
PARADIGM CLOTHING (PVT) LTD**Vs.****CHANDRAMADU AND OTHERS**

SUPREME COURT

ALUWIHARE, J.

DEHIDENIYA, J.

THURAIRAJA, J.

SC/APPEAL/106/2014

SC/LA/166/2013

HC/ALT/GL/HC/LT/AP/901/2012

FEBRUARY 28, MARCH 15, 2019

Industrial Disputes Act, sections 31B(4), 31C(1), 33(1)(d) — Transfer of an employee—Constructive termination of employment—Governing criteria on the calculation of compensation to the employee

A number of employees of the appellant's factory at Niyagama, who are residents of the same area, were given new year holidays, and during that period the appellant posted letters of transfer, transferring all the employees to two factories in Karandeniya and Dehiwala. Thereafter the appellant obtained an enjoining order restraining the said employees from entering the factory premises at Niyagama on the basis of reasonable suspicion of unrest. Through a mediation process that took place subsequently, the appellant offered the employees a slightly higher payment if they agreed to report to the new workplace and payment of compensation to those who did not wish to report to the new workplace. However, notwithstanding such offer, the appellant posted letters to the employees notifying them that their failure to report to the new workplace would be treated as a vacation of post. The employees instituted proceedings in the Labour Tribunal on the basis of constructive termination of their services.

Held:

1. Although the employer has an inherent right to transfer an employee, the decision should not be tainted with *mala fides*. A transfer made stealthily and without considering the economic and social hardships faced by the employees is a serious breach of the employer-employee relationship by the employer.

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2. The Labour Tribunal can order relief disregarding the written contract of employment containing the acceptance of transfers, when it is just and equitable to do so.
 3. Calculation of the quantum of compensation involves consideration of the whole gamut of issues ranging from the solvency of the employer to the immediate aftermath of termination. Consideration only of the length of service, present salary and designation may cause unfairness and inequity in the absence of the other criteria. The reason for injecting an expansive formula into this equation is to ensure that the Labour Tribunal in awarding compensation would not haphazardly disturb the business equilibrium.
 4. In the present case, the Labour Tribunal has resorted to a mechanical formula of three months' salary for each year of service in calculating compensation for all 224 employees. The employees' respective losses of earnings from the date of dismissal to the date of the order has not been calculated, nor has remuneration obtained from fresh employment been deducted from that sum, as no evidence had been adduced by the employees regarding the securing of alternative employment.
 5. The burden is on the employee to adduce sufficient evidence to enable a Labour Tribunal to decide the loss. However, there is no bar to the Labour Tribunal calling upon any necessary evidence to make a just and equitable order.

Cases referred to:

1. United Engineering Workers' Union v. Devanayagam 69 NLR 289
2. National Radio Corporation v. Their Workmen 1963 1 LLI 282 SC
3. Ceylon Estates Staff's Union v. Superintendent, Meddecombra Estate, Watagoda, Wattagoda, (1986) 1 CALR 102/73 NLR 278
4. De Silva v. Sri Lanka State Engineering Corporation [1996] 2 Sri LR 342
5. Walker Sons & Co Ltd v. Fry 68 NLR 73 at 113
6. Caledonian (Ceylon) Tea and Rubber and Estates Ltd v. Hillman (1977) 79 1 NLR 421 at 429
7. Ceylon Transport Board v. Wijeratne (1975) 77 NLR 481
8. Jayasuriya v. Sri Lanka State Plantations Corporation [1995] 2 Sri LR 379 at 413

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9. Scottish and Newcastle Breweries PLC v. Halliday [1986] ICR 577
 10. Liyanage v. Weeraman (SC/235/72, SC Minutes of 31. 01. 1974)
 11. Nidahas Karmika Saha Velenda Sevaka Vurthiya Samithiya v. Continental Motors Ltd ID 32 CGG 11, 224 of 27. 12. 57 at 5
 12. Fentiman v. Fluid Engineering Products Ltd [1991] ICR 570
 13. Employment Appeal Tribunal observed in Adda International Ltd v. Curcia [1976] 3 All ER 620 at 624
 14. Raymond v. Ponnusamy (SC/57/69, SC Minutes of 10. 12. 1969)
 15. Uplands Tea Estates Ltd v. Ceylon Workers' Congress 72 NLR 68
 16. Hayleys Ltd v. de Silva 64 NLR 130 at 131
 17. Commissioner of Inland Revenue v. Fraser 1 (1940- 1942) 24 TC 498 at 501

APPEAL from the Judgement of the High Court of Galle.

