1962 *Present:* **Weerasooriya, S.P.J.**

HAYLEYS, LTD., Petitioner, *and* S. C. S. DE SILVA *et al.*, Respondents

S. C. 560 of 1960—Application for a Writ of Certiorari

Industrial Court—Constitution—Procedure for filling of vacancies—Subsequent proceedings—Procedure—Industrial dispute—Duty of Industrial Court to decide material questions involved in the dispute—"Error of law"—Certiorari—Advisability of having issues framed—Industrial Disputes Act (Cap. 131), as amended by Act No. 62 of 1957, ss. 22 (1), 22 (3), 24 (1) (2), 31 (1) (2) (3) (4), 39 (1) (f).

Where an Industrial Court consists of three persons and all of them become incapablo of functioning, either simultaneously or at different times, the only procedure laid down for the filling of vacancies is that contained in section 31 (2) of the Industrial Disputes Act (Cap. 131), as amended by Act No. 62 of 1957. Where, in such a case, as a result of vacancies being filled under section 31 (2), an entirely new Court is, in effect, constituted, such Court has a discretion, under section 31 (4), whether to continue the inquiry from the stage at which it was when the vacancies were filled or to commence it *de novo*.

[1] *(1915) 18 N. L. R. 413.* [2] *(1955) 57 N. L. R. 337.*

An inquiry by an Industrial Court must be regarded as pending or " continuing " within the meaning of section 31 (4) even at the stage when the examination of all the witnesses has been concluded and the Counsel for the petitioner has addressed the Court. In such a case, it is open to the Court, when vacancies in it have been filled, to proceed with the inquiry without a re-hearing of the previous evidence or address if the evidence has been duly recorded and a full note of the address appears as part of the proceedings.

A decision of an inferior tribunal, which is based on an error of law apparent on the face of the record of the tribunal's proceedings, is one of the grounds for the issue of a writ of *certiorari* quashing the decision.

Under section 24 (1) of the Industrial Disputes Act one of the duties cast on an Industrial Court is " to take such decision or make such award as may appear to the Court just and equitable ". These provisions, by necessary implication, also require an Industrial Court to consider and decide every material question involved in the dispute, application or other matter referred to by the Minister. A failure on the part of the Industrial Court to consider and decide a question which the statute requires the Court to decide would be an error of law. Moreover, the error would be one due to a disregard of statutory provisions. An award of the Court which is based on such an error apparent on the face of the record is liable to be quashed by order of *certiorari*.

On the 5th October, 1959, the petitioner (Hayleys, Ltd.) terminated the services of 23 daily-paid workers for misconduct in having participated in a concerted slowing down of work during the period 18th September to the 5th October, 1959. The dispute was then referred to an Industrial Court and the real question that arose for decision was whether the action of the workmen amounted to misconduct justifying their dismissal. The finding, however, of the Industrial Court in regard to this dispute was as follows :—

> " We hold that the action resorted to by the Union is not a ' go-slow ' and therefore, the dismissals in question are unjustified. "

Held, that the finding of the Industrial Court could not be regarded as amounting to a decision of the crucial question, viz., whether or not the action of the workmen amounted to misconduct. The omission of the Court to consider and decide the question of misconduct was an error of law proceeding from a disregard of section 24 (1) of the Industrial Disputes Act. Accordingly, inasmuch as the error of law was apparent on the face of the record and arose from a misconstruction or disregard of statutory provisions, *certiorari* would lie.

Obiter : Certiorari for error of law on the face of the record will lie even where the error consists of the misconstruction of a document forming part of the record.

Observations on the advisability for an Industrial Court to frame issues as a preliminary step to an inquiry.

APPLICATION for a writ of *certiorari* to quash the award of an Industrial Court constituted under the Industrial Disputes Act (Cap. 131).

H. V. Perera, Q.C., with *S. J. Kadirgamar*, *K. Viknarajah* and *L. Kadirgamar*, for the Petitioner.

N. Senanayake, with *Desmond Fernando* and *Miss S. Wickremasinghe*, for the 4th Respondent.

No appearance for the 1st, 2nd, 3rd, 5th, 6th, 7th Respondents.

Cur. adv. vult.

