# VANIJA HA KARMIKA SEVAKA SANGAMAYA
v.
# UNILEVER CEYLON LIMITED

SUPREME COURT.
M. D. H. FERNANDO, J.
GOONEWARDENA, J. AND
P. R. P. PERERA, J.
S.C. APPEAL NO. 54/94
H.C.A. NO. 495/92
L.T. NO. 2/194/88
DECEMBER 13, 1994.

*Industrial Dispute – Collective Agreement – Breach of clause re. absence without reason – Was failure to terminate the workman's services a breach of clause 31(c) a pardon ? – Medical leave.*

A collective agreement of 30.5.85 between a workmen's union and the employer had provisions dealing with absence without leave in clause 31. Clause 31(c) provided for termination of services where an employee has been absent for 40 days more than his entitlement without adequate reasons. The Union agreed not to support in any way a claim for reinstatement or other relief on behalf of such a workman.

The workman had a record of serious absenteeism. In 1986 he was repeatedly reminded of the consequences of continuous absenteeism. On 16.10.86 he was asked to show cause why he should not be dismissed or otherwise disciplinarily dealt with for absenting himself from work without authority for over 40 days in the year. After inquiry the employer wrote on 26.11.86 as follows:

". . . we would have been fully justified in terminating your services. However, in order to give a you a final opportunity to improve in your attendance, we will not take such a drastic step on this occasion instead (sic) warn you. In future you are required to adhere to the following conditions regarding leave.

"1. This year (1986) you will not take any more unauthorised leave.

2. In the years 1987 and 1988 you should not exceed 10 days unauthorised absence for each year.

3. If you are sick you are required to obtain sick leave from the Company Medical Officer and no medical certificate issued by (an) outside Medical Practitioner will be accepted, unless approved by the Company Medical Officer.

In the event of the breach of any of the above conditions, you are finally warned that your services will be terminated forthwith".

The workman acknowledged this letter without any protest about these conditions.

By letter dated 20.11.87 the employer terminated the workman's services because –

(a) as at 10.11.87 in addition to 26 days authorised leave and 18 days sick leave, the workman had taken 12 1/2 days unauthorised leave, and

(b) having been absent on 7.11.87 and 9.11.87, the workman only brought a medical certificate from an outside medical practitioner, and did not report to the employer's medical officer despite being told to do so by his Manager.

**Held:**

(1) What the employer did, when it found the workman guilty of unauthorised leave in breach of clause 31(c) of the Collective Agreement in 1986 was to defer the punishment for a period of 2 years. The offence was neither forgiven nor punished with immediate effect. Instead the punishment was suspended for two years, conditional on improved performance in each of the next two years. One year later when it was found that the workman had failed to comply with the conditions, the punishment became effective and he was dismissed. It would be wrong to view the final act in the series all by itself. Here the final act in the series was unauthorised absence in 1987, but that was not the cause of termination. The cause was absenteeism in 1986. By his defaults in 1987 the workmen disentitled himself to the benefit of the deferment or suspension of the punishment. The dismissal was sanctioned by clause 31(c).

(2) The annual leave entitlement of 31 days was in excess of the statutory requirements. It was the employer's practice to deduct five days if in the preceding year an employee had taken excessive unauthorised leave. Such deduction was made known to the affected employees at the commencement of the year. This evidence was not challenged in cross-examination.

The workman's evidence was led in a form which virtually confirmed the employer's position.

(3) In regard to the medical certificate the usual procedure was irrelevant because the workman was required to comply with a special procedure as an obvious safeguard against the abuse of the sick leave facility.

**Case referred to:**

1. *Colombo Apothecaries Co., Ltd. v. Ceylon Press Workers' Union* (1972) 75 N.L.R. 182, 186-187.

**APPEAL** from judgment of the High Court.

*W. Dayaratne* for appellant.
*S. L. Gunasekera* for respondent.

*Cur adv vult.*

January 31, 1995.
**M. D. H. FERNANDO, J.**

The Applicant-Respondent-Appellant Union ("the Union") on behalf of its member, the workman, contends that the Respondent-Appellant-Respondent ("the Employer") had terminated the services of the workman in breach of clause 31 of the Collective Agreement dated 30.5.85 between the Union and the Employer. Clause 31 provides:

> **"31. Absence without Adequate Reason**
>
> The following rules regarding absence without adequate reasons will continue to apply:
>
> (a) Where an employee has been absent for 20 days more than his entitlement without adequate reasons, he will lose his annual increment.
>
> (b) Where an employee has been absent for 30 days more than his entitlement without adequate reasons, his job rate will be withdrawn . . .
>
> (c) Where an employee has been absent for 40 days more than his entitlement without adequate reasons, his services will be terminated. The Union agrees not to support in anyway, a claim by such persons for reinstatement or other relief.
>
> Where employees' services are to be terminated under this provision, Management will take a sympathetic view if such employee has not been disciplinarily dealt with for bad attendance during the 5 years immediately preceding.

> The Union shall be notified in each case of the proposed termination if the Union disagrees with the Management that the absence was without adequate reasons the matter will be referred to the Commissioner of Labour whose decision will be final.
>
> Absence on any grounds other than the following will be considered as "without adequate reasons" – hospitalisation, prolonged or chronic illness certified by the Company Doctor to be such."

Special leave to appeal was granted on the question "whether the view of the High Court that the workman was liable to dismissal is correct having regard to the terms of the Collective Agreement referred to in these proceedings, and the particular facts and circumstances of this case."

The workman had a record of serious absenteeism. In 1986 he was repeatedly reminded of the consequences of continuing absenteeism. On 16.10.86 he was asked to show cause why he should not be dismissed or otherwise disciplinarily dealt with for absenting himself from work without authority for over 40 days in the year. After inquiry, the employer informed him by letter dated 26.11.86:

> ". . . we would have been fully justified in terminating your services. However, in order to give you a final opportunity to improve in your attendance, we will not take such a drastic step on this occasion instead [*sic*] warn you. In future you are required to adhere to the following conditions regarding leave.
>
> 1) This year (1986) you will not take any more unauthorised leave.
>
> 2) In the years 1987 and 1988 you should not exceed 10 days unauthorised absence for each year.
>
> 3) If you are sick you are required to obtain sick leave from the Company Medical Officer and no medical certificate issued by

> [an] outside Medical Practitioner will be accepted, unless approved by the Company Medical Officer.
>
> In the event of the breach of any of the above conditions, you are finally warned that your services will be terminated forthwith."

The workman acknowledged this letter, without any protest about these conditions.

By letter dated 20.11.87 the Employer terminated the workman's services because –

(a) as at 10.11.87, in addition to 26 days authorised leave and 18 days sick leave, the workman had taken 12 1/2 days unauthorised leave; and

(b) having been absent on 7.11.87 and 9.11.87 the workman only brought a medical certificate from an outside medical practitioner, and did not report to the Employer's medical officer despite being told to do so by his Manager.

After inquiry the President of the Labour Tribunal held that the workman's absenteeism in 1986 would have justified the Employer in terminating his services **in that year,** but not at its discretion thereafter; that the Employer's letter dated 26.11.86 had imposed a condition which contravened the Collective Agreement (i.e. by permitting dismissal for unauthorised leave exceeding **ten** days); and that the Employer having pardoned the workman, could not thereafter deny him the benefits to which he was entitled under the Collective Agreement, or impose new conditions. On this basis, he held that the termination was unjustified and ordered reinstatement with three years back wages.

On appeal the High Court held that the attendance of the workman had been woefully unsatisfactory; that the Labour Tribunal had viewed the Employer's merciful decision not to exercise its right to dismiss the workman in 1986 in an unreasonable and unfair light – namely that the Employer must either exact the extreme penalty of dismissal or do nothing; that the Employer was entitled to temper the

punishment with mercy; and that the decision not to dismiss the workman in 1986 did not mean that the default was completely wiped off the slate, echoing the observations of Weeramantry, J., in *Colombo Apothecaries Co. Ltd. v. Ceylon Press Workers' Union* [1]. Learned Counsel for the Union conceded that the Union had led no evidence that any punishment had been imposed on the workman in 1986, as, for example, that he had been denied his annual increment, or that his job rate had been withdrawn. He submitted that the reasoning and conclusion of the Labour Tribunal was correct, and that the termination was wrongful, because it was for 12 1/2 days unauthorised absence in 1987, contrary to clause 31(c). This is untenable. What the Employer did, when it found the workman guilty of 10 days unauthorised absence in 1986, was to defer the punishment for a period of two years. The offence was neither forgiven nor punished with immediate effect. Instead, the punishment was suspended for two years, conditional on improved performance in each of the next two years. One year later when it was found that the workman had failed to comply with the conditions, the punishment became effective, and he was dismissed.

I would respectfully adopt Weeramantry, J.'s observations which apply with equal force today:

> "... it would be wrong to view the final act in the series as though it existed all by itself ... a proper assessment of a dispute can only be made against a background of the conduct and relationship between the parties ... Any other view would seem to be lacking in that broad and general approach to labour disputes which it is the very aim and object of the labour laws to foster."

Here the "final act in the series" was unauthorised absence in 1987, but that was not the cause of termination. The cause was absenteeism in 1986; by his defaults in 1987 the workman disentitled himself to the benefit of the deferment or suspension of the punishment. Let me leave aside for the moment legal niceties about defaults, conditions, and punishments. If one were to ask "why was the workman dismissed", it would be quite unreal to answer "because of absenteeism in 1987"; for that was not the effective cause of the

dismissal, but only a proximate cause. The only commonsense answer is "because of his absenteeism in 1986, the consequence of which he failed to avert by failing to reform in 1987". The dismissal was therefore sanctioned by clause 31(c).

To take any other view of clause 31(c) would compel (as the learned High Court Judge correctly observed) the Employer always to terminate, suppressing every human instinct of leniency or sympathy. That would be unreasonable, not only from the Employer's point of view, but especially from the employees' – which Employee would wish that preference be given to an interpretation that compels dismissal for even a first offence, and necessarily denies a second chance? In the absence of plain words, compelling an interpretation of such severity, I must decline to interpret a contract of employment in that way. The dismissal was justified by both the letter and the spirit of the Collective Agreement.

Learned Counsel for the Union sought to rely on two matters, which are not dealt with in the Labour Tribunal order, and which related to findings of fact and assessment of evidence; but for the amplitude of the order granting special leave, these could not have been raised on appeal. Learned Counsel argued that the workman was not in breach of the two conditions set out in the letter dated 26.11.86. With scant regard for the Supreme Court Rules, this contention was stated in the Union's written submissions in two obscure sentences:

> "The workman's services were terminated for non-compliance of the above new grounds and furthermore adding into his leave entitlement the leave he has obtained in the previous year."

Firstly, he submitted that the workman had exceeded his 1987 leave entitlement by only 7 1/2 days; that the annual leave entitlement was 31 days, but that the Employer had reduced this by five days, improperly and without the workman's knowledge. He was faced with a serious difficulty. Evidence was led on behalf of the Employer that the annual leave entitlement of 31 days was in excess of statutory requirements; that it was the Employer's practice to deduct five days if in the preceding year an employee had taken excessive,

unauthorised leave; and that such deduction was made known to affected employees at the commencement of the year. All this was not challenged in cross-examination. Learned Counsel glossed over this default, and insisted that this had been sufficiently contradicted by the workman's evidence-in-chief. Even for this submission all he could point to was a statement that five days had been cut from the workman's 1987 leave entitlement. Counsel submitted, with greater persistence than logic, that this meant (a) that there was no practice as claimed by the Employer, and (b) that in any event the workman was not aware of any such deduction until after his dismissal in 1987. He contended that this inference had to be drawn because the matter had not been probed or clarified in cross-examination. The truth is that the default, if any, was entirely on the part of the Union. Initially, it failed to challenge the Employer's evidence through cross-examination, and then it led the workman's evidence in a form which virtually confirmed the Employer's position. Cross-examination could not have improved the Employer's case any further, and cross-examining Counsel quite rightly left the matter strictly alone. In these circumstances one must assume that Counsel who then appeared for the Union acted as he did because he had received instructions that the Employer's position was correct.

Secondly, it was contended that the workman's conduct in submitting the medical certificate to the leave clerk of the Employer was in accordance with the usual procedure, and hence he was not in default. Not surprisingly, Counsel could give no answer to the question as to how this conduct complied with the second condition in the letter dated 26.11.86, and the specific instruction, given by the Manager to the workman, to present himself to the Employer's Medical Officer. It was clear that the "usual procedure" was wholly irrelevant in this case, because the workman was required to comply with a special procedure, as an obvious safeguard against the abuse of the sick leave facility. This contention is as untenable as the other.

The appeal must therefore be dismissed. The learned High Court Judge observed, with justification, that, in supporting the claim of the workman to re-instatement or other relief, the Union was doing what it had agreed not to do by Clause 31(c) of the Collective Agreement.

Further the manner in which these proceedings have been pursued by the Union does not afford me any ground to deprive the successful party of its costs. I accordingly order the Appellant-Union to pay the Employer costs in a sum of Rs. 5,000/-.

**GOONEWARDENA, J.** – I agree.

**P. R. P. PERERA, J.** – I agree.

*Appeal dismissed.*