1971 *Present :* **H. N. G. Fernando, C.J.**

LEWIS BROWN & CO., LTD., Appellant, *and* P. N. C. PERIYAPPERUMA, Respondent

S.C. 35/71—In the matter of an Application under Section 31 D of the Industrial Disputes Act No. 43 of 1950 in Labour Tribunal Case 14/99/70

Labour Tribunal—Failure to consider all relevant evidence—Question of law—Industrial Disputes Act (Cap. 131), s. 31D—"Just and equitable order".

The order of a Labour Tribunal at an inquiry held by it under the Industrial Disputes Act is not a just and equitable order if it is made without examination and consideration of all relevant evidence adduced at the inquiry.

[1] *(1921) 1 K. B. 49.*

APPEAL from an order of a Labour Tribunal.

N. Satyendra, with *V. Jegasothy* and *G. Dayasiri*, for the employer-appellant.

Nimal Senanayake, with *R. Weerakoon* and *Nihal Singaravelu*, for the applicant-respondent.

Cur. adv. vult.

August 2, 1971. H. N. G. FERNANDO, C.J.—

This appeal is by an employer against the order of a Labour Tribunal ordering the re-instatement with back wages of an employee who had been dismissed from his employment in 1964. The determination of the dispute has unfortunately been long delayed, owing to judgments of this Court holding appointments to the office of Presidents of Labour Tribunals to be in conflict with the Constitution, and the reversal of those judgments by the Privy Council. I regret that there has to be further delay by reason of the conclusion I have reached in this appeal that the employee's application for relief has to be inquired into afresh.

Since there has to be a fresh inquiry, it is necessary as far as possible to avoid expressing my views as to the facts of the case.

The ground on which the employer claimed to have dismissed the employee, (to whom I will refer as " the applicant "), was that the latter had committed certain acts of misconduct on 3rd October 1964 and on 16th October 1964, during a period when there had been a strike of the firm's employees.

Three witnesses called by the employer gave evidence that the applicant committed certain acts of misconduct on 3rd October 1964, and the applicant gave evidence denying that he committed such acts. The Tribunal in its order has summarised the evidence of the three witnesses called by the employer, and has recorded also the fact that the applicant denied " the charges ". But the Tribunal did not proceed to consider the evidence of these four witnesses, and did not reach any finding as to the truth of the evidence of any of these four witnesses. Instead the conclusion that " the applicant is not guilty of this charge " (i.e., relating to the alleged incidents of 3rd October 1964) was reached on a consideration of certain other matters, to which I will now refer.

Police Constable Sirisena, who had been on duty outside the employer's premises because of the prevailing strike, was called as a witness for the applicant. Sirisena testified generally to certain incidents which took place outside the employer's premises, when the strikers hooted and jeered at one T. L. Peiris, to an exchange of abuse between Peiris and the strikers, and to some sort of attack by the strikers on Peiris' car. In fact, the evidence of the employers' witnesses was that the applicant took an active part in these incidents. Sirisena, however, stated more than

once that he did not see the applicant participating in the incidents. He said also that he had not previously known the applicant, and therefore could not say, one way or the other, whether or not the applicant had participated in the incidents. In brief, Sirisena's position was that he had not been able to observe every stage of these incidents and had not seen the applicant participating in them.

That being so, the President of the Tribunal misunderstood the purport of Sirisena's evidence in thinking that Sirisena "*denied completely* that (the applicant) either kicked or banged at the car of Peiris". To say "I did not see X doing something" is by no means equivalent to saying "I am certain that X did not do anything".

This misunderstanding on the part of the President was particularly grave, because it was his principal reason for disregarding the evidence that the applicant participated in the alleged incidents.

The Tribunal also made the following observation in the order :—

> "The witnesses (for the employer) were of equal rank or were holding similar positions as Executives in the Firm............................As the strike was mainly directed against the action of the Management of Lewis Brown & Co. Ltd., protesting against the handing over of its Estates to Mackwoods Ltd., I am of opinion that it is not safe to accept the evidence of these executives on a charge of moral turpitude mainly because none of the Executives who were asked to be eye-witnesses to the incident was produced."

This last comment referred to the failure to call two officers, Messrs Mortimer and Ernst. But the President overlooked the evidence that Mortimer was not in Ceylon at the time of the inquiry. As to Ernst, the evidence which he had given at a domestic inquiry was marked in these proceedings; but the President did not consider whether the omission to call Ernst was remedied in this way. Thus it appears that the main reason why it was thought unsafe to accept the evidence of the three witnesses was scarcely justifiable.

In any event it seems to me that when a witness, whoever he may be, gives evidence that certain incidents occurred, a Tribunal cannot relieve itself of its duty to decide whether or not the alleged incidents did occur. A general assumption that Executives are likely to give false evidence on behalf of an employer, or else that strikers are likely to give false evidence on behalf of an employee, has the result that parties to a dispute are denied their right to a determination based upon the evidence tendered to the Tribunal.

The fact that the Tribunal decided to disregard the evidence adduced by the employer, on the grounds to which I have referred, had the consequence that the Tribunal did not examine that evidence. Nor did the President examine and consider the evidence given by the applicant himself, which, in the submission of counsel, was contradicted by the

evidence of Constable Sirisena. The only evidence which the Tribunal took into account was that of Constable Sirisena, who did not deny that the applicant committed the alleged acts.

The order of a Tribunal is not a just and equitable order, if it is made without examination and consideration of all relevant evidence adduced at the inquiry ; there was no such examination and consideration in the instant case of the evidence relevant to the alleged incidents of 3rd October 1964.

The order of the Tribunal is accordingly quashed, and a fresh inquiry will be held by a Tribunal consisting of a different President. But at the fresh inquiry it will not be open to the employer to rely on any alleged misconduct of this applicant on 16th October 1964.

The applicant must pay to the employer the costs of this appeal which are fixed at Rs. 210.

Order quashed.