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

In the matter of an Appeal to the Supreme Court from a judgment of the High Court of the Province holden in Colombo in terms of section 31DD of the Industrial Disputes Act (as amended).

SC Appeal No: 09/2010

SC (Spl) LA No. 209/2009
HC ALT No: 26/2008
LT Colombo No. 1/117/2001

David Micheal Joachim
No. 27/6, Peters Lane,
Colombo 06.

APPLICANT

-VS-

Aitken Spence Travels Ltd.
No. 305, Vauxhall Street,
Colombo 02.

RESPONDENT

AND BETWEEN

David Micheal Joachim
No. 27/6, Peters Lane,
Colombo 06.

APPLICANT-APPELLANT

-VS-

Aitken Spence Travels Ltd.

No. 305, Vauxhall Street,

Colombo 02.

RESPONDENT -RESPONDENT

AND NOW BETWEEN

David Micheal Joachim

No. 27/6, Peters Lane,

Colombo 06.

APPLICANT-APPELLANT-APPELLANT

-VS-

Aitken Spence Travels Ltd.

No. 305, Vauxhall Street,

Colombo 02.

RESPONDENT - RESPONDENT RESPONDENT

BEFORE : **L.T.B. DEHIDENIYA, J.**

S. THURAIRAJA, PC, J.

YASANTHA KODAGODA, PC, J.

COUNSEL : Harsha Fernando with Charith Senayake for Applicant-Appellant-Appellant.

Dulinda Weerasuriya, PC with Pasan Malinda for Respondent-Respondent – Respondent.

ARGUED ON: 3rd July 2020.

WRITTEN SUBMISSIONS: Applicant- Appellant-Appellant on 20th of January 2020.

Respondent – Respondent – Respondent on 14th January 2020.

DECIDED ON: 11th February 2021.

S. THURAIRAJA, PC, J.

This is an appeal arising from a judgment of the Provincial High Court of the Western Province holden in Colombo (High Court), delivered in an appeal from an order of the Labour Tribunal of Colombo.

It is pertinent to consider the facts of this matter since this court has to decide on the concept of proportionality, by weighing the incidents with the punishment imposed by the Respondent on the Appellant, namely that of termination of employment. In the circumstances, I would like to narrate facts which are as follows:

The Applicant-Appellant-Appellant (hereinafter sometimes referred to as Appellant) was an employee of the Respondent- Respondent- Respondent company (hereinafter sometimes referred to as the "Respondent") namely, Aitken Spence Travels Ltd, as a Senior Executive. The main business of the Respondent was the sale of Air Tickets and serving its customers regarding reservation of flights etc.

Appellant commenced his employment on a casual basis as a Trainee Executive with the Respondent with effect from the 1st March 1990. Sometime thereafter, the Appellant was confirmed in the said appointment as a Junior Executive with effect from 31st August 1991. By letter dated 1st April 1996, the Appellant was promoted to the position of a Senior Executive and was functioning as a Supervisor/ Senior Executive of the Ticketing Division of the Respondent company at all times material to this appeal. On the afternoon of 27th June 2000, the Appellant during the course of his functions, submitted a voucher and associated documentation without entering necessary details in a book named "Exchange Order Book". These documents were submitted to his superior officer- Manager Operations and Sales namely, Shane De Silva for his approval. Since the said 'Exchange Order Book' was not properly filled and submitted along with the voucher by the Appellant, said Shane De Silva had returned it to the Appellant with a note stating that, it has not been properly filled.

Over this, there had been a telephone conversation between the Appellant and the said Shane De Silva which the Appellant had originated, and Shane De Silva stated that in the said conversation between the two of them he was abused with the use of obscene language by the Appellant. Through an Inter- Office Memorandum dated 28th June 2000 addressed to a Director of the Respondent Company (marked as 'R1') Shane De Silva has promptly lodged a complaint regarding the incident with the senior management of the Respondent company. On this incident, explanations were called from the Appellant on 30th June 2000 (marked as 'R2'). As per 'R2', when the Sales Manager commented that the Appellant's excuse for incompletion of documents not acceptable and gave instructions on how it should be carried out the Appellant replied "*I will do what I want to, I was also waiting to see what you can do*" and had also asserted (referring to Shane De Silva) "*Bloody well do what you want*".

Following Shane De Silva's complaint, Directors of the Respondent company namely Keerthi Jayaweera and Ganeshan summoned the Appellant for a meeting and made inquiries, regarding the incident which occurred the previous day. The Appellant had provided an explanation and had asked the two Directors to take the matter up with the Board of Directors.

Appellant submitted his explanation on 01st July 2000 (marked as 'A2' and 'R6'). In his explanation the Appellant stated that, during the said telephone conversation in issue, Sales Manager Shane De Silva threatened him and it resulted in his (Appellant's) harsh retaliation without abuse. The Appellant categorically stated that he did use obscene language on the Sales Manager. Appellant's explanations were found unsatisfactory by the Respondent company and hence disciplinary action was initiated by a charge sheet being issued containing the following charges/ allegations:

1. Defying instructions given by the Manager.
2. Abusing the Manager and using obscene language over the telephone.
3. Belittling the authority of the Manager and the directors of the company, which tantamount to insubordination.

On 16.08.2000, a domestic inquiry into the incident was conducted by Mrs. S.N. Fernando who was also a senior officer of the Respondent company. At the said inquiry, Mr. Shane De Silva and Mr. Ganeshan gave evidence on behalf of the Respondent company, and the Appellant and two witnesses Miss. Natasha Happawana and Mr. Gayan Ondaatjie gave evidence on behalf of the Appellant. Following the conduct of the disciplinary inquiry, the Appellant had been found 'guilty' and thereafter, the Appellant's services were terminated by letter dated 03.11.2000. It states inter-alia as follows:

"Having carefully considered the evidence led at the aforesaid inquiry, we find that you have conducted yourself in an objectionable manner as set out in our show cause letter, and in the process undermined and belittled the authority and the position of the Manager to whom you report. After careful consideration, therefore it has been decided to terminate your services with immediate effect".

Thereby, the Appellant's services at the Respondent company were terminated. The Appellant filed an application bearing No. LT 1/117/01 before the Labour Tribunal- Colombo challenging the said termination on the basis that it was unjustified, and prayed for compensation in lieu of reinstatement. The Respondent filed answer denying the several averments in the application but admitting to the termination of employment. Evidence of two witnesses namely, Shane De Silva, (page 18-68 of the Brief) and Keerthi Jayaweera (page 69-120 of the Brief) and documents marked "R1 to R11" were led on behalf of the Respondent company (page 231-259 of the Brief). Only the Applicant gave evidence on his behalf (Pages 122-183) leading in evidence documents marked "A1-A5" (pages 125-134 of the Brief).

At the conclusion of the inquiry, on 11th March 2008 the President of the Labour Tribunal held that the termination of the Appellant's services was justified and dismissed the Appellant's application.

The Appellant not being satisfied by the order of the Labour Tribunal appealed against the order to the High Court on the following grounds:

(i) The order of the Labour Tribunal is wrongful and unlawful and is against the weight of evidence led at the trial and is unjust and inequitable in all the circumstance of the case.

(ii) The order of the learned President of the Labour Tribunal was seriously flawed in that he based his decisions on the evidence recorded by

another judge and consequently lacked all the obvious advantages of observing the demeanor and other indications of veracity whilst the witnesses were giving evidence.

(iii) The order of the Labour Tribunal was seriously flawed in that the President failed and neglected to consider the faulty procedure adopted by the Respondent- Respondent company that eventuated in the termination of the service of the Applicant- Appellant.

(iv) The order of the Labour Tribunal was in error when the President of the Labour Tribunal cast a burden of proof to establish his innocence on the Applicant- Appellant, thus resulting in an order which is not "just and equitable" as mandated by the Industrial Disputes Act.

