1977 *Present :* **Sharvananda, J. and Wanasundera, J.**

THE CALEDONIAN (CEYLON) TEA AND RUBBER ESTATES, LTD., Employer-Appellant

and

J. S. HILLMAN, Applicant-Respondent

S.C. 250/72—*L.T.* 1/27665

Labour Tribunal—Finding that termination of services justified—Jurisdiction to award compensation—Distinction between damages and compensation—Claim in justice and equity—Employer's right to close down business—Industrial Disputes Act as amended by Act No. 4 of 1962, sections 31B, 31C, 33(1) (d).

Appeal from order of Labour Tribunal—In what circumstances will Appellate Court set aside a determination of facts—Standard of proof required in respect of allegations of misconduct—Balance of probabilities.

H was employed by the appellant as the Superintendent of an estate from 1959 to 1965. In January 1966 the appellant sold the estate. After giving notice to *H*, the appellant terminated his services in February 1966. On the date of termination of services *H* was drawing a salary of Rs. 1,800 per mensem plus the usual allowances Upon termination of employment the appellant offered to pay, *ex gratia,* a sum of Rs. 21,600 being one year's salary but *H* refused to accept the same. In an application filed in the Labour Tribunal by *H,* it was held that the termination of the services of *H* was *justified* but the appellant was ordered to pay *H* 10 years' salary at Rs. 1,800 a month as compensation.

It was contended on behalf of the appellant that the Labour Tribunal had no jurisdiction to award any compensation inasmuch as the Tribunal had held that the termination of services was justified.

Held : That where the termination of employment was caused solely by the act and will of the employer in pursuance of his desire to sell the estate, the relief of compensation is available to *H,* the discharged employee.

Held further : (1) That inasmuch as an appeal lies from an Order of a Labour Tribunal only on a question of law an appellant who seeks to have a determination of facts by the Tribunal set aside, must satisfy the Appellate Court that there was no legal evidence to support the conclusion of facts reached by the Tribunal, or that the finding is not rationally possible and is perverse even with regard to the evidence on record.

(2) That an allegation of misconduct in proceedings before a Labour Tribunal has to be decided on a balance of probabilities, and it is not necessary to call for proof beyond reasonable doubt as in a criminal case. In the present case, however, the fact that the Tribunal adopted the standard of proof beyond reasonable doubt has not led to a miscarriage of justice as, even on the application of the standard of a balance of probabilities the case against the applicant had not been established.

Per Sharvananda, J.—

"A Labour Tribunal is thus entitled to grant compensation for loss of career if it thinks such relief is just and equitable in the circumstances, even though the termination is consequent to the exercise by the employer of his fundamental right to close down his business ....By exercising his right to close down his business, the employer may frustrate the employee's re-instatement but he cannot escape his liabilty to pay compensation to the employee for loss of employment ....".

Cases referred to :

Inland Revenue v. Fraser, (1942) 24 Tax cases 498.

Edwards v. Bairstow (1955) 3 All E.R. 48; (1956) A.C. 14; (1955) 3 W.L.R. 410.

Associated Battery Manufacturers Ltd. v. United Engineering Worker's Union, 77 N.L.R. 541.

Wataraka Muti-Purpose Co-operative Society Ltd. v. Wickramachandra, 70 N.L.R. 239.

The Group Superintendent, Dalma Group v. The Ceylon Estate Staffs' Union, 73 N.L.R. 574.

Rumblan v. Ceylon Press Workers' Union, 75 N.L.R. 575.

Ceylon Transport Board v. Wijeratne, 77 N.L.R. 481.

Superintendent, High Forest Estate v. Malapane Watu Kamkaru Sangamaya, 66 N.L.R. 14.

Highland Tea Co. v. National Union of Workers, 70 N.L.R. 161.

Ceylon Workers' Congress v. Superintendent, Roseberry Estate, 70 N.L.R. 211.

Lloyd v. Brussey, (1969) 1 All E.R. 382; (1969) 2 W.L.R. 310.

