INDRAJITH RODRIGO V. CENTRAL ENGINEERING CONSULTANCY BUREAU

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
AMARATUNGA, J. AND
MARSOOF, P.C., J.
S.C. APPEAL NO. 57/2004
S. C. (SPL.). L.A. NO. 126/2004
H.C. APPEAL NO. 105/2001
L. T. APPLICATION NO. 13/1793/97
SEPTEMBER 25TH , 2008

Industrial Disputes Act No. 43 of 1950 – Section 31B – Application to a Labour Tribunal – Section 31C – Duties and powers of Labour Tribunal in regard to applications under Section 31B – Tribunal may make such order as may appear to be just and equitable – Maxim – ei incimbit probatio, qui dicit, non qui negat – *Burden of proof lies upon him who affirms, not upon him who denies.*

The High Court of the Western Province made the decision dated 25.03.2004 pursuant to an Appeal filed by the appellant – respondent – appellant (appellant) against the decision of the Labour Tribunal President, whereby the President made the order in favour of the appellant that he be reinstated in service in the respondent-appellant-respondent Bureau (respondent) and awarded Rs. 190,080.00 as compensation for the period he had been out of employment consequent to his interdiction and subsequent dismissal. In his appeal to the High Court, the appellant only sought to have the compensation ordered by the Labour Tribunal enhanced. There was also a cross-appeal filed by the respondent against the order of the Labour Tribunal. These appeals were taken up together in the High Court which decided in favour of the respondent and set aside the decision of the Labour Tribunal and dismissed the appeal of the appellant.

The appellant sought leave to appeal against the decision of the High Court and leave to appeal was granted by the Supreme Court.

Held :

(1) A Labour Tribunal, in the process of redressing grievances of workmen in a just and equitable manner, cannot lose sight of procedural propriety and evidentiary legitimacy.

(2) An unduly technical approach should not be adopted towards the equitable remedy provided by Section 31B of the Industrial Disputes Act.

(3) In Labour Tribunal proceedings where the termination of services of a workman is admitted by the respondent, the onus is on the latter to justify termination by showing that there were just grounds for doing so and that the punishment imposed was not disproportionate to the misconduct of the workman. The burden of proof lies on him who affirms, and not upon him who denies as expressed in the maxim *ei incimbit probatio, qui dicit, non qui negat.*

(4) It is a well established principle that the primary (albeit discretionary) remedy for harsh, unjust or unreasonable termination of employment is reinstatement to the same position or re-engagement to a comparable position held prior to the termination.

Held further:

Reinstatement has always been awarded at the discretion of the Labour Tribunal or Court and such discretion has to be exercised judicially taking into consideration all the circumstances of the case.

(5) The back wages payable to the appellant have to be computed on the basis of the terminal salary drawn by him on the last day he actually worked for the respondent.

Cases referred to :

1. *A. G. v. Windsor* – 24 Beav 679
2. *Manager, Ury Group, Passara v. The Democratic Workers' Congress* – 71 NLR 4
3. *Up Country Distributors (Pvt.) Ltd. v. Subasinghe* – 1996 Sri L. R. 330
4. *Associated Cables Ltd. v. Kulatunga* – 1999 2 Sri L.R. 314

5. *Millers Ltd. v. Ceylon Mercantile Industrial and General Workers Union* – 1993 1 Sri L. R. 179
6. *Vasudeva Nanayakkara v. K. N. Choksy and Others* – S. C. Application No. 209/07, S. C. Minutes of 13. 10. 2009
7. *Amarajeewa v. University of Colombo* 1993 2 Sri L. R; 327
8. *Saleem v. Hatton National Bank* – 1994 3 Sri L. R. 409
9. *The Caledonian (Ceylon) Tea and Rubber Estates Ltd. V. J. S. Hillman* 1977 79 (1) NLR 421
10. *Sithamparanathan v. Peoples Bank* – 1989 1 Sri L.R. 124
11. *Jayasuriya v. Sri Lanka State Plantationas Corporation* – (1995) 2 Sri L. R. 379
12. *Hatton National Bank v. Perera* – 1996 2 Sri L. R. 231

APPEAL from the High Court of the Western Province.

Manohara de Silva, P. C., with *Pubudini Wickremaratne Rupasinghe* for Appellant.

A. Srinath Perera, P. C., with *Shammil J. Perera* and *P. Sarathchandra* for Respondent.

Cur. adv. vult.

December 17, 2009

MARSOOF, J.

This is an appeal from the decision of the High Court of the Western Province dated 25th March 2004. The said decision of the Provincial High Court was made pursuant to the appeal filed by the Appellant-Respondent – Appellant (hereinafter referred to as "the Appellant") against the decision of the President of the Labour Tribunal dated 8th November 2001, whereby he was reinstated in service as an Engineer (Grade III) in the Respondent–Appellant-Respondent Bureau (hereinafter referred to as "the Respondent") and awarded Rs.190,080/- as compensation (as equivalent to two years salary as back wages) for the period he had been out of employment consequent to his interdiction and

subsequent dismissal from service. In his appeal to the Provincial High Court, the Appellant had sought only to have the said compensation enhanced. There was also a cross-appeal filed in the Provincial High Court by the Respondent inter alia on the basis that the learned President of the Labour Tribunal had failed to take into consideration the fact that the termination of service on the basis of which the Appellant had come before the Labour Tribunal had subsequently been set aside by a decision of the Supreme Court by virtue of which he was paid back wages and consequential dues on the assumption that he had continued in service for nearly two more years, and that the subsequent termination of his service was not the subject to the application filed in the Labour Tribunal. The Provincial High Court held with the Respondent on both appeals and made order that the application made by the Appellant to the Labour Tribunal should stand dismissed.