The High Court after hearing both parties upheld the order of the President of the Labour Tribunal and dismissed the said appeal on 31/07/2009. The Applicant being aggrieved by the judgment of the High Court filed an Application seeking Special Leave to Appeal to this Court and prayed that the said judgment of the High Court be set aside. Leave was granted on the following questions of law in paragraph 37 (a), (b) (c) and (d) raised by the Appellant in his petition dated 10/09/2009.

a) Did the High Court fall into error by failing to consider that the Labour Tribunal has misdirected itself in the evaluation of the evidence?

b) Did the High Court err by failing to consider the total insufficiency of evidence and in particular independent evidence to establish that the Petitioner in fact had abused his superior officer with obscene language?

c) In any event did the High Court misdirect itself by failing to consider that there was no witness whatsoever to the telephone conversation in issue where it is unilaterally alleged that the Petitioner used obscene language to his superior?

d) Without prejudice to the foregoing, in any event did the High Court err by completely failing to consider the clear principles as supported by the judicial dicta, that suitable compensation can be granted in a fit case even if termination is deemed to be justified and/or if there is actual loss of confidence, without reviving the contract of employment?

I will first consider the questions of law contained in paragraph 37 (a), (b) and (c). In this appeal the main contention of the learned Counsel for the Appellant was that there were contradictions and/or omissions regarding the exact abusive words the Appellant had allegedly used over the telephone in the conversation, the Appellant had with Shane De Silva. Therefore, without any independent evidence to corroborate Shane De Silva's evidence regarding this telephone conversation and the abusive words, the Labour Tribunal and the High Court have misdirected themselves in evaluating the evidence regarding the above incident had thereafter accepting the evidence of Shane De Silva and coming to an incorrect conclusion that the Appellant had used abusive language on Shane De Silva during the telephone conversation.

It was argued on behalf of the Appellant that the words used by the Appellant do not amount to such abusive words that warrant a dismissal from employment. The Appellant throughout maintained that he did not use abusive language on the Manager, Shane De Silva. But to a question from the Labour Tribunal the Appellant admitted that he spoke "firmly" to the Manager. The Appellant stated that, the reason for the firm language which he used is a result of sequence of events that happened between the Manager and the Appellant. The Appellant contended that, he sent a set of vouchers, which were sufficiently complete as per the practice and norm of the Respondent company. Then, Shane De Silva sent it back because the vouchers were incomplete. Then, the Appellant completed it and sent it back to the Manager with an explanation as to why it was

incomplete on the first occasion. In spite of all that, Manager Shane De Silva, sent a second note, and that the Appellant had merely conveyed that it was an unnecessary note (using the phrase "bullshit").

In any event it was submitted on behalf of the Appellant that, assuming without conceding that the impugned sentences were uttered by the Appellant, there are no words that qualify as being "obscene". The position taken up on behalf of the Appellant was that the phrase "bullshit" is a phrase used in common parlance in today's context which is generally used to describe anything or a situation which has no or very little substance value. Learned Counsel for the Appellant urged that, the courts cannot simply overlook the common use of this phrase. In my view, the seriousness of these words should be considered, in the context they were used and on whom they were used. These words were used by a subordinate officer on his supervising officer during an official conversation in writing when the supervising officer pointed out a shortcoming of the subordinate officer. Furthermore, during the telephone conversation the Appellant had used the words "*I will do what I want to"* and "*Bloody well do what you want*".

Therefore, the fact that the Appellant in fact used words amounting to "obscene language" is apparent, and that the utterance of those words reflect insubordination is also evident.

It is next to be seen whether imposition of the punishment of dismissal from service is proportionate to the gravity of the imputed conduct. When obscene language is used by a subordinate against a superior, it must be understood in the environment in which that person is situated and the circumstances surrounding the event that led to the use of abusive language. No strait-jacket formula could be evolved in adjudging whether the obscene language in the given circumstances would warrant dismissal from service. Each case has to be considered on its own merits when the nature of the abusive language used by the appellant was not conclusively stated.

As per the evidence given by Shane De Silva before the Labour Tribunal, the Appellant phoned him and said "*you are a bloody fool, what this fool note that you are sending to me*". In response Shane De Silva had replied to the Appellant stating that the Appellant should follow his instructions and he would not tolerate the Appellant's behaviour, and that he will take necessary action if the Appellant does not adhere to his instructions. In reply to that, the Appellant stated that, *"I will do what I want to do. I was also waiting to see what you can do*".

In answering the Labour Tribunal, Shane De Silva stated that there have been such previous incidents as well, and he had advised him (the Appellant) personally, but had been of no avail. He further stated that, the Appellant has an aggressive nature and keeps shouting at others. Although the Appellant had been warned verbally, there had been no improvement in his attitude and behaviour. The complaint made by Shane De Silva stated that he has no personal animosity towards the Appellant. Keerthi Jayaweera too confirmed the said stance taken by Shane De Silva and stated that, the Appellant's service was very unsatisfactory in spite of many advices and warnings. In proof of that assertion, the performance appraisal of 1999 was submitted to the Labour Tribunal, inwhich the director who appraised the Appellant had stated that, "Employee has been spoken to in February, March 1999, October 1999, December 1999 and again today (27/01/1990). Have clearly explained what is required of him. If no improvement in 2-3 months, further action has to be taken". "At present does not meet the standard of a supervisor".

The Appellant takes up the position that he was not "instructed" by the manager but "orally threatened". He admits advise from the manager and categorically states that he did not "belittle the authority" of any manager. It is the Appellant's position that he was treated unfairly and in spite of being threatened by the manager, the director also merely accepted the version of the manager without giving the Appellant a fair hearing. At that stage the Appellant had no choice but to seek the protection of the authority above that of the Director.

Appellant submits that, both the manager and the director seem to have already made up their minds against the Appellant, he would like the matter to be referred to the Board of Directors being his appointing authority; he wanted natural justice; to be heard fairly. Further, learned Counsel for the Appellant submitted that Manager, Shane De Silva's evidence submitted before Labour Tribunal and statements given at the domestic inquiry were contradictory in nature.

It is the Appellant's position that Manager Shane De Silva spoke of the alleged "obscene language" for the first time when he gave evidence before the domestic inquiry on 16/08/2000, and that in his first complaint made on 30/06/2000 (letter marked "A1") the Manager does not state the words that were used nor classify the words used as "obscene". Additionally, it was submitted on behalf of the Appellant that there is no evidence to demonstrate that the management was made aware of the words that were used. Therefore, as to how the management issued the show cause letter "A1" in which use of "obscene language" is alleged, is not explained in evidence. In this regard, it is pertinent to note that in his complaint to Director Sasi Ganeshan submitted within 24 hours of the incident, Shane De Silva has submitted "*what happened after that was absolute insubordination and disrespect to me as his superior. His verbal abuse and aggression with regard to this subject, and even the nerve he had to challenge my action (if I did take any), was the last straw in my hat*". It would thus be seen that in his complaint to the senior management, Shane De Silva has captured the very essence of what happened. Unlike when making a complaint to the Police, in an internal complaint to the senior management one cannot reasonably expect a verbatim reproduction of what exactly happened.

As per the marked document "A1" which the Appellant relied upon, a letter was sent by the Director of the Respondent company to the Appellant calling for explanation regarding the alleged incident which occurred on 27/06/2000. As per paragraph 2 of the letter, Director alleged as follows;

"You had then kept back with you the incomplete vouchers and submitted another voucher for his signature. You had written back to the manager that the voucher which he had signed was in order. You had also given the excuse that the vouchers cannot be completed as the book was not available, half of the time in one place. When the manager commented that the excuse was not acceptable, you had telephoned him and used obscene words on him."

Further, by this letter marked "A1", the Director alleged that, the Appellant was orally warned on several previous occasions for defying the instructions given by the Manager, for poor productivity of the Appellant's job and repetitive actions done by the Appellant of such conduct demonstrated that he was not amenable to discipline.