Mohamed Adamaly with Anoukshi Vidanagamage for the Respondent-Appellant-Appellant.

J. C. Weliamuna, P. C., with Thushara de Silva, Pulasthi Hawamanne and Thilini Vidanagamage for the Applicants-Respondents-Respondents.

cur. adv. vult.

December 19, 2019

THURAIRAJA, J.

The instant Appeal was filed by the Respondent-Appellant-Appellant, Paradigm Clothing [Private] Limited (hereinafter referred to as the 'Employer'/'Appellant') against the Judgment of the Learned Judge of the Galle High Court dated 04. 06. 2013, who had affirmed the order of the Labour Tribunal, dated 24. 09. 2010.

I find it pertinent to produce the material facts of the case, prior to addressing the issues before us.

The Applicants-Respondents-Respondents (hereinafter referred to as the 'Employees'/'Respondents') are residents of Niyagama and were employed as blue-collar workers at the Niyagama Branch of the Appellant Company. According to the submitted documents, the Employees were granted their New Year's Holidays by the Employer from 08. 04. 2009 till 27. 04. 2009. During the period of the said holidays, the Employer posted letters of transfer dated 15. 04. 2009 (1st letter of transfer), transferring

the Employees of the Niyagama factory to the factories at Dehiwala and Karandeniya with effect from 27. 04. 2019.

In the meantime, the Employer had sought a notice of injunction and an enjoining order from the District Court on 20. 04. 2009, against all the Employees (who were 413 in number) from entering the factories at Niyagama and Karandeniya, on the alleged basis of a reasonable suspicion that there could be a possibility of unrest. On 23. 04. 2009, an ex-parle enjoining order was granted by the District Court of Elpitiya, restricting the Employees from entering the said factories.

On 24. 04. 2009, a mediation process was attempted. During the said mediation process, the Employer suggested a slightly higher payment, if the Employees agreed to report at the new workplace and the Employer, upon Board Approval further agreed, that compensation could be paid to those who do not report to the new workplace. For that purpose, another meeting was fixed on 12. 05. 2009. However, the Employer posted letters of warning dated 30. 04. 2009 (2nd letter of transfer), in which it was notified that an opportunity had been given to the Employees to report for duty at the relevant place of duty, on or before 11. 05. 2009 and it was further notified that, the services of any employee who fails to report for duty on or before the said date, would be terminated.

On 12. 05. 2009, as agreed to previously, both parties were present before the Commissioner of Labour, wherein it was informed that the Employees were unwilling to report to the new workplace. Further, discussions were held to reopen the factory with 250 Employees and for that, the Employer had to obtain approval of the Board. Therefore, another meeting was fixed on 15. 05. 2009 and on the said date, the Employees were present while the Employer was absent and unrepresented.

Upon notices being served on the Employees, they had appeared at the District Court of Elpitiya but the Employer was absent and unrepresented. Therefore, the enjoining order was dissolved. Thereafter, the Employer issued letters dated 19. 05. 2009 (3rd letter of transfer), in the form of a notice of vacation of post, stating that, the Employees would be treated as having vacated their posts, if they fail to report to duty by 01. 06. 2009.

Following the above events, the Employees had filed their respective Applications in the Labour Tribunal of Galle on 06. 05. 2009 against the Appellant, seeking reinstatement in service with back wages or in the alternative, compensation in lieu of reinstatement. The President of

the Labour Tribunal of Galle consolidated the Applications and heard the matters together. The President of the Labour Tribunal held, by order dated 24. 09. 2010, that there was a constructive termination of employment and directed the Employer to pay Rs. 26, 668, 995/- in respect of all Employees (breakdown of the details of payment were provided). The Applications before the Labour Tribunal were filed by 413 workmen, but the order of the Labour Tribunal is limited to the 224 workmen who had participated in the Trial.

Aggrieved by the order of the Labour Tribunal, the Employer filed an Appeal dated 27. 10. 2010, before the High Court of Galle. After considering the submissions made by both parties, the Learned Judge of the High Court dismissed the Appeal on 04. 06. 2013 and further, awarded costs at the sum of Rs. 1000/- to each of the Respondents. Thereafter, the Employer had preferred the present Appeal before us.

Having heard the Counsel in support of the present Appeal, this Court had granted leave on the questions of law set out in paragraph 13(b), (e), (h), (I), (m) and (q) of the Petition dated 12. 07. 2013, which have been reproduced for easy reference.