March 30, 1962. WEERASOORIYA, S.P.J.—

This is an application for a writ of *certiorari* to quash the award of an Industrial Court constituted under the Industrial Disputes Act, No. 43 of 1950 (hereinafter referred to as " the Act "). The award relates to a dispute which arose between Hayleys, Ltd., the petitioner, and the 4th respondent, a Union of workmen, including twenty-three workmen employed by the petitioner and against whom certain disciplinary action had been taken ending in their dismissal.

The Industrial Court originally consisted of the 1st respondent and two other members, one of whom resigned before any witnesses were examined by the Court. As permitted by section 31 (1) of the Act, the inquiry proceeded thereafter with the Court constituted of only the 1st respondent and the other member, who was also the President of the Court. After the evidence of all the witnesses called at the inquiry was concluded and counsel for the petitioner had addressed the Court, the President resigned. The vacancy so created and also the earlier vacancy were thereupon filled by the appointment of the 1st respondnet as President and the 2nd and 3rd respondents as additional members selected from the Panel appointed by the Governor-General under section 22 (1) of the Act. The award sought to be quashed is the award of the Court consisting of these respondents.

The appointment of the 1st respondent as President and of the 2nd and 3rd respondents as members of the Court was purportedly made under section 31 (2) of the Act as amended by the Industrial Disputes (Amendment) Act, No. 62 of 1957, which provides that where the President is unable to function, the Minister shall select another person from the Panel and appoint him as President, and where a member other than the President is unable to function, the Minister may select another person from the Panel and appoint him as a member of the Court. I do not think that there is any substance in the objection taken by Mr. H. V. Perera for the petitioner to the appointment of the 1st respondent (while he was a member of the Court) as President on the ground that it was contrary to the provisions of section 31 (2). As the 1st respondent was yet a member of the Panel at the time of his appointment as President, it is clear that he was eligible for appointment as such under section 31 (2).

The only proceedings that took place before the Court after these vacancies were filled consisted of the address of counsel for the 4th respondent, a submission by way of reply from junior counsel for the petitioner and the making of the award by the Court. Thus, the 2nd and 3rd respondents did not see or hear any of the witnesses examined at the inquiry, nor did they hear the address of senior counsel for the petitioner. Under section 31 (4) of the Act, as amended by Act No. 62 of 1957, an inquiry may be continued " from the stage at which it was " when a vacancy in an Industrial Court is filled. Mr. Perera contended, however, that the inquiry had already concluded before the vacancies were filled, therefore section 31 (4) could not have been availed of by the

Industrial Court for the subsequent proceedings and the Court acted without or in excess of jurisdiction in respect of such proceedings. This contention I am unable to accept as, even though the examination of the witnesses had been concluded, the inquiry was, in my opinion, pending when the vacancies were filled.

Yet another contention of Mr. Perera which I reject is that on the appointment of the 1st respondent as President, and the 2nd and 3rd respondents as members of the Court, an entirely new Court was constituted, thereby making it necessary for the inquiry to be held *de novo*. Under section 22 (3) of the Act, as amended by Act No. 62 of 1957, the Minister may select from the Panel either one person or three persons to constitute an Industrial Court. Where the Court consists of one person and he is unable to function, section 31 (3), as amended by Act No. 62 of 1957, provides that the Minister shall reconstitute the Court by the appointment of another person selected from the Panel; but even after such reconstitution the inquiry may under section 31 (4) be continued from the stage at which it was at the time of the reconstitution. Where a Court consists of three persons and all of them become incapable of functioning, either simultaneously or at different times, the only procedure laid down for the filling of vacancies is that contained in section 31 (2) which does not, however, specifically refer to a reconstitution of the Court. But where, in such a case, as a result of vacancies being filled under section 31 (2), an entirely new Court is, in effect, constituted, it would appear that under section 31 (4) such Court has a discretion whether to continue the inquiry from the stage at which it was when the vacancies were filled or to commence it *de novo*.