After the alleged incident, as stated earlier Manager Shane De Silva sent a complaint explaining the situation which occurred between him and the Appellant. This letter was marked as "R1" and this was the first complaint done by the Manager Shane De Silva. In the said complaint, Shane De Silva also states the following:

"Sir, as I have very clearly stated above, this is not the first time that I had to face Mr. Joachim's attitude which I now believe should be addressed very severely. I do not think that he would change though we have given him ample chances. In light of the progress of the OTSD and its junior staff, Mr. Joachim could very easily be a stumbling block who I am not prepared to have in my team or work with anymore.

……Mr. Joachim has proved beyond any shadow of doubt that he is not willing to support and respect his superiors".

It is thus evident that quite independent of the incident that occurred on 27th June 1990, the Appellant's conduct had been questionable over a period of time. That he displayed unsatisfactory conduct is so very evident. At this stage, as per the

decided authorities, I am of the view that the allegations of this nature (misconduct in employment settings) should be proved on a balance of probability and not beyond reasonable doubt as in criminal cases as held in the **Caledonian (Ceylon) Tea and Rubber Estates Ltd vs. S. Hillman** [79 NLR 421]. Chief Justice Sharvananda has held as follows:

> *"An allegation of misconduct in proceedings before a Labour Tribunal has to be decided on a balance of probabilities, and it is not necessary to call for proof beyond reasonable doubt as in a criminal case. In the present case, however, the fact that the tribunal adopted the standard of proof beyond reasonable doubt has not led to a miscarriage of justice as, even on the application of the standard of a balance of probabilities the case against the applicant had not been established*."

As evident by the judgment of the Labour Tribunal as well as the High Court, it is clear that the Labour Tribunal and the High Court have considered the question of law of credibility, acceptability and sufficiency of the evidence of Shane De Silva and the circumstances under which the telephone conversation in issue had taken place, have come to a conclusion that the Appellant had abused and used obscene language on Shane De Silva in the said telephone conversation. It is evident that there has been a proper evaluation of the evidence of the contents of this telephone conversation and the associated incident by the Labour Tribunal as well as the High Court. The order of the learned President of the Labour Tribunal states as follows;

> *"ඉල්ලුම්කරු විශමාචාර ලෙස කටයුතු කර ඇති ලෙසට වගඋත්තරකරු විසින් ශකඡතා සමබරතාව මත ඔප්පු කර ඇති ලෙසට සැලකිය හැකිය. ඒ අනුව එකී චෝදනා මත වගඋත්තරකරු විසින් ඉල්ලුම්කරුගේ සේවය අවසන් කර තිබීම සාධාරණ සහ යුක්ති සහගත ලෙසට මම නිගමනය කරමි. ඒ අනුව ඉල්ලුම්කරු මෙම ඉල්ලුම් පතුයෙන් ඉල්ලා ඇති සහන සඳහා හිමිකම් නොමැති ලෙසට සලකා ඉල්ලුම්කරුට හිමි වෙනත් වඡවස්ථාපිත හිමිකම් වෙතොත් ඒවාට යටත්ව මෙම ඉල්ලුම් පතුය නිෂ්ප්‍රභා කරමින් නියෝගය නිකුත් කරමි."*

"It can be considered that the Respondent has proved on a balance of probability that the applicant has engaged in misconduct. Accordingly, I am of the opinion that terminating the service of the Applicant by the Respondent is fair and justifiable based on the aforesaid allegations. Accordingly, having considered that the applicant is not entitled to the reliefs prayed by this application, I do hereby dismiss this application subject to statutory entitlements due to the Applicant, if any."

The Learned High Court Judge has quite rightly identified that he has to consider the order of the Labour Tribunal and decide whether termination of services is proportionate to the charges proven in evidence. At one point of his order, he says,

"එම නිසා එම අවස්ථාවේදී ශේන් ද සිල්වා අභියාවක හට බැන වැදීම මත අභියාවකටද තදින් කතා කිරීමට සිදු වූ බවට දෙන ලද සාක්ෂිය විය හැකි භාවයේ පරීක්ෂණයට ලක් කරන විටකදී වුවද පිලිගත නොහැක. අභියාවක වෙනුවෙන් ශේන් ද සිල්වා විසින් සමාගම වෙත ඉදිරිපත් කරන ලද සන්දේශයෙහි අසභ්‍ය වචන පිලිබඳව සඳහනක් නොමැති බවට කරුනු දක්වන ලද නමුත්, එම වචන ඒ ආකාරයෙන් ම සටහන් කර නොමැති වුවද, අසභ්‍ය වචනයෙන් බැන වැදුන බවට ඔහු පැමිනිලි කර ඇත... උගත් කම්කරු විනිශ්චය සභාපතිතුමා විසින් ශේන් ද සිල්වා විසින් දෙන ලද සාක්ෂිය වැඩිබර සකච්ඡා පරීක්ෂණය අනුව පිලිගත හැකි අතර, ඔහු විසින් දක්වා ඇති කරුණු අනුව එම නිගමනය වෙනස් කිරීමට ප්‍රබල කරුණු අභියාවක විසින් තහවුරු කර නොමැති හෙයින්, මෙම අභියාචනය ගාස්තු රහිතව නිශ්ප්‍රභා කරමි."

"Therefore, the evidence which says that the appellant had to speak severely as Shane De Siva had scolded the Appellant on that occasion cannot be accepted even when it subjected to the test of probability. Even though it is stated that nothing is mentioned regarding the indecent words in the letter presented to the company by Shane De Silva, he has complained regarding the scolding using indecent words although the said words are not noted in the same manner... the

evidence given by Shane De Silva before the learned President of the Labour Tribunal can be accepted on the balance of probability and as per the facts mentioned by him, the Appellant has not confirmed vital facts to change that decision, and therefore this appeal is dismissed without costs."

This is substantiated by many cases as in, **The Electricity Equipment & Construction Company Vs Cooray** [1962, 63 NLR 164], and **Reckit & Colman Ltd. Vs Peris** [1979, 2 NLR 229], it was held that, as a general rule, refusal to obey reasonable orders justifies dismissal from service. Accordingly, it is obvious that the President of the Labour Tribunal has considered the question of proportionality in the first instance. In **Ceylon Estate Staffs' Union vs. The Superintendent, Meddecombra Estate, Watagoda** [73 NLR 297] Justice Weeramantry held that,

"In the making of a just and equitable order, one must consider not only the interest of the employees but also the interest of the employers and the wider interest of the country, for the object of social legislation is to have not only contended employees but also contented employers".

As highlighted by me above, the learned President of the Labour Tribunal had identified the question of proportionality. It is in that light that he has considered the cumulative effect of the Appellant's conduct at the work place and after consideration of the factors before him; he had determined finally that termination of the Appellant is just and reasonable.

Relying on the leading treatise of "Law of Dismissal" (3rd edition) by S.R. De Silva, at page 74, he states that, abuse of a superior officer justifies termination, even though the employee has legitimate grounds of protest. In the case of **Lanka Synthetic Fibre Company Ltd. vs. Perera** [1998 3 SLR 191] the Supreme Court held that the use of abusive language towards superiors amounted to serious

misconduct. The Court cited with approval the following paragraph of B. R. Ghaiye in "Misconduct in Employment" (page 560);

> *"The use of abusive language towards a superior is a misconduct because it creates such a situation in which it becomes impossible to maintain proper discipline in an establishment . . . Whatever may be the reason of the use of abusive words, it is a recognised misconduct and unlike use of defamatory words it has no exceptions. It means that the use of abusive language will be misconduct irrespective of the circumstances in which it has been uttered."*

In view of the foregoing, I find that the learned President of the Labour Tribunal had considered all evidence submitted before it with reference to the charges against the Appellant. The High Court has reconsidered the assessment of evidence. The High Court Judge had evaluated the evidence judicially. In any event, the Supreme Court will not arrive at findings contrary to the findings of the original court or tribunal before which the evidence was presented, unless the findings are perverse. In this instance I see no pervasive conclusion either by the learned President of the Labour Tribunal or by the Learned High Court Judge.