(b) Has the Learned High Court Judge erred in law in failing to appreciate the fact that the Transfer of the Respondents were prima facie lawful and justified?

(e) Has the Learned High Court Judge erred in law and misdirected himself in holding that the Transfer of the Respondents amounts to constructive termination of their services, particularly when the same is not supported by reasons in the impugned order?

(h) Has the Learned High Court Judge erred in law in holding that the Petitioner had acted ma/a fide in obtaining an enjoining order from the District Court of Elpitiya, especially in view of the finding by the Labour Tribunal that the Petitioner did so to safeguard the property of the Petitioner Company?

(I) Has the Learned High Court Judge erred in law in failing to consider that, the Respondents had not proved their losses and/ or established any basis for the award to them of compensation?

(m) Has the Learned High Court Judge erred in law in failing to consider the established authorities of the superior courts as regards the grant of compensation, and, contrary to law awarded

compensation 'mechanically' to all employees regardless of age, employability, skill etc. of the Respondents and affordability of the Petitioner?

(q) Has the Learned High Court Judge erred in law in failing to make a just and equitable order?

In addition to the aforesaid, the following question of law was raised by the Counsel for the Respondents on 02. 07. 2014.

Is the Appellant entitled to any relief in these proceedings in view of the findings of fact made by the Learned Labour Tribunal President?

Both Counsels have filed their written submissions and the matter was argued before us. The stance taken by the Employees is that, their services were constructively terminated, but on the contrary, the Employer had submitted that, there was no termination and that, it was only a transfer order.

I find that, the Learned President of the Labour Tribunal, in his judgment made a specific finding that, the transfers were ma/a fide on 8 grounds. The same has been reproduced for easy reference.

i. The instant transfers were mass scale transfers without sufficient prior notice.

ii. Convenience of the workmen and individual issues of the individual workmen should have been considered individually and it is the duty of the employer to give a platform to submit appeals setting out their grievances.

iii. The employer has offered to pay Rs. 2000/- for those who have been transferred to Dehiwala, but the evidence show that, this amount is anyway not sufficient for accommodation and meals.

iv. In making transfers, the employer has not considered the financial challenges that might arise in respect of those employees, especially since the employees were earning very low salaries, approximately Rs. 6300/- a month.

v. Had there been a genuine-economic reason to close down the factory, such closure would have been justified and the employer should have followed the Termination of Employment (Special Provisions) Act No. 45 of 1971.

vi. The Employer had made use of the New Year vacation to transfer employees and to resort to a District Court for Enjoining Order preventing them from entering the factory. It is very clear that, there was no actual evidence, but only reasonable suspicion that any disturbance would happen.

vii. The transfers were effected for a long distance, but sufficient notices were not given.

viii. The workmen had not been given any opportunity to appeal against the transfer.

As per the above findings, the President of the Labour Tribunal had stated that, the said transfers are tainted with malice and unfair labour practices and are therefore, unjustified.

The Counsel for the Appellant had contended that, the transfer was lawful since there was a specific clause in the letters of appointment, providing that the employment of the Respondents was transferable. It was further contended that, the letters of appointment were signed and accepted by the Respondents, thereby constituting a 'Contract of Employment' between the Appellant and each of the Respondents.

With regard to the above contention, I find it apposite to produce the relevant excerpts from the below-mentioned cases.

In the case of *United Engineering Workers' Union v. Devanayagam*,¹ it was observed that-

A Labour Tribunal, an arbitrator and an Industrial Court are required to do what is just and equitable and it is expressly provided that a Labour Tribunal when dealing with an application is not restricted by the terms of the contract of employment in granting relief or redress. (emphasis added)

In the case of *National Radio Corporation v. Their Workmen*,² it was held that-

Even inhere is provision made in the contract of employment, if any transfer is done "mala fide" that transfer is not a legitimate transfer.

In the case of *Ceylon Estates Staff's Union v. The Superintendent, Meddecombra Estate, Watagoda, Wattagoda*,³ it was observed that-

There is of course no general principle that an employee is In all cases bound to accept such a transfer order under protest, for there may be cases where the mala fides prompting such an order is so self-evident... the right to transfer has been conceded as a right Inherent in the employer. . . the only grounds on which the transfer in this case has been resisted namely that the exercise of the power was not bona fide and that it should not in any event harm the employee, have not, as already observed, been proved. (emphasis added)

In the aforesaid Judgment, Justice Weeramantry firmly established that although the employer has an inherent right to transfer an employee, it should not be mala fide and that, it should not in any event harm the employee.