Amblamana Tea Estates Ltd. v. Ceylon Estate Staff's Union, 76 N.L.R. 457.

United Engineering Workers' Union v. Devanayagam, 69 N.L.R. 289 (P.C.); (1968) A.C. 356; (1967) 2 All E.R. 367; (1967) 3 W.L.R. 461.

The National Union of Workers v. The Scottish-Ceylon Tea Co. Ltd., 78 N.L.R. 133.

Dixon v. Calcroft, (1892) 1 Q.B. 458; 66 L.T. 554; 8 T.L.R. 397; 61 L.J.Q.B. 529.

Hall Brothers v. Young, (1939) 1 K.B. 748; (1939) 1 All E.R. 809; 160 L.T. 402; 55 T.L.R. 506.

Taos Ltd. v. P. O. Fernando, 65 N.L.R. 259.

APPEAL from an order of the Labour Tribunal.

R. A. Kannangara, with *D. C. Amerasinghe* and *P. Suntheralingam*, for the employer-appellant.

H. W. Jayewardene, Q.C. with *I. Perera* and *Miss S. Fernando*, for the applicant-respondent.

Cur. adv. vult.

September 20, 1977. SHARVANANDA, J.

The applicant-respondent, coming from a family of up-country planters, himself turned to planting as a career. In August, 1954, he took up an appointment as Assistant Superintendent of Millakande Tea Estate under Rosehaugh Co. Ltd. While in the service of Rosehaugh Co., after serving on numerous estates, in 1958 he was offered the post of Superintendent of Selegama Estate, owned at the time by Caledonian (Ceylon) Tea and Rubber Estates Ltd., the employer-appellant. Up to the time the applicant was appointed to Selegama Estate in 1958, all estates in which the applicant worked were owned by Rosehaugh Co. Ltd. The applicant was employed by the appellant during the period 1959 to 1965 as Superintendent of Selegama Estate, Mahawela. In January, 1966, the appellant sold Selegama Estate and found no further use for the applicant's services. On or about 28th February, 1966, after notice on that behalf, the appellant terminated the services of the applicant. On the date of termination of his services, the applicant's salary was Rs. 1,800 per mensem plus the usual allowances ; upon termination of his employment, the appellant offered to pay the applicant *ex gratia* a sum of Rs. 21,600, being one year's salary, but the applicant refused to accept the same. In May, 1966, the applicant filed the present application for relief in the Labour Tribunal. The applicant alleged that the purported termination of his services on the ground that Selegama Estate was sold was discriminatory, wrongful and unjust. The appellant filed answer stating, *inter alia*, that Selegama Estate was sold in January, 1966, and that it terminated the services of the applicant-respondent after adequate notice consequent upon the said sale. By its letter dated 28th September, 1965 (A91), the appellant-company had indicated to the applicant that it was negotiating the sale of the Selegama Group and that the company would not be in a position to retain the services of the applicant. By letter dated 21st January, 1966, the applicant refused to accept the position that the company was entitled to terminate his services and stated that " in the event of Selegama being sold, you will be bound to offer alternate employment in keeping with my services and seniority ". The appellant-company did not offer the applicant any suitable alternative employment. In his application to the Tribunal, the applicant stated that he had always executed his duties as Superintendent to the best of his ability and to the entire satisfaction of the employer-company and that he had many recorded instances of his excellent and loyal service and that at all times before the termination he was given the expectation of continued employment for the rest of

his active life. By its answer, the appellant, while justifying the termination of the applicant's services on the ground of the sale of Selegama Esate, denied, *inter alia,* the applicant's averments that he had always executed his duties to the entire satisfaction of the employer and that he was given the expectation of continued employment for the rest of his active life.

