PFIZER LIMITED
V.
RASANAYAGAM

COURT OF APPEAL
GUNASEKERA, J
C.A. 146/85 &
C.A. 147/85
L.T. CASE NO. 21/620
EARLIER NO. 8/11245/80
OCTOBER 04, 10, 29, 1990
NOVEMBER 07, 22, 1990
JANUARY 30, 1991
FEBRUARY 08, 1991
MARCH 13, 1991 AND.
JULY 25, 1991

Industrial Dispute - Industrial Disputes Act - Constructive termination and vacation of post - Questions of fact - Error of law - Appeal only on questions of law - Assessment of compensation.

Held:

After the amendment bringing in s. 33(1) D, the Labour Tribunal is empowered to grant compensation *simpliciter* and not necessarily as an alternative to reinstatement. The President held the action of the Company to report to a junior officer is tantamount to a demotion and hence there has been a constructive termination. The finding was arrived at after giving consideration to all the relevant evidence on the point. The appellant had failed to satisfy the court that there was an error of law. As an appeal against an order of a Labour Tribunal is available only on a question of law, the appeal failed.

In the cross-appeal, the respondent workman was to show that many uncontradiicted items of evidence on the assessment of compensation had not been considered. To make a just and equitable order every material question involved in a dispute must be considered and failure to do so is an error of law.

In assessing compensation the essential question is this. What is the actual financial loss caused by the unfair dismissal? With regard to financial loss there is -

First, the loss of earnings from the date of dismissal - the pay (net after tax), allowances, bonuses, value of the use of a car for private purposes, value of a residence and domestic servants and all other perquisites and benefits having a monetary value. Since the applicant could have worked for 6 years more the salary at retirement should have been taken into account.

The matters to be considered should be at least an approximate computation of immediate loss, prospect of future loss and loss of retirement benefits. A stated basis of the computation is essential.

Cases referred to:

1. *Caledonian (Ceylon) Tea & Rubber Estates Ltd.* V. *Hilman* (1979)1 NLR 421, 431, 438
2. *Ceylon Transport Board* v. *Wijeratne* 77 NLR 481
3. *Hayleys Ltd.* v. *De Silva* 64 NLR 130, 139, 140
4. *Associated Newspapers of Ceylon* v. *Jayasinghe* (1982) 2 Sri LR 595, 600
5. *Sri Lanka State Plantation Corportion* v. *Lanka Podu Sevaka Sangamaya* (1990)1 Sri LR 84.
6. *M.A. Jayasooriya* v. *The Sri Lanka State Plantation Corporation* SC9/89 spl LA 215/88 C.A. 449/83 LT 10/1032/82 S.C. Minutes of 30 May 1991.
7. *Silva* v. *Kuruppu* SC 182/69 S.C. Minutes of 14.10.71.

APPEAL by the employer from the order of the President, Labour Tribunal and cross appeal by the employee on quantum of compensation.

K. Thevaraja for applicant-respondent in C.A. 146/185

L. Kadiragamar with *K. Thevaraja and S. Sittampalam* for applicant - appellant

M. Nehru P.C. with *R. Surendran* for respondent - respondent

Cur. adv. vult.

21 August, 1991

GUNASEKERA J.

The Applicant W.J. Rasanayagam who had commenced his career as a Medical Representative under the Respondent Appellant Company in 1958 made an application to the Labour Tribunal that his services as Sales Manager (National Hospital Services) were unlawfully and unjustifiably terminated by the Respondent Appellant Company by letter dated 21.8.79 marked A8 and claimed by way of relief compensation for wrongful termination.

The Respondent Appellant Company in its answer denied that it had terminated the services of the Applicant and took up the position that the Applicant workman had vacated post and prayed that the application be dismissed.

After a long and protracted inquiry the learned President having considered the evidence both oral and documentary and the written submissions filed on behalf of the parties came to a finding that the Appellant Company had by its letter of 21.8.79 constructively terminated the services of the Applicant Respondent and ordered the payment of Rs. 179,500 made up as follows:-

Rs. 144,000 being 4 years salary as compensation,

Rs. 33,000 being 11 years salary for the 22 years of service as gratuity and Rs. 2,500 as costs.