The duties and powers of an Industrial Court to which a dispute is referred are defined in section 24 (1) of the Act. They are " as soon as may be, to make all such inquiries, and hear all such evidence, as it may consider necessary, and thereafter to take such decision or make such award as may appear to the Court just and equitable ". Section 24 (2) provides that, subject to such regulations as may be made under section 39 (1) (f) in respect of procedure, an Industrial Court conducting an inquiry may lay down the procedure to be observed by such Court in the conduct of the inquiry. I have not been referred by learned counsel to any regulations made under section 39 (1) (*f*) in respect of procedure which are applicable to the matters under consideration. In the absence of such regulations the Court was free in the present case to devise its own procedure provided, of course, the procedure adopted did not amount to a disregard of the rules of natural justice. Mr. Perera submitted that there had been a violation of these rules in that the petitioner's case was not given due consideration by the 2nd and 3rd respondents who had not seen or heard the witnesses or heard the address of senior counsel for the petitioner. But the power given to the Court under section 31 (4) to continue the inquiry from the stage at which it was when the vacancies were filled necessarily would imply that it was open to the court to proceed with the inquiry without a re-hearing of the evidence. There is no

definite proof that in making the award the Court failed to take into consideration this evidence, which was duly recorded. As for the address of senior counsel for the petitioner, a full note of it running into thirty pages appears as part of the proceedings. In my opinion this submission too, fails.

One of the points in dispute referred to the decision of the Industrial Court was the disciplinary action taken against the twenty-three workmen who were dismissed by the petitioner; and the substantial question which arises for decision in the present case is whether the award of the Industrial Court, in so far as it relates to this particular point, should be quashed. This dispute is to some extent connected with an earlier dispute between the petitioner and the 4th respondent over the retrenchment of twenty-eight other workmen employed in the petitioner's fibre stores and in regard to which an agreement was entered into between the parties on the 25th August 1959. For reasons which need not be gone into here, the implementation of that agreement by the petitioner was delayed and in consequence the daily-paid workers in the fibre stores staged what the petitioner alleged was a "go-slow". According to the 4th respondent "from 18.9.59 the entirety of the daily-paid resorted to trade union action which the employer has conveniently sought to describe as 'go-slow'". This state of affairs continued till the 5th October, 1959.

At the petitioner's fibre stores loose fibre is pressed into bales by means of electrically operated baling presses. The petitioner had contracts with overseas buyers for the delivery of fibre in bales. Time is said to be of the essence of such contracts. Before the loose fibre is pressed into bales and made ready for movement out of the stores to the export wharfs, several operations have to be gone through, such as unloading, handling, movement up to the presses, pressing and baling, moving out of the presses, stocking, handling and movement into lorries and out of the stores. These operations were performed by the daily-paid workers. The normal output of the presses during the day was about eighty bales in the case of some and sixty-five bales in the case of others. The petitioner alleged that as a result of the concerted slowing down of work by the daily-paid workers during the period 18th September to the 5th October, 1959, the output of the presses was progressively reduced to eighteen bales and sixteen bales respectively per day. According to the Secretary of the 4th respondent Union the action resorted to by the workmen achieved their objective of reducing the daily production to even less than three-fourths of the normal output during the same period. The workmen drew their full wages for this period.

On the 23rd September, 1959, the petitioner took disciplinary action against nine of the daily-paid workers who participated in the "go-slow" campaign on the 22nd and 23rd September and whom the petitioner regarded as the principal offenders. Similar action was taken on the 2nd October, 1959, against fourteen others for participating

in the " go-slow " campaign on the 25th September and thereafter. All twenty-three workmen were suspended from their work pending a decision by the petitioner on the charges brought against them.

The reply received from each of the nine workers to the " Show cause " notices served on them reads as follows :

> " With reference to your charge sheet dated 23.9.59 served on me' I wish to state that in terms of the unanimous decision arrived at by our Branch Union as a step adopted by the main Union to go slow with the work as from 22.9.59. I as a daily-paid worker on my own accord, have also decided to go slow with the work in terms of the above decision.
>
> This action being a privilege granted to our Union it was accordingly adopted by me and I therefore wish to inform that my interdiction from work is a violation of the rights of our Union and that such action on your part is unjust.
>
> I therefore request that I may be re-employed with all the benefits I am entitled to."

This reply amounts to an admission by the nine workmen that they did go slow with their work on the dates mentioned, but such action was described as a " privilege " granted to the Union which did not justify disciplinary measures being taken against them. The position of the other fourteen workmen would appear to have been the same as in the above reply.