At the inquiry, though the reason for the termination of the applicant's services was given as closure, yet the appellant led a large volume of evidence respecting the applicant-respondent's misconduct alleged to have been discovered after the applicant's services were terminated. The position taken up by the employer-company was that the sale of the estate amounted to a closure and hence the termination was justifiable and that it was not necessary to further justify the termination on the ground of the alleged misconduct of the applicant, but since the applicant was claiming reinstatement or compensation, his character was relevant to determine whether he was entitled to such relief. After a long drawn out inquiry, the Labour Tribunal held as follows :

> "The Tribunal has carefully considered the evidence led in this case and also has carefully considered the grounds on which the respondent has terminated the services of the applicant, namely that the applicant's services were not required any further consequent on the sale of the estate where he worked and also he could not have fitted into the remaining only estate this company had in its business in Ceylon. This Tribunal therefore accepts the position of the respondent that, in the circumstances, *the termination of applicant's services was justified, but considers the relief offered on the ground of termination of his services woefully inadequate.*"

As regards the charges made against the applicant, the Tribunal came to the following conclusion :

> "The Tribunal, having considered all the evidence and documents in support of these charges and since the charges involved allegations amounting to moral turpitude of the applicant the burden of proving the charges is beyond reasonable doubt, holds, after a clear assessment of the evidence placed before it, that none of these charges has been proved beyond reasonable doubt."

The Tribunal held that the relief offered to the applicant was totally inadequate and concluded that ten years' salary at Rs. 1,800 a month as compensation would be just and equitable

relief to the applicant. The Tribunal hence ordered the employer-company to pay the applicant a sum of Rs. 216,000 as compensation plus a sum of Rs. 5,000 as costs of the inquiry. From this order, the employer-company has preferred this appeal.

Under section 31.D (2) of the Industrial Disputes Act, an appeal to the Supreme Court lies from an order of a Labour Tribunal only on a question of law. Parties are bound by the Tribunal's findings of fact, unless it could be said that the said findings are perverse and not supported by any evidence. With regard to cases where an appeal is provided on questions of law only, Lord Normand, in *Inland Revenue v. Fraser,* (1942) 24 Tax Cases p. 498, spelt the powers of Court as follows :

> " In cases where it is competent for a Tribunal to make findings of fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears...... that the Tribunal has made a finding for which there is no evidence, or which is inconsistent with the evidence and contradictory of it. "

In this framework, the question of assessment of evidence is within the province of the Tribunal, and, if there is evidence on record to support its findings, this Court cannot review those findings even though on its own perception of the evidence this Court may be inclined to come to a different conclusion. " If the case contains anything *ex facie* which is bad in law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any misconception appearing *ex facie,* it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the Court must intervene. "—per Lord Radcliffe in *Edwards v. Bairstow* (1956) 3 A.E.R. at 57. Thus, in order to set aside a determination of facts by the Tribunal, limited as this Court is only to setting aside a determination which is erroneous in law, the appellant must satisfy this Court that there was no legal evidence to support the conclusion of facts reached by the Tribunal, or that the finding is not rationally possible and is perverse having regard to the evidence on record. Hence, a heavy burden rested on the appellant when he invited this Court to reverse the conclusion of facts arrived at by the Tribunal.

Both counsel for the appellant and respondent addressed us fully on the facts and subjected the evidence to a critical examination with a view to persuading us that the findings of fact

1***—A 45068 (79/10)

reached by the Tribunal on the several matters in dispute in the case are capricious or unreasonable and should be reversed. The Legislature has designated the Labour Tribunal as the proper tribunal to determine the facts, and this Court should not seek to substitute its own view of the facts for that of the Tribunal. Since it cannot be said that the conclusions are unreasonable and not warranted by the evidence on record, this Court will have to accept those findings and base its decision on the questions of law arising on these findings of fact, even though it may, on a review of the evidence, be inclined to accept Counsels' criticism of the findings.