Hence, I answer the questions of law contained in paragraphs 37 (a), (b) and (c) in the negative.

I will then consider the 37 (d) question of law that, suitable compensation can be granted in a fit case even if termination is deemed to be justified and/or if there is actual loss of confidence without reviving the contract of employment.

In the present case the complaint against the Appellant is that he used obscene words and abused a manager of the company who was his immediate superior. In **K.B.D. Somawathie vs. Baksons Textiles Industries Ltd** [79 NLR 204] Justice Rajaratnam held that,

"I entirely agree with learned counsel for the respondent employer that compensation awarded either in lieu of reinstatement or under S. 33(1)(d) should be compensation for some loss suffered by the employee at the hands of the employer. Mr. advocate however placed his argument very high and submitted that it should be a loss as a result of some wrong done to the workman and in this case as there was no wrong done by the employer, there could be no order for compensation. In my view an order for compensation could be made even where the workman loses her job because the employer in the interest of his business quite rightly had to discontinue her services, but the cause for termination was not such a serious act of misconduct. "

It is settled law that no compensation can be awarded in a situation where a justified termination occurred in the consequence of a wrongful act or misconduct of the employee, particularly when termination of employment is found to have been a proportionate and lawful response to the impugned conduct of the employee. Compensation will only be awarded to compensate a person for a loss he sustained and in my view such loss must be the result of a wrongful act on the part of the employer. In this instance, I do not find any wrongful conduct on the proof of the Respondent company being the employer. I am in agreement with the Labour Tribunal and the High Court regarding the finding that the termination of the services of the Appellant is justified. Hence, the question of reinstatement does not arise and therefore the question of compensation in lieu of reinstatement does not arise. Hence, I answer the question of law contained in paragraph 37(d) in the negative.

I have considered all the submissions made on behalf of the Appellant as well as those on behalf the Respondent in this case. I answer the question of law raised at the commencement of this judgment in the negative to the effect that both the Labour Tribunal and the High Court have considered the evidence and

arrived at a correct and lawful conclusion regarding the disputed facts and regarding the doctrine of proportionality in entering this decision to terminate the services of the Appellant by the Respondent company. Accordingly, I hold that there are no grounds to disturb the judgment of the High Court. In these circumstances, the Appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J.

Justice S. Thurairaja, PC, was pleased to share his draft judgment with me. I have considered it. I respectfully express my agreement with Justice Thurairaja's judgment regarding (i) the summation and analysis of the evidence led before the Labour Tribunal on behalf of both parties, (ii) the conclusions reached regarding the truth pertaining to the impugned conduct of the Appellant, and (iii) the conclusions reached pertaining to the first three questions of law in respect of which the Supreme Court has granted Leave to Appeal. I am also in agreement with his Lordship's view that, this Appeal should be dismissed.

However, in view of my respectful disagreement with Justice Thurairaja's finding pertaining to the fourth question of law in respect of which this Court had granted leave, I wish to present my own consideration of the fourth question of law and pronounce my findings thereon.

As Justice S. Thurairaja, has dealt with the evidence of this matter at length, assessment of credibility of witnesses and conclusions reached with regard to disputed areas of evidence, and since I totally agree with the analysis of the evidence and conclusions reached, I will in this judgment refrain from engaging in a detailed analysis of the evidence. In any event, doing so would not be necessary, as an Appeal to the High Court established in terms of Article 154P of the Constitution from an order pronounced by a Labour Tribunal, should in terms of section 31C(3) of the Industrial Disputes Act be only on a question of law. Similarly, an appeal from the ensuing judgment of the High Court to the Supreme Court in terms of section 31DD of the Industrial Disputes Act, should also only be with leave first obtained and **only on a question of law**.

Nevertheless, I shall very briefly set out and refer to the factual position pertaining to the incident in issue which resulted in the termination of the employment of the Appellant, and I do so, as the facts pertaining to the incident have some relevance to my finding.

The Respondent company is a private sector organisation colloquially referred to as a 'travel agency'. At the time in issue, the Respondent company was engaged in serving its customers by making on their behalf flight reservations and selling airline flight tickets to them. The Appellant having joined the Respondent company in March 1990 as a Trainee Executive, had received two promotions, and since April 1996 was serving as a 'Senior Executive'. In his position as 'Senior Executive 'he functioned *inter-alia* as a 'supervisor 'of several subordinate employees. His immediate superior was one Shane de Silva, who was Manager Sales & Operations. The incident in issue relates to a verbal and written interaction between the Appellant and Shane de Silva.

On 27th June 2000, while making arrangements pertaining to a flight reservation of a particular customer, the Appellant submitted to Shane de Silva the relevant documentation for ratification of the proposed transaction by him. The Appellant did so without submitting a particular book referred to as the *Exchange Orders/Vouchers Book*. In terms of relevant rules of procedure of the Respondent company, it was necessary to perfect and submit the *Exchange Orders/Vouchers Book* along with the other documentation. According to the Appellant, the reason for not complying with this requirement was that, at the time in issue, the relevant book was not available with the Appellant, as the company had only one such book, and several other personnel of the company were also using it. In response, without ratifying the particular transaction, Shane de Silva returned the documentation back to the Appellant, with a comment written on a *post it slip*, stating that he was not ratifying the documentation, as the documentation was incomplete sans perfected entries in the *Exchange Orders/Vouchers Book*. In his note, he instructed the Appellant to duly perfect the book and submit. Instead of complying with the directive of Shane de Silva, the Appellant had presented the same documentation to another senior officer named Rajanan Dharmasena and obtained ratification of the proposed transaction, and proceeded with the matter. The Appellant had thereafter responded in writing to Shane de Silva, stating that the documentation was complete, as he had got space reserved in the book to enter details of the relevant voucher through the officer who had the *Exchange Orders/Vouchers Book* at the relevant time. The Appellant had subsequently submitted the duly completed book along with the documents ratified by Rajanan Dharmasena to Shane de Silva. In response, Shane de Silva once again has written to the Appellant stating that the reasons given by the Appellant were 'unacceptable'.

Afterwards, the Appellant phoned Shane de Silva relating to the preceding sequence of events, and had stated that, he (the Appellant) *"would do what I want to"* and had also told Shane de Silva that he can "*bloody well do what you want.*"

Following this telephone conversation, the following day, Shane de Silva complained to the senior management regarding what he referred to as *"absolute insubordination and disrespect"* to him as the Appellant's superior. On receiving the complaint, Directors of the Respondent company Sasi Ganeshan and Keerthi Jayaweera called up the Appellant and inquired from him about the incident. The Appellant denied having abused Shane de Silva, and told the two Directors to *"take the matter up with the Board of Management"*.

By letter dated 30th June 2000, the Appellant was asked to show cause as to why he should not be dealt with for having (a) defied instructions given by the manager Shane de Silva, (b) abused manager Shane de Silva by using obscene words, and (c) belittling the authority of Manager Shane de Silva and the Directors, which tantamount to insubordination. By letter dated 1st July 2000, the Appellant responded denying the allegations against him. Following an internal determination that the explanation provided by the Appellant was unacceptable, disciplinary action was taken against him through a domestic disciplinary inquiry conducted by a senior officer of the Respondent company. The charges levelled against the Appellant were based on the same allegations contained in the afore-stated *show cause letter*. Following the conduct of the disciplinary inquiry, the officer who conducted the inquiry arrived at a finding that the Appellant was *guilty* of all three charges. Consequently, the Respondent company dismissed the Appellant, thereby terminating his services.

