/ restaurant between 6 pm and 10 pm.

[30] Shop and Office Employees' Act No. 15 of 1954, s 18D (2).
[31] ibid s 18E.
[32] ibid s 19 (1).
[33] ibid s 15 (1).
[34] ibid s 10 (b).

- Female who has attained 18 may be employed in or about any prescribed work in a residential hotel before 6 a.m. or after 6 p.m. on any day
- Female who has attained 18 may be employed in or about the business of a shop or office for the period, or for any part of the period, between 6pm and 8 pm.

The Shop and Office Employees Act provides greater protection to employees in many aspects, leading to many criticisms that such a protection had been granted at the expense of productivity. Particularly, the provisions granting an excessive number of holidays, restrictions of working hours and the restrictions imposed on employing female workers at night can be perceived as disadvantageous from employers' point of view.

As a result of globalization, the country is attracting more businesses in the service sector, especially BPO and information technology-related businesses that require employees to work online beyond borders and time restraints. Such businesses require employees to work on flexible hours and without restricting to rigid policies in terms of the employer-employee relationship. In such cases, the current provisions of the Shop and Office Employee in terms of rigid working hours must be updated to be consistent with market requirements.

Although a large number of holidays; particularly the paid holidays may be perceived to be a privilege for employees

from the employee's viewpoint, the excessive number of holidays compared to other countries have been believed to be one of the major factors for the slow economic development of the country. Not only such provisions have resulted in lessoning employers' opportunities to compete with foreign counterparts and winning the confidence of the market, but they have also negatively resulted in attracting foreign investments to the country, as well.

The increase of the female population and their higher level of education have also paved the way to increase the contribution of female employment in the labour force, particularly in the service sector. However, in contrast to the welfare and cultural perspectives, limiting provisions on night work of female employees have negatively affected both employers and employees in certain ways. While female employees have limited opportunities for working with flexible schedules, employers have also been restricted from employing women in maximizing their productivity targets.

Therefore, the above provisions of the Shop and Office Employees' Act support the argument that the provisions regulating the terms and conditions of employment in Sri Lanka are over-protective of employees to the extent of degrading the interests of employers.

The analysis of the above three labour statutes, although does not generate an overall picture of the legal framework in terms of the employment relationship in Sri

Lanka, shed light to understand a general overview of the focus and direction of Sri Lankan labour legislation. Most of the labour statutes include provisions meant for the protection of employees, sometimes even at the expense of employers' interests, employee productivity and national development goals. Some of such over lenient provisions included in such over-protective statutes such as the provisions on working hours and leave entitlements in the Shop and Office Employees' Act, provisions on employing women at night in the Employment of Women, Young Persons and Children Act No. 47 of 1956 have also failed in generating perceived protection over employees as such statutes have not been adequately updated and rationalized according to current labour market requirements in emerging fields such as information communication technology (ICT) and Business Process Outsourcing (BOP).

Conclusion

This study observes that the contemporary labour legislation in Sri Lanka, to a greater extent, follows an over-lenient approach rather than a balanced approach, in regulating the employment relationship. The analysis reflects the inherent characteristics of the existing legal framework such as the over-protective focus of legislative framework, lack of cohesion and uniformity in existing laws, obsolete statutory provisions and the failure to introduce timely amendments to the existing law which have adverse effects on productivity, employment generation and investment climate in today's market

economy.

Employment protection legislation can be justified by the state's responsibility to protect workers, the weaker party in the employment relationship. However, maintaining a conducive labour market which facilitates employment generation is a primary requirement for balancing the interests of all the parties in the employment relationship since there will be 'no employees to protect' in the absence of employment opportunities. The former can be secured only by safeguarding employers' interests. In many developing and emerging economies, stringent employment protection is weakly enforced, which reduces the ability of economies for effective and efficient utilization of their labour resources[35]. Therefore, labour law reforms should necessarily be focused on establishing the right balance among the interests of the employers, the employees, and the state, in order to successfully compete with unprecedented challenges in the globalized world. Such a balanced approach would ensure positive protection for all the parties in the employment relationship than providing superficial protection to a specific party, which would synchronize the labour law regime with Sri Lanka's socio-economic environment.

[35] S Scarpetta, *Employment Protection: Policymakers Need to Find the Right Balance Between Protecting Workers and Promoting Efficient Resource Allocation and Productivity Growth* (IZA World of Labor 2014) 12.