VASANTHA KUMARA
v
SKYSPAN ASIA (PVT.) LTD.

SUPREME COURT.
DR. SHIRANI BANDARANAYAKE, J.
AMARATUNGA, J. AND
BALAPATABENDI, J.
S.C. APPEAL NO. 14/2006
S.C. (SPL.) LA NO. 237/2005
H.C. GAMPAHA NO. 59/2003
L.T NO. 24/916/2000
MARCH 12th, 2008

Industrial Disputes Act – Section 31(B), Section 31C(1) – Duties and powers of a Labour Tribunal – Common law principles – Applicability in employer and employee relationship.

The appellant who was an employee of the respondent company had joined the company on 2.6.1997 and was promoted as a Head Supervisor on 5.11.1998. In July 2000, the appellant was served with a charge sheet dated 26.7.2000 containing five charges. The appellant was interdicted and after a domestic inquiry his services were terminated by letter dated 25.10.2000. The appellant sought re-instatement with back wages and compensation for wrongful termination before the Labour Tribunal. After inquiry the Labour Tribunal made its order on 30.6.2003 and by that order held that the termination was unjustified and ordered re-instatement with full back wages; the respondent appealed to the High Court, which allowed the appeal and set aside the order of the Labour Tribunal. Against that order the appellant preferred an application to the Supreme Court for which special leave to appeal was granted.

Held:

(1) The paramount consideration by a Labour Tribunal is the need for a just and equitable solution and for this purpose what is necessary is to do justice between the parties to the application.

(2) The concept of common law that gave prominence to the rights and duties of the employees under their contractual terms, which were taken into consideration by the High Court Judge in deciding the appeal, are no longer applicable in Sri Lanka with regard to labour disputes.

per Dr. Shirani Bandaranayake, J.

"Although the position under the common law, where either party was entitled to terminate the contract of employment in accordance with its provisions without any consequential effect, the introduction of Labour Laws had modified this position. Through the establishment of the Labour Tribunals, the common law concepts. dealing with labour relations were changed and the Industrial Disputes Act came into being and Labour Tribunals were established under and in terms of the said Act and expressly provided for the Labour Tribunal to take action, notwithstanding anything to the contrary in any contract of service between an employer and his employee."

Cases referred to:

(1) *Urban Council, Panadura* v *Cooray* 1971 75 NLR 236.
(2) *United Engineering Workers' Union* v *Devanayagam* 1967 69 NLR 289.

APPEAL from the judgment of the High Court.

Rohan Sahabandu for employee-applicant-respondent-appellant.
Chandana Liyanapatabendi with *Ranjika Pilapitiya* for employer-respondent-appellant-respondent.

Cur.adv.vult.

December 16, 2008

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of the Western Province holden in Gampaha dated 20.09.2005. By that judgment, learned Judge of the High Court set aside the order made by the Labour Tribunal, Gampaha and allowed the appeal preferred by the employer-respondent-appellant-respondent (hereinafter referred to as respondent). The employee-applicant-respondent-appellant (hereinafter referred to as the appellant) thereafter preferred an application to this Court for which Special Leave to Appeal was granted.

At the hearing, it was agreed that this appeal could be argued on the basis of the following questions:

1. Did the learned High Court Judge consider the evidence led in this case in the correct perspective, taking into consideration that the learned President of the Labour Tribunal is only expected to make a just and equitable order?
2. Is the approach to the matters in dispute by the learned High Court Judge erroneous?

The facts of this appeal, as submitted by the learned Counsel for the appellant, *albeit* brief, are as follows:

At the time material to this appeal, the appellant was a Head Supervisor of the respondent Company on a salary of Rs. 10,500/- per month. He had joined the respondent Company as a Section Leader on 02.06.1997 and was promoted as a Head Supervisor on 05.11.1998.

In July 2000, the appellant was served with a charge sheet dated 26.07.2000 containing five (5) charges, which were as follows (R1):

1. that being a Head Supervisor of the hand welding section had conducted training sessions for all sections of the production department from June 21, 2000 to July 4, 2000 whereas the instructions given for Supervisors were to conduct training for their respective sections;
2. that he had addressed certain grievances of the workers during the said training sessions, and tried to give a bad impression of the Company to the workers;
3. that he had criticized the management and the Managers of the Company indicating various weaknesses and lapses;
4. that he had informed the workers that those who fail in the written test that would be conducted after the workshop would be dismissed; and
5. that he had represented the management informally where he had no authority to do so in the circumstances.

The appellant was interdicted with effect from 27.07.2000 and after a domestic inquiry his services were terminated by letter dated 25.10.2000 with effect from 27.07.2000. The appellant sought re-instatement with back wages and compensation for wrongful termination before the Labour Tribunal.

Learned President of the Labour Tribunal, by his order dated 30.06.2003, held that the termination was unjustified and ordered re-instatement with full back wages with effect from 27.07.2000. The respondent appealed to the High Court, which allowed the appeal and set aside the order of the Labour Tribunal.

Learned Counsel for the appellant submitted that the learned Judge of the High Court had failed to appreciate that over the years, Labour Laws have developed on the basis of social legislation, which had been the approach taken by the learned President of the Labour Tribunal and that the learned Judge of the High Court had considered the matter in question under the concepts of Common Law. Learned Counsel for the appellant also contended that the learned President of the Labour Tribunal had carefully considered the documents marked as R3 and R4, whereas the learned Judge of the High Court, only on a mere perusal of these two documents, had come to the conclusion that the Labour Tribunal was in error in its evaluation of the said documents marked as R3 and R4. Learned Counsel for the appellant also contended that the High Court had erred in law and has not appreciated the fact that the Labour Tribunal was empowered by statute to give a just and equitable order. Referring to the award made by the Labour Tribunal, learned Counsel for the appellant submitted that the appellant should be entitled to be reinstated with full back wages.

Learned Counsel for the respondent, on the other hand, contended that the learned President of the Labour Tribunal had failed to evaluate the material placed before the Tribunal and especially, there had been no proper examination of the two documents marked as R3 and R4. It was also submitted that in terms of section 31C of the Industrial Disputes Act, the evidence that was led at the Tribunal was sufficient to establish the nature and the seriousness of the misconduct involved. In these

circumstances learned Counsel for the respondent contended that the termination of the appellant could be justified as correctly held by the learned Judge of the High Court.

Having stated the submissions of both learned Counsel, let me now turn to examine those in the light of the two questions set out at the outset of this judgment.

It is common ground that the appellant was interdicted with effect from 27.07.2000 and that his services were terminated by letter dated 25.10.2000. At the Labour Tribunal the respondent had admitted the termination of the appellant and the employer had given evidence. In addition to the employer, Keerthi Vithanage, the Quality Control Engineer and Shanthilal Fernando, the Human Resources Manager had also given evidence whereas the appellant had given evidence on his behalf. Having considered the submissions and the relevant documents, learned President of the Labour Tribunal, on 30.06.2003 had ordered re-instatement with full back wages for the period the appellant was out of employment, viz. from 27.07.2000 to 01.07.2003. Accordingly, the Tribunal ordered the payment of Rs. 369,250/- to the appellant.

Learned Judge of the High Court thereafter had considered the appeal of the respondent and whilst allowing the said appeal, had taken the view that the order of the learned President of the Labour Tribunal cannot stand, for the following reasons:

1. Clause 13 of the letter of appointment issued to the appellant, clearly had given the authority to the respondent to terminate services of the respondent. Further the respondent had conducted a domestic inquiry, prior to its decision to terminate the services of the appellant and accordingly the respondent's action in such termination could be justified.

   Accordingly learned President of the Labour Tribunal had not addressed his mind to clause 13 of the letter of appointment issued to the appellant.

2. Since the respondent is a private Company, the provisions of the Evidence Ordinance would not be applicable and it would not be necessary to prove a fact in terms of the

Evidence Ordinance. Accordingly even hearsay evidence would be sufficient for the purpose of terminating the services of an employee.

3. It is not necessary to place all available evidence before the Labour Tribunal in order to justify the termination, since the Labour Tribunal should consider the evidence led before the domestic inquiry to arrive at a decision.

4. If an employer becomes aware that the employee is conducting himself in a manner detrimental to the employer, irrespective of the fact as to from where he obtains the information, the employer could terminate the service of the employee.

5. The employer should have the right to terminate the services of an employee, who disregards orders, and in this instance, the Labour Tribunal had not considered the letters of warning, marked as R3 and R4, issued to the appellant.

The allegations leveled against the appellant by the respondent were based on a preliminary investigation carried out by the respondent (R1). According to the respondent, the appellant functioned as a Head Supervisor of the hand welding section and was given instructions to conduct a training session for the workers in his section. In fact these instructions were given to all Head Supervisors and the allegation was that the appellant had conducted the said training session for all the sections of the Production Department from 21.06.2000 to 04.07.2000. Further it was said that the appellant had addressed certain grievances of the workers during the training sessions to create a bad impression of the respondent to its employees. In that respect the allegation was that the appellant had criticized the managers and the management of the respondent Company indicating various weaknesses and lapses on their part. Further it was stated that,

I. the appellant had informed the workers that a written test would be held soon and those workers, who fail in the said written test would be dismissed immediately;

II. that the appellant had represented the management informally, where he had no authority for such representation.

Learned President of the Labour Tribunal having considered the matter before him was of the view that, the respondent had not led any evidence to show as to how the appellant had criticised the management. Although the respondent had alleged that the appellant had been critical of the management, the respondent had not placed any material before the Labour Tribunal to substantiate this position. On perusal of the evidence that was led before the Labour Tribunal, it is evident that the respondent had not been successful in either leading or corroborating the evidence in order to substantiate its position.

The witness Keerthi Vithanage, who was the Quality Control Engineer, had stated that he had received complaints from workers that the appellant had been giving advice to persons not in his unit, and that he had been criticizing the management. However, no evidence had been led on this position. Vithanage had stated in his evidence that he had seen the appellant talking to others, but at that given time he had not been with the workers, but was inside his room, which was located some distance away.

The said Keerthi Vithanage had clearly stated in his evidence that,

"ප්‍ර: තමන්ගේ යාක්ෂියේ හැටියට තමන් දැක්ක ගමන් මේ සේවකයා පි.වි.සි. අංශයේ සේවකයෙක් නොවන වෙනත් සේවකයන්ට උපදෙස් දෙනව?

උ: ඔව්.

ප්‍ර: තමන් කොයි අවස්ථාවේද දැක්කේ?

උ: මම ඉන්නේ වීදුරු ආවරණ තියෙන කාමරේක. වැඩ මුරයට යන කොට දැක්ක."

Accordingly except for the fact that Keerthi Vithanage had seen the appellant being with a group of workers, he had not been able to state as to how and in what context the appellant had criticized the management with the workers. Further, although Vithanage had referred to complaints, none of those were produced before the Tribunal.

The other witness, who was from the Human Resources Department had not been able to state as to what he had heard or seen at the relevant time.

In the aforementioned circumstances, the Labour Tribunal had correctly come to the conclusion that on a consideration of the totality of the evidence led, the allegations, which are questions of fact, have been proved on a balance of probability. The High Court as stated earlier had gone on the basis that hearsay evidence is adequate and that there is no necessity to call for witnesses in terms of the Evidence Ordinance.

It is not disputed that a workman or a trade union on behalf of a workman, who is a member of that union, could make an application to a Labour Tribunal for relief or redress in respect of:

i. the termination of his services by his employer;
ii. the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits; and
iii. such other matters relating to the terms of employment or the conditions of labour, of a workman as may be prescribed. (Section 31B(1) of the Industrial Disputes Act)

Section 31C(1) of the Industrial Disputes Act deals with the duties and powers of a Labour Tribunal with regard to the applications in terms of Section 31B of the Industrial Disputes Act. The said Act clearly states that it shall be the duty of the Labour Tribunal to make all such inquiries into the specific application made and hear all such evidence and make such order, which is just and equitable. According to section 31C(1) of the Industrial Disputes Act,

> "Where an application under section 31B is made to a labour tribunal, it shall be the *duty of the tribunal to make all such inquiries into that application and hear all such evidence* as the tribunal may consider necessary, and *thereafter make such order as may appear to the tribunal to be just and equitable*" (emphasis added).

The need to hear all such evidence in order to properly inquire into the application made by a workman had been considered by Sirimane, J., in *Urban Council, Panadura* v *Cooray*[1], where it had been stated that, though an employee's application for relief before a Labour Tribunal should be heard with sympathy and understanding, yet the Tribunal must act judicially. More importantly it was held that the Labour Tribunal *should not shut its eyes to positive evidence*. Further in *United Engineering Workers' Union* v *Devanayagam*[2], it was clearly stated that the paramount consideration by a Labour Tribunal is the need for a just and equitable solution and for this purpose, what is necessary is to do justice between the parties to the application.

Learned Judge of the High Court referred to the documents marked as R3 and R4 and had held that by these documents the appellant had been primarily warned by the respondent and that the learned President of the Labour Tribunal had not paid any attention to the contents of these documents.

An examination of R3 clearly indicates that the position taken by the learned Judge of the High Court, is not correct. The said document (R3) dated 24.02.1999 is a letter issued not to the appellant directly, but to all the Supervisors, indicating steps they should take to avoid mistakes and to maintain good supervision. This document had been issued by the Chairman of the respondent Company. The document marked as R4 dated 30.06.2000 was issued to the appellant by the Human Resources Manager of the respondent Company regarding the 'Busbahnhuf Dingelstaedt Project' and had drawn the attention of the appellant to his obligations as a Supervisor to advice the work force in order to avoid mistakes. This letter indicates that the Company had issued certain guidelines for the Supervisors to follow regarding supervision in order to avoid mistakes and obtain a high yield from those projects they had undertaken. Therefore, a careful perusal of the order of the Labour Tribunal clearly shows that the position taken by the High Court in this regard is not correct. In fact the Labour Tribunal had considered the issue based on the documents marked R3 and R4 and had come to the conclusion that R3 is a document, which was a kind of a general circular issued to all the Supervisors and R4 also gave general instructions

based on the role of the appellant as a Supervisor. Accordingly, the Labour Tribunal had taken the view that on a balance of probability the respondent had not been able to prove past bad conduct of the appellant.

It is therefore apparent that whilst the learned President of the Labour Tribunal had considered the application after evaluating the evidence before him, the learned Judge of the High Court had been of the view that there is no necessity for the respondent to justify its decision to terminate the services of the appellant, since the latter had given his consent at the time of acceptance of his letter of appointment for such termination. The High Court had for this purpose, referred to clause 13 of the letter of appointment dated 30.05.1997 (R2). The said clause reads as follows:

> "**Termination**
>
> *Your employment with the Company after confirmation may be terminated by either party giving one month's notice or by paying an amount equivalent to one (01) month's remuneration. However, the employer reserves the right to terminate this contract of employment without such notice or payment or remuneration for reasons of insobriety, insubordination, gross neglect in the basic duty, misconduct or theft.*
>
> ....."

During the existence of *laissez-faire* state, the employer-employee relationship was based on the common law principles and it was an accepted fact that an employer could give effect to what the employer and employee had agreed upon at the commencement of their relationship. Referring to the applicability of common law concepts and its input on the contract of employment. S.R. de Silva (The Contract of Employment, monograph No. 4, 1983, pg. 2) states that,

> "There was a time when the common law regarded an employer as having a proprietary right in his servant with criminal sanctions attaching to breaches of contract by employees. It is this concept that made a stranger

> wrongly injuring a servant liable not only to the servant, but also to the master. Even though the common law has come a long way since that time, in the modern common law the contract of employment is still considered more or less conclusive in determining the rights of the parties and it implies rights and duties only in the absence of contractual terms. This attitude is based on the fundamental misconception of the common law that the contract of employment is a voluntary agreement entered into between parties of equal bargaining strength. The common law looks upon employment as a mere contractual relationship between two parties terminable at the will of either party, subject to the condition of notice in certain cases."

These concepts of common law that gave prominence to the rights and duties of employees under their contractual terms, which were taken into consideration by the learned Judge of the High Court in deciding this appeal, are no longer applicable in our legal system. Along with the collapse of the *laissez-faire* state and with the emergence of the modern welfare state, countries had taken steps to establish special systems of Courts for the purpose of granting just and equitable orders. In Sri Lanka, the Industrial Disputes Act came into being to provide for the prevention, investigation and settlement of industrial disputes and for matters connected therewith or incidental thereto. Labour Tribunals were established under and in terms of the said Act and Section 31B4 clearly states that,

> "Any relief or redress may be granted by a labour tribunal to a workman upon an application made under subsection (1) *notwithstanding anything to the contrary in any contract of service between him and his employer*" (emphasis added).

It is therefore quite clear that the common law principles stated earlier are no longer applicable in Sri Lanka with regard to labour disputes and as stated by Lord Devlin in *United Engineering Workers' Union* v *Devanayagam* (*supra*),

"The common law of master and servant has fallen into disuse."

The High Court however had quite contrary to the aforesaid position had gone on the basis that, in terms of clause 13 of the letter of appointment, the respondent could have terminated the services of the appellant.

"ඉහත සඳහන් කාරණය සම්බන්ධයෙන් සළකා බැලීමේදී ආර් 2 වශයෙන් ලකුණු කර ඇති පත්වීම් ලිපියේ අන්තර්ගත වූ සියළු කරුණු සේවා තත්ත්වය කෙරෙහි තිබිය යුතු යැයි ඉතා පැහැදිලිව සඳහන් වේ. එහි ඇති කොන්දේසි සළකා බැලීමේදී තරමක් දුරට ඒක පාර්ශික ස්වභාවයක් ගනු ලැබුවත්, වග උත්තරකරුගේ සේවා කොන්දේසි වලට වග උත්තරකාර සේවකයා එකඟව අත්සන් තබා ඇත. එම කොන්දේසි වල 13 වෙනි කොන්දේසිය ප්‍රකාරව වග උත්තරකාර අභියාචකයා සේවය අවසන් කළ හැකිව තිබුණු අතර....."

It is to be noted that although this position would have been correct under the common law, where either party was entitled to terminate the contract of employment in accordance with its provisions without any consequential effect, the introduction of Labour Laws had modified this position. Through the establishment of the Labour Tribunals, the common law concepts dealing with labour relations were changed, and the Industrial Disputes Act, as stated earlier, expressly provided for a Labour Tribunal to take action, notwithstanding anything to the contrary in the contract of service between an employer and his employee. In fact in the well known case of the *United Engineering Workers' Union* v *Devanayagam (supra)*, Lord Devlin, referring to Section 31B(4) of the Industrial Disputes Act empowering a Labour Tribunal to grant relief contrary to the terms of a contract of service had said that,

"Indeed in this sub-section the statute is doing no more than accepting and recognising the well known fact that the relations between an employer and his workman are no longer completely governed by the contract of service."

In these circumstances, it is apparent that the High Court had based its decision in terms of the common law applicable to employer-employee relationships and had failed to appreciate the changes that had taken place in the legal concepts dealing with labour disputes, since the introduction of the Industrial Disputes Act in this country.

Accordingly, on a careful consideration of the aforementioned, it is apparent that the approach taken by the High Court in deciding this application cannot be accepted.

For the reasons aforementioned, the questions, which were set out at the out set of this judgment are answered as follows:

1. Learned Judge of the High Court had not considered the evidence led in this case in the correct perspective, taking into consideration that the learned President of the Labour Tribunal is only expected to make a just and equitable order.

2. the approach to the matters in dispute by the learned Judge of the High Court is erroneous.

Accordingly I allow the appeal, set aside the judgment of the High Court dated 20.09.2005 and affirm the order of the Labour Tribunal dated 30.06.2003. The respondent is directed to reinstate the appellant with effect from 01.01.2009 with back wages, as directed by the Labour Tribunal from 27.07.2000 upto 01.01.2009, where his monthly salary was agreed upon Rs. 10,500/-

I make no order as to costs.

AMARATUNGA, J. - I agree
BALAPATABENDI, J. - I agree

Appeal allowed.