UNIVERSITY OF SRI LANKA (NOW THE UNIVERSITY OF KELANIYA) v. GINIGE

COURT OF APPEAL.
SENANAYAKE, J.
C.A. NO. 23/84.
L.T. NO. 1/6853/73.
SEPTEMBER 15, 1992.

Industrial Law – Termination of services during probation – Misrepresentation and unbecoming conduct of the employee – Right to relief of probationer.

During the period of probation, the employer has the right to terminate the services of the employee if he is not satisfied with the employee's work and conduct. Where the employee is guilty of misrepresentation of facts, use of unbecoming language and misconduct, the termination is justified and bona fide. If the employer has acted *mala fide* the probationer has a right to relief.

Cases referred to :

01. *Ajit Singh v. State of Punjab* (1983) 2 S.C.C. 217.
02. *Piliyandala – Polgasowita Multi Purpose Co-operative Society v. Liyanage* 74 N.L.R. 138.
03. *Richard Pieris & Co. Ltd. v. Jayatunga 1 Sri Kanthas Law Reports 17.*
04. *Ceylon Ceramics Corporation v. G. G. Premadasa* [1986] 1. Sri L.R. 287.
05. *M/s. Elstayel Ltd. v. W. Jayasena* S.C. No. 20/80 – C. A. No. 625/85, S.C. Mins. of 6.4.90.
06. *H. N. Gunatilleke v. The Land Reform Commission* C.A. 117/85 and 144/85 C.A. Minutes of 26.2.91.
07. *Ceylon Trading Co. Ltd., v. United Tea Rubber and Local Produce Workers Union* (1986) 2 C.A. L.R. 82.

APPEAL from judgment of the Labour Tribunal.

K. N. Choksy P.C. with *I. S. de Silva* for appellant.

A. A. de Silva with *M. V. de Silva* for applicant – respondent.

Cur. adv. vult.

April 29, 1993.

SENANAYAKE, J.

This is an appeal from the order of the Learned President of the Labour Tribunal dated 29.12.1983 where the learned President held the termination of the services of the applicant to be unjustified and in lieu of reinstatement awarded compensation in a sum of Rs. 50000.

The facts relevant to the dispute are briefly that the applicant by document R1 made an application for the post of Warden to the appellant and after two interviews she was selected to the post of Warden by document R2 on three years probation. According to the applicant she was appointed on 1.4.71 and her services were terminated unjustifiably and she prayed that she be reinstated with back wages. The appellant admitted employment and the date of termination and they relied on R2 the letter of appointment given to the applicant where she was on three years probation ; and it provided that her services could be terminated at any time during the period of probation without any cause being shown ; and a clause of the document R2 contained that if on a subsequent occasion the particulars or information furnished by the applicant in her application are found to be false or that she has wilfully not disclosed certain information or if she was unfit for the post her appointment would be cancelled. The appellant averred that within a week of the appointment the hostel was closed and the applicant commenced work as a Warden from 1.4.72. Even though she was paid the full salary for the period, the appellant did not have sufficient opportunity to assess the work and capability of the applicant.

The appellant averred that the applicant in R1 made a false declaration in clause 16 of R1 that she served as a sub-warden of Hilda Obeysekera Hall but at a domestic inquiry held by the appellant on 24.11.72, the applicant had admitted that she had not functioned As a sub-warden of a Hall of Residence of the University of Ceylon, Peradeniya. This misrepresentation was sufficient for the appellant to cancel the appointment in terms of R2.

The applicant had submitted false documents to obtain taxi fare. She had been found to leave the hostel in the night without permission. She had made baseless allegations against

C. Dassanayake, the Assistant Registrar (Welfare) and also conveyed false information to the students of the Hostel pertaining to its administration. She had failed to cooperate in the general administration of the campus and she had written letters to the President, the Deputy Registrar and the Assistant Registrar (Welfare) in a language not becoming of an University employee and made unauthorised comments on the proceedings of a committee meeting and sent copies to various members and Students Council Office bearers. She had absented herself frequently from her work place, and removed University property to unauthorised places and failed to return it when ordered.

She failed to report for duty on 1st February '73. The appellant had lost confidence in the applicant as she was temperamentally not suited to be a Warden of a girl's Hostel and prayed that the application be dismissed.

The applicant in her replication admitted that the period of probation was 3 years, and she averred the civil disturbance in the country had put matters beyond her control and it was left to the appellant to offer a suitable appointment. She denies that the appellant did not have sufficient opportunity to assess the work and capability of the applicant. The applicant denies paragraph 5a,b, c,d,f,g,h,j of the appellant's pleading answering paragraph 5(e). The applicant's position was that she gave her full cooperation to the management of the University and even brought in commendable measures to improve discipline of the hostel. Answering para 5(1), the applicant admitted that she reported for duty on the 1st February 1973 at 3 p. m. She averred that the appellant failed to stipulate conditions of leave in spite of several requests on her part. The appellant failed to make satisfactory acting arrangements whenever the applicant had to take leave. The appellant failed to make available satisfactory living quarters. The failure and negligence on the part of the appellant compelled the applicant to raise the issues constantly with the employer which affected the employer–employee relationship adversely.

It was common ground that the applicant was subject to a three year period of probation and that her services were discontinued within the said period. There was no allegation in the Application

or in the replication that the action of the appellant was done *mala fide* or that it was an act of victimisation.

The learned counsel for the appellant submitted, the award of compensation to the applicant was an error in law as the applicant was a probationer. He submitted further, the applicant in her application R1 had stated that she was a sub-warden which was found to be factually incorrect and she made baseless allegations against the management and published them among the members including the President of the Students, Council. He submitted the learned President had referred to the document R32 and the relevant paragraphs of R32 written by the applicant on 15.1.73. " The applicant attempted to justify the remarks made, stating that the Assistant Registrar (Student Welfare) once served in the Ceylon Transport Board as a Bus Inspector and that he had an Island wide reputation as a comedian. I think these remarks made by the respondent marked as R32 are absolutely unbecoming of a subordinate officer to make in regard to her immediate superior. I also find that the letter R32 runs into 4 pages. As for the matters mentioned in the body of this letter the applicant certainly was in error in going into matters which at the time that she addressed this letter did not seem to be relevant. As such the action of the applicant in referring to these matters was absolutely uncalled for. I also would like to refer in particular to the remarks made at R32b which I consider impertinent on the part of a subordinate and almost bordering on insubordination.

The learned counsel referring to the said passage as assessed in the order of the learned President submitted, one cannot expect a subordinate officer who is also on probation to write official letters in this manner. In my view there is force in his argument and I agree with his submission. In my view the learned President had erred in construing the language in the document R32 (a) to be bordering only on the verge of insubordination ; thereby he had erred in law. This document clearly shows that the applicant was not at all suitable to hold the responsible post of a Warden of a University. In R1a the applicant has stated that she worked like a sub-warden in the Hilda Obeysekera Hall, whereas she has admitted that there was no sub-warden in Hilda Obeysekera Hall. She has admitted in evidence that there was no sub-warden in Hilda Obeysekara Hall. She had incorrectly stated facts in R1a with a deliberate intention of misleading the appellant. If she was assisting the warden she could without any

hesitation have stated that she assisted the warden in her application. The learned President in my view has construed the document most charitably in favour of the applicant ; in so construing the document he has erred. The applicant deliberately has misrepresented facts when she stated as a fact what was not factually correct. The Sinhalese language should not be distorted for one's own advantage. When she should have done regarding the work she was performing was to give a true picture. I am of the view that the learned President had erred in law in construing the document R1 without reference to the evidence in the case.

The learned President failed to consider that the applicant was a Probationer. Probation in the Concise Oxford Dictionary has been explained to mean " testing of conduct, character of person " and a " Probationer is one who is on trial or in a state to give proof of certain qualifications for a place or state ".

In the words of the Supreme Court of India in the case of *Ajit Singh v. State of Punjab* [1]. " To guard against human error of judgment in selecting suitable personnel for service, the new recruit was put on test for a period before he is absorbed in service or gets a right to the post. A period of probation gave a *locus poenitentiae* to the employer to observe the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post the master reserved a right to dispense with his services without anything more at the end of the period which is styled as a period of probation. A period of probation may vary from post to post or from master to master, and it is not always obligatory on the master to prescribe a period of probation. It is always open to the employer to employ a person without putting him on probation. The power to put the employee on probation for watching his performance and the period during which the performance is to be observed are the prerogative of the employer."

I am of the view that the employer, if he is dissatisfied with the employee regarding her conduct and her performance has the right to terminate the services of the probationer. The applicant in her correspondence with the superior officers had resorted to language unbecoming of a subordinate office working in one of the premier educational institutions. In official correspondence one does not expect language used in folk lore and folk culture.

The learned Counsel for the appellant submitted that the applicant in R1 had declared that if she had given any false or incorrect facts in her application, she was liable to be discontinued from service without any compensation. The document R3, the volantary statement made by her on 27.10.72 was a long statement in Sinhala and in R3a she had admitted that she had not worked as a Sub-Warden at any stage but only assisted the warden. In my view she could have used the same terminology in R1, without being semantic. I am of the view the learned President not only misconstrued the entry in R1a but also gave an interpretation which was incorrect; thereby he had erred in law in construing the document R1a. In my view the applicant deliberately had made the entry R1a knowing that the said entry was not factually correct with the intention of misleading the appellant.

The learned Counsel submitted that the award of compensation by the tribunal to a probationer was bad in law. In *Pilliyandala–Polgasowita Multi–Purpose Co–operative Society v. Liyanage* [2] the applicant was appointed to a post on 15.2.68 on condition that if during a probationary period of one year the employer was not satisfied with him, his services were liable to be discontinued. About five months afterwards his services were terminated because the employer found that the applicant had been charged in 1946 in a Magistrate's Court for an offence involving dishonesty and dealt with under section 325 of the Criminal Procedure Code. The Supreme Court held that the termination of the applicant's services was justified. In such a case the employee is not entitled to an alternative order of compensation.

In *Richard Pieris & Co. Ltd. v. Jayatunge* [3] Abdul Cader J. observed " If the employer could terminate the services of the workman at the end of the term of probation without good cause, there is no reason why the same principle should not apply when his services are terminated during the period of probation. There is no requirement under the law that an employee should be forewarned orally or in writing so that he may adjust himself to the requirements of his service. The very word probation implies that he is on trial".

In *Ceylon Ceramics Corporation v. G. G. Premadasa* the Court of Appeal held " The services of a probationer can be terminated during the period of his probation if the services are not considered

satisfactory. Such termination is not unlawful or unjustifiable provided it is *bona fide* ".

I am of the view the appellant acted *bona fide* in terminating the services of the applicant for not representing facts correctly in the application R1 and specifically the entry R1a. There was an investigation and the document R3 establishes that her entry in R1a was not factually correct. The appellant was within his legal rights in summarily terminating her services.

The learned counsel for the applicant respondent cited and relied on the unreported Supreme Court case *M/S Elsteyel Ltd. vs. W. Jayasena* [5] where the Supreme Court affirmed the award of compensation to the applicant who was a probationer on the face of the appeal. Fernando J. observed " In this case, the parties have agreed to two specific conditions :

(a) " that if the respondent's services were found to be satisfactory, the Appellant was obliged to confirm him at the end of the probationary period.

(b) If the respondent's services were found to be unsatisfactory at the end of that period the appellant had the right to extend the probationary period, and if during such extended period the respondent's services were found to be unsatisfactory, the appellant had the right to terminate his services.

Thus he could not be dismissed without a reason being assigned. It is not clear from the document whether the parties contemplated that the appellant should have the right to terminate the respondent's services at the end of the initial probationary period if his services were found to be unsatisfactory, or that by expressly so providing, the right to terminate during or at the initial period was impliedly excluded. Having regard to the antecedent contract of permanent employment, and the principle of interpretation *Contra proferentem*", I am satisfied that the second construction should be preferred. Termination during the initial period of probation is thus not a matter solely in the appellant's discretion, but had to be justified. The probation clause thus excluded the right to terminate without cause. It was alleged that the respondent had made improper financial levies from his subordinates, but the labour tribunal has held that this was

not established. That finding is consistent with the certificate issued after termination which does not suggest that the respondent was found wanting in any way."

It is clear from the observations that the facts of that case have no relevance to the facts of the instant case. The affirmation of the order of compensation was on a distinct concept of interpretation of the terms of probation and also on the certificate given by the respondent that the applicant's services were satisfactory during the 7 months. It is my view the facts and the observations have no relevance to a normal case of probation as in the instant case.

The counsel for the applicant – respondent relied on another unreported case of the Court of Appeal *H. N. Gunatillake v. The Land Reform Commission* [6]. The facts are not relevant to the instant case. That was a case where the applicant appellant was employed as Superintendent *cum* Director Training and was in fact on probation for a period of two years. His services were terminated for alleged unlawful financial transactions and his services were terminated after a domestic inquiry where the applicant was found to be guilty but the learned President had come to a strong finding of fact that the charges have not been established. Gunasekera, J. observed " Whilst I am in agreement with the general principle laid down in cases of *Richard Peiris & Co. Ltd. v. Jayatunge* [3] and *Ceylon Ceramics Corporation v. Premadasa* [4] and *Ceylon Trading Co. Ltd. v. United Tea Rubber and Local Producers Workers Union* [7]. I am of the view that these principles have no application to the facts of the instant case. In my view the right of an Employer to terminate the services of an employee during the pendency of the probationary period does not extend to the right to make allegations of a serious nature involving moral turpitude and slur on the character and the reputation of an employee and upon failure to establish the allegations to have recourse to the probationary clause to justify termination. If such a situation is permitted it would be unjust and inequitable in so far as the employee is concerned and for this reason I am unable to agree with the contention of the learned counsel for the employer respondent." Whilst I am in agreement with the general principles laid down in these cases it may be observed that they also recognised the right of a probationer to be awarded relief if *mala fides* was proved as against the employer."

I am in agreement with the above observation but the facts of the instant case are based on the false misrepresentation made by the applicant-respondent. There was also no basis as to how the President computed compensation ; there was no reasonable basis in his award. I am of the view that the termination of the applicant was justifiable for misrepresentation of facts and also for misconduct in writing letters to superior officers in unbecoming language as an employee of the University. The applicant had no absolute or unrestricted rights ; they do not exist and cannot exist in modern society. They are subject to such reasonable limitations and regulations as an employee of the University.

I am of the view the order must be just and equitable. The intention of social legislation is not to keep only one section in clover but to see that the Employer and Employee would be content and live in Industrial peace. That does not mean the employee is to be treated from a position of advantage. I am of the view that during the time of probation the employer has a right to terminate the services if he is not satisfied with the work and conduct. Otherwise the concept of probation has no application to Industrial law. In such circumstances the employee will not be entitled to any relief under the Industrial Disputes Act. If the employer has acted *mala fide* the right to get relief is a recognised concept in our law.

In view of the above reasons I hold the termination of the applicant's services to be justified. I set aside the order of the learned President and allow the appeal with costs fixed at Rs. 1050.

Appeal allowed.