On the 5th October, 1959, the petitioner terminated the services of the twenty-three workmen for misconduct in having participated in the " go-slow " as stated in the notices served on them. The disciplinary action so taken was one of the matters in dispute between the petitioner and the 4th respondent which the Minister of Labour by his Order dated the 15th October, 1959, referred to the Industrial Court. The finding of the Industrial Court in regard to this dispute is as follows :

> " We hold that the action resorted to by the Union is not a ' go-slow ' and therefore the dismissals in question are unjustified."

The Court accordingly directed in its award that the dismissed workmen should, if they so desired, be given suitable employment by the petitioner as from a specified date and also that each be paid compensation in a sum of Rs. 300 for being out of employment.

This finding was severely criticised by Mr. H. V. Perera on the ground that the very terms of it pointed to the Industrial Court having failed to decide the real question that arose for decision, namely, whether the action of the twenty-three workmen—by whatever name it was described—amounted to misconduct justifying their dismissal.

Although in the statement of the petitioner's case dated the 4th December, 1959, the action of the twenty-three workmen was described as a " go-slow " as understood in industrial law, it is clear that the gravamen of the charge against them was one of misconduct. According to the 4th respondent the so-called " go-slow " was a misnomer, and what actually happened was that there was a complete stoppage of work for short intervals in different sections of the petitioner's fibre stores. This action the 4th respondent described as " a partial strike ", and claimed that it was legitimate trade union action.

The address of the senior counsel for the petitioner, as appearing in the notes of the inquiry proceedings of the 5th July, 1960, contains the following submission as to the main issue before the Industrial Court regarding this particular dispute :

" Our position is that there was throughout an organised reduction in production. We call the action of the Union ' go-slow ' ; the Union calls it a partial or a token strike. But the position is this : that in consequence of certain action taken by the Union we terminated the services of these twenty-three workers. Therefore the question that arises for your consideration is whether or not the Company was justified in terminating the services of these twenty-three workers. The Court has to consider all the evidence and ask itself what really happened. In other words, what was it that the workers did. My submission is—I put it as high as this and I press it—that whatever name you give, whatever title you give to this form of conduct, the conduct of the workers is misconduct and entitles the Company to terminate their services . . . My argument is that whatever be the name or title you give to the form of action taken by the union, it is misconduct ."

The reply of counsel for the 4th respondent to the above submission would be seen from the following passages in his address to the Industrial Court :

" The employer states that whatever took place between the 18th of September and the 5th of October amounted to misconduct. My submission on that point would be that it is not misconduct because it was concerted action on the part of a trade union body, ... "

" . . . . . My point is that we took action which amounted to a strike. If it was a go-slow, and there was a fall in production, the management must clearly discharge the burden to show that it was misconduct . . . . . "

" . . . . . My final submission to this Court is that there has been no misconduct. A person cannot be punished for going on strike because that is a legal instrument of trade unionists, and if the Court accepts my submission they (the twenty-three workers) should be reinstated with back wages but if the Court holds that there has been some element of misconduct then the punishment should not be dismissal but something of a lesser degree."

It would appear, therefore, that not only counsel for the petitioner but also counsel for the 4th respondent addressed the Industrial Court on the footing that, apart from the question whether there was a " go-slow " or a strike, the question whether the action of the twenty-three workmen amounted to misconduct or not was a crucial issue. Much of the evidence recorded at the inquiry was relevant only with reference to such an issue. I do not think that the finding of the Court " that the action resorted to by the Union is not a ' go-slow ' and, therefore the dismissals are unjustified ", can be regarded as amounting to a decision of that issue. There is nothing in the rest of the award to indicate that the issue was even considered by the Court. The finding actually consists of two findings—(*a*) that the action resorted to by the Union is not a " go-slow ", and (*b*) that the dismissals are, therefore, unjustified. The Court obviously regarded finding (*a*) as conclusive of the question whether the dismissals were justified or not, and in doing so failed to decide whether, " go-slow " apart, the dismissals could be justified on the ground of misconduct. I may pause here for a moment to consider what the position would have been had the Industrial Court found that the action resorted to by the Union was a " go-slow ". The Court would probably have then felt constrained to hold, as a finding which necessarily followed, that the dismissals of the twenty-three workmen were justified. On such findings the 4th respondent would have had the same cause for complaint that the petitioner now has.

Mr. Senanayake, who appeared for the 4th respondent at the hearing of this application before me, did not contend that the Industrial Court decided the issue as to misconduct. His submission was that such an issue did not arise for consideration by the Industrial Court, because the case for the petitioner, as raised before the Court, rested entirely on the allegation that the action of the workmen amounted to " go-slow " as known to industrial law which justified their dismissal. For reasons which would be apparent from what I have stated earlier, I am unable to accept his submission.

Is the failure of the Industrial Court to decide the issue of misconduct a ground for quashing by order of *certiorari* the award in so far as it relates to the dispute as to the disciplinary action taken against the twenty-three workmen ? In exercising jurisdiction in proceedings for the issue of a writ of *certiorari*, the Supreme Court does not, of course, function as a Court of appeal. Such jurisdiction does not extend to the correction of a wrong decision of fact by an inferior tribunal. But it is settled law now that a decision of an inferior tribunal, which is based on an error of law apparent on the face of the record of the tribunal's proceedings, is one of the grounds for the issue of a writ of *certiorari* quashing the decision.

Mr. Senanayake submitted that " error of law " as a ground for issue of the writ should be limited to an error of law arising from a misconstruction or disregard of some statutory provision. In the case of

Rex v. Northumberland Compensation Appeal Tribunal. Ex parte Shaw[1], which he relied on, an award of compensation made by a tribunal as payable to an ex-employee of a local authority was quashed on the ground of an error of law on the face of the award, in that the tribunal took into account only a portion of the ex-employee's period of service and ignored the rest of it, which under the relevant regulations should also have been taken into account. Undoubtedly in that case the error of law arose from a disregard of statutory provision. In *Rex v. Board of Education*[2], the Court of Appeal in England affirmed an order of the King's Bench Divisional Court making absolute a rule for *certiorari* quashing a decision of the Board of Education on the ground that the Board had not decided the true question submitted to them. The matter came before the Board as a result of a dispute between a local education authority and the managers of a voluntary or "non-provided" school regarding the salaries payable to the teachers of the school, the duty of meeting the cost of which was, under the Education Act, 1902, thrown on the local education authorities. Prior to that Act there were "provided" schools and voluntary or "non-provided" schools, the former supported out of rates and government grants and the latter by voluntary subscriptions and government grants. Section 7 (1) of the Act imposed upon local education authorities the obligation of maintaining and keeping efficient both types of schools within their respective areas. In the particular case a local education authority insisted on the teachers in the voluntary schools within the area of the authority being paid smaller salaries than those paid to teachers in the "provided" schools whereas the managers of one of the voluntary schools maintained that the teachers in that school should be paid the same salaries as paid to teachers in the "provided" schools. This dispute was referred to the Education Board under section 7 (3) of the Act which read as follows :

> "If any question arises under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education."

The questions submitted for the determination of the Board are stated in the speech of Lord Loreburn, Lord Chancellor, when the case came before the House of Lords, on an appeal taken by the Board from the decision of the Court of Appeal—see *Board of Education v. Rice*[3]. The House of Lords dismissed the appeal. The questions were :

> "(1) whether the local education authority have in fixing and paying the salaries of the teachers fulfilled their duty under subsection 1 of section 7 of the Act.
>
> (2) whether the salaries inserted in the teachers' present agreements are reasonable in amount and ought to be paid by the authority, or what salaries the authority ought to pay."

[1] *(1952) 1 K.B. 338.* [2] *(1910) 2 K.B. 165.*
[3] *(1911) A.C. 179.*

The Board of Education took the view that the true question at issue between the local authority and the managers was one of fact, namely, whether teachers could be procured for the voluntary schools at the lower scale of salaries sanctioned by the local education authority. The Board stated that they did not find upon the evidence that the money provided by the local education authority for the salaries of the teachers of the voluntary school concerned had been shown to be inadequate for that purpose and they decided accordingly that the authority had not failed to maintain and keep efficient the school.

In addition to the two questions for the determination of the Board as set out earlier, certain issues arising therefrom were also submitted to the Board by the managers of the school. One of the issues raised what was regarded as the crucial question whether in future the school concerned should not be maintained by the local authority without any discrimination as to salaries between it and schools provided by the authority. It would appear that Cozens-Hardy, M.R., was referring to this question in his judgment in the Court of Appeal in *R. v. Board of Education* (*supra*) when he stated as follows :

> " There is nothing in the Board's decision to indicate that the right to discriminate, about which the whole battle raged, had ever been challenged. Still less is there anything to indicate the view of the Board as to the existence of such a right ".