The Respondent Appellant Company as well as the applicant have appealed against this order in Appeal C.A. 146/85. The Respondent Appellant Company has prayed that the order awarding relief to the applicant workman be set aside and the application made to the Labour Tribunal be dismissed. In Appeal C.A. 147/85 the applicant workman has prayed that the amount of compensation ordered by the learned President be set aside and that he be awarded enhanced compensation as supported by the evidence of the Applicant.

The Applicant's case was that he joined the services of the Respondent Appellant Company as Medical Representative in 1958 with the amalgamation of Pfizer Limited with Dumex at a time when Rubasinghe the Marketing Director was then a District Supervisor who was his senior. In 1959 he was designated Sales Inspector and thereafter in 1960 appointed Field Co-ordinator. In about 1968 as Field Co-ordinator of the Company he interviewed and recruited several Medical Representatives including one Robin John whom he trained on the instructions of the Company. In 1976 the aforesaid Robin John was promoted Management Trainee with a salary of Rs. 1200 per month and in 1978 was made the Pharmaceutical Products Manager with a salary of Rs. 1400 per month. The Managing Director of the Company J.A. Stewart left Sri Lanka after his assignment here and Stone took over his place as Managing Director in November 1978. By Memo dated 29.3.78 marked A2 the applicant was

appointed as the National Sales Manager who was required to report to the Marketing Director Rubasinghe. As at February 1978 the applicant was placed on a gross salary of Rs.2925 which include as merit increment of Rs. 235 and the 1978 Budget allowance of Rs. 50 and was placed in the Administrative grade A2 in the Company. On 29.3.78 he received a Memo from the Marketing Director Rubasinghe which was copied to John, requiring him to furnish some information from the field with the assistance of the officers working in the field in order to evolve a new credit policy for the purpose of increasing the Company's business. When he questioned the Marketing Director as to why it was copied to John who was the Pharmaceutical Products Manager he was informed that it was done merely for administrative reasons and he flew into a rage and stated "Not only will I copy to Robin John, I will make you report to Robin John". The Applicant claimed that was an ingidious way of suggesting that John was superior to him in the Company and took up the position that it was an illegitimate order with the purpose of undermining his superior position in the Company. Thereafter he stated that he got a low increment of Rs. 75 for the year 1978 and he protested to the new Managing Director who requested him to speak to the Marketing Director and thereafter he wrote X4 dated 7.2.79 to the Marketing Director with copy to the Managing Director protesting about the low increment and appealed for a reconsideration of his increment. This was followed up by X5 dated the 29th of June in which the applicant wrote to the Marketing Director about the devious manner in which an attempt was made to demote him to a subordinate position as a Professional Service Representative and understood the order to take up Professional Service Representative work in the Eastern Area as a constructive wrongful dismissal.

Learned President's Counsel appearing for the Appellant Company contended that on the own admission of the Applicant in his pleading that the order of the Marketing Director referred to in X5 as a "Constructive Wrongful Dismissal" should be interpreted to mean that the Applicant Respondent had severed connections with the Appellant Company from 29.6.1979 and thereafter taking the date 29.6.79 as the alleged date of termination of the Applicant's services the application having been filed on 10.2.80 was out of time and therefore prescribed.

I am unable to agree with this contention of learned counsel for it is to be observed in the letter X5 itself that the Applicant had requested the Marketing Director to abandon his illegitimate action and to make amends for past wrongful acts and followed it up by X6 date 18.7.79 and X7 dated 28.7.79 addressed to the Managing Director with copy to the Marketing Director that he would continue to report to the Marketing Director which is a clear indication that in fact that Applicant did not consider that his services had been terminated at 29.6.79.

Mr. Nehru during the course of his submission contended that the moment an employee refuses to carry out orders and work and obey instructions given by the employer there is an abandonment of employment and in the instant case the applicant's refusal to report to John and carry out the work as directed by the Marketing Director although he was physically present in the place of work constituted a vacation of post. Learned counsel's submission in this regard was that the learned President having correctly identified the issue in this case by observing that "This case in its entirety pivots round the main issue whether there was constructive termination of employment by the Company or vacation of employment by the Applicant has erred in coming to a finding that it would not be wrongful to treat this case as a case of construcive termination of employment".

The question as to whether a given set of circumstances constitutes a vacation of employment or a constructive termination is a question of fact to be determined by the Tribunal having regard to all the facts and circumstances which transpire in the evidence. In the instant case the learned President having considered the evidence and the correspondence has reached the conclusion that the Applicant had made it very clear that he was willing to work the rest of his life for the Company and all that he was protesting against was the order made by them to report to John who he says was his junior. The Company has never set out the reasons as to why this order of theirs was lawful and also not given a reply to the matters raised by him. In these circumstances the learned President has taken the view that the Company's position that they had treated him as having vacated employment from 21.8.79 as indicated in their letter of 21.8.79 would not appear to be acceptable.

The learned President's counsel strenuously argued that the use of insulting and insolent language and disparaging remarks about the Managing Director Mr. Stone and the Marketing Director Rubasinghe in his correspondence was a clear indication of his intention to sever his connections with the Company and the learned President has glossed over the use of such language by making the observation that on a careful consideration of the correspondence in its entirety with particular reference to the circumstances surrounding the exchange of such correspondence and the behaviour pattern of the applicant in general at the inquiry before the Tribunal that it was his view that the Applicant was an enthusiastic and methodical workman. In coming to this conclusion the learned President has indeed been mindful of the language which could have been best avoided and seeks to justify the use of such 'strong' language as a result of the Company too using similar language.

Another submission that was made by the learned counsel for the Appellant Company was that the Labour Tribunal had no jurisdiction to award compensation save and except as provided for in the situations contemplated in Sections 33(3), 33(5) & 33(6) of the Industrial Disputes Act. This would be true before the amendment of 1962 which brought in section 33(1)D to the Industrial Disputes Act which empowers a Tribunal to grant compensation simpliciter.

Sharvananda J. (as he then was) in the *Caledonian (Ceylon) Tea & Rubber Estates Ltd. V. Hilman* (1) stated that "The Industrial Disputes (Amendment) Act 4/1962 amended section 33(1)D by the deletion of the words "as an alternative to his reinstatment". According to this amendment a decision as to the payment of compensation to a worker is no more postulated as an alternative to a decision as to reinstatement.

Nigel Hatch in his commentary on the Industrial Disputes Act of Sri Lanka at page 349 states that "The amendments introduced by Act 4/1962 enables the award of compensation simpliciter in terms of section 33(1)D which is in addition to the remedy of compensation in lieu of reinstatment provided for by sections 33(3), (5) & (6). These amendments thus removed the limitations on the powers of the Tribunals which were earlier confined to awarding compensation only as an alternative to reinstatement." Thus I see no substance in this argument of learned President's counsel.

S.R. de Silva in the Employers Federation of Ceylon Monograph 4 on the Contract of Employment in paragraph 267 states that "Where the conduct of one party amounts to a constructive termination, then the Law deems the contract in question to have been terminated as a result of the action of the party who has so misconducted himself. Therefore if the employer has conducted himself in relation to the employee in such a way as to amount to a constructive termination of the contract then the termination of the contract will be deemed to be by the employer and such a termination attracts the consequences of an express termination by the employer". In the instant case the learned President after analysing the evidence has taken the view that the action on the part of the Company to require to report to John is tantamount to a demotion and hence that there has been a constructive termination.

In the *Calendonian (Ceylon) Tea & Rubber Estate* case Sharvananda J. reiterated the now well settled law that "Where an appeal under section 31(d)2 of the Industrial Disputes Act lies only on a question of law that parties are bound by the Tribunal's findings of fact, unless it could be said that the said findings are perverse and not supported by any evidence. In the instant case there is evidence on record to support the findings of the learned President and I see no reason to interfere with the findings. In the circumstances I affirm the finding of the learned President that this is a case of constructive termination and dismiss the appeal of the Appellant Company without costs.

In Cross Appeal *C.A. 147/85* which has been preferred by the Applicant Appellant, he is seeking to have the order of the learned President awarding compensation, gratuity and costs in a sum of Rs.179,500/- set aside and prays that an enhanced amount be ordered as claimed by him in his evidence.

Mr. L. Kadirigamar who appeared for the Applicant Appellant in this appeal quite rightly prefaced his argument by submitting that if the Appellant failed to satisfy this court that there was an error of law in the order of the learned President that this appeal must fail for the reason that an appeal against an order of Labour Tribunal is available to this court only on a question of law.

Learned counsel for the Applicant Appellant contended, that the concept of error of law applied to Labour Tribunal cases and

submitted that an error of law arises where the Tribunal has failed to take into consideration relevant evidence which emerges during the course of the proceedings before the Labour Tribunal.

It was the submission of Mr. Kadiragamar that the learned President having correctly come to a finding on the evidence that the services of the Applicant Appellant had been constructively terminated by the Respondent Company had taken into consideration relevant factors such as :-

(a) the age of the applicant and the chances of his securing employment elsewhere in the trade in which he was employed,

(b) financial capacity of the employer,

(c) the length of service,

(d) the behaviour pattern of the tribunal at large,

(e) the loss suffered by the applicant as a result of his cessation of employment with particular reference to the income derived by him during the period of non employment.

(f) the present high rate of inflation,

(g) the past conduct of the workman; and

(h) the circumstances and manner of his dismissal including the nature of the charges levelled against him as enunciated in the decisions of the Supreme Court and the Court of Appeal such as the *Ceylon Transport Board V. Wijeratne* (2), the *Caledonian (Ceylon) Tea & Rubber Estates Ltd V. Hilman* and the unreported case *SC 33/73 L.T. 14(359/70) SCM 21.3.75* but has failed to take into consideration a very material and relevant body of evidence which was uncontradicted.

Learned counsel formulated his proposition in regard to the error of law that arises in the instant case as follows:-

(a) was the evidence given by the Applicant Appellant regarding incremental wages upto his reaching the retiring age of 60 as

quantified in detail in document A138 *relevant* to the question of the computation of compensation.?

(b) was that evidence of the applicant unchallenged.?

(c) did the Tribunal take into consideration this evidence in computing compensation.?

(d) if not has the tribunal failed to take into consideration a relevant factor.?

(f) if so is there an error of law.?

In support of this contention learned counsel relied on the observation of Weerasooriya S.P.J. in *Hayleys Ltd V. de Silva* (3) "That the duty to make a just an equitable order requires the court, by necessary implication to consider and decide every material question involved in a dispute and the failure to do so would be an error of law".

It was submitted on behalf of the Applicant Appellant that the purpose of compensation is to place in the hand of the victim what he had lost so far as money and do it (and as Soza J. in the *Associated Newspapers of Ceylon Ltd V. Jayasinghe* (4) had stated "compensation" connotes the money equivalance) and contended that the evidence of the Applicant that he could have worked for another 6 years till he reached the retiring age of 60 if not for the wrongful termination and that he would have got about Rs.7000 - 8000 per month as salary remains uncontradicted which in his subsequent evidence was increased to Rs. 11000 per month as was supported by the document A 138.

Relying on the dicta of Kulatunga J. in the case of the *Sri Lanka State Plantation Corporation v. Lanka Podu Sevaka Sangamaye* (5) that the workmen who have not reached the age of retirement will be entitled to reinstatement with effect from 1.5.1989 *on terms not less favourable than those enjoyed by them before termination and taking into account their right to a scale of salary which they would have been entitled to had they been reinstated* as ordered by the Tribunal, learned counsel submitted that the learned President erred in not taking into account the uncontradicted evidence of the Applicant in regard to the loss he has suffered as a consequence

of the wrongful termination.

Although the learned President has considered several relevant factors enumerated above in assessing the amount of compensation to be awarded he has totally failed to take into consideration the evidence of the Applicant which remained uncontradicted even without a suggestion to the contrary in regard to the financial loss he has suffered as a consequence of the wrongful termination, and I am inclined to agree with the submissions of learned counsel for the Applicant Appellant that there is an error of law in that the learned President has failed to take into account relevant evidence in regard to the assessment of the quantum of compensation to be awarded.

In the case *M.A. Jayasooriya v. The Sri Lanka State Plantation Corporation* (6) Amerasinghe J. having considered the principles set out by Vaithiyalingam J. In the *Ceylon Transport Board* v. *Wijeratne* (supra) & Sharvananda J. in the *Calendonian (Ceylon) Tea & Rubber Estate Ltd.* v. *Hilman* (supra) whilst agreeing that the amount of compensation should not be 'mechanically' calculated has observed that "It is preferable to have a computation which is expressly shown to relate to specific heads and items of loss". In the course of the judgment he states "it is not satisfactory in my view to simply say that a certain amount is just and equitable. There ought I think to be a stated basis for the computation taking the award beyond the realm of mere assurance of fairness. This would enable the parties and anyone reading the order to see that it is all in all just and equitable". With respect I agree with these observations for it is seen that in the *Caledonian (Ceylon) Tea & Rubber Estates* v. *Hilman* case the basis for reducing the quantum of compensation from 10 years awarded by the tribunal to 7 years by Sharvananda J. is not apparent for all that was stated is "In the view of this court the grant of Rs. 216,000 errs on the excessive side. A just and equitable decision in the circumstances would be to order the Appellant to pay Rs. 151,200 representing 7 years salary to the Applicant Respondent". Similarly in the case of the *Ceylon Transport Board* v. *Wijeratne* the basis for reducing the quantum of compensation from Rs. 140,400 the salary for 10 years less the 3 months salary which the applicant had received in lieu of Notice to Rs. 44,200 that is 3 years salary is lacking.

Amerasinghe J. in *Jayasooriya's* case *(6)* having agreed with Sharvananda J. that in computing compensation "flexibility is essential as circumstances may vary in each case and the weight to be attached to any particular factor depends on the context of each case" observes "That however there are certain parameters". There is data which is necessary to determine the orbit of every Tribunal so as to prevent it from straying off its course. The matters to be considered should be at least an approximate computation of immediate loss, i.e. loss of wages and benefits from the date of dismissal up to the date of the final order of judgement, another with regard to prospective future loss and a third with regard to the loss of retirement benefits based as far as possible on a foundation of solid facts given to the Tribunal by the parties".

Further having stated that while it is not possible to enumerate all the circumstances that may be relevant in every case Amerasinghe J. observes that "It may be stated that the essential question in the determination of unfair dismissal is this. What is the actual financial loss caused by the unfair dismissal for "compensation is an indemnity for the loss". With regard to financial loss there is first the loss of earning from the date of dismissal to the determination of the matter before the court, that is the date of the order of the Tribunal, or if there is an appeal to the date of the final determination of the Appellate Court. The phrase "loss of earning for this purpose would be the dismissed employee's pay (net after tax), allowances, houses, the value of the use of a car for private purposes, the value of a residence and domestic servants and all other perquisites and benefits having a monetary value to which he was entitled. The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss he had incurred".

According to the evidence led in the instant case the Applicant's services were terminated on 21.8.79. The age of retirement being 60 years he could have worked till October 1983 and at the date of the order of the Tribunal the Applicant was 10 months short of 60 years and as at today is well past 65.

Thus for the purpose of computing the compensation to be awarded the learned President should have taken the salary the Applicant would have drawn at the age of retirement. Since the Applicant could have worked for the company for a period of 6 years had his

services not been terminated, I would now examine the evidence led in the case regarding the loss incurred by the applicant.

The documents A2, A12, A45, A47, A76, X4, A49, A72 reveal that the Applicant had received a salary of Rs. 1500, 1650, 1865, 2015, 2215, 2440, 2640, 2925 & 3000 per month respectively in the years 1971 to 1979. In examination in chief in answer to the question with reference to the salaries that are paid to the persons who are continued and who are now terminated what would your salary have been at the age of 60? The applicant's answer was "about Rs. 7000 to 8000" Whilst under re-examination in answer to the Tribunal, the Applicant's evidence was that he would have carried on till October 1985 if his services were not wrongfully terminated and stated thus, "I would have carried on till the age of 60, that is another 6 years. When I would reach the 60th year the salary I would have drawn because I prove myself through the years and the total I would have got as salary is Rs. 590,640. Then end of every year we were given one months salary bonus, and that would have worked up to Rs. 51,470. I would have got my E.P.F., Employer's Contribution 171/2% being Rs. 103,362. My contribution would have been Rs. 118,128, then cost of action and travelling and expenses in correspondence and legal expenses would come to about Rs. 105,320. During the period subsequent to the termination of my employment by the Company I have been working at two places as a consultant and I have collected Rs. 134,460".

This oral evidence of the Applicant regarding the loss of income was substantiated by document A138 in which he sets out a breakdown of the loss. His evidence in regard to the loss of income is at variance and is inconsistent.

It was common ground that there were no fixed salary scales with fixed annual increments in this Company. According to the evidence, salaries and increments were adjusted annually according to the turn over of the business having regard to factors like inflation. An examination of the documents A2, X12, A45, A47, A49, A72, A76, X1 & X4 reveals that the average percentage increase of the salary of the Applicant over a period of 9 years from 1970 - 1979 has been about 9% and this was the period when the Applicant according to his own evidence had no problem with the Management and his relationship with the Marketing Director Rubasinghe was cordial. in

the claim for compensation for the balance period for which the Applicant could have worked for the Company till he reached the age of 60 he has ventured to give a hypothecial salary scale with the percentage increase of the incremental wages as follows:-

1979 September to December	Rs. 3220	10.085%
1980	Rs. 5000	56.25%
1981	Rs. 6000	20%
1982	Rs. 7500	25%
1983	Rs. 8750	16.6%
1984	Rs.10000	14.28% &
1985	Rs. 1100	10%

There is no evidence of the basis for this hypothetical increase in salary and in view of the evidence of the Applicant that he would have drawn a salary of Rs. 7000 to 8000 when he would have reached the age of retirement had his services not been wrongfully terminated I am unable to hold that the applicant would have drawn a monthly salary of Rs. 11,000 in the year 1985 as set out in the compensation table A138 although his oral evidence supported by the documentary evidence in A138 is that he lost a sum of Rs. 590,640 by way of salary. Nor can I accept his evidence in examination in chief that he would have drawn Rs. 7000 - 8000 per month had he reached 60 years for there is no certainty although this evidence was uncontradicted and unchallenged.

Since counsel submitted that in the event of my holding that the learned President had erred in computing the basis of compensation to be awarded having regard to the interval of time that has passed since the institution of the application relevant to this case that this case need not be remitted to the Labour Tribunal for a fresh computation of compensation, I would now venture to determine the compensation that should be awarded to the Applicant Appellant.

It has been held by the Supreme Court in *Silva* v. *Kuruppu* (7), that the assessment of compensation is eminently a matter within the province of the President of the Labour Tribunal. In this case the learned President having considered the evidence, both oral and documentary and the oral and written submissions of the counsel for the parties has taken the view that 4 years salary (terminal salary at the time of termination) would be adequate compensation for unjustified termination.

Having regard to the view I have taken and having for the reasons stated, rejected the evidence of the Applicant that he would have drawn Rs. 7000 - 8000 per month and Rs. 11000 in his document A 138 although unchallenged, I am of the view that it would be a safe guide to base the calculation of computation on the unchallenged and uncontradicted evidence that has been established in regard to the Applicant's salary and incremental wages for the years 1970 to 1979 which reflect an average increase of 9% per annum. On this basis I would hold that the Applicant would have got a salary of Rs. 3270 per month in 1980, Rs. 3480 in 1981, Rs. 3654 in 1982 & 4082 in 1983. Thus I hold that the Applicant Appellant would be entitled to,

3270 x 12	=	39,240.00
3480 x 12	=	41,760.00
3654 x 12	=	43,848.00
4082 x 12	=	48,984.00
		173,832.00

as loss of salary.

The uncontradicted evidence of the Applicant Appellant was that he was entitled to a bonus of one months salary and therefore I would add to the compensation a sum of Rs. 14,486 as bonus that the applicant would have been entitled to for 4 years and a sum of Rs. 55,107 as gratuity for 27 years of service and a sum of Rs. 10,000 as costs totalling a sum of Rs. 253,425.

Thus I set aside the order of the learned President awarding the applicant Rs. 179,500 and make an order directing that the Applicant Appellant be paid a sum of Rs. 253,425 as compensation.

This amount of Rs. 24,425 is awarded after giving credit to the Rs. 134,460 which the Applicant Appellant had earned after his services were terminated.

The Respondent Company is directed to deposit the aforesaid sum of Rs. 253,425 in the Office of the Assistant Commissioner of Labour Colombo South to be withdrawn by the Applicant within one month of the communication of this order.

Appeal of employer dismissed.
Cross - appeal allowed and
compensation enhanced.