Before adverting to the several questions of law on which leave to appeal was granted by this Court, it is necessary to refer briefly to the facts of this case which will make it easier to comprehend the said questions of law.

The Appellant had initially joined the service of the Respondent on 31st January 1986 on "Contract basis" and from 3rd November 1986 he had been absorbed into the permanent cadre as a Grade III Engineer. It transpires that while so serving, the Appellant was served with a charge sheet dated 14th June 1995 (R1) alleging that he "had failed to comply with the directions that had been given". Following a disciplinary inquiry, the proceedings or report of which were not produced by either party at the Labour Tribunal, the Appellant was served with a letter dated 19th December 1995(R2) informing him of the decision of the inquiry, which was against him, and asking the Appellant to resign from his post as a "merciful"alternative to dismissal by the

Respondent. The Appellant refused to resign and was subsequently dismissed from service by the letter dated 14th November 1996(R3) issued by the Chairman of the Respondent Bureau.

Invoking the jurisdiction of the Labour Tribunal against his dismissal in terms of Section 31B of the Industrial Disputes Act No. 43 of 1950, as subsequently amended, the Appellant filed his application dated 9th May 1997 praying for reinstatement with back wages, or alternatively, for compensation in a sum of Rs.1 million for loss of livelihood, and Rs.4 million for promotions and scholarships which he had allegedly been deprived of, and for gratuity. The Respondent filed its answer on 30th June 1997, expressly admitting in paragraph 7 thereof, the termination of the Appellant's services by its letter dated 14th November 1996 (R3), and seeking to justify the same on the basis that the said termination of services was just and reasonable in view of the Appellant's alleged grave misconduct.

Since the Appellant had also filed SC Application No 220/96 (FR) in this Court challenging the aforesaid termination of his service under Article 126 of the Constitution, by his order dated 7th November 1997 the President of the Labour Tribunal directed that the application filed by the Appellant be laid by pending the final determination of the said fundamental rights application. Based on the admission made by the learned Counsel for the Respondent that it was the Board of Directors, and not the Chairman of the Respondent, that had the power to dismiss the Appellant under the provisions of the State Industrial Corporations Act No. 49 of 1957, as subsequently amended, on 11th June 1998 this Court by its order marked 'R5' set aside the purported dismissal of the Appellant and directed

the Board of Directors of the Respondent "to take a decision after considering the report of the inquiring officer and the disciplinary proceedings." Thereafter, by a letter dated 6th July 1998(R8), the Respondent informed the Appellant that upon considering the disciplinary inquiry report dated 17th November 1995 and other relevant documents relating to the said inquiry, the Board of the Respondent had made a decision to dismiss the Appellant from its service.

The Appellant, being aggrieved by the said decision of the Board filed another fundamental rights application, SC Application No. 438/98(FR), against the second dismissal. An amicable settlement was reached by the parties based on which this court made its order dated 16th March 2000 (R10) granting the Appellant limited relief to the extent of considering the Appellant as being in employment from 14th November 1996 to 6th July 1998 during which period he was out of employment. It appears from the said order that it was expressly agreed that the Appellant shall be entitled to "the wages and all other consequential dues on the assumption that he has in fact worked during that period" and that the amounts thus due to the Appellant shall be set off against the money payable by the Appellant to the Respondent Bureau *inter alia* on a car loan and distress loan taken by him. Subject to the aforesaid, the fundamental rights application filed by the Appellant was *pro-forma* dismissed.

Upon the conclusion of the said fundamental rights proceedings, the application filed by the Appellant in the Labour Tribunal which had , as already noted, been laid by, was called in the Labour Tribunal on 5th May 2000 and was fixed for trial on 20th July 2000. It is significant to note that on 5th May 2000 no objection was taken by the Respondent to the maintainability of the application filed by the Appellant in the Labour Tribunal, nor was any application made on behalf of either the Appellant or the

Respondent to amend the pleadings filed by them in the Labour Tribunal. On 20th July 2000 the case was not taken up for trial, and was re-fixed for trial on 29th September 2000. On the latter date too at the commencement of the trial, no objection was taken to the maintainability of the application filed by the Appellant in the Labour Tribunal. Instead, on behalf of the Respondent, its General Manager Sarath Piyadasa, was called to give evidence. In the course of his testimony, he stated that the purported letter of termination dated 14th November 1996 (R3) had been withdrawn by the Respondent's subsequent letter dated 1st July 1998 (R7) pursuant to the decision of this court in S.C. Application No. 220/96 (F.R.), and that in the circumstances the Appellant cannot have and maintain the application filed by him in the Labour Tribunal.