He held that the decision of the Board " did not answer the question put " and that it must, therefore, be quashed.

In the present case, one of the matters in dispute referred to the decision of the Industrial Court was, as already stated, the disciplinary action taken against the twenty-three workmen. This particular dispute involved the decision of a number of questions. I would concede that one of the questions involved was whether the action of the workers concerned amounted to a " go-slow " as known to industrial law. That question has been answered in the negative by the Industrial Court; and although the workers themselves admitted that they did go slow with their work during the material period, no submission was made to me by Mr. Perera that the decision of that question by the Industrial Court is wrong or that it is liable to be quashed by order of *certiorari*. But the question whether there was misconduct on the part of the workers justifying their dismissal or lesser punishment, which was the subject of a large volume of evidence adduced before the Industrial Court and to which much importance was attached in the addresses of counsel, the Court omitted even to consider. I have already had occasion to refer to section 24 (1) of the Act under which one of the duties cast on an Industrial Court is " to take such decision or make such award as may appear to the Court just and equitable ". I think that these provisions, by necessary implication, also require an Industrial Court to consider and decide every material question involved in the dispute, application or other matter referred to it by the Minister. A failure

on the part of the Industrial Court to consider and decide a question which the statute requires the Court to decide would, in my opinion, be an error of law. Moreover the error would be one due to a disregard of statutory provisions. An award of the Court which is based on such an error, if apparent on the face of the record, is liable to be quashed by order of *certiorari*.

That the omission of the Industrial Court to consider the question of misconduct is apparent on the face of the record cannot be denied. No submission to the contrary was addressed to me by Mr. Senanayake. It was not suggested however by Mr. Perera that the omission was deliberate or perverse. It was very likely the result of inadvertence. The appointment of two new members of the Court after all the evidence had been recorded and senior counsel for the petitioner had addressed the Court may have had something to do with it. Perhaps the situation that has arisen would have been avoided if the Industrial Court had at the outset called upon counsel to formulate the issues in regard to the matters in dispute. No doubt, under section 24 (2) of the Act, an Industrial Court is, in the absence of regulations made under section 39 (1) (*f*) in respect of procedure, master of the procedure to be followed in the conduct of an inquiry before it, and there is no legal requirement to frame issues. Even so, I would commend for the consideration of Industrial Courts the advisability of having issues framed as a preliminary step in an inquiry. Industrial disputes, more often than not, involve complex questions of law and fact which are by no means readily discernible in the somewhat bare statement of the matter or matters in dispute which accompanies the Minister's Order referring a dispute to the decision of an Industrial Court. The framing of issues need not, however, be subject to any hard and fast rules as obtain in proceedings before a Court of law.

In my opinion the omission of the Industrial Court to consider and decide the question of misconduct is an error of law proceeding from a disregard of section 24 (1) of the Act. It is not necessary, therefore, for me to examine the correctness of Mr. Senanayake's submission that *certiorari* will issue to quash the decision of an inferior tribunal on the ground of an error of law apparent on the face of the record only where the error arises from a misconstruction or disregard of statutory provisions. But I would, in this connection, refer to the recent case of *Baldwin & Francis, Ltd. v. Patents Tribunal and Others*[1] where the House of Lords seems to have accepted the principle that *certiorari* for error of law on the face of the record will lie even where the error consists of the misconstruction of a document forming part of the record.

For the reasons I have given, I quash the finding of the Industrial Court that the dismissals of the twenty-three workmen are unjustified, and so much of the award as directs the petitioner to give the dismissed workmen suitable employment, if they so desire, as from the date specified

[1] *(1959) 2 A.E.R. 433.*

and to pay each of them a sum of Rs. 300 as compensation. As the present application is only for a writ of *certiorari*, and no application has been made for a writ of *mandamus* to the Industrial Court to determine afresh according to law the dispute relating to the disciplinary action taken against these workmen, I leave it to the respective parties to consider what further legal action, if any, should be taken in consequence of this order.

The 4th respondent will pay the petitioner's costs of this application which I fix at Rs. 525.

Application allowed.