ELMO REX LORD AND ANOTHER, PARTNERS, MERCANTILE PRINTERS AND STATIONERS

v.

EKSATH KAMKARU SAMITHIYA ON BEHALF OF SOMADASA

SUPREME COURT
AMERASINGHE, J.
PERERA, J. AND EDUSSURIYA, J.
SC APPEAL 37/99
S.C.S.L.A. APPLICATION NO. 204/98
H.C.A. L.T NO. 1357/96
LT ADDITIONAL NO. 89/85
6TH NOVEMBER, 2000

Industrial dispute - Termination of services - Probationary employment - Summary termination of employment for continued absenteeism - Errors by the Labour Tribunal regarding findings of fact - Errors by the High Court regarding evaluation of evidence.

The workman Somadasa was employed as a compositor in the printing business carried on by the appellants-partners. He was appointed on 7.11.1990 on probation for six months or such further period as may be determined by the employers. The letter of appointment informed him that he will be advised on satisfactory completion of his probation period ending which *inter alia*, he will be subject to summary termination "for continued absenteeism in spite of written warnings".

In 1991 the workman was absent on 24 1/2 days for which he was warned that his service may have to be summarily terminated. In 1992 he was absent on 34 1/2 days. In 1991 and 1992 he was absent in all on 48 days, without prior leave to do so, except on 3 days. In the meantime he received some increased wages not on account of improved service but by way of mandatory statutory increases in the printing trade.

In 1992 while the workman was absenting himself from work the appellants warned him that if such "intolerable" absence was repeated instant termination may follow. Thereafter they watched his progress and when he had taken 34 1/2 days off in 1992 his probationary employment was terminated with immediate effect.

The Labour Tribunal President disputed the exact number of days the workman was absent and ordered reinstatement with Rs.40,000/= as back wages. At the hearing of the appeal counsel for the workman conceded the fact that the workman was absent as alleged. The High Court opined that

the workman had not been warned in writing regarding his "work and conduct" and affirmed the decision of the Labour Tribunal.

Held :

1. The findings of the Labour Tribunal were not supported by evidence; and the High Court erred in evaluating evidence in that the letter of appointment refers specifically to absenteeism as a ground of termination. In any event absenteeism cannot be separated from work and conduct.
2. The High Court erred in the evaluation of evidence particularly in regard to the issue of the letters of warning.

Case referred to :

Colombo Apothecaries Co. Ltd. v. Ceylon Press Workers Union (1974) 75 NLR 182

APPEAL from the judgement of the High Court.

Shirly M. Fernando and *Ruwan P.V. Dias* for appellants.

L.V.P. Wettasinghe with *Ms. Ganga Gunathtlake* for respondent.

Cur. adv. vult.

March 07, 2001
AMERASINGHE, J.

The respondent, the Eksath Kamkaru Samithiya, was a Trade Union acting for and on behalf of one of its members. Mr. S. Somadasa. Somadasa was a compositor in the printing trade. He was employed by the appellants in their business as printers on the 7th of November 1990. His services were terminated by the letter of the appellants dated the 17th of November 1992 on the ground of absenteeism, despite warnings, while he was on probation. The respondent complained against the termination of Somadasa to the Labour Tribunal and sought relief. The Labour Tribunal made order that Somadasa be reinstated from the date of the termination of his services and that he be paid a sum of Rs. 40,000 as wages due to him from that date. The appellants appealed to the Provincial High Court of Colombo which affirmed the order of the Tribunal. The appellants then applied for special leave to appeal to this Court. Special leave to appeal was granted on the following matters:

1. Has the High Court erred in the evaluation of the evidence, particularly in regard to the issue of the letters of warning and the alleged failure to take disciplinary action against the other employees similarly placed?

2. In view of the findings of fact of the Labour Tribunal with regard to the matters set out in question 1, in any event will the decision in this case be different?

3. Are the findings of fact of the Labour Tribunal regarding the matters raised in question 1 supported by the evidence."

The terms and conditions of Somadasa's employment were set out in his letter of appointment. He accepted the terms and conditions set out in that letter. The letter, among other things, stated as follows:

> "In the first instance you will be on probation for a period of six months during which time your services may be terminated without notice for incompetence or dishonesty or *for conduct detrimental to our business*. We, however, reserve the right to extend the probationary period of employment for a further period to enable you to satisfy our requirements. On satisfactory completion of your probationary period of which you will be advised, this contract will be terminable with a month's notice or payment therefor by either side. Also, *your services may be summarily terminated for continued absenteeism in spite of written warnings.*"

The emphasis is mine.

On the 14th of October 1991 the appellants wrote to Somadasa pointing out that his record of attendance showed that he had been absent on 29 1/2 days up to the end of September 1991. He was warned:

> "Please note that this type of attendance is not acceptable to us and will be taken into account when assessing the

amount of bonus, if any, in December 1991. Further, if you continue your irregular attendance, disciplinary action will be taken, even to the extent of summarily terminating your services."

On the 12th of February 1992, the appellants wrote to Somadasa stating that he had been absent on 35 1/2 days during the last year when his earned leave entitlement was only 1 day. He was warned:

"Please note that this record of absence is intolerable, and that if it is repeated this year as well, it will merit the instant termination of your employment. Your absence will be closely watched, and if warranted, according to our opinion, your next increment when falling due, will be deferred."

On the 30th of April 1992, the appellants drew attention to their two letters and stated that in the circumstances Somadasa's probationary period had been extended. They warned:

"if there is no improvement in your attendance, we shall be compelled to terminate your employment."

On the 17th of November 1992, the appellants wrote to Somadasa referring to their previous letters, and concluded with the following words:

"...You were not confirmed in your employment. Your absence up to date, 17th November, is 34 1/2 days against an entitlement of only 14 days. In view of the above your probationary employment is terminated with immediate effect."

The learned Judge of the High Court came to the conclusion that at no time had Somadasa been warned in writing with regard to his 'work and conduct'. Learned counsel for Somadasa maintained that position was 'factually correct' since the warnings had been in respect of 'absenteeism'. The letter of

appointment refers specifically to absenteeism as a ground for termination. The letters of warning too refer to the matter of absenteeism. In any event, absenteeism, in my view, cannot be separated from 'work and conduct' in the circumstances of the case as established by the evidence. Such a distinction would be highly artificial. The Labour Tribunal disputed the calculations of the appellants with regard to the exact number of days when Somadasa was absent. Learned counsel for Somadasa in his written submissions however conceded that his client was absent on 24 1/2 days in 1991 and on 34 1/2 days in 1992. Absenteeism on such a scale may be objectionable, but it reaches, in the words of the appellants, an 'intolerable' level when absence takes place in the manner chosen by Somadasa. The documents adduced in evidence show that he was absent on some 48 days between the 13th of February 1991 and the 16th of November 1992. In every instance, except three, he was absent without prior leave to do so. In all of the other instances, his explanations for absence were made after resuming duties. In my view, absenteeism in that manner, brought his conduct within the ambit of the prohibition in the letter of appointment relating to 'conduct' that was 'detrimental to the business' of the appellants and justified the termination of the employee's services.

The law relating to employment is not a one-way street. Justice, fairness and equity must be meted out even-handedly to employees and employers alike. An employee is no doubt entitled to exercise the rights and enjoy the privileges and benefits granted by law or conceded by agreement. Yet, he or she must act with a due sense of responsibility. Article 28 (c) of the Constitution reminds us that the enjoyment of rights and freedoms is 'inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka... to work conscientiously in his chosen occupation.' Specifically on the matter of absence from work, Weeramantry J in *Colombo Apothecaries Co. Ltd. v. Ceylon Press Workers' Union*[1] observed in a case involving a compositor like Somadasa, that :

"while an employee is no doubt entitled to his quota of leave, he must not as far as is avoidable draw on his leave without prior notice to the management; nor must he repeatedly draw on such leave in such a manner as would throw out of gear the work of the establishment he serves."

Alfred Avins in *Employees' Misconduct* (1968) pp. 5-6 expressed a similar view:

"The necessity for employees to be present for duty at the time and place required is obvious. No enterprise of any kind could function if employees were able to come and go as they choose. Without knowing the size of its labour force, no employer could plan any productive undertaking."

The High Court, in my view, erred not only in putting a wrong construction on the workman's absence, it also erred in misconstruing the fact Somadasa had been paid his salary increments. Admittedly, in the light of the appellants' threat in their letter of the 12th of February 1992 to defer Somadasa's increase in wages unless there was an improvement in his conduct, the payment of the increase in wages might appear to be a recognition of his satisfactory service. However, such an inference was wrong in the circumstances of this case, for the payment of increased wages did not depend on the quality of the employee's service. Somadasa, as a person employed in the printing trade was *statutorily entitled* to a salary increase. (See Sri Lanka Labour Gazette, Vol. 47 No. 1 Jan-March 1996). The payment of enhanced wages was not a matter of discretion for the workman's employers based on their estimation of his worth or satisfaction with regard to his performance. Learned counsel for the respondent urged that the increases in wages paid to his client greatly exceeded the statutorily prescribed amounts and therefore meant that his employers had not only condoned past lapses but were greatly pleased with his services. I am unable to accept that view in the light of the communications addressed to Somadasa, especially the plain and clearly expressed view that his conduct was 'intolerable' whatever other explanation

there may have been for payments in excess of the prescribed statutory minimum.

In the circumstances, responding to a question raised by this Court in granting leave, I am of the view that the High Court did err 'in the evaluation of the evidence particularly in regard to the issue of the letters of warning.'

With regard to the question raised by this Court in granting leave whether the High Court erred on the question of 'the alleged failure to take disciplinary action against the other workmen similarly placed', having regard to the evidence on record, I find myself unable to answer that question except in the affirmative. The view of the High Court in that regard has no support from the evidence in the record. No persons were named who were supposed to have received preferential treatment, except for one Piyasena, and the evidence about him was that he was a loyal employee who had, however, joined another establishment to further his prospects. Piyasena's case therefore offered no basis for the allegation of invidious discrimination which the respondent claimed was triggered by the role of the employee in Trade Union activities.

For the reasons stated in my judgment, I set aside the decisions and orders of the High Court and the Labour Tribunal.

In all the circumstances, however, I make no order as to costs.

PERERA, J. - I agree.

EDUSSURIYA, J. - I agree.

Appeal allowed.