It is this termination of employment that led to the Appellant filing an Application in the Labour Tribunal of Colombo complaining of unjustifiable termination of employment. He prayed for compensation in lieu of reinstatement. He did not pray for reinstatement. After inquiry, the learned President of the Labour Tribunal concluded that, the termination of the employment of the Appellant was justified. He therefore, dismissed the Application. Against that order, the Appellant

appealed to the High Court of the Western Province holden in Colombo. Following the hearing of the appeal, the learned Judge of the High Court dismissed the Appeal. This Appeal of the Appellant is against that judgment of the High Court of the Western Province.

As stated at the commencement of this judgment, following a consideration of an Application seeking Special Leave to Appeal, this Court was pleased to grant leave to appeal in respect of four questions of law. Justice S. Thurairaja has extensively dealt with the first three questions of law, and as stated above, I respectfully agree with his reasoning and findings thereon.

The Fourth question in respect of which leave has been granted, is as follows:

Without prejudice to the foregoing, in any event, did the High Court err by completely failing to consider the clear principles as supported by the judicial dicta, that suitable compensation can be granted in a fit case even if termination is deemed to be justified and/or if there is actual loss of confidence, without reviving the contract of employment?"

The Respondents did not present their case on the footing that the services of the Appellant were terminated on the premise that the Respondent had *lost confidence* in the Appellant as a result of his conduct. The position of the Respondent company was that the services of the Appellant were terminated since he had engaged in misconduct and was found *guilty* at the domestic disciplinary inquiry pertaining to the allegation that he had engaged in misconduct. Furthermore, in his Application to the Labour Tribunal, the Appellant did not seek re-instatement. Therefore, the issue of re-activating the employment contract by ordering reinstatement, did not arise for consideration by the Labour Tribunal.

Therefore, in the factual context of this Appeal, the afore-stated question of law can be re-framed in the following manner:

Even if the termination of employment of the Appellant is justified, did the Labour Tribunal / High Court err in not having considered and ordered the payment of compensation to the Appellant?

Thus, we arrive at a crucial matter in the adjudication of industrial disputes in terms of the Industrial Disputes Act. What needs to be considered and determined is twofold.

> *Firstly, with regard to an application presented under the Industrial Disputes Act by a workman or by a trade union on behalf of a workman, alleging termination of services by an employer, following the conduct of an inquiry and hearing of evidence, if the Labour Tribunal determines that the termination of services of the workman had been both lawful and justifiable, would it be lawful for the Labour Tribunal, to order the employer to pay compensation to the workman?*
>
> *Secondly, if the answer to the afore-stated question is in the affirmative, in the instant matter, did the Labour Tribunal err in not considering whether the Appellant should be awarded compensation?*

The positions taken up with regards to these two questions of law by the learned counsel for the Appellant and the learned President's Counsel for the Respondent is diametrically opposed.

Before dealing directly with the afore-stated questions of law in which leave has been granted, it is necessary to commence the consideration of this matter by

making certain preliminary observations. Doing so is necessary in view of certain submissions made by learned Counsel during the hearing, relating to certain associated matters.

As stated in its preamble, the Industrial Disputes Act No. 43 of 1950 (hereinafter referred to 'the Act'), has been enacted to provide for the prevention, investigation and settlement of industrial disputes. Without leaving it at the hands of the common law on employer – employee relations including the common law principles on the law of contract, to deal with industrial disputes, the Industrial Disputes Act and parallel legislation relating to employer - employee relations (generally referred to as *labour legislation*') were enacted approximately half a century ago, *inter-alia,* to remedy social injustice peculiar to a vulnerable and particularly weak and at times an oppressed group of persons, namely employees (workers). Thus, the interpretation and application of provisions of the Industrial Disputes Act must necessarily be founded upon the mischief sought to have been remedied by the enactment of such *labour legislation*, such as the Industrial Disputes Act. The intention of Parliament must necessarily reign. As observed by Justice A.R.B. Amerasinghe in ***S.B. Perera v. Standard Chartered Bank and Others*** [(1995) 1 Sri L.R. 73], *The meaning of the legislation is clear. However, it would be of interest, perhaps, to remind ourselves of the background, for the words of a statute, if there is any doubt, as to their meaning, should be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view."*

Indeed, the duty of Labour Tribunals and Courts should be to necessarily recognise and give effect to the provisions and the spirit of labour legislation. However, the Court cannot be blind to certain changes that have taken place since the enactment of such legislation, which are inherent to employer – employee relations and the evolution of certain environmental conditions relating to employer

– employee relations, employment environments, the rights and entitlements conferred by law on workers and those being now enjoyed by workmen and by trade unions, and to national and public interests, which includes the status of the national economy. In that regard, it is necessary to bear in mind the national need to generate employment opportunities. The judiciary must in public interest desist from contributing towards creating certain conditions that may inhibit generation of employment, occasioned by causes that may dissuade investors and entrepreneurs from commencing and engaging in business activities that would generate employment opportunities. It is the duty of Judges to give effect to the intention of Parliament and to legislative policy embedded in legislation. However, when exercising judicial discretion, Judges must bear in mind ground realities such as those referred to above, and apply the law in a manner that meets the recognition of individual rights and entitlements and the needs of the public at large, and the country as a whole. That is how just and equitable orders should be arrived at.

The Industrial Disputes Act in its original form contemplated the use of multiple mechanisms for the settlement of industrial disputes, namely settlement, negotiation including collective bargaining, conciliation, and arbitration. The original Act did not provide for Labour Tribunals as a means of settling industrial disputes. These tribunals were established in terms of Part IVA of the Act, which was introduced by Industrial Disputes (Amendment) Act, No. 62 of 1957 for the settlement of industrial disputes through **adjudication** and by arbitration. Thus, it should be noted that the purpose for which Labour Tribunals were established and its mandate is understandably not properly reflected in the preamble to the Act. Ending over a decade of confusion, with the promulgation of the 1st Republican Constitution of 1972, it has not become settled law that, Labour Tribunals are conferred with judicial power, when exercising adjudicatory functions. Accordingly, Presidents of Labour Tribunals are recognised as judicial officers. This position is reflected in Article 111M read with Articles 4(c), 105(1)(c), 105(2) and 111H(1)(b) of

the 2nd Republican Constitution (Constitution of the Democratic Socialist Republic of Sri Lanka, 1978). Labour Tribunals are recognised as judicial tribunals, primarily because of the nature of the mandate conferred on Labour Tribunals, that being *inter-alia* to adjudicate industrial / labour disputes presented to it in terms of section 31B(1) of the Act, due to the powers and functions of Labour Tribunals and the consequential legal impact of orders made by Labour Tribunals. Additionally, industrial disputes may be referred to Labour Tribunals for settlement through arbitration. In such instances, Labour Tribunals do not exercise judicial functions. Adjudication of industrial disputes by Labour Tribunals is facilitated by *litigation* initiated by the presentation of an application to the tribunal.

Section 31B of the Act entitles a workman or a trade union acting on behalf of a workman who is a member of such trade union, to present an application to a Labour Tribunal seeking **relief or redress** in respect of several matters. In terms of section 31B(1)(a) of the Act, one such matter is the **termination of the workman's services by his employer**.

When an application is made to a Labour Tribunal in terms of section 31B(1) of the Act, section 31C(1) of the Act confers a statutory duty on such Labour Tribunal *to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary"*. The use of the term *inquiries"* in section 31C(1) of the Act postulates a deviation from the traditional adversarial approach and trial procedure which are cornerstones of Sri Lanka's contemporary justice system applied by courts of first instance. The adversarial system of justice is founded upon the common law tradition, which is the primary source of the procedural laws of Sri Lanka relating to the conduct of civil and criminal trials in courts of first instance. In view of this difference, the President of the tribunal is not supposed to adopt a passive approach, by presiding over the proceedings like an *umpire*, and merely receive and consider evidence presented by the adversarial parties (in this instance

the workman or his trade union on the one part and the employer on the other part). In terms of section 31C (1) of the Act, in his quest to determine the truth pertaining to the dispute placed before the Labour Tribunal for adjudication, the President of the tribunal is required in terms of the Industrial Disputes Act to **make all such inquiries into the application** and **hear all such evidence as the tribunal may consider necessary**. Therefore, the President of the tribunal is required to adopt an **inquisitorial approach** and **participate actively by conducting the inquiry and receiving of evidence**. Unlike when proceedings are conducted in consonance with the *adversarial trial system*, the adoption of the *inquisitorial system* confers on the President of the Labour Tribunal an enhanced duty to search for the truth by making necessary inquiries and receive evidence, enabling him to arrive at a correct determination on whether or not the termination of services was lawful and justifiable, and pronounce a just and equitable order. There is support to this view in ***Merril J. Fernando & Co. v. Deimon Singho*** [(1988) 2 Sri L.R. 242] where Justice Wijetunga has held that *there is a significant difference between the duties and powers of a Labour Tribunal under section 31C(1) of the Industrial Disputes Act as amended by section 6 of Act No. 74 of 1962 and the original provisions as contained in Act No. 62 of 1957. Whereas the original section required the Tribunal to* ***hear such evidence as may be tendered ...*** , the amended section makes it the duty of the Tribunal to ***hear all such evidence as the tribunal may consider necessary"***. *The latter indeed is a very salutary provision which the Tribunal should not have lost sight of."*

It is pertinent to note that, section 31C (2) of the Act provides that a Labour Tribunal conducting an inquiry shall observe the procedure prescribed under section 31A, in respect of the conduct of proceedings before the tribunal. Section 31A(2)(b) provides that, the Minister in charge of the subject of Justice may, with the concurrence of the Minister in charge of the subject of Labour, make regulations, prescribing *inter-alia* the procedure to be observed by a Labour

Tribunal in any proceedings before Labour Tribunals under Part IVA of the Act. The promulgation of such regulations and adherence to them would ensure formal recognition of the inquisitorial approach to be adopted by Labour Tribunals, and uniformity of proceedings amongst different Labour Tribunals. It is a matter of regret that, regulations have not been made to-date in terms of section 31A(2)(b). The Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act, No. 13 of 2003, also does not contain the procedures to be followed upon the commencement of proceedings under Part IVA of the Industrial Disputes Act.

Following the completion of the inquiry, according to section 31C (1), the President may make such order as may appear to the tribunal to be **just and equitable**. When making such order, section 31B (4) of the Act provides that, the tribunal **may grant any relief or redress to the workman**, notwithstanding anything to the contrary in any contract of service between such workman and his employer. Section 33(1)(d) of the Act provides that, the order which the tribunal shall make, **may include** an order for the **payment of compensation** to the workman by the employer. When an application is presented to a Labour Tribunal by a workman / trade union alleging termination of services by the employer, and the ensuing inquiry is concluded, the tribunal must, prior to deciding whether any relief or redress to the workman should be ordered, decide on two preliminary issues. That is, whether in fact the services of the workman had been terminated by the employer, and if so, whether such termination is **lawful and justifiable**. It is also necessary for the President of the tribunal to determine the circumstances attendant to the termination of employment. It is only thereafter, that the President should determine whether any relief or redress should be granted to the workman. By the use of the term ***may*** in section 31B (4), it is evident that the legislature has conferred discretionary authority on the President of the Labour Tribunal to grant relief or redress to the applicant (workman). The President may make an order

granting relief or redress to the workman, **only if he deems the grant of such relief or redress to be appropriate** in the circumstances of the respective case. In any event, according to section 31C (1) of the Act, the order which the President makes should necessarily be just and equitable. Thus, if the President determines that in view of the facts and circumstances of the case, relief or redress should be granted, the Act requires such order to be **just and equitable**. Therefore, a workman who presents an application to a Labour Tribunal in terms of section 31B(1) complaining of the termination of his services, is not *ipse dixit* entitled for relief or redress.

If following inquiry, the tribunal determines that the termination of services had been either **unlawful** or **unjustifiable**, then undoubtedly the President may make a **just and equitable order** and thereby confer on the workman **relief and redress**. His powers with regard to the determination of the nature of such relief and redress are circumscribed by section 33(1) of the Act. The relief and redress that he orders may include reinstatement with back wages, reinstatement without back wages, compensation in lieu of reinstatement, compensation, arrears of salary, or an alternative order of reinstatement or compensation.

The issue that arises for consideration in this case, relates to the converse situation. If the President determines that the termination of services was both lawful and justifiable, notwithstanding such determination (which determination would obviously be favourable to the interests of the employer), can the President order relief and redress in the nature of compensation? Would doing so be 'just and equitable'? It is necessary to be conscious of the fact that, the Industrial Disputes Act **does not impose a condition or limitation** on a President of a Labour Tribunal to the effect that, relief or redress may be granted to a workman only if the President determines that the termination of employment was either unlawful or unjustifiable. Thus, *ex-facie* it appears that, a President of a Labour Tribunal **has not been**

specifically and statutorily precluded from ordering relief and redress even in instances where he has determined that the termination of services had been both lawful and justifiable. Thus, the jurisdiction conferred on Labour Tribunals to order just and equitable relief and redress is quite wide. Provided however, the President of the tribunal must ensure that, if he chooses to award relief and redress, such relief or redress must necessarily be **just and equitable** having regard to the evidence and circumstances of the case, including circumstances attended with the termination of employment and antecedents. In arriving at this determination, the President should exercise judicial discretion. He must through the order he makes, deliver justice based on equitable grounds. It is important to bear in mind that justice must be delivered not only to the workman. Particularly in instances where the termination of services is determined by the President to have been both lawful and justifiable, the final order that he makes must ensure that justice is delivered to the employer as well.

In ***Manager, Nakiadeniya Group v. The Lanka Estate Workers Union*** [11CLW 52] Justice de Kretser has observed that *in the making of a just and equitable order one must consider not only the interest of the employees, but also the interest of the employers".* As aptly put by Justice Weeramantry in ***Ceylon Estate Staffs Union v. The Superintendent, Meddecombra Estate, Watagoda*** [73 NLR 278], *in making of a just and equitable order, one must consider not only the interest of the employees, but also the interest of the employers and the wider interests of the country, for the object of social legislation is to have not only contended employees, but also contended employers".*

Further, as observed by Justice Rajaratnam in ***K.B.D. Somawathie v. Baksons Textile Industries Ltd.*** [79(1) NLR 204], the order that a President of a Labour Tribunal is required to make should be just and equitable in relation to both the employer and employee and the employer-employee relationship, following

due consideration to the discipline and resources of the employer, and should even be in the interests of the public.

In my view, it is necessary to keep in mind the view expressed by Justice T.S. Fernando in ***Richard Pieris & Co. Ltd. v. D.J. Wijesiriwardena*** [62 NLR 233] that *in regard to the power of the Tribunal to make such order as may appear to it to be just and equitable there is a point in Counsel s submission that, justice and equity can themselves be measured not according to the urgings of a kind heart, but only within the framework of the law*".

On the specific issue of whether the Labour Tribunal / High Court should have considered the payment of compensation to the Appellant by the Respondent, in the backdrop of the President having determined that the termination of employment was both lawful and justifiable, I wish to first refer to the submissions made by learned Counsel for the Appellant and the Respondent.

The submission of Mr. Fernando, the learned Counsel for the Appellant, was that the High Court had fallen into substantial error by failing to even consider, in terms of the required law, the entitlement of the appellant to compensation as an alternative relief, in all the circumstances of the case and in accordance with the governing principles of justice and equity. In his written submissions, learned counsel for the Appellant submitted that in terms of the established rules of law, it is vital that the entitlement of a person to compensation is considered, separate from the issue of termination. He submitted that the when considering the entitlement of an employee to compensation, the tribunal is under a duty to take into account the length of service, the service record and other attendant circumstances. He further submitted that, in terms of the established principles of law, a workman is entitled to compensation even in instances where the termination of his services are considered to be lawful and just. In support of his submission,

Mr. Fernando drew the attention of Court to ***Somawathie v. Baksons Textile Industries*** [79(1) NLR 204].

