1972 *Present*: **Weeramantry, J.**

THE COLOMBO APOTHECARIES CO. LTD., Appellant, *and* CEYLON PRESS WORKERS' UNION, Respondent

S. C. 111/70—LT/14/429/69

Industrial dispute—Workman—Frequent absences without prior leave—Liability of services to be terminated—Duties of employee to employer—Obligation of Tribunal to consider them—Misdirection or non-direction by Labour Tribunal regarding questions at issue—Invalidity of order.

The respondent-employee, who was employed as a Compositor in the printing trade since 1951 under the appellant-employer, used to absent himself without leave on numerous occasions. On many occasions the employee was excused after his explanation was called for, and on more than one occasion he was informed that he had vacated his post but was reinstated after he had made his excuses. Finally, in December 1967, the services of the employee were terminated "on the ground of misconduct and particularly of absence without prior permission over a period of time although warned by the employer". In the present application for relief under the Industrial Disputes Act, the principal question for determination was whether the employee, despite repeated warnings that he should not absent himself without notice to the management, was entitled to keep continuing in this course of conduct month after month.

It was admitted by the Manager of the printing press that the total number of days of the employee's absence without leave was not in excess of his leave entitlement.

Held, that the employee's services were liable to be terminated. "While an employee is no doubt entitled to his quota of leave, he must not, as far as is avoidable, draw on this leave without prior notice to the management; nor must he repeatedly draw on such leave in such a manner as would throw out of gear the work of the establishment he serves."

Observations on the principle that, although there is no right of appeal on questions of fact, the Supreme Court will interfere where the Labour Tribunal has misconstrued the questions at issue and directed its attention to the wrong matters or has arrived at findings which bear no relation to the evidence led before it.

APPEAL from an order of a Labour Tribunal.

H. W. Jayewardene, Q.C., with *Ben Eliyatamby*, for the employer-appellant.

N. Satyendra, for the applicant-respondent.

Cur. adv. vult.

January 26, 1972. WEERAMANTRY, J.—

The respondent-employee was employed as a Compositor under the appellant employer since August 1951.

It is the position of the employer that since August 1959 the appellant started absenting himself without leave and that in the years 1966 and 1967 such absences occurred with increasing frequency. On many occasions the appellant was excused after his explanation was called for, and on more than one occasion he was informed that he had vacated his post but was reinstated after he had made his excuses. Finally on 28th November 1967 he kept away without obtaining leave, whereupon the employer served on him a letter asking him to show cause why his services should not be terminated. On this occasion he stayed away without leave on December 3rd and 4th as well, and his services were terminated in consequence of this default.

It is the position of the employee that the employer was not entitled to take into account all the previous defaults in respect of which he had been excused and that the absence of November 28th by itself, even if taken in association with the absence of December 3rd and 4th, was insufficient to justify termination.

The position of the employer in regard to the prior defaults is that even though the employee had been excused, such defaults were revived upon a repetition of the very type of default which he had been warned against. It was consequently his position that although the employer could not without further default rely upon earlier defaults that had been excused, the repetition of this type of default entitled the employer to take into account the series of prior defaults which became thereby revived. The question of law involved in this submission does not appear so far to have received the attention of our Courts.

I should at this point recapitulate very briefly the history of the previous defaults to which I have referred.

There is a schedule of these defaults in R53A. This was an annexure to R53 of December 2nd 1967 by which the employer called upon the employee for his comments in regard to his absence. This schedule lists the various absences of the employee without leave in the years 1966 and 1967.

It would appear that in the year 1966 there were no less than eleven such occasions making a total of sixteen days. In each case a reason was given later—that he had to present himself for a blood examination, that an uncle had expired, that he had a chest pain, that he had rheumatism, that a friend had died and so forth. In regard to the occasion in respect of which he had stated that an uncle had expired, he had stayed away five days. His explanation had been called for by letter and he was thereafter excused.

In the year 1967, apart from the incident of 28th November there were seventeen such occasions, and here too the excuses were rheumatism, a private matter, a chest pain, a stomach pain, family trouble, delay at Anuradhapura, delay at Galle and so forth. In this year he was absent for a period of eleven days from the 8th to 18th March, and by letter R51 of 22nd March he was informed that he had been absent without leave since 8th March and that it was presumed that he had vacated his post. By R51A the employee begged to be excused stating that he had been prevented from coming to work due to domestic troubles and was compelled to stay away from work owing to some unavoidable circumstances. By R51B of 22nd March he again begged to be excused for his absence without leave and stated that in future in the event of similar remissness he was prepared to suffer any punishment imposed on him.

In response to this letter the management wrote him letter R51 of 22nd March 1967 informing him with reference to his request to be excused that he was reinstated on his undertaking not to commit such an offence in the future, on his agreeing to submit to any punishment should he commit such an offence again and in view also of a letter of guarantee given by a co-worker, K. D. Piyadasa. It was also made clear to him that no wages would be paid for the period of his absence.

Despite all this, several subsequent defaults followed and he was absent again for a stretch of six days in June 1967 when again he was informed that his post was vacated. The period of his absence was from 9th to 13th June and a medical certificate was received date-stamped 14th June stating that he suffered from a rheumatic ailment. This medical certificate was issued by an Ayurvedic physician on 8th June stating that the employee was under the physician's treatment from 8th to 13th June. Despite the manifestly unsatisfactory nature of this certificate he was re-employed. This further kindness extended to him by the management proved unavailing, and the employee was guilty of several other defaults thereafter, prior to that on 28th November which resulted in the termination of his services.

The absence of 28th November would appear to have been the last straw which made a sympathetic management decide finally that this state of affairs could not continue indefinitely.

It is necessary to bear in mind further that the employee was employed in the printing trade, where, as would appear from the evidence of the Manager, Mr. Lakshman Perera, it is necessary to apportion and plan out work ahead. The result of one worker keeping away without notice may well be to upset the work schedules of all the others and this becomes a matter not merely of the absence of the individual worker concerned but also of the management's inability to re-allocate duties to a whole group of others. There are many special skills in the printing trade and when a team of workers is geared to the completion of a particular piece of work the unexpected absence of one may throw the whole team out of gear. A compositor for example must turn out his work in time

if the proof reader, the machine minder, the binder and others are to do theirs to schedule. Moreover an intricate composing job once taken in hand is best understood by the person who has commenced it and it is not easy for another to take over half way through. As Mr. Perera has said in evidence, in the case of an annual report, for example, where a balance sheet has to be printed, the person to whom the job is entrusted plans out the work, he knows how many columns are necessary and he arranges accordingly the essential material which is kept under his care. When he does not come the next day the next man who is given that work has to start all afresh. If indeed a worker has informed the management ahead that he is unable to work, alternative ways and means of executing the work entrusted to him will be planned out but where he merely fails to turn up without notice, the management waits for him for an hour or two expecting his attendance and it then becomes difficult to assign that job to another workman as that workman also is invariably busy with some other task entrusted to him.

Moreover in a printing press there is often work of great urgency which cannot be put off without detriment to the business and to the reputation of the press. It may for example be the printing of a programme for some event or an invitation to a function. These must be in the hands of the customer well ahead of the event in question and when unexpected absences of workmen disrupt the working of the press customers are disappointed and the entire business suffers.

Having regard to these factors it would appear that the gravamen of the employer's complaint against the workman was frequent absences without prior leave and that was the matter to which the President was required to give his attention. The employer had made it quite clear in paragraph 3 of his answer that the services of the employee were terminated " on the ground of misconduct and particularly of absence without prior permission over a period of time although warned by the employer. . . "

The principal question which thus arose for determination on these facts was whether the employee, despite repeated warnings that he should not absent himself without notice to the management, was entitled to keep continuing in this course of conduct month after month.

The President on the other hand seems to have concentrated his attention on an examination of the question whether the total number of days leave taken by the workman was within or in excess of his leave entitlement. Having thus directed his attention to an issue which did not represent the crux of the dispute the President has relied on an admission by the Manager of the press that the leave taken by the workman was not excessive and has proceeded on the footing that the employee acted within his leave entitlement. He supports this conclusion by reference to the Manager's further admission that the workman still had in 1967 seven days' leave not availed of.

After giving his attention to the question whether the leave taken was in excess of the amount of leave to which the employee was entitled, the President has thereafter expressed the view that the employer was not entitled to rely on the absence which had earlier been excused and that the employer should not have framed charges on the workman in respect of such days.

All these lose sight of the basic factor that a business establishment—and particularly one of this nature—cannot function efficiently when employees keep away without leave except in unavoidable and unforeseen circumstances such as sudden illness. It is to be remembered that while an employee is no doubt entitled to his quota of leave, he must not, as far as is avoidable, draw on this leave without prior notice to the management; nor must he repeatedly draw on such leave in such a manner as would throw out of gear the work of the establishment he serves.

A management which has been considerate enough to excuse an employee repeatedly in respect of such defaults cannot in my view be penalised for its own considerateness. It is true that where defaults are repeated and are excused over and over again, with a warning that they should not be repeated, the very last default viewed by itself may appear inconsequential and insufficient of its own force to justify drastic action by the employer. This would however be a most unrealistic way of viewing the matter, for before a Labour Tribunal one is not concerned with technicalities. It is to be remembered that in considering disputes of this nature we are not in the technical field of estoppel where by reason of one party's acceptance or forgiveness of another's conduct he is prevented from placing any reliance whatsoever thereon.

The fact that an earlier default had been pardoned or excused does not, in my view, wipe it off the slate so completely as to render that default totally irrelevant. That default assumes relevance and importance in the context of a complaint by the employer of successive and repeated defaults of the same nature. When one is considering how reasonable or unreasonable has been the conduct of each party, it would be wrong to view the final act in the series in isolation as though it existed all by itself. Here as elsewhere in the field of labour law, a proper assessment of a dispute can only be made against the background of the conduct and relationship between the parties.

Labour laws must be worked with justice both to employee and employer and I do not consider realistic or satisfactory a view of a labour dispute which reduces an employer to a state of impotence in the face of repeated defaults of the same nature by the employee. There can very well come a time when the employer makes up his mind that he will not suffer his indulgence to be taken advantage of any longer. It is then for the Tribunal to see whether in the context of his entire conduct towards his employer, the latter has been reasonable in taking the action he did.

Any other view would seem to be lacking in that broad and general approach to labour disputes which it is the very aim and object of the labour laws to foster.

A point was made on behalf of the employee that the conduct of the employer was an act of revenge on the part of the employer for certain trade union activities on the part of the employee. On this point the President has observed that no direct evidence was led by the applicant Union to show that the termination of the employee's services was mainly due to his trade union activities and that there has been no evidence at all on this matter. The President however observes that " . . . it is quite clear from the evidence that Peter Perera (the workman) being the President of the branch Union and the demand for increased wages coming from the parent union, had some repercussions on the employer especially in view of the strike that took place on 20th December 1967 until 16th January 1968 ".

Findings of this nature cannot rest on speculation in the absence of specific evidence. In the course of a long cross-examination of the press Manager not a single suggestion direct or indirect was put to him that the termination of the employee's services was in any way attributable to victimisation for trade union activities, and indeed there is no reference to such an allegation in the application of the employee. It would appear therefore that the President was travelling outside the scope of the dispute as presented to him when he goes on, in the absence of evidence, to hold that the termination of the employee's services was attributable to the management's disapproval of his trade union activities.

I may in this connection refer also to R53F which is a long letter of explanation by the employee in reply to the show cause notice. He there relies on various grounds to justify his absences and assures the management that he will try his best to improve his attendance and see to it that he gives no cause for complaint. It is significant that nowhere in this letter is there the slightest suggestion of victimisation or unfair conduct towards him in consequence of his trade union activities. The same applies to the letter of explanation R54A which followed R53F.

I have also perused the submissions made by the applicant to the Tribunal and there is nowhere in those submissions any allegation of victimisation. In these circumstances the fact that the employee was an official of a union which was pursuing its normal efforts to better the conditions of its members cannot be used as the basis for a speculative finding that the employee's union activities were the cause of his dismissal. Far less may such a speculative view be used as the basis of a finding that the employer's termination of the employee's services was not just and reasonable.

In view of these observations I consider that the order of the Labour Tribunal President ought not to stand. Even as an employer has his duties towards his employees it must be remembered that there are duties

owing by the employee to the employer the disregard of which may paralyse the very activity which is their mutual source of sustenance.

This court has time and again repeated the principle that although there is no appeal to it on questions of fact it will interfere where the Tribunal has misconstrued the questions at issue and directed its attention to the wrong matters. So also will it interfere where there has been a failure by the Tribunal to consider the issues which actually arise before it or has arrived at findings which bear no relation to the evidence led before it.

Acting on these principles I would set aside the order of the President, allow this appeal and dismiss the employee's application with costs.

Appeal allowed.