It is significant to note that witness Sarath Piyadasa was subjected to cross-examination by learned Counsel for the Appellant on that date and on the next date of trial, namely 21st November 2000. Under cross-examination the witness admitted that the letters of termination dated 14th November 1996 (R3) and 6th July 1998 (R8) were based on the same disciplinary proceedings and the report of the inquiry officer dated 17th November 1995, copies of which were not produced before the Labour Tribunal. It is material to note that although by the aforesaid letters of termination of service, the Appellant had been found guilty of charge (a) of the Charge Sheet dated 14th June 1995 (R1), for certain alleged acts of insubordination, the said witness did not in the course of his testimony, furnish any particulars of the said acts of insubordination or in any other way seek to justify the termination of the Appellant's services. No other witnesses were called by the Respondent, and the Appellant too closed his case without getting into the witness box or calling any other witnesses on his behalf.

The proceedings in the Labour Tribunal culminated in its order of 8th November 2001 in the course of which the president of the Labour Tribunal dismissed the objection to the maintainability of the application before the Labour Tribunal as a mere technicality. The President of the Tribunal adverted to the admission contained in Paragraph 7 of the answer filed by the Respondent to the effect that the Appellant's services were terminated by the Respondent's letter dated 14th November 1996 (R3), and emphasized that in the absence of any amendment "the answer still remains."He accordingly held that "the services of the applicant (the Appellant) terminated on 14.11.1996 and the said termination was unjust and unreasonable."Accordingly, the Tribunal granted relief to the Appellant by way of reinstatement in service of the Respondent with effect from 1st January 2002 along with back wages computed on the basis of the basic salary drawn on 6th July 1997 which was Rs. 7,920/- per month for two years aggregating to Rs.190,080/-.

As stated earlier, both the Appellant as well as the Respondent appealed to the Provincial High Court against the order of the Labour Tribunal. These appeals were taken up together in the High Court which decided in favour of the Respondent overturning the decision of the Labour Tribunal, and dismissed the appeal of the Appellant. In coming to its decision, the High Court stressed that the failure of the Appellant to amend his application to the Labour Tribunal to make reference to the subsequent letter of termination has resulted in uncertainty regarding the specific date of termination of service which considered relevant to the time-bar for making applications for relief against wrongful termination of service to the Labour Tribunal under the Industrial Disputes Act. The High Court emphasized the fact that the Appellant was for all purposes deemed to have continued in service at the Respondent Bureau till 7th July 1998, and therefore the application dated 9th May 1997 filed by the Applicant in the

Labour Tribunal was fatally defective insofar as it sought to redress a termination of service alleged to have occurred on 14th November 1996.

The Appellant sought leave to appeal against the said decision of the High Court, and leave to appeal was granted by this Court on the following questions of law:

(a) Did the learned High Court Judge err in failing to consider that the termination letter dated 14th November 1996 and the subsequent termination letter dated 6th July 1998 has been made based on the findings of the same disciplinary proceedings/ disciplinary report, and the only difference between the two letters was being the authority that made the decision?

(b) Did the learned High Court Judge err in failing to consider that the Respondent has failed to submit any evidence to justify termination and even failed to produce the purported disciplinary inquiry report dated 17th November 1995 which the Board is said to have relied on for the termination of the Appellant's service?

(c) Did the learned High Court Judge err in failing to consider that the punishment given to the Appellant is totally disproportionate to the charge contained in the charge sheet dated 14th June 1995?

(d) Did the learned High Court Judge err in not taking into consideration the purpose of a Labour Tribunal, which is to grant a just and equitable remedy and to dispense with strict procedure?

(e) Did the learned High Court Judge err in failing to consider that the learned President of the Labour Tribunal erred in assessing back wages in as much as the learned President of the Labour Tribunal erred in taking

into account the last drawn salary as at 14.11.1996 for the assessment of back wages when it should be the monthly salary which he would be entitled to on 06.07.1998?

The question of maintainability of the LT application

The submissions of President's Counsel appearing for the Appellant as well as the Respondent focused on question (a) and (d) above, which have been raised by the Appellant in the face of the decision of the High Court that the Appellant's application filed in the Labour Tribunal was not maintainable insofar as the purported termination of his services by the letter dated 14th November 1996(R3), against which he sought redress, has been rectified by an order of this Court in S.C. Application No. 220/96 (FR) and also withdrawn by the Respondent's subsequent letter dated 1st July 1998 (R7). The learned High Court Judge had taken the view that the effect of the subsequent order of this Court in S.C. Application No. 438/98 (FR) dated 16th March 2000 (R10), awarding the Appellant all wages and other consequential dues up to 6th July 1998 (being the operative date of the second letter of termination of service marked 'R8'), was to restore him in service up to that date, and that the Appellant could not in law maintain his application for redress against a termination of services which allegedly took place on 14th November 1996. The High Court held that this went to the root of the jurisdiction of the Labour Tribunal, and that by reason of the failure of the Appellant to amend his application specifying the date of his subsequent termination of services by the letter dated 6th July 1998 (R8), the said application was fatally defective and has necessarily to be rejected.

Mr. Srinath Perera, P.C., appearing for the Respondent Bureau, sought to justify the decision of the High Court by arguing that the Appellant's application to the Labour Tribunal was not maintainable insofar as the purported

termination of his services by 'R3" against which he sought redress, has been subsequently withdrawn, and he has not complained against the subsequent termination letter dated 6th July 1998(R8). He submitted that in terms of Section 31B of the Industrial Disputes Act, the jurisdiction of the Labour Tribunal may be invoked by a workman directly or through his trade union only for "relief or redress" in respect of the termination of his services, terminal benefits and " such other matters relating to the terms of employment, or the condition of labour, of a workman as may be prescribed. " Learned President's Counsel submitted that by reason of the fact that the termination of service against which relief was sought by the Appellant has been rectified, the Tribunal was not competent to grant him redress. Mr. Perera relied on Section 101 of the Evidence Ordinance which enacts that the burden of proof lies upon " him who affirms, not upon him who denies", to contend that the burden of proof in establishing a valid basis for his application lay on the Appellant. He invited the attention of the Court to *AG v Windsor*[1] at 706 to support the position that the Appellant's failure to specify the second date of termination of his services furnishes a strong inference against him. He submitted that the Respondent was under no obligation in law to lead any evidence whatsoever of any misconduct on the part of the Appellant as the Appellant had failed to submit a valid application to the Tribunal specifying the actual date of his termination of services, and that the High Court of the Western Province quite rightly set aside the decision of the Labour Tribunal.

Mr. Manohara de Silva, P.C., appearing for the Appellant, submitted that the learned High Court Judge erred in failing to consider that the endeavour to terminate the services of the Appellant, which commenced with the letter marked 'R3' and culminated with the second letter marked 'R8', tantamount to a single act of termination and that said

letters of termination of service, though emanating from different sources, have been based on the findings of the same purported disciplinary proceedings and the disciplinary report dated 17th November 1995, the only difference between the said letters being the dates on which the said termination of services were intended to take effect. He stressed that the Respondent Bureau, after withdrawing the original letter of termination, neither served fresh charges against the Appellant nor held a fresh disciplinary inquiry, and that the same disciplinary inquiry report was submitted to the Board of Directors and the decision to terminate was arrived at.

Adverting to the question of adequacy of pleadings, Mr. de Silva emphasised that since the action taken by the Respondent to terminate the services of the Appellant were challenged in the Labour Tribunal as well as in the Supreme Court in two fundamental rights applications, namely SC Application No.2210/96 (FR) and SC Application No.438/98 (FR), the Labour Tribunal application was laid by, and was taken up for inquiry only after the conclusion of the second fundamental rights application, and that since the decisions contained in 'R3' and 'R8' related to the same alleged act of misconduct with respect to which there had been only one disciplinary proceedings and report, there was no necessity for the Applicant to either amend his application filed in the Labour Tribunal or file a fresh application. Mr. de Silva submitted that since there is no requirement that the date of termination should be pleaded, this was purely a matter of evidence. He further submitted that under the applicable legislation, the Labour Tribunal was required to make a "just and equitable" order and that the equitable jurisdiction of the Tribunal should not be, and has never been, impeded by technicalities. In support of this contention, he referred to the decision in *Manager, Ury Group, Passara v. the Demo-*

cratic Workers Congress[2] at 47, in which this Court showed leniency to a workman who had failed to state the name of his employer correctly in the application filed by him in the Labour Tribunal.

I am of the opinion that there is merit in the submission of the learned President's Counsel for the Appellant. It is expressly laid down in Section 31C (1) of the Industrial Disputes Act that every Labour Tribunal is bound "to make all such inquiries into any application filed before it" and "hear all such evidences as the Tribunal may consider necessary, and thereafter make such orders as may appear to the Tribunal to be just and equitable". In decisions such as *Up Country Distributors (Pvt.) Ltd v Subasinghe*[3] and *Associated Cables Ltd. V Kulathunga*[4] this Court gave effect to the said statutory provision and held that Labour Tribunals should not be bound by strict procedural requirements in the process of making just and equitable awards. In *Millers Ltd., v. Ceylon Mercantile Industries and General Workers Union*[5] at 183 G.R.T.D. Bandaranayake,J. observed that-

> "An award is just and equitable only if it takes into consideration the interest of all the parties."

The equitable nature of the jurisdiction of Labour Triunals has consistently been recognized in the decisions of our courts. However, in the process of redressing grievances of workmen in a just and equitable manner, one cannot lose sight of procedural propriety and evidentiary legitimacy. In this context, it is always important to bear in mind the following dictum of Weerasekera,J. in *Associated Cables Ltd., v Kalutarage (supra)* at 320:-

> *"Although the Labour Tribunal was required to make a just and equitable order in my opinion it must not only be just and equitable but the procedure adopted to that*

end must be legal and every judicial body exercising judicial powers must so arrive at an order only on legal evidence."

It was not contended by the Respondent that the application filed by the Appellant was *ab initio* void. According to the Respondent, the application cannot be maintained by reason of supervening events such as the vacation by this Court of the original termination of the Appellant's services, the withdrawal by the Respondent of the original letter of termination R3, and the payment of all emoluments for the period during which by reason of his dismissal, the Appellant had not reported for work from 14th November 1996 to 6th July 1998 (subject to set off amounts due from the Appellant on certain loans taken by him). It was the contention of learned President's Counsel for the Respondent that these supervening circumstances had the effect of remedying the Appellant's grievance and sending the "termination of services", for which the Appellant had sought relief from the Labour Tribunal, into oblivion.

I am unable to agree with the Respondent's line of reasoning. It is important to remember that the Appellant had to file two applications in this Court, SC Application No. 220/96 (FR) and SC Application No. 438/98 (FR), with respect to alleged violations of his fundamental rights, and the payment of emoluments was agreed upon only in the second of these cases. The order made by this Court in SC Application No. 220/96 (FR) merely set aside the original termination to enable the Board of Directors of the Respondent, which admittedly was the single authority having the power to terminate the services of an officer such as the Appellant, to consider the Appellant's case afresh, but when the said Board of Directors also decided to terminate the Appellant's services, he sought redress against the second termination in SC Application No.

438/98(FR), which led to the order of this court dated 16th March 2000 (R10) by which the Appellant was awarded his salaries and other emoluments for the period 14th November 1996 to 6th July 1998, during which admittedly his removal from service was invalid.

The question is whether the amicable settlement reached by the Appellant in SC Application No. 438/98(FR) which resulted in the order of this Court dated 16th March 2000 (R10), in any way affected the maintainability of the application dated 9th May 1997 filed by the Appellant in the Labour Tribunal. It is noteworthy that while the Supreme Court makes no mention of the Appellant's application then pending before the Labour Tribunal that had been laid by, it refrained from making its order of 16th March 2000 a "full and final" settlement of all disputes between the Appellant and Respondent. A careful scrutiny of the brief order made by this Court leaves no doubt that in dismissing the Appellant's application *pro forma* in view of the settlement reached, the Court confined the relief it thereby granted to wages and other dues that would have, if not for the invalid interruption of his service, been lawfully earned by the Appellant between the dates of the first (and admittedly invalid) letter of termination and the second letter of termination. This Court has been careful not to endow the said order with a gloss of finality.

In my considered opinion, an award of withheld emoluments up to the date of the valid, though not necessarily just, termination of services of an employee would not adequately redress the grievance of such employee. What this Court had sought to do in the two fundamental rights cases filed by the Appellant was to give him redress by setting aside the first letter of termination of services and directing the payment of his wages and all other consequential dues up to the date of the second

letter of termination *"on the assumption that he has in fact worked during that period"*, leaving it to the Labour Tribunal, as it lawfully might, to determine the question whether the termination of the Appellant's services was just, and if not, what relief should be granted to him. The attitude of the Supreme Court is understandable in the light of my own observation in the course of my recent judgment in *Vasudeva Nanayakkara v K. N. Choksy and Others*,[6] that the affidavit procedure applicable for the determination of fundamental rights cases "is ill-equipped" to deal with disciplinary procedures, which may in appropriate cases result in the termination of employment.

It needs to be observed that the fact that the Appellant was successful in obtaining certain relief from this Court through the above mentioned fundamental rights applications, which included payments of wages and other consequential dues for the period 14th November 1996 to 6th July 1998, does not necessarily mean that his services were terminated only on the latter date, since receiving remuneration is not the only incident in the contract of service. Such a contract encompasses mutual rights and obligations, which in fact regulate and harmonises the relationship between the employer and workman. The relationship between master and servant, in a broad sense, is a partnership between capital and labour, and the common understanding familiar to all who engage mind and body in entering the services of another, is that employment brings with it not mere material emoluments, but also the benefit of what is commonly called "job satisfaction", which provides the employee the feeling of contentment and a sense of participation in the enterprise of the employer, whether it be the State, a public corporation, a company or an individual. This mental element is of fundamental importance to a

dignified human condition, and conversely, the deprivation of employment on any grounds is a rejection of an individual's right to this basic dignity.

I am in agreement with the submission of the learned President's Counsel for the Appellant that the letters of termination of services, dated 14th November 1996 (R3) and 6th July 1998 (R8), arose from the same charge sheet (R2) and purported disciplinary proceedings and disciplinary report, and were part of the process that led to the Appellant being deprived of his employment in the Respondent Bureau. In my opinion, the learned President of the Labour Tribunal very correctly held that the effective date of termination of the Appellant's services was 14th November 1996, as from that date he had not only been deprived of his emoluments but had also lost the opportunity to work in the Respondent Bureau. The fact that through the intervention of this Court the invalid exercise of authority by the Chairman of the Respondent Bureau was rectified by the setting aside and withdrawal of the letter of termination of services dated 14th November 1996 (R3) paving the way for the Board of Directors of the Respondent having disciplinary authority over the Appellant to consider the disciplinary report afresh and make a decision, does not in any way affect the maintainability of the application already made by the Appellant to the Labour Tribunal as the said Board had simply completed the process set in motion by the Chairman by adding its *imprimatur* to the decision to terminate the service of the Appellant taken in 1996.

I am also of the view that the failure on the part of the Appellant to amend his application to specify the date of the second letter of termination as the date of his alleged termination of services, did not in any way prejudice the maintainability of the application filed by him in the Labour

Tribunal. This is because, in my opinion, the Appellant had invoked the jurisdiction of the Labour Tribunal on the basis that his services were terminated on 14th November 1996, and none of the intervening circumstances adverted to by Counsel have in any way affected the reality of such termination. It is noteworthy that the averment that the Appellant's services in the Respondent Bureau was terminated by the letter dated 14th November 1996 (R3), as set out in paragraph 6 of the application filed by the appellant in the Labour Tribunal, has been expressly admitted in paragraph 7 of the answer dated 30th June 1997 filed by the Respondent, and neither party had sought to amend their original pleadings which therefore stand, and upon these pleadings it is manifest that the Respondent has admitted termination of the Appellant's services with effect from 14th November 1996, which was apparently the basis on which evidence was led at the ensuing Labour Tribunal inquiry.

After this Court made its order dated 15th March 2000 in SC Application No. 438/98 (FR), the Labour Tribunal case filed by the Appellant was called on two dates, namely on 5th May 2000 and 20th July 2000, on which dates the Respondent did not raise any objection to the maintainability of the application of the Appellant. Neither was any such objection raised on 29th September 2000 before the Labour Tribunal when the Respondent called its only witness, General Manager Sarath Piyadasa, to testify. While as pointed out by M. D. H. Fernando J in *Amarajeewa v. University of Colombo*[7] at page 321, the Industrial Disputes Act does not prescribe the procedure for the conduct of inquiries before Labour Tribunals, and under Section 31C(2) of the said Act it is for the Labour Tribunal to devise a suitable procedure; it is the inveterate practice in Labour Tribunal proceedings for the Respondent to lead evidence to justify termination of service of a workman where the fact of termination is admitted. Thus, when the

Respondent called Sarath Piyadasa to give evidence it was presumably to justify the termination of the Appellant's services, which according to the pleadings had admittedly taken place on 14th November 1996.

The witness, however, took the Appellant as well as the Tribunal by surprise when he took up the position towards the end of his examination in chief, that by reason of the settlement reached and the order made by this Court in the said fundamental rights case, the application filed by the Appellant in the Labour Tribunal cannot be maintained in law. The gravamen of his testimony was that the Appellant's application to the Labour Tribunal dated 9th May 1997 cannot be maintained as the effective date of the termination of his services was 6th July 1998. The testimony, however, was altogether inconsistent with the Respondent's pleadings and previous conduct before the Labour Tribunal.

For the aforesaid reasons I hold that questions (a) and (d) above should be answered in the affirmative and in favour of the Appellant, and, more specifically, that the learned High Court Judge erred in failing to consider the two letters of termination of services dated 14th November 1996 (R3) and 6th July 1998 (R8) in their perspective as constituting one single process which led to the termination of the Appellant's services, and in adopting an unduly technical approach towards the salutary and equitable remedy provided by Section 31B of the Industrial Disputes Act.

Sufficiency of evidence to justify termination of services

Question (b) on which leave to appeal was granted in this case, is whether the learned High Court Judge erred in failing to consider that the Respondent has not led any evidence in the Labour Tribunal to justify termination of the Appellant's services and had even failed to produce the purported disciplinary inquiry report dated 17th November 1995 which

the Board is said to have relied upon for the termination of the Appellant's service. As noted already, in Labour Tribunal proceedings where the termination of services of a workman is admitted by the Respondent, the onus is on the latter to justify termination by showing that there were just grounds for doing so and that the punishment imposed was not disproportionate to the misconduct of the workman. In this appeal, the question of proportionality has specifically been raised through question (c) on which leave to appeal was granted. It is convenient to consider both these questions together, but it may be observed at the outset that the learned High Court Judge, who had taken the view that the application filed in the Labour Tribunal by the Appellant was fatally defective and should therefore stand dismissed, had understandably not looked at these questions too closely.

It is trite law that the burden of proof lies upon him who affirms, not upon him who denies as expressed in the maxim *ei incimbit probatio, qui dicit, non qui negat,* and in view of the admission of termination of the Appellant's services in paragraph 7 of the answer of the Respondent dated 30th June 1997, the burden was clearly on the Respondent to justify the decision to terminate the services of the Appellant. The only witness called by the Respondent to testify in the inquiry before the Labour Tribunal was the General Manager of the Respondent Surath Piyadasa, and it is remarkable that in the course of his testimony, no attempt was made to either substantiate the allegation contained in the charge sheet dated 14th June 1995 (R1) that the Appellant "had failed to comply with the directions that had been given" on 11th May 1995 and 6th June 1995, or to show that the Appellant was guilty of any misconduct. In particular, the witness failed to produce the purported disciplinary inquiry proceedings and the report on the basis of which the decision to terminate the Appellant's services had been arrived at. All this clearly demonstrated that there was absolutely no justification for the termination of the Appellant's services or even for the inposition of a less severe punishment.

I note that the Appellant has not chosen to testify or call any witnesses on his behalf in the Labour Tribunal, but this omission will only affect the relief that may be granted by that tribunal, and as far as the termination of his services is concerned, which is an admitted fact, the onus was clearly on the Respondent to lead evidence to justify the decision to dismiss the Appellant from service, and in the absence of any such evidence, the only possible inference is that the termination of the Appellant's services cannot be justified in law. I accordingly hold that questions (b) and (c) have to be answered in the affirmative and in favour of the Appellant, as the Learned High Court Judge had erred in not taking into consideration either the failure of the Respondent to lead any evidence to justify the termination of services of the Appellant, or the appropriateness of the punishment of dismissal imposed on the Appellant.

Just and equitable relief

I now turn to the question of relief. In this regard, this Court has granted leave to appeal on the following question:-

(e) Did the learned High Court Judge err in failing to consider that the learned President of the Labour Tribunal erred in assessing back wages in as much as the learned President of the Labour Tribunal erred in taking into account the last drawn salary as at 14.11.1996 for the assessment of back wages when it should be the monthly salary which he would be entitled to on 06.07.1998?

This question has to be viewed in the context of the application made by the Appellant to the Labour Tribunal, the relief awarded by the Tribunal and the substantive questions that have come up for determination in this appeal from the decision of the High Court. It is noteworthy that in his application to the Labour Tribunal, the Appellant has

prayed for reinstatement with back wages, or alternatively, for compensation in a sum of Rs. 1 million for loss of livelihood, and Rs. 4 million for promotions and scholarships which he had allegedly been deprived of and for gratuity. After due inquiry, the learned President of the Labour Tribunal by his order dated 8th November 2001 held that the termination of the services of the Appellant was "unjust and unreasonable" and directed that the Appellant be reinstated in service as an Engineer (Grade III) in the Respondent Bureau with effect from 1st January 2002 and be paid Rs. 190,080/- as compensation (as equivalent to two years salary as back-wages) for the period he had been out of employment consequent to his interdiction and subsequent dismissal from service.

The Appellant had appealed to the High Court against that order inter alia on the ground that the President of the Labour tribunal erred in computing the back wages based on the last drawn salary as at 14th November 1996 (date of the first termination letter R3) when it should have been based on the monthly salary which he would have been entitled to on 06th July 1998 (date of second termination letter R8). The High Court, which took the view that there was no proper application before the Labour Tribunal on the basis of which any relief can be granted to the Appellant, had summarily dismissed the Appellant's appeal, and when granting leave to appeal against the decision of the High Court, question (e) above was formulated to enable this aspect of the matter to be considered if this Court is of the opinion that the High Court was in error when it held that the Appellant was not entitled to any relief.

The Labour Tribunal is endowed with a wide discretion in regard to the grant of just and equitable relief to any workman invoking its beneficial jurisdiction. As Wijetunga J observed in Up *Country Distributors (Pvt) Ltd., v Subasinghe (supra)* at 335,

"The legislature has in its wisdom left the matter in the hands of the tribunal, presumably with the confidence that the discretion would be duly exercised. To my mind some degree of flexibility in that regard is both desirable and necessary if a tribunal is to make a just and equitable order."

His Lordship Kulatunga, J. in the course of his judgment in *Saleem v Hatton National Bank* [8] at page 415, set out the parameters for the exercise of this discretion in the following words:

"Whilst the question is not free from difficulty, it appears that in each case the Court has evolved a formula for making the order which it considered to be consonant with the spirit of labour law and practice and social justice. In doing so, the Court has been guided by three cardinal principles namely, the jurisdiction of the Labour Tribunal is wide; relief under the Industrial Disputes Act is not limited to granting benefits which are legally due; and the duty of the tribunal is to make the order which may appear to it to be just and equitable."

It is necessary to bear in mind the aforesaid principles in reviewing the decision of the Labour Tribunal in regard to the question of relief. In considering what relief should be granted to the Appellant in all the circumstances of this case, the question arises as to whether it is legitimate to consider the contents of the pleadings and affidavits filed by the Appellant in SC Application No. 220/96 (FR) and SC Application No. 38/98 (FR), which no doubt have a veneer of truth and show at least on a prima facie basis that the Appellant has been subjected to continuous harassment by his superiors, including the General Manager of the Respondent, allegedly because he had complained about the misuse of company vehicles by a Project Manager under whom he worked. However, since

the aforesaid fundamental rights applications were amicably resolved, this Court has not arrived at any findings in regard to these matters, and even if it had, such findings cannot legitimately supply the omission of the Appellant to testify before the Labour Tribunal and be subjected to cross-examination, which, after all, is the time tested tool used in the adversarial system to get at the truth. Nevertheless, I have already (under the heading "Sufficiency of Evidence to Justify Termination of Services") answered question (d) above in the affirmative, as the only reasonable inference that can be drawn from the failure of the Respondent to adduce any evidence before the Tribunal to show that the Appellant was guilty of some serious misconduct sufficient to justify dismissal, is that the decision to terminate his services was unjust and unreasonable. The Respondent only called one witness to testify on its behalf in the Labour Tribunal, and the thrust of the testimony of this witness was that for the various reasons adduced by him, the application filed by the Appellant in the Labour Tribunal is not maintainable, and his testimony does not shed any light in regard to the question of relief that the Appellant may be reasonably entitled to.

In view of the fact that the Respondent has admitted that the Appellant's services were terminated with effect from 14th November 1996 and has also made no attempt to prove that the Appellant was guilty of any misconduct or even to place before the Labour tribunal any material circumstances that would make an order of reinstatement inappropriate, and in view of the decision of this Court on questions (a) to (d) on which leave to appeal has been granted, I hold that the order of reinstatement made by the Labour Tribunal should be affirmed. It is a well established principle that the primary (albeit discretionary) remedy for harsh, unjust or unreasonable termination of employment is reinstatement to the same position or re-engagement to a comparable position held prior to the said termination. Compensation is a secondary

cure and is only ordered where, in the discretion of the court or Tribunal Court, it is held the reinstatement or re-engagement is not appropriate. Reinstatement has always been awarded at the discretion of the Labour Tribunal or Court and such discretion has to be exercised judicially taking into consideration all the circumstances of the case. *See, The Caledonian (Ceylon) Tea and Rubber Estates Ltd., v. J. S. Hillman*[9], *Sithamparanathan v Peoples Bank* [10]*Jayasuriya v. Sri Lanka State Plantations Corporation*[11], *Hatton National Bank v Perera*[13]. In the absence of any evidence that would have any bearing in regard to the question of reinstatement, such as whether or not the Appellant has got himself gainfully employed elsewhere during the pendency of the appeals to the High Court and to this Court, I hold that it would be just and equitable to reinstate the Appellant in service as an Engineer (Grade III) in the Respondent Bureau with effect from 1st January 2010.

I have also considered the question as to whether the Appellant should be reinstated in a higher grade in the service in view of the fact that, had he not been unjustly dismissed from service, he would have had opportunities of promotion to a higher grade. However, in the absence of evidence in this regard, and in particular, the failure of the Appellant to get into the witness box and testify in regard to his promotional prospects, it is not possible to consider reinstating the Appellant to a higher position. I also find that there is no basis for awarding to the Appellant compensation for loss of livelihood or for scholarships which he has allegedly been deprived of, as the Appellant has failed to place any evidence before the Labour Tribunal in support of these claims, and these claims are all very speculative. In view of the decision of this Court that the Appellant should be reinstated in service with effect from 1st January 2010, there is no question of paying him any gratuity.

There remains the question of back-wages, and in particular whether the learned President of the Labour Tribunal was in error in regarding the salary drawn by the Appellant on 14th November 1996 as his terminal salary instead of the salary he would have drawn as on 6th July 1998 on the assumption that he has in fact worked till that date. This is the gist of question (e) on which leave to appeal has been granted, and I have no hesitation in answering it in the negative and in favour of the Respondent. I find it difficult to agree with the submission of the learned President's Counsel for the Appellant that back wages should be computed on the basis of what would have been the terminal salary of the Appellant on 6th July 1998, which was the date from which his dismissal from service was confirmed by the Board of Directors of the Respondent Bureau, since it is necessary to take a realistic view of the sequence of events material to this case. If the fictional basis on which this Court gave effect to a settlement reached by the parties in SC Application No. 438/98 (FR) is taken too literally to the extent of deeming the Appellant to have been in employment till 6th July 1998, the Appellant would not have been able to lawfully maintain the application he made in the Labour Tribunal prior to that date, He cannot have it both ways, and in view of the reality of the termination of his services with effect from 14th November 1996, on the basis of which I have already held that the Appellant is entitled to have and maintain his application filed in the Labour Tribunal, back wages payable to the Appellant have to be computed on the basis of the terminal salary drawn by him on the last day he actually worked for the Respondent, which was 14th November 1996. This is, for reasons set out more fully above, the material date of termination in determining the questions of law in this application. Accordingly, I hold that the President of the Labour Tribunal did not err in computing back wages payable to the Appellant on the basis of the last

drawn monthly salary as on 14th November 1996, which was Rs. 7,290 per month.

However, I note that when the Labour Tribunal made its order dated 8th November 2001, that the Appellant be reinstated in service from 1st January 2002, it also directed that he be paid back wages computed on the basis of the terminal salary as on 14th November 1996 for a period of two years, taking into consideration the fact that in terms of the order of this Court in SC Application No. 438/98 (FR) marked 'R10' the Appellant has been paid wages and all other consequential dues from the period between 14th November 1996 to 6th July 1998. In view of the decision of this court that the Appellant will now have to be reinstated in service with effect from 1st January 2010, it is necessary to accordingly increase the back wages payable to the Appellant in a just and equitable manner. Accordingly, I am of the opinion that in all the circumstances of this case, it would be reasonable to award the Appellant back wages from 15th November 1996 to the date of his reinstatement, as directed by this Court, namely 1st January 2010, on the terminal monthly salary of Rs. 7,920.

Conclusion

For the reasons fully set out above, I allow the appeal and vacate the order of the High Court dated 25th March 2004. I affirm the decision of the Labour Tribunal dated 8th November 2001, subject to the variation that the Appellant be reinstated in service as an Engineer (Grade III) in the Respondent Bureau with effect from 1st January 2010, with back wages computed for the period 15th November 1996 to 31st December 2009 on his terminal salary of Rs. 7,920 per month.

To facilitate the expeditious payment of back wages, it is hereby declared that the Appellant is entitled to with-

draw forthwith the sum of Rs. 285,120 which has been deposited to the credit of this case in the People's Bank by the Respondent Bureau on 3rd December 2001, along with all accrued interest thereon. It is further declared that the said sum of Rs. 285,120 (excluding interest) and the amount already paid to the Appellant as "wages and all other consequential dues" in terms of the order of this court in SC Application No. 348/98 (FR) dated 16th March 2000 (R10) may be set off against the aggregate amount due as back wages, and the balance sum shall be paid to the Appellant on or before 15th January 2010.

I award the Appellant Rs. 25,000 as costs of this appeal, which amount too shall be paid by the Respondent to the Appellant on or before 15th January 2010.

DR. BANDARANAYAKE, J. – I agree.

AMARATUNGA, J. – I agree.

Appeal allowed.