In response, Mr. Weerasuriya, the learned President's Counsel for the Respondent submitted that, there is no authority or judicial dicta which supports the position that, compensation can be considered even in a fit case if the termination is justified. In his written submissions, Mr. Weerasuriya submitted that, there are judicial authorities which support the contention that, where the services of a person in the nature of personal secretary, domestic servant, etc. are terminated on the ground that the employer had lost faith or confidence in the workman, if the termination is unjustified, compensation in lieu of reinstatement can be considered. He submitted that the services of the Applicant did not fall into such category, and hence, he was not entitled for compensation. He also submitted that in any event, as the issue of reinstatement does not arise, compensation in lieu of reinstatement also does not arise.

I propose to now examine relevant pronouncements contained in certain judgments delivered in the past.

In ***Shell Company of Ceylon Ltd. v. D.C. Pathirana*** [64 NLR 71] Justice Abeyesundere has observed that, there is no limit imposed by the legislature in regard to the power to grant relief under section 31B of the Industrial Disputes Act that would in effect prevent the grant of relief in instances where the termination of services is both lawful and justified. The only limit placed on the power to grant relief under section 31B is that contained in sub-section (1) of section 31C of the Industrial Disputes Act, which requires the order granting relief to be just and equitable. Justice Abeyesundere has further held that, the power to grant relief under section 31B is wide in view of the fact that sub-section (4) of that section enables relief to be granted notwithstanding anything to the contrary in any

contract of service between the workman and the employer. The views expressed by Justice Abeysundere have been cited with approval in the majority judgment of the Privy Council in ***The United Engineering Workers Union v. K.W. Devanayagam (President, Eastern Province Agricultural Co-operative Union Ltd.)*** [69 NLR 289]. The Privy Council has observed that the absence of the term 'wrongful 'in section 31B (1) of the Act is significant. The section does not provide that, a workman can apply for relief in respect of 'wrongful termination 'of his services. It merely says that a workman can apply in respect of 'termination 'of his services.

The Highland Tea Company of Ceylon Ltd. and Another v. The National Union of Workers [70 NLR 161] is a case where the services of an estate labourer named Iruthayam to whom Estate Labour (Indian) Ordinance applied had been terminated. The President of the Labour Tribunal had held that, the dismissal was wrongful, but in view of certain circumstances associated with her husband's services also having been terminated, did not order reinstatement. Instead, taking into consideration the period of service of Iruthayam, directed the employer to pay compensation. In appeal against that order to the Supreme Court, Justice Alles held that, the termination of services of Iruthayam was not wrongful or unlawful. However, he held that the President of the Labour Tribunal had not erred in law in making the order for compensation, as it was an order that he was entitled to make in terms of the Industrial Disputes Act.

In ***Wataraka Multi-Purpose Co-operative Society Ltd. v. W. Wickremachandra*** [70 NLR 239] Justice Victor Tennakoon dealing with a matter where the services of a workman (respondent) had been terminated due to inefficiency, has held that, if the respondent was in fact inefficient and there was neither illegality nor any finding that termination of services for inefficiency was an

unfair labour practice, it is an error of law to award any compensation under section 33(1)(d) of the Act.

The Group Superintendent, Dalma Group Halgranoya and Others v. The Ceylon Estates Staffs Union [73 NLR 574], is a case where the President of the Labour Tribunal had held that the termination of the services of the workman had been made for *bona fide* reasons and that the termination of employment was lawful. Nevertheless, the President concluded that he thinks that some consideration was due to the applicant in view of his enforced retirement, and made order that the respondent pay *ex gratia* a sum of Rs. 4,000 as compensation for loss of career of the workman. In appeal, Justice Alles held that, compensation is payable only when a wrong has been done. In the case in issue, no wrong had been done. In the circumstances, it is not possible to state that the termination of the workman's services was either unlawful or contrary to accepted standards of fair labour practice. In the circumstances, the Supreme Court set aside the order made by the President of the Labour Tribunal for the payment of compensation.

In ***K.B.D. Somawathie v. Baksons Textile Industries Ltd.*** [79(1) NLR 204], Justice Rajaratnam held that, even following the President of the Labour Tribunal concluding that the termination of services was both lawful and justifiable, as he is required to make a just and equitable order, he should address his mind to whether the applicant (workman) deserves redress or relief, and if so, what should such relief of redress be. He has observed that, in some cases, the failure of the President to direct his mind specifically to these questions may not lead to a legally defective order, but in other cases and in his Lordship's view in that particular case, such failure had led to a legal defective order.

The Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. J.S. Hillman [79(1) NLR 421] is a case decided by two Justices of the then Supreme Court, unlike

the judgments cited above, which were heard and decided by a single Justice of the then Supreme Court, excluding the case of ***The United Engineering Workers Union v. K.W. Devanayagam*** which was heard by five justices of the Privy Council and decided by a majority of the said justices. In this case, then Chief Justice S. Sharvananda observed that, the proposition 'if the termination is held to have been justified, an order for reinstatement would not arise and no order for compensation can be made 'will hold good if the termination is justified on the ground of misconduct of the employee and such termination is by way of disciplinary measure. If it was the employee's conduct that had induced the termination, he cannot, in justice and equity have a just claim to compensation for loss of employment. Justice Sharvananda proceeded to hold that, on the other hand, where an employee is in no way responsible for the termination of his services and the termination was consequent on the lawful exercise of the proprietary rights of the employer, as in the case where the employer closes down the business and that renders the employment of the worker purposeless, the afore-stated proposition is not tenable. Where the termination has been caused solely by the act and will of the employer in the exercise of his managerial discretion to organize and arrange his business, a tribunal, exercising just and equitable jurisdiction, uninhibited by limitations of law, but actuated by postulates of justice, is well entitled to grant relief in the nature of compensation to the discharged employee, even though, in law, the employer was justified in discharging him from service on account of surplusage.

In ***Premadasa Rodrigo v. Ceylon Petroleum Corporation*** [(1991) 2 Sri L.R. 382] decided by three judges of the present Supreme Court, Justice Dr. A.R.B. Amerasinghe has cited with approval Justice Sharvananda's view in ***Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. J.S. Hillman*** (supra) that, *if the employee s conduct had influenced the termination, he cannot in justice and equity have a just claim to compensation for loss of career, as he has only himself to blame for the predicament in which he finds himself*".

In ***Saleem v. Hatton National Bank Ltd.*** [(1994) 3 Sri L.R. 409] an appeal heard by three Justices of the present Supreme Court, Justice K.M.M.B. Kulatunga having considered a string of judgments in which different opinions on this matter have been expressed, has held that, a Labour Tribunal may order compensation upon a termination of services even when such termination is justified and correct; and no distinction as to whether such termination was upon a closure of an industry or for misconduct as a disciplinary measure can be imposed in considering a claim for compensation. He has further held that, whether the appellant deserves compensation, is dependent upon the special circumstances which would make it just and equitable to order such relief.

In ***The Board of Governors for Zahira College v. Naina Mahamed alias Naina Lebbe*** [(1999) 2 Sri L.R. 309] the then Chief Justice G.P.S. De Silva, considered whether a school teacher whose services had been terminated by the employer on grounds of indiscipline and or misconduct, and the Labour Tribunal having dismissed his application on the ground that the charge of misconduct had been proved, was entitled to compensation. Referring to the Judgment of Justice Kulatunga in *Saleem v. Hatton National Bank Ltd.* (in the backdrop of His Lordship the former Chief Justice having been on the bench that decided that case), held that, *in awarding compensation, Kulatunga, J. took into account the special and exceptional circumstances of the case*".

In ***Kotagala Plantations Ltd. and Another v. Ceylon Planters Society*** [(2010) 2 Sri L.R. 299], Chief Justice J.A.N. De Silva has held that, if the conduct of the workman had induced the termination, he cannot in justice and equity claim compensation for loss of career. On the other hand, if the termination was not within the control of a workman but solely by the act and will of an employer, a Tribunal exercising just and equitable jurisdiction is well entitled to

grant relief in the nature of compensation to a discharged workman. Former Chief Justice has further held that, no workman should be permitted to suffer for no fault of his, but an unwanted, dishonest, troublesome workman may be discharged without compensation for loss of his employment. The workman in those circumstances has to blame himself for the unpleasant and embarrassing situation in which he finds himself.

The Superintendent, Belmont Tea Factory and Namunukula Plantations PLC v. Ceylon Estate Staffs Union [SC Appeal 59/2016 – SC Minutes of 31.03.2017) decided by Anil Gooneratne, J. is a case where the services of a *Factory Tea Officer* had been terminated on grounds of having been responsible for a shortage of 791kg of tea which was in his custody. The position of the employer was that, the employee had been negligent, he had not acted in a manner as required by an experienced officer and the incident had resulted in a substantial loss to the employer. This had resulted in loss of confidence. The Labour Tribunal, the High Court and the Supreme Court held that in the circumstances, the termination of services was justified. However, Justice Goonaratne affirmed the view that, nevertheless, compensation should be awarded. However, he directed a reduction of the amount of compensation ordered by the High Court.

In ***Ranjith Palipana v. Etisalat Lanka (Pvt.) Ltd.*** (SC Appeal 161/2012, SC Minutes of 20th June 2017) Justice Eva Wanasundera having cited some of the judgments that I have enumerated above, held that, *the law in regard to termination of services is very much in favour of the employee, and a workman can be granted relief even though the termination of services of an employee is held to be justified"*.

The above enumeration points to divergent views having been expressed by the Supreme Court on this matter.

On a careful consideration of the provisions of the Industrial Disputes Act, general principles of law, the spirit of the law relating to labour legislation, and the principles of law contained in the judgments referred to above, I hold that, in instances where a workman has presented an application to a Labour Tribunal in terms of section 31B(1)(a) of the Industrial Disputes Act in respect of the termination of his services by his employer, and following an inquiry into such application and hearing of all such evidence as the tribunal may consider necessary in terms of section 31C of the Act, if the President of the tribunal has concluded that (a) **termination of services had in fact taken place**, and that (b) such **termination of services was lawful and justified**, the President of the Labour Tribunal should be guided by the following **principles**:

1. The law confers wide **discretion** on the President of the tribunal to make **any just and equitable order**, which is circumscribed by section 33(1) of the Act, and such discretion shall be exercised by the President of the Labour Tribunal **judicially**.

2. The power conferred by law on the labour tribunal requires the President of the tribunal to make a **just and equitable order**, and he is **not precluded** by law from making an order for the payment of **compensation** to the applicant, **if the circumstances justify** the making of such an order.

3. An applicant (workman) whose services the Labour Tribunal has determined has been terminated lawfully and for justifiable reasons, **cannot as of right claim compensation**.

4. The ordering of compensation to the applicant **should be considered favourably**, if attendant circumstances justifies the making of an order for compensation, and particularly when termination of services though

determined by the tribunal to have been both lawful and justifiable, **was not occasioned** due to any wrongdoing / misconduct committed by the applicant (employee).

5. In situations where termination of services was due to misconduct by the applicant / workman and such termination is held by the tribunal to have been just and equitable, an order for compensation would be just and equitable, **only if** there are **special or exceptional circumstances**, that warrant the making of such an order for payment of compensation.

6. When the order of the President of the tribunal reflects the absence of consideration by him whether or not compensation should be ordered, whether such failure on the part of the President of the tribunal would make such order legally defective, has to be determined **based on the individual facts and circumstances of such case**.

In view of the foregoing, I answer the first question of law formulated by me above, in the following manner:

With regard to an application presented under the Industrial Disputes Act by a workman or by a trade union on behalf of a workman alleging termination of services by an employer, following the conduct of an inquiry and hearing of evidence, even if the Labour Tribunal determines that the termination of services of the workman had been both lawful and justifiable, it would nevertheless be lawful and necessary for the Labour Tribunal to order the employer to pay compensation to the workman, provided such order is compatible with the principles referred to in paragraphs (i) to (iv), above.

I will now answer the second question of law formulated by me, on whether in the instant case, the Labour Tribunal and the High Court had erred in not considering whether the Appellant should be awarded compensation.

A consideration of both the order delivered by the learned President of the Labour Tribunal and the Judgment delivered by the learned Judge of the High Court reveals that, both of them have not considered the question of compensation following the determination that the termination of services of the Appellant was lawful and justifiable. A consideration of both the said order and the judgment gives the impression that, both the learned President of the Labour Tribunal and the learned High Court Judge had entertained the erroneous view that, once the tribunal determines that the termination of services is lawful and justifiable, it is not necessary in law to consider whether the tribunal should proceed to make an order awarding just and equitable relief or redress to the applicant, in the nature of compensation.

Thus, I conclude that both the Labour Tribunal and the High Court had erred in not considering whether any compensation should be awarded to the Appellant.

In view of the foregoing, I answer <u>both questions of law</u> formulated by me in place of the <u>fourth question of law</u> in respect of which the leave to appeal had been granted, in favour of the Appellant.

However, on a consideration of (a) the nature of the proven misconduct on the part of the Appellant including the fact that he had infringed rules of procedure of the company, (b) the Appellant having showed insubordination towards his superior officer, (c) the Appellant having uttered obscene words at his superior officer, (d) the Appellant having conducted himself in a manner unbecoming of a supervising officer, (e) the Appellant's conduct being a bad example to his subordinate officers, and (f) the Appellant's unsatisfactory work performance during

the period immediately preceding his termination of employment, and the absence of any exceptional or special circumstances that warrant an order being made for the payment of compensation to the Applicant - Appellant, **I am of the view that, no order for compensation should have been made by the Labour Tribunal in favour of the Appellant**. The making of such an order for payment of compensation, in the circumstances of this case, would not have been just and equitable. **Therefore, I hold that the final order made by the learned President of the Labour Tribunal and the Judgment delivered by the learned High Court Judge should not be interfered with.**

In this regard, I wish to observe that, Justice Sisira de Abrew has held in ***Peoples' Bank v. Lanka Banku Sevaka Sangamaya*** [SC Appeal 106/2012, SC Minutes of 9th June 2015] that, when compensation is awarded in favour of a person whose services have been terminated by the employer on the ground of misconduct stemming from dishonesty, and the Labour Tribunal has correctly held that the termination of services had been just and equitable, the award of compensation may be construed as an encouragement to commit misconduct. Thus, Justice Sisira de Abrew has expressed the view that, compensation should not be awarded.

Further, I respectfully note that, Chief Justice Sarath N. Silva in ***Alexander v. Gnanam and Others*** [(2002) 1 Sri L.R. 274] has held that, when the conduct of an employee is contemptuous and falls short of expected standards, an order for the payment of compensation is not warranted.

Finally, I wish to observe that Labour Tribunals and Courts should pay due regard to the justifiable policy and expectation of most employers, that workplace discipline and integrity of employees are of fundamental importance to any organisation, and hence should be strictly enforced. Those who act in breach of such standards and in infringement of core values of an organisation which are not

only lawful and in the interests of the organisation, but also in public and national interests as well, have to necessarily be dealt with firmly and in terms of fair disciplinary procedures. Doing so in my view is extremely important towards maintaining efficiency and productivity of organisations, as well as in the best interests of organisational integrity and sustainable development, which are prerequisites of national economic development.

In the totality of the afore-stated circumstances, I respectfully agree with Justice Thurairaja's finding that this Appeal should be dismissed.

Accordingly, I dismiss this Appeal. In the circumstances of this matter, I make no order as regards costs.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT