CEYLON MEAT PRODUCTS LTD.

v.

MRS. C. FERNANDO

COURT OF APPEAL
WIJETUNGA, J.
C.A. NO. 398/81
L.T. NO. 2/11105/78
JANUARY 26, 1989

Industrial Dispute – Refusal to accept variation in terms of employment – Termination

– Sufficiency of pleadings – Industrial Disputes Regulations. 1958, Regulations 15 and 31 – Industrial Disputes Act, s. 31B – Can a Director also serve as an employee of the Company?

The applicant was a founder Director of the respondent Company and also its Production Manager from 1965. On 19.10.77 she resigned from the Directorate. In her application she had failed to state that she had been a Founder Director of the Company. She also failed to file a replication when served with the answer.

Held:

(1) Regulation 15 of the Industrial Disputes Regulations, 1958 provides that every application to the Labour Tribunal under section 31B shall be substantially in Form D set out in the First Schedule which requires inter alia that the "full facts of the matter to which the application relates" must be set out. The applicant had failed to state that she had been a Founder Director of the Company but this is not a suppression of facts or a failure to disclose the full facts of the matter to which the application relates – her application being in respect of the termination of her services as Production Manager.

(2) Under Regulation 31 of the Industrial Disputes Regulations the applicant must forward his replication within the period specified in the notice of the Secretary of the Tribunal. What the Regulation stipulates is that the applicant must forward his replication, *if any*, within the period specified in the notice. It does not mean that where the employer files his answer, *there should be a replication* the applicant. The necessity for further pleadings after answer would depend on the facts and circumstances of each case. This Regulation is only directory in nature and no adverse inference need be drawn by a Tribunal on the applicant's failure to file a replication.

(3) The facts justify the inference that the applicant was in the Company in dual capacities: as Director and as Production Manager (not Production Director). From the former position she had resigned.

(4) The mere fact that someone is a Director of a Company is no impediment to his entering into a contract to serve the company; a Director can hold a salaried employment or an office in addition to his Directorship and so be an employee or servant.

(5) The applicant was Production Manager and the respondent Company was not entitled to give her a fresh letter of appointment effecting changes in her status as Production Manager. Her refusal to accept the letter was justified.

Cases referred to:

(1) *Lee* v. *Lee's Air Farming Ltd.* [1961] AC 12]
(2) *Ceylon Electricity Board* v. *De Abrew* 78 NLR 97

APPEAL from Order of Labour Tribunal

Isidore Fernando for employer-appellant

H.L. de Silva P.C., for applicant-respondent

Cur. adv. vult.

September 08, 1989

WIJETUNGA, J.

An application was made to the Labour Tribunal stating that –

(a) the applicant had been a founder member of the respondent company and from about December, 1965, she had also been employed as a Production Manager of the company,

(b) in or about November, 1977, by letter dated 11.11.1977, the respondent company attempted to vary the existing terms and conditions of her employment,

(c) she did not accept the said alteration and/or fresh terms of employment,

(d) thereafter the respondent company terminated her services by letter dated 28.12.1977,

and (e) the said termination was wrongful, unlawful and not justified.

She prayed inter alia for reinstatement and/or compensation in lieu of reinstatement in a sum of Rs. 100,000/-.

The respondent company filed answer stating that –

(a) the applicant was a founder member of the company and was also functioning as a Working Director of the company with the designation of Production Director since 1965,

(b) for reasons best known to the applicant, she had by letter dated 19.10.1977 resigned from the Directorship of the company and its subsidiary company known as Goldi Enterprises Ltd.,

(c) no letter of appointment had been issued to the applicant on her appointment as Production Director as she was considered a Working Director and no letter of appointment was considered necessary,

(d) on the applicant tendering her resignation from the post of Director of the company, the company gave her a letter of appointment dated 11.11.1977, intimating to her that the company had decided to appoint her as an Executive of the company as from 19.10.1977 on an all inclusive monthly salary of Rs. 1,100/- and stipulating the terms and conditions of employment as an Executive of the company.

and (e) on the applicant's persistent refusal to accept the said letter of appointment, her services were terminated on the ground of gross indiscipline, with effect from 28.12.1977.

After inquiry, the learned President made his order dated 30.7.1981 holding that the termination of the applicant's services was without good cause and awarding a sum of Rs. 75,000/- as compensation for wrongful termination of her services. It is from this order that the respondent company has appealed to this Court.

Learned Counsel for the appellant submits that –

(a) the applicant has suppressed material facts in her application to the Labour Tribunal,

(b) had failed to file a replication which is a mandatory requirement and was consequently not entitled to any relief from the Tribunal,

and (c) the finding of the learned President that the termination of the applicant's services was without good cause is untenable,

In regard to the submission relating to the suppression of material facts, reference is made to Regulation 15 of the Industrial Disputes Regulations, 1958, which provides that every application to the Labour Tribunal under Section 31B shall be substantially in Form D set out in the First Schedule. Form D requires the applicant to state inter alia "the full facts of the matter to which the application relates". It is submitted that the applicant has failed to state in her application that she was a founder Director of the company since 1965 and was also the Production Director from its inception, that she had resigned from the Directorship of the company and its subsidiary company Goldi Enterprises Ltd. on 19.10.1977 by reason of the fact that she had sold all her shares in both companies and that as a Director of both companies she had at no time received any letter of appointment.

The position of the applicant, however, is that though she resigned from the Directorship of the company, she continued to be in employment as Production Manager of the company, which post she had held from 1965, that she had functioned in dual capacities and had at no time resigned from the post of Production Manager. Therefore, she claims that a fresh letter of appointment was unnessary as she continued to be an employee of the company on the same terms and conditions of service previously enjoyed by her and that the management could not reduce her in status or position by imposing new conditions under a fresh letter of appointment.

It will straightaway be seen that while the company claimed that she

had functioned as Production Director, the applicant's position was that she functioned in dual capacities, as a Director and also as Production Manager of the company. Admittedly she had resigned from the Directorship, but that did not affect her continuance in employment as Production Manager. The application made to the Labour Tribunal relates to the termination of her services as Production Manager of the company and the relief sought is reinstatement in that capacity and/or compensation in lieu of reinstatement.

When Form D in the First Schedule to the Industrial Disputes Regulations refers to "the full facts of the matter to which the application relates", it contemplates in my view only the matters directly relevant to the application submitted to the Tribunal. The present application being in respect of her employment as Production Manager, she was not obliged to refer to her position as a Director of the company, which was an entirely different capacity. Her resignation from the Directorship would not in any way have affected her position as Production Manager, if in fact, she had functioned in dual capacities. Her resignation from the Directorship not being a matter within the purview of the Tribunal, is not, in my view, encompassed by the expression "full facts of the matter to which the application relates". I am, therefore, unable to agree that there had been a suppression of facts or a failure to disclose the full facts of the matter *to which the application relates.*

As to the submission that the applicant had failed to file a replication, it appears that when the inquiry commenced before the Labour Tribunal on 29.7.1979, the learned President has made the following minute: "I find that the replication of the applicant has not been filed. This will be done within a month with copy direct to the employer. Subject to this, the matter shall proceed to inquiry". No replication has in fact been filed thereafter.

Regulation 31 of the Industrial Disputes Regulations requires the Secretary to the Tribunal, on receipt of an application, by written notice to call upon the employer to transmit to him within the period specified in such notice, in duplicate, a statement setting out his answer in relation to the matter to which the application relates. When the statement of the employer (answer) is so received by the Secretary, he is further required to forward a copy of such statement (answer) to the applicant and call upon the applicant to transmit to him within the period specified in such notice, in duplicate, a

statement setting out the applicant's answer, viz. the replication. Emphasis is laid by Counsel on the words "the applicant shall transmit such statement in duplicate within the period specified in such notice".

He contends that the words of the Regulation suggest that it is a mandatory requirement and that the applicant's failure to comply with such requirement should have been taken into consideration by the learned President before he proceeded to make the order in this case and an adverse inference should have been drawn against the applicant on account of such failure. I am unable to construe this Regulation as being mandatory in nature. To my mind, what it contemplates is that the applicant shall transmit the replication, *if any,* within the period specified in such notice. I do not understand this provision to mean that in every application before a Labour Tribunal where the employer files his answer, *there should be a replication* by the applicant. The necessity for further pleadings after answer would depend on the facts and circumstances of each case. I am, therefore, inclined to the view that this Regulation is only directory in nature and no adverse inference need be drawn by a Tribunal on the applicant's failure to file a replication.

I shall now consider the order of the learned President in the light of the facts of this case. As was mentioned earlier, while the respondent company's position is that the applicant was the Production Director of the company from 1965 to 19th October, 1977, when the applicant resigned from the Directorship of the company, the applicant's position is that she served in dual capacities, as a Director of the company as well as Production Manager of the company. A strenuous effort has been made by the respondent company to demonstrate that her designation throughout has been Production Director and that at no time had she been designated as Production Manger. But, this assertion is in the teeth of the evidence led in this case. The letters (A1), (A5), (A6), (A7), (A8), (A9), (A10), (A11) and (A12), written by the Managing Director in her own handwriting, are addressed to the applicant under the designation of Production Manager. (A4) is a type written letter from the Managing Director to the applicant, where too she is designated as Production Manager. (A13), (A14) and (A15) significantly are addressed to the Director-Production Manager by the Managing Director. There is only one solitary letter dated 25.9.1972 (A17), where the applicant had

been addressed as Production Director by the Chairman and Managing Director of the company. Apart from the above letters, there are the publications in the 'Daily News' of 14.12.1966 (A2) and in the Sinhala journal 'Vanitha Viththi' of 25.4.1966 (A3), where the applicant had been prominently featured as Production Manager of the company. (A2), as the document itself indicates, is an advertising supplement of the company, which contains a message carrying the photograph of the applicant under the caption Production Manager's message, alongside other messages including that of the Managing Director. The article in the 'Vanitha Viththi' similarly makes reference to the applicant as Production Manager of the company.

The learned President having examined the contents of some of these letters comments that they are mild reprimands and that their tone suggests that the applicant as Production Manager was under the supervision and control of the Managing Director and that these circumstances strongly savour of a contract of employment between the applicant and the respondent company. He further holds that the evidence of the Managing Director that the applicant unilaterally changed her designation to that of Director-Production Manager in 1976 is far from the truth and on the evidence there cannot be any doubt that the applicant was designated Production Manger, despite the insistence of the Managing Director that she was the Production Director as stated by her in evidence.

He further refers to the fact that the respondent company continued to pay her a salary for a period of three months after her resignation from the Directorship, until the termination of her services, as well as the admitted obligation to pay provident fund contributions on her behalf as factors which further affirm the applicant's position in this matter.

On a perusal of the order and the proceedings, I have no hesitation in accepting the correctness of the conclusions of fact reached by the learned President, amply supported as they are by the evidence in this case.

What has to be further examined is whether, as claimed by the applicant, she could function in dual capacities as Director and Production Manager. I do not see any anomaly in this situation. Legal authority recognises the validity of such dual positions.

In *Lee v. Lee's Air Farming Ltd.*(1) the defendant company was

formed for the purpose of carrying on the business of aerial top-dressing. Lee, a qualified pilot, held all but one of the shares in the company and by the articles was appointed governing director of the company and chief pilot. Lee was killed while piloting the company's aircraft and his widow claimed compensation for his death under the New Zealand Workers Compensation Act, 1922. The company opposed the claim on the ground that Lee was not a "worker" within the statuory definition as the same person could not be both employer and employee. But, the Privy Council held that there was a valid contract of service between Lee and the company and Lee was therefore a "worker" within the meaning of the Act.

Lord Morris there expressed the view at page 25 that "it is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company".

Further, in Palmer's Company Law, Vol.I, (23rd Edition, 1982), it is stated at pages 793 and 794 that "directors are not, as such, employees of the company; nor are they servants of the company, or members of its staff ..... A director can, however, hold a salaried employment or an office in addition to that of his directorship which may, for these purposes, make him an employee or servant and in such a case he would enjoy any rights given to employees as such; but his directorship and his rights through that directorship are quite separate from his rights as employee ....".

In *Ceylon Electricity Board v. de Abrew*(2) Tennekoon, C.J. deals with the question as to whether a member of the body which constitutes the "employer" can also be an "employee' of that same body and at page 103 makes reference to several authorities relevant to the matter presently under consideration, which too support this aspect of the applicant's case.

I am, therefore, of the view that the learned President was right when he came to the conclusion that the applicant had served in dual capacities as Director and Production Manager, which was permissible and well recognised in law. Since her resignation was only from the Directorship, consequent upon her selling her shares of the company which necessitated such resignation, she continued to hold the post of Production Manager up to the time of her termination. The respondent company was, therefore, not entitled to give her a fresh letter of appointment as there had been no change

in her status as Production Manager. In fact, no occasion arose by virtue of her resignation from the Directorship of the respondent company to issue her a new letter of appointment as she continued as Production Manager on the same terms and conditions previously applicable to that post. Her refusal to accept the fresh letter of appointment is hence quite justified in the circumstances. The learned President's finding that the termination of the applicant's services was without good cause is, therefore, correct.

In regard to the question of quantum of compensation for wrongful termination of her services, the learned President has considered it just and equitable that the respondent company pay the applicant a sum of Rs. 75,000/- as compensation. The applicant as Production Manager was entitled to a salary of Rs. 1,100/- per mensem. She had worked in that capacity from about December, 1965 to December, 1977, for a period of about 12 years. This would work out to about 6 years' salary, which in my view is not unreasonable in all the circumstances of this case.

For the reasons aforesaid, I would affirm the order of the learned President and dismiss this appeal with costs.

Appeal dismissed.