I have observed that, the Employees transferred from the Niyagama Factory had been prohibited from entering the premises of the Niyagama Factory and the Karandeniya Factory, by virtue of the injunction that was obtained by the Employer. The Employer should have sought the injunction only if there was scope for reasonable suspicion that, there existed anxiety amongst the Employees such that it could have resulted in them indulging in a conduct that ought to have been restrained. However, I find that, there is no evidence of violence or industrial unrest among the Employees, some of whom have been employed for more than 10 years.

It is evident from the 3rd letter of transfer that, the Employer has stated that the Employees would be treated as having vacated their posts, if they fail to report to duty by 01. 06. 2009. I am of the view that, the concept of vacation of post involves two aspects-one, is the mental element i. e. the intention of the Employee to desert and abandon the employment and the second, is the physical absence i. e. the failure of the employee to report at the designated workplace, which in this case is the Factory at Dehiwala or Karandeniya. To constitute the mental element, it must be established that the Employee who had refrained from reporting at the workplace was actuated by an intention to voluntarily vacate his employment.

Moreover, the view that the physical absence and the mental element must co-exist for there to be a vacation of post in law, was affirmed in the case of Nelson *De Silva v. Sri Lanka State Engineering Corporation* wherein, it was observed-

A temporary absence from a place does not mean that the place is abandoned; there must be shown also an intention not to return. So, to the physical failure to perform a contractual duty there must be added the intention to abandon future performance. A reasonable explanation may negative the intention to abandon. A bona fide challenge to the validity of an order is a satisfactory explanation for not complying with it. By challenging the order the complainant was affirming the contract not abandoning it.

I find that, in the present case, there is no evidence of the presence of the mental element i. e. the intention of the Employee to desert and abandon the employment. Therefore, I am of the view that, in the given circumstances, the failure to comply with the letters of transfer does not amount to a vacation of post.

Moreover, I find that, the Employer has failed to comply with the legal provisions relating to the transfer and these transfers were made stealthily and without considering the economic and social hardships faced by the Employees. With the given facts, it can be observed that the Employer-Employee relationship was seriously breached by the Employer. Accordingly, I conclude that the act of the Employer is deemed to be a constructive termination of service.

In light of the above analysis, I am of the view that, the Learned High Court Judge has not erred in his observations regarding the questions of law, marked as (b), (e) and (h).

Answering the question of law marked as (I), I am of the view that, the Appellant Company has failed to prove its losses as a result of “Global Financial Downturn” before the Labour Tribunal. The Appellant produced Audited Accounts of Paradigm Clothing [Private] Limited as a whole and that cannot be considered as the separate Accounts of the Niyagama Factory. It is stated and observed that, in page 45 of the order of the Learned President of the Labour Tribunal,

**..ඒ අනුව සත්‍ය වශයෙන්ම දෙහිවල, කරන්දෙනිය, නියගම යන කර්මාන්තශාලා
 තුනම පාඩු ලැබුවේද? ඉන් එකක් පාඩු ලැබුවේද? යන්න සොයා ගැනීමට
 සාක්ෂියක් විනිශ්චයාධිකාරියට ඉදිරිපත් වී නොමැත.**

Answering the questions of law (m) and (q), I am of the view that, the order of the President of the Labour Tribunal is just and equitable and well considered. In page 69 of the order of the Learned President of the Labour Tribunal stated that,

මෙහිදී සේවකයන්ගේ සේවා කාලය, වැටුප් සලකා බැලීමේ දී විවිධ සේවා
කාලයන් එනම්, මාස 11 සිට වසර 9, 10 වැනි සේවකයන් සිටින බව පෙනේ.

It is evident that, the Learned President of the Labour Tribunal considered the age, salary and period of service of the Employees while preparing the breakdown of compensation, which was considered and affirmed by the Learned High Court Judge.

For the reasons already enumerated by me, I answer the questions of law set out in paragraph 13, marked as (b), (e), (h), (l), (m) and (q) in the negative. Accordingly, I agree with the order of the Learned High Court Judge and the findings of the Learned President of the Labour Tribunal. Further, in response to the question of law raised by Counsel for the Respondents on 02. 07. 2014, as reproduced previously, I am of the view that, the Appellant is not entitled to any relief in these proceedings and therefore, answer the same in the negative.

Appeal dismissed.

ALUWIHARE, J.

I have had the benefit of reading the judgement of his Lordship Justice Thurairaja. I am in agreement with the reasoning and the conclusions reached by his Lordship in this matter, in particular that the termination of employment of the workers (the Respondents) concerned, amounts to constructive termination and that it was unjust.

Lately, however, this Court has observed that there had been failures on the part of the learned Presidents of the Labour Tribunals to adhere to well-settled principles in awarding compensation to Applicants, who invoke the jurisdiction of the Labour Tribunals of law:

It is in this context that leave was granted by this Court on the following question,

Has the Learned High Court Judge erred in law in failing to consider the established authorities of the superior courts as regards the grant of compensation, and, contrary to law awarded compensation ‘mechanically’ to all employees regardless of age, employability, skill etc. of the Respondents and affordability of the Petitioner? (Subparagraph “m” of paragraph 13 of the Petition, emphasis added).

In this backdrop, I wish to state my own observations on the aspect of awarding compensation by the Labour Tribunals.

The provisions of the Industrial Disputes Act, No. 43 of 1950 equip the Labour Tribunals with broad powers for awarding relief in general, and compensation in particular, for unjust terminations.

Under powers vested with the Labour Tribunals to grant relief in general, Section 318(4) of the Industrial Disputes Act provides that a Labour Tribunal may grant “relief or redress” to a workman **notwithstanding anything to the contrary in any contract of service** between him and his employer. Tambiah J. in *Walker Sons & Co Ltd v. Fry*⁵ stated that “*Relief may be given to a workman although the employer has adhered to the terms of the contract and has fulfilled his legal obligation*” (emphasis added).

Further expanding the powers of a Labour Tribunal to grant relief, Section 31 C(1) of the Industrial Disputes Act provides that when an application is preferred to a Labour Tribunal under the Act, a duty is imposed upon it **to make all such inquiries into that application and hear all such evidence**, and make a “**Just and equitable order**”.

In the landmark case, *Caledonian (Ceylon) Tea and Rubber and Estates Ltd v. Hillman*,⁶ Sharvananda J. (as he then was) has encapsulated the gist of both these provisions as follows: “[T]he question . . . is **not whether the employment has been terminated in terms of the contract between the parties or according to law, but whether the employee has . . . a claim, in justice and equity, to compensation or other benefit for the loss of career resulting from the termination** (emphasis added).” In the above case, Sharvananda J. further stated that a Labour Tribunal is entitled to grant compensation in just and equitable terms, even where the termination is consequent to the exercise by the employer of his fundamental right to close down the business.

Therefore, it can be established at the outset that despite the claim by the Appellant Company that the Letters of Appointment (which are in effect the contracts of employment) of the workmen, contained their agreement to accept and obey any transfer order, the Labour Tribunal can order relief disregarding such contractual terms, if in its view, it is just and equitable to do so.

As regards the power of a Labour Tribunal to grant compensation in particular, Section 33(1)(d) of the Industrial Disputes Act provides that any award of the Labour Tribunal may contain decisions “*as to the payment by any employer of compensation to any workman, the amount of such compensation or the method of computing such amount, and the time within which such compensation shall be paid.*”

Further, Sections 33(5) and 33(6) respectively provide for a Labour Tribunal to make an order for compensation in lieu of reinstatement **if the workman so requests**, and as an alternative to reinstatement where the **Tribunal thinks fit so to do**.

The impugned Labour Tribunal order, refers to the letter dated 24. 04. 2009 issued by the Labour Commissioner (Labour Relations), marked ‘A14’, which contains the terms to which the two parties agreed consequent to a mediation process, including inter alia the agreement, **that those who do not wish to resume work upon the transfers will be paid compensation**. It is also mentioned in the order, that this fact was not contested by the Respondent Company (the ‘Appellant’ in the present case). The mediation process pursuant to which the parties agreed to pay and receive compensation, did not specify the criteria for calculating the quantum, nor does the Industrial Disputes Act. However, jurisprudence in this regard, has introduced **several criteria** which should be taken into consideration in the assessment of the quantum of compensation.

I am firmly of the view that there is a duty cast on the learned Presidents of the Labour Tribunals to give due regard to the criteria when awarding just and equitable compensation.

In the case of *The Ceylon Transport Board v. Wijeratne*,⁷ this Court analysed the concept of compensation in detail and listed down several aspects that ought to be factored in, when determining the quantum of compensation. These include: nature of the employer’s business and his capacity to pay, the employee’s age, the **nature of his employment, length of service**, seniority, **present salary**, future prospects, opportunities for obtaining similar alternative employment, his past conduct, manner of the dismissal, effect of the dismissal on future pension rights, any sums paid or actually earned or which should also have been earned since the dismissal took place(emphasis added).

Quite apparently, ‘quantum of compensation’ involves a whole gamut of issues that range from the solvency of the employer, moral entitlement

of the employee, to the immediate aftermath of termination. The reason for injecting such an expansive formula into this equation is to ensure that a Court in awarding compensation would not haphazardly disturb the business equilibrium. The field of labour law has striven at every step to offset the uneven bargaining power between the parties equitably; however ‘equity’ does not invite selective application of law, nor does it promote the interests of one party to the complete exclusion of the other.

The learned President of the Labour Tribunal has, incorporated **only** the distinctions among the employees in length of service, terminal/ present salary and the nature of employment (designation), for the purpose of constructing the formula for calculating the amount of compensation payable to each employee. The factors; Opportunities for obtaining alternative employment, the nature of the employer’s business, employer’s ability to pay, employees’ age and the manner of dismissal, although **mentioned** in the order, have been conveniently overlooked by the learned President of the Labour Tribunal in determining the quantum of compensation.

I cite with approval the observations made in the case of *Jayasuriya v. Sri Lanka State Plantations Corporation*,⁸ where it was held that “it is not sufficient to recite a sort of litany of factors to which Presidents of Labour Tribunals who are making computations are supposed to respond . . . and be merely mentioned and left, as it were, in the air”. In the present case too, dismayingly, the learned President of the Labour Tribunal has limited herself to the mere itemization of the above factors, and failed to consider at all, several other key criteria in computing compensation.

The Appellant is a business establishment engaged in the manufacture of clothing for export. Necessarily, the success of the business is contingent upon market forces, to be precise the ‘demand’ for clothing in the overseas markets. The learned counsel for the Appellant in the course of his submissions contended that due to the global economic downturn in 2006, the orders placed with the Appellant for finished garments dwindled and as a result, manufacturing of garments had to be drastically reduced. The fact that the Appellant suffered losses during 2006- 2008, albeit for different reasons, had been admitted to a certain extent by the Respondents, as per the Labour Tribunal order. It was in this backdrop, the learned counsel submitted, that the management of the Appellant company decided to close down the factory at Niyagama and to transfer the workforce of the said factory to their other two factories at Dehiwela

and Karandeniya, with an offer of an additional allowance amounting to Rs. 2000 to each employee, in order to offset the additional expenses they may have to incur in reporting to work at far off places from their homes. Although many employees did take the offer, the Respondents refused to do so, and the Appellant had treated the Respondent as having vacated their employment. These are factors, the learned President ought to have considered in arriving at the quantum of compensation to be ordered.

In this regard the case of *Jayasuriya (supra)* is of significance. The employee's duty to mitigate his/her loss was supported in that case, (at pages 411 and 412) where it was held that an **employee must mitigate his/her loss** by taking an offer of employment reasonably offered to him/her, acting as if he/she had no hope of seeking compensation from the previous employer. A similar practice of the U. K. Industrial Courts is reflected in *Scottish and Newcastle Breweries pie v. Halliday*,⁹ where it was stated that the applicant employee is under a duty to mitigate his/her loss so far as possible, in the sense that he/she should take reasonable steps to obtain other employment. Whether in the present application the employees had breached this duty of mitigating their losses, is not known, due to the absence of evidence regarding employees' acceptance or refusal of alternative employment.

Similarly, the Labour Tribunal has overlooked Justice Vythialingam's criterion laid down in *Wijeratne (supra)*, i. e. compensating the **loss of employment and legitimate expectations for the future in that employment**. In the present case, the workmen who unsuspectingly left the factory for the usual Sinhala New Year vacations had no knowledge of any urgent need to abruptly close down the factory wherein they were employed for many years, and entertained legitimate expectations of continuing to work there. The impact of these unfavourable circumstances on the employees should have been taken into account by the learned President of Labour Tribunal in computing the sum of compensation.

This Court held in the case of *Jayasuriya (supra)* that it is preferable to have compensation computed based on **specific headings and items of loss**. These headings are namely; **1) approximate computation of immediate loss** (loss of wages from the date of dismissal to the final judgment), **2) prospective future loss** and **3) loss of retirement benefits**. These factors were considered in that case as the "data which is necessary to determine the orbit of every Tribunal, so as to prevent it from straying off its course" [page 409].

However, in the present impugned order by the Labour Tribunal, the Labour Tribunal had strayed away, by failing to accurately assess the immediate loss/actual financial loss suffered by the employees, which was claimed by the learned President as the sole basis for granting compensation. In calculating financial loss, firstly, **the loss of earnings** has to be calculated from the date of dismissal to the final determination of the case. From this amount, the Tribunal should deduct any **wages or benefits paid** by the employer after termination, as well as **remuneration from fresh employment**.

It has been held that if the employee had obtained equally beneficial or financially better alternative employment, he should receive 'no compensation' at all, for he suffers no loss; if it's a less remunerative job, compensation should be 'reduced by such amount earned'. The whole basis of such quantification of immediate loss, was the principle that the 'employee is entitled to indemnity but not profit'. (Jayasuriya at page 411).

Similarly, in *Liyana v. Weeraman*,¹⁰ it was held **that the amount earned by a workman after his dismissal (through alternative employment)** is deductible from the compensation otherwise awardable to him.

Even though in *Jayasuriya and Nidahas Karmika Saha Velenda Sevaka Vurthiya Samithiya v. Continental Motors Ltd*,¹¹ it was noted that if an employee obtains equally beneficial or financially better alternative employment after dismissal, he should receive 'no compensation', as no loss is caused to the employee, the Industrial Courts of the U. K. have not gone to that extent. It was held in *Fentiman v. Fluid Engineering Products Ltd*¹² that if an employee obtains new employment at a higher rate of pay, then the Industrial Tribunal should calculate the compensatory award on the basis of the loss suffered from the date of dismissal up to the date when the new employment commenced.

In the present case, the Labour Tribunal has resorted to a mechanical formula of **3 months' salary for each year of service** in calculating compensation for all 224 Respondents. The employees' respective losses of earnings from the date of dismissal to the date of the Labour Tribunal order had not been calculated, nor has remuneration obtained from fresh employment been deducted from that sum, as no evidence had been adduced by the Applicants regarding the securing of alternative employment. Therefore, no mitigating effect on the employees' loss of earnings was considered, nor was it considered whether any unemployed worker remained so through a fault of his/her own.

As regards the absence of evidence on a key factor in calculating the immediate loss, such as the securing of alternative employment, in Jayasuriya (above), it was determined that the **burden is on the employee to adduce sufficient evidence to enable a Labour Tribunal to decide the loss.** But such failure to provide evidence should be considered against the employee, and not as a ground to award an enhanced amount of compensation, by disregarding any remuneration he/she earned from alternative employment. As the Employment Appeal Tribunal observed in *Adda International Ltd v. Curcia*¹³ as cited in Jayasuriya on page 415, “The tribunal must have something to bite on and if an applicant produces nothing for it to bite on, he will have only himself to blame if he gets no compensation”. Therefore, the failure on the part of the employees to adduce such evidence, should have been factored in to prevent possible over compensation or under-compensation.

In terms of Section 31C(1) of the Industrial Disputes Act, it is the duty of the Tribunal to make all such Inquiries into the application and **hear all such evidence as it may deem necessary**, untrammelled by the rules of evidence and after adopting such procedure, to make such order as may appear to the Tribunal to be just and equitable. (Wijeratne, page 488)

Substantiating the above view, Nigel Hatch in «commentary on the Industrial Disputes Act of Sri Lanka» (1989) at page 271, reiterates the procedure provided in Section 31C(1) of the Industrial Disputes Act, and at page 272 states that “the requirement to record . . . tendered evidence is no bar to the adjudicator **calling in addition any “necessary “evidence.”** (emphasis added)

However, in the impugned Labour Tribunal order, it is deemed that the learned President had failed to make “all such inquiries” and call all “necessary” evidence, in order to avoid placing the employees in a more favourable position than they ought to be in. In the order, a question lingers as to whether the Labour Tribunal has not correctly calculated the actual financial loss and has not called for evidence of the reception or otherwise of alternative employment by the employees, and of the remuneration received by them after securing such employment.

The additional criteria of considering the **employee’s advanced age**, and the type of work he was engaged in, which would render it improbable for him to obtain employment in the same capacity, was elaborated on in *Raymond v. Ponnusamy*.¹⁴ Accordingly, the **monetary value of a workman’s balance work-span** has to be taken into account, which

the learned President of the Labour Tribunal had apparently unheeded in the present case, but had only cursorily mentioned ‘age’ as a relevant consideration at page 69 of the order.

As the foregoing discussion of relevant criteria points out, any award of compensation must consider each employee separately and the tests must be applied to each employee, when deciding the loss that each has suffered. In this respect, there must be separate evidence relating to each Respondent. In the absence of such evidence, the Tribunal cannot award compensation as it cannot assume or hypothesize the loss that each has made.

In Jayasuriya at page 407, Dr. Amerasinghe J. stated that, “while I respectfully agree that the amount of compensation should not be **“mechanically” calculated** and that Labour Tribunals have a **wide discretion, there is . . . no power conferred by the Legislature on Labour Tribunals to act without unhampered restraint** “ (emphasis added). Although restraint must be accordingly exercised, it must be reiterated that in the instant case, the formula for compensation constructed by the learned President of the Labour Tribunal can be deemed a strictly mechanical formula through which 3 months’ salary for each year of service as compensation has been awarded to all 224 Respondents. Any consideration of the criteria subjective to each employee, discussed above in detail, is absent. Hence, compensation awarded in the present case-which was calculated mainly based on the past services of the employees as pointed out by Alles, J. in *Uplands Tea Estates Ltd v. The Ceylon Workers’ Congress*,¹⁵ was more akin to the payment of gratuity than compensation.

In calculating the ‘actual financial loss’ suffered by each employee for the purpose of indemnifying it, merely taking into consideration the three criteria; the length of service, present salary and the designation, may cause unfairness and inequity in the absence of consideration of the other criteria enumerated above.

In the case of *Hayleys Ltd v. de Silva*¹⁶ Weerasooriya J. opined that, a similar duty is cast on the Industrial Court, as on the Labour Tribunal to “*take such decision or make such award as may appear to the Court just and equitable*” (which) by necessary implication requires the Court to **consider and decide every material question involved in a dispute**. . . A failure on the part of the Industrial Court to consider and decide a question which the statute (*Industrial Disputes Act*) requires

the Court to decide **would be an error of law** “ (emphasis added). The failure of the learned President of the Labour Tribunal to consider the above criteria, which are subjective to each employee, in constructing the compensation formula, is therefore an omission of material concerns, leading to an error of law.

The High Court judgment, however, had simply affirmed the sums of compensation ordered by the learned President of the Labour Tribunal.

In these circumstances, it is clear that the Labour Tribunal has overlooked several of the established criteria, material to the computation of compensation, which could either reduce and/or increase the sum awardable as compensation. As pointed out in *Commissioner of Inland Revenue v. Fraser*,¹⁷ “*Court has always jurisdiction to intervene if it appears . . . that the Tribunal has made a finding for which there is no evidence*”.

It must also be borne in mind that as commendably observed in Jayasuriya at page 407, a Labour Tribunal in calculating the quantum of compensation is expected to, “*after a weighing together of the evidence and probabilities in the case . . . form an opinion of the nature and extent of the loss, arriving in the end at an amount that a sensible person would not regard as mean or extravagant, but would rather consider to be just and equitable in all the circumstances of the case*” (emphasis added).

Considering the above, I answer the question of law raised in paragraph “m” referred to above, in the affirmative. As I have stated above, the employees would legitimately be entitled to compensation and the only issue that is to be decided is the quantum of compensation applying the criteria referred to herein before.

Having answered the question in the affirmative, I make haste to observe that this litigation has run its course since 2012. The long delay attached to this case, taken together with the admission by the employer, that the Respondents are entitled to compensation, warrants that there be an end to the litigation with an outcome that serves justice to both parties. It is possible that the Respondents may be entitled to more compensation than what was awarded to them by a mechanical formula. It is also possible that the Appellant may have been able to contest that amount, had they adduced substantial evidence with regard to their capacity to pay. The absence of such evidence in the judgment is as

much a failure by the respective parties as it is by the Labour Tribunal. However, taking into account the concerns of the Respondents and the fact that the Appellant business had several branches which speaks of the availability of the resources, I am of the view that it is reasonable, in the unique circumstances of this case, that the Appellant company pay Rs. 26, 668, 995/- to the Respondents minus the accrued interest. Accordingly, I make order directing the learned President of the Labour Tribunal to have the monies deposited by the Appellant be paid to the Respondents (employees), and the interest accrued on the sum of Rs. 26, 668, 995/- be paid to the Appellant.

Appeal dismissed subject to the variation referred to.

DEHIDENIYA, J.

I have had the privilege of reading the judgment of His Lordship, Justice S. Thurairaja, and His Lordship, Justice Buwaneka Aluwihare. I am in agreement with the reasoning and conclusion reached by His Lordship, Justice S. Thurairaja in relation to the termination of the employment of the employees (Respondents). Further, I am in agreement with His Lordship, Justice Buwaneka Aluwihare, with the reasoning and conclusion on the matter of compensation.

Judgment by: S. Thurairaja, PC, J.

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