The Tribunal has held that the termination of the applicant's services, for the reasons given by the appellant (viz. that the applicant's services were not required any further, consequent upon the sale of the estate where he worked and also that he could not be fitted into the only remaining estate of the appellant) was justified. The Tribunal has thus rejected the allegation made by the applicant that the termination was *male fide,* unfair and/or discriminatory. The Tribunal has also held that, though the evidence disclosed that the conduct of the applicant was irregular, the appellant had failed to bring home the charges of improper conduct against the applicant. It must be observed that the Tribunal required the charges to be proved beyond reasonable doubt. The President was wrong in adopting such a high standard of proof in respect of the allegations of misconduct against the applicant. I agree with the decision in *Associated Battery Manufacturers Ltd. v. United Engineering Workers' Union,* 77 N.L.R. 541, that an allegation of misconduct in proceedings before a Labour Tribunal has to be decided on a balance of probabilities and it is not necessary to call for proof beyond reasonable doubt as in a criminal case. However, in my view this lapse or misdirection has not led to a miscarriage of justice, as, even on the application of the standard of balance of probabilities, the case against the applicant respecting his misconduct cannot be held to have been established. In the answer filed by the appellant, it did not make any of the specific charges of misconduct that it sought to substantiate later at the inquiry The only ground that the appellant urged for terminating the services of the applicant was that Selegama Estate was sold. The termination of the applicant's service was sought to be justified before the Tribunal not on the basis of these charges subsequently made, but principally on the ground that the estate was sold. It is to be noted that by its notice of termination dated 28th September, 1965, (A91), the appellant had undertaken to compensate the applicant for its inability to continue him in service.

The main burden of the appellant's counsel's argument was that the President, having held that the termination was justified, had no jurisdiction to award any compensation in respect of the said termination; and accordingly in awarding a sum of Rs. 216,000 by way of compensation to the applicant, the President had erred in law and had exceeded his jurisdiction. He submitted that apart from the case of retrenchment compensation, an award for the payment of compensation by an employer is dependent on a finding that there had been a termination of employment, which is irregular, wrongful or unjust, and that if the termination is held to have been justified, an order for reinstatement would not arise and no order for compensation can be made. In support of his proposition, he relied on the following authorities:

Wataraka Multi-Purpose Co-operative Society Ltd. v. Wickremachandra (70 N.L.R. 239);

The Group Superintendent v. The Ceylon Estate Staff's Union (73 N.L.R. 574);

Rumblan v. Ceylon Press Workers Union (75 N.L.R. 575);

Ceylon Transport Board v. Wijeratne (77 N.L.R. 481 at 489);

S. R. de Silva —"The Legal Framework of Industrial Relations" at p. 386.

In my view, the proposition urged by counsel has been too broadly stated. The proposition will hold good if the termination is justified on the ground of misconduct of the employee and such terminations is by way of disciplinary measure. But, where an employee is in no way responsible for the termination and the termination was consequent on the lawful exercise of his proprietary rights by the employer, as in the case where he closes down the business and thus renders the employment of the worker purposeless, the proposition is not tenable. In the case of closure of business, justification of termination of the employee's services flows from the closure itself and not from the employee's misconduct.

In the case of *Wataraka Multi-Purpose Co-operative Society Ltd. v. Wickremachandra,* 70 N.L.R. 239, the services of the workman were terminated by the employer on the ground of inefficiency. It was in that context that Tennekoon, J. stated: "If the respondent was in fact inefficient and there was neither illegality nor any finding that the termination of services for inefficiency was an unfair labour practice, it is an error of law to award any compensation under section 31 (1) (*d*) of the Act."

The facts in the case of *Group Superintendent v. Ceylon Estate Staffs' Union*, 73 N.L.R. 574, were that the services of the workman were terminated after due notice in view of the closing of the employer's factory as an economy measure in order to meet the increasing expenditure on production and as a result of the amalgamation between Glendowen Estate where the factory was situated and the adjoining Delma Group, whence a number of employees at Glendowen Estate became redundant; the employer had made a very reasonable offer of alternative employment, which the applicant refused purely on a question of prestige. The President, having held that the termination of employment was unlawful, granted compensation in view of the worker's enforced retirement. While setting aside the order of the President, Alles, J. observed:

> "In this case, no wrong has been done. On the contrary, Perera has been offered very favourable terms of employment with a higher wage which he chose to discard on the ground of prestige......... It is not possible to state in this instance that the termination of the applicant's services was unlawful or contrary to the accepted standards of fair labour practice."

The right of a workman to compensation on closure of business is designed to relieve the hardship caused by involuntary unemployment due to no fault of the employee. No unemployment-compensation is payable when suitable alternative employment is offered and the workman wrongly refused to accept it.

In the case of *Rumblan v. Ceylon Press Workers' Union*, 75 N.L.R. 575, the workman was dismissed because he had caused damage to the machine and it was held that the dismissal was justified. It was in these circumstances that de Kretser, J. held that where dismissal is proper and justified, no compensation can be awarded. This case was referred to by Vythialingam, J. in *Ceylon Transport Board v. Wijeratne*, 77 N. L. R. 481 at 489, when he stated that where dismissal is justified, no compensation can be ordered. The termination of services that he had in mind was the dismissal of an employee as a disciplinary measure and not the discharge of an employee as an economy measure. The proposition of law "apart from the case of retrenchment-compensation an award for the payment of compensation by an employer is dependent on a finding that there had been a termination of employment by the employer which is illegal, wrongful or unjust" stated in Silva—"Legal Framework of Industrial Relations" at p. 387 cannot be accepted in its wide breadth. Its applicability must be confined to cases of dismissal as a disciplinary measure and not to cases of discharge from employment

resulting from closure of business or any other act of the employer. In the latter situation, though the termination may be justifiable, a Tribunal has jurisdiction, in making a just and equitable order, to direct compensation to be paid to the discharged employee.

The authorities relied on by counsel for the appellant are all cases of misconduct or other acts on the part of the workman which justified the termination of his services. He also cited the case of *Superintendent, High Forest Estate v. Malapane Sangamaya,* 66 N.L.R. 14, where T. S. Fernando, J. held that it is not open to a Labour Tribunal to grant equitable relief under section 31. C (1) of the Industrial Disputes Act to a labourer's spouse when her contract of service had been compulsorily terminated by the employer in terms of section 23 (1) of the Estate Labour (Indian) Ordinance in consequence of the lawful dismissal of her husband. In view of the provisions of the Estate Labour (Indian) Ordinance, the employer had no alternative but to dispense with the services of the labourer's spouse. The statute imposed on the employer the obligation, under pain of punishment, of determining the contract of service of the spouse. In the circumstances, the termination of the spouse's services was involuntary. T. S. Fernando, J. held that no order which is in conflict with the law, as declared by the Legislature, can be just and equitable. In the case of *Highland Tea Co. v. National Union of Workers,* 70 N.L.H. 161, Alles, J. while holding that the termination of the services of the spouse was not wrongful or unlawful, took the view that the President had not erred in law in making an order for compensation (taking into consideration the period of service)—an order that was just and equitable in the circumstances. In the case of *Ceylon Workers' Congress v. Superintendent, Roseberry Estate,* 70 N.L.R. 211, Alles, J. observed that it was open to a Labour Tribunal to give relief, in an appropriate case, to an innocent spouse whose services had been lawfully terminated under section 23 (1) of the Estate Labour (Indian) Ordinance whether a joint statement was filed or not.

The question that the Tribunal has to address itself is not whether the employment has been terminated in terms of the contract between the parties or according to law, but whether the employee has, in the circumstances of the termination, a claim, in justice and equity, to compensation or other benefit for the loss of career resulting from the termination. If the employee's conduct had induced the termination, he cannot, in justice and equity, have a just claim to compensation for loss of career, as he has only to blame himself for the predicament in

which he finds himself. But where the termination was caused solely by the act and will of the employer in the exercise of his managerial discretion to organise and arrange his business, a Tribunal, exercising just and equitable jurisdiction, uninhibited by limitations of law but actuated by postulates of justice, is well entitled to grant relief in the nature of compensation to the discharged employee, even though, in law, the employer was justified in discharging him from service on account of surplusage. The jurisdiction that is vested in a Labour Tribunal by the Industrial Disputes Act is not a jurisdiction of merely administering the existing common law and enforcing existing contracts. The relations between the employer and his workman are no longer governed by the contract of service. The Tribunal has the right, nay the duty, to vary contracts of service between the employer and the employee—a jurisdiction which can never be exercised by a civil Court. In the course of adjudication, a Tribunal must determine the 'rights' and 'wrongs' of the claim made, and in so doing it undoubtedly is free to apply principles of justice and equity, keeping in view the fundamental fact that its jurisdiction is invoked not for the enforcement of mere contractual rights, but for preventing the infliction of social injustice. The goals and values to be secured and promoted by Labour Tribunals are social security and social justice. The concept of social justice is an integral part of Industrial Law, and a Labour Tribunal cannot ignore its relevancy or norms in exercising its just and equitable jurisdiction. Its sweep is comprehensive as it motivates the activities of the modern welfare state. It is founded on the basic ideal of socio-economic equality. Its aim is to assist in the removal of socio-economic disparities and inequalities. It endeavours to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties. so that industrial disputes can be prevented. The claim of the employer, based on a freedom of contract, has to be reconciled with the claim of the employee for security of tenure; the process may involve the imposition of an obligation on the employer to make such provision as to relieve the hardship caused by the unemployment resulting from the exercise of his rights by the employer. The jurisdiction is designed to produce, in a reasonable measure, a sense of security in a worker that in case he performs his duties efficiently and faithfully, he can be discharged by the employer only with adequate compensation for loss of employment. The employee should be assured job security. He should not suffer for no fault of his. An honest worker doing an honest job is entitled to a reasonable expectation of permanency of employment. He should not be oppressed with the sense of economic insecurity. The old principle of abso-

lute freedom of contract and the doctrine of laissez-faire have yielded place to new principles of social welfare and social justice. These principles have imparted a new dimension to the concept of justice and equality. The Labour Tribunal is one of the instruments chosen by the Legislature to achieve these objects. The freedom of contract which is fundamental to laissez-faire enabled an employer to 'hire and fire' the employee according to the dictates of commercial expediency. This exposed the workman to the grave hazard of unemployment. But with the erosion of laissez-faire and the emergence of modern concepts of social justice and of Labour Tribunals, geared to making just and equitable orders, the reasonably-generous-employer has been projected as the model employer, and the employee has been assured of a certain measure of job security. The absolute right of discharging the unwanted employee, without adequate compensation for loss of employment, has not survived these developments. Compensation enables the workman to face the rigours of premature retirement. Hence, on grounds of social justice, compensation is substituted for re-instatement. An employer has the right to close his business and thus render re-instatement non-feasible. But such a consequence does not relieve him from liability to compensate the employee for the resulting loss of employment.

Lord Denning, in *Lloyd v. Brassey,* (1969) 1 A. E. R. 382 at 383, has described the development as follows :—

> " A worker of long standing is now recognised as having an accrued right in his job ; and his right gains in value with the years. So much so that if the job is shut down, he is entitled to compensation for loss of the job—just as a Director gets compensation for loss of office."

Though this right of the employee is still an imperfect right not enforceable in a court of law, it is competent for a Labour Tribunal, exercising equitable jurisdiction, to recognise it and enforce it. The Tribunal is thus able to correct and mitigate the deficiency of the common law and evolve a reasonable balance between capital and labour in defining their mutual obligations. This wholesome jurisdiction enables the Tribunal to give validity to the legitimate expectation of an employee to the payment of compensation when, as a result of his employer exercising his proprietory rights, he is thrown out of employment.

In *Ambalamana Tea Estates Ltd. v. