CEYLON CEMENT CORPORATION
v.
FERNANDO

COURT OF APPEAL.
WIJETUNGA, J.
C.A. No. 765/82 - L.T. No. 1/17637/79.
FEBRUARY 2, 1990.

Industrial Dispute - Industrial Disputes Act, ss. 31B, 31C - Employment on probation - Right of employer to terminate employment during probationary period.

The employer is the sole judge to decide whether the services of a probationer are satisfactory or not. A probationer has no right to be confirmed in the post and the employer is not bound to show good cause where he terminates the services of a probationer at the end of the term of probation or even before the expiry of that period. The Tribunal cannot sit in judgment over the decision of the employer. It can examine the grounds for termination only for the purpose of finding out whether the employer had acted *mala fide* or with ulterior motives or was actuated by motives of victimisation. There is no law which requires that an employee should be forewarned in writing so that he may adjust himself to the requirements of the service. The very word "probation" implies that he is on trial.

When s. 31 B (4) provides 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", it means that a Labour Tribunal is unfeterred by considerations based on contractual rights between the employer and employee unlike the ordinary courts of law which have to adhere to the terms of the contract. The manner in which a probationary clause in a contract of employment should be considered is governed by a different principle which enable the employer to assess the employee's aptitudes, abilities and characteristics and the amount of interest he shows from which suitability for permanent employment can be gauged.

Cases referred to :

(1) *Moosajee Ltd. v. Rasiah CALR 1986 Vol. 1 p 95.*

(2) *Richard Peiris & Co. Ltd. v. Jayatunga, Sriskantha's Law Reports Vol. 1 p 17*

(3) *S.W.R.D. Bandaranaike National Memorial Foundation v. M.P.C. Perera, C.A. Nos. 694/80 & 696/80 LT No. 13/7764/80, C.A. Minutes of 27.06.1988.*

(4) *Venkatacharya v. Mysore Sugar Co. Ltd. A.I.R. 1954 Mysore 175.*

(5) *Shell Company of Ceylon Ltd. v. Pathirana 64 NLR 71.*

(6) *Giovanola Binny Ltd. v. Industrial Tribunal (1969) Labour and Industrial Cases (India) 1473 at 1475.*

(7) *Ceylon Trading Co. Ltd. v. United Tea, Rubber and Local Produce Workers' Union, 1986 Vol. 2 CALR p. 62.*

APPEAL from Order of Labour Tribunal.

N. K. M. Perera with *Miss L. Abeysekera* for employer-appellant.

A. J. I. Tillakawardene with *R. Gunapala* for Applicant-Respondent.

Cur. adv. vult.

June 11, 1990

WIJETUNGA, J.

The applicant - respondent was employed as Deputy Works Manager of the appellant Corporation with effect from 1.12.1978. The appointment was subject to a period of 3 years' probation. His services were terminated with immediate effect on 3.4.1979 by a V.H.F. communication. He made an application to the Labour Tribunal claiming *inter alia* compensation/compensation in lieu of reinstatement.

The appellant Corporation filed answer stating that the applicant's work was found to be unsatisfactory and that his conduct was adversely affecting the discipline of the Corporation and admitted having terminated the applicant's services as aforesaid, but claimed that it was in law entitled to do so at any time during the applicant's probationary period. The answer further stated that the applicant had found similar employment soon after his services were thus terminated. It was the appellant Corporation's position that the termination of the applicant's services was

not only lawful but also justified and that the applicant was not entitled to the reliefs he had prayed for.

After inquiry, the learned President of the Labour Tribunal, by his order dated 11.10.1982, held that the services of the applicant had been terminated without good cause and ordered the payment of compensation to the applicant in a sum of Rs. 18,000/-. The present appeal is from that order.

It is common ground that the applicant was on probation at the time his services were terminated.

The only oral evidence before the Tribunal was that of the Chairman of the appellant Corporation. The applicant did not give evidence. The learned President has held that the termination of the contract of employment without the applicant being forewarned of his shortcomings was unjust and that good cause has not been shown to justify such termination.

It was the contention of learned counsel for the employer-appellant that it was well within the rights of an employer to terminate the services of a probationer if he considered his services to be unsatisfactory, during or at the end of the period of probation, so long as he acted *bona fide*. He submitted that the sufficiency of cause for the termination was a matter for the employer. He was not obliged to adduce reasons for the termination of the probationer's services nor was it necessary that the probationer should be forewarned prior to his services being terminated, provided the employer did not act *mala fide*. The reasons for such termination, as to their sufficiency or otherwise, cannot, he submitted, be questioned before a Labour Tribunal. In the instant case, *mala fides* on the part of the employer was never alleged, nor in issue. He further contended that the President had erred in law when he held that the applicant should be compensated for loss of employment. In any event, the Tribunal had given no indication whatsoever as to the basis of computation of such compensation. Learned Counsel cited a number of authorities in support, to which I will advert later.

Learned Counsel for the applicant-respondent, on the other hand, submitted that the main ground of appeal that the applicant was not entitled to any relief as he was on probation at the time of the termination

of his services was not consistent with the statutory provisions contained in the Industrial Disputes Act. He contended that a probationary clause contained in a letter of appointment does not preclude the Labour Tribunal from granting relief in the same manner as it would grant relief to any other employee. The definition of 'workman" contained in section 4B of the Act drew no distinction between a probationer and any other workman. Further, the Labour Tribunal was under a duty to make all such inquiries into an application and to hear all such evidence as it may consider necessary and make a just and equitable order, notwithstanding anything to the contrary in any contract of service between the workman and his employer. He submitted that the Tribunal was not restricted to the rights and obligations that the parties had created between themselves according to law and that the terms or the conditions of the letter of appointment relating to probation do not in any way prevent the Labour Tribunal from granting relief. There was no statutory provision which prevented the Labour Tribunal from examining the decision of the employer to terminate the services of a probationer. Nor does a probationary clause in the letter of appointment oust the jurisdiction and power of the Tribunal to grant relief, even if the clause may have anything to the contrary.

Counsel further submitted that the authorities relied on by the employer-appellant have not considered the statutory provisions contained in the Industrial Disputes Act, in particular in sections 31 B (1), 31 B (4), 31 C (1) and 48. I shall now refer to those decisions.

In *Moosajee Ltd., v. Rasiah (1)* it was held that a probationer has no right to be confirmed in his post and that the employer is not bound to give any reason as to why he does not confirm the probationer. The period of probation is a period of trial during which the probationer's capacity, conduct or character is tested before he is admitted to regular employment. For the purpose of confirmation, the employee must perform his services to the satisfaction of his employer.

The employer is the sole judge to decide whether the services of a probationer are satisfactory or not. A probationer has no right to be confirmed in the post and the employer is not bound to show good cause where he terminates the services of a probationer at the end of the term of probation or even before the expiry of that period. The Tribunal cannot sit in judgment over the decision of the employer. It can examine the

grounds for termination only for the purpose of finding out whether the employer had acted *mala fide* or with ulterior motives or was actuated by motives of victimisation. There is no law which requires that an employee should be forewarned in writing so that he may adjust himself to the requirements of his service.

In *Richard Peiris & Co. Ltd., v. Jayatunga, (2)* it was held that a period of probation necessarily entails that the probationer should satisfy the employer before the employer decides to affirm him in his employment which would place the employer under various legal restraints and obligations and, therefore, ...any employer should have the right to discontinue a probationer if he does not come up to the expectations of the employer. 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 *S. W. R. D. Bandaranaike National Memorial Foundation v. M.P.C. Perera, (3)* following *Moosajee Ltd., v. Rasiah* (supra), it was held that it is now a well settled law that the services of a probationer can be terminated if his services are not considered satisfactory, that the principle has been well established that the employer is the sole judge to decide whether the services of a probationer are satisfactory or not and that the employer is not bound to show good cause where he terminates the services of a probationer at the end of the term of probation or even before the expiry of that period.

In that case, the court further stated that it is also a well settled principle that the Labour Tribunal in these circumstances cannot sit in judgment over the decision of the employer and that it can examine the grounds for termination only for the purpose of finding out whether the employer has acted *mala fide* in doing so.

Learned counsel for the applicant-respondent submitted that the *dicta* in the cases referred to above have been taken from the judgment of *Venkatacharya v. Mysore Sugar Co. Ltd., (4)* but the facts of that case are different from those that had been considered by our Courts and that no consideration has been given by our Courts to the provisions of section 31 C of the Industrial Disputes Act under which the Tribunal can lessen the effect of the rigour of the law whereas in that case the judgment could only declare the rights under the contract. It was also submitted that the

Indian decision concerned itself with a fixed term contract and not a period of employment of which a part was subject to probation.

Venkatacharya's case was a plaintiff's appeal against the dismissal of a suit for damages claimed on the ground of wrongful termination of service. The defendant denied liability to pay any amount and contended that the appointment of the plaintiff was not regular, that even otherwise its termination could not be questioned. The learned subordinate Judge on a consideration of the evidence adduced in the case held that the appointment of the plaintiff was quite valid and legal, that there was no good reason for the termination of the service but it afforded no cause of action for the suit as the employment was at the will of the defendant. He therefore dismissed the suit with costs.

In the appeal, the arguments on either side were confined to the nature and extent of the rights which an employee has when he is appointed on probation. The appellate Court dismissed the appeal with costs holding that the claim was rightly disallowed by the lower Court.

In the course of that judgment, it was stated as follows :—

> "Obviously a probationer is not in the same position as others in service. His is a state of suspense attended with the uncertainty of an inchoate arrangement. Prima facie his rights and claims against the employer are less than those of others. "Probation" cannot be taken to bind the parties to be employer and employee till it is over and confer on the employee rights not available to others. That would be contrary to the accepted notions of service as 'Probation' is understood to be a stage preparatory and prior to confirmation. It is not disputed that the services of a person on probation can be dispensed with on grounds on which a person appointed without it can be dismissed. While the two to that extent are on a par, it is more reasonable to imply a disability or disadvantage for a "probationer" than a privilege as against one who is not on probation. The period denotes the time up to which he will be on trial and not an assured duration of service."

It is correct that this judgment was only declaring the rights of parties under the contract and that the Court was not empowered to grant relief or redress contrary to the terms thereof, whereas specific provision has been made in section 31B(4) enabling a Labour Tribunal to grant such relief, notwithstanding anything to the contrary in any contract of service. It is also true that the facts of no two cases would be identical. But, in my

view, the status of a probationer as expounded in that judgment is equally applicable to a probationer who seeks relief under the Industrial Disputes Act. While there is no difference in the attributes of status, it is in regard to the question of relief that the Labour Tribunal is unfettered by the terms of the contract. Therefore, our Courts were well entitled to adopt the dicta of that case in relation to the status of a probationer.

Undoubtedly, the Industrial Disputes Act has conferred wide powers on Labour Tribunals in granting relief to persons whose services have been terminated. It has been held in *Shell Company of Ceylon Ltd. v. Pathirana* (5) that "there is no limit imposed by the legislature in regard to the power to grant relief under section 31B that would prevent the grant of relief where the termination of service is both lawful and justified. The only limit placed on the power to grant relief under the said section 31B is that contained in sub-section (1) of section 31C of the Industrial Disputes Act. That sub-section requires the order granting relief to be just and equitable. The power to grant relief under section 31B is wide in view of the fact that sub-section (4) of that section enables relief to be granted notwithstanding anything to the contrary in any contract of service between the applicant and his employer".

But, as stated by Nigel Hatch in his commentary on the Industrial Disputes Act of Sri Lanka at page 277, "Wide as the power of Labour Courts are, they are not unlimited and their discretion must be exercised reasonably giving due weightage to the interest of the employee, employer and the public..... the latter where relevant".

When section 31B(4) provides that "any relief or redress may be granted by a labour tribunal to a workman upon an application made under sub-section (1) notwithstanding anything to the contrary in any contract of service between him and his employer", it means that a Labour Tribunal is unfettered by considerations based on contractual rights between the employer and the employee, unlike the ordinary courts of law which have to adhere to the terms of the contract. Labour Tribunals could, therefore, grant relief even contrary to the terms of the contract, but one golden thread runs through the entire fabric of the duties and powers of a Labour Tribunal in regard to applications for relief or redress, viz. that the Labour Tribunal should make such order as may appear to the Tribunal to be just and equitable. In determining what is just and equitable, the Courts have through numerous decisions laid down principles for the guidance of such tribunals.

The manner in which a probationary clause in a contract of employment should be considered is another such principle which has evolved over the years through the various dicta of the superior Courts, which dicta in my view do not run counter to the provisions of the Industrial Disputes Act.

The term 'probation' has been defined as "a fixed and limited period of time for which an organization employs a new employee in order to assess his aptitudes, abilities and characteristics and the amount of interest he shows in this job so as to enable employer and employee alike to make a final decision on whether he is suitable and whether there is any mutual interest in his permanent employment." Arye Cloberson "Duration and Extension of Probationary Employment–A Re-Examination" in (1969) Vol. II,. The Journal of Industrial Relations (Australia) 54 at 56, (quoted by S. R. de Silva in his Legal Frame work of Industrial Relations in Ceylon at page 480). Various other definitions have appeared in treatises as well as decisions of the Courts.

It is of the very essence of the concept of probation that such a person is on trial regarding his suitability for regular employment and is liable to be discharged on being found to be unsuitable for permanent absorption- vide *Giovanola Binny Ltd.* v. *Industrial Tribunal* (*6*).

The next question that arises is, who should decide whether the services of such a probationer have been satisfactory or not. It has been consistently held that in the absence of mala fides, it is none other than the employer.

In *Ceylon Trading Co. Ltd. v. United Tea, Rubber and Local Produce Workers' Union (7)* this Court reiterated the general principle that 'the employer must remain the sole judge of whether his conduct and work were satisfactory during the period on probation and if he decides it is not so, it would be inequitable and unfair, in the absence of malice, to foist the view of the Tribunal on that of the Management which has to contend with management of labour, maintenance of discipline in the labour force and other allied questions'.

This, however does not mean that an employer can demand that his decision to terminate the services of a probationer cannot be examined by the Labour Tribunal. But, our Courts have laid down the principle that relief would be granted to a probationer in respect of the termination of his services only if the employer had acted *mala fide*. Thus, the grounds of

termination will be examined solely for the limited purpose of ascertaining whether the element of *mala fides* exists. This approach leaves the employer free to satisfy himself as to the suitability of a probationer, so long as he acts *bona fide.* To hold otherwise would make serious inroads into the management's discretion of selection of suitable employees and would not be conducive to the efficient working of institutions and their good management.

Applying these principles to the instant case, it is patently clear that the Labour Tribunal had misdirected itself in regard to the manner and circumstances in which a probationer's services could be terminated and compensation awarded.

The learned President was in grave error when, contrary to the numerous authorities cited above, he held that forewarnings were necessary before the termination of services of the applicant, who was admittedly a probationer and that the employer should have shown good cause for such termination.

As was mentioned earlier, mala fides on the part of the employer was never in issue. The President himself makes no mention of *mala fides* in his order. Nor was there any material placed before the Tribunal touching on *mala fides.* The award of compensation, therefore, does not arise.

For the reasons aforesaid, I would set aside the order of the President awarding compensation to the applicant.

In all circumstances of this case, I make no order as regards costs.

Appeal allowed.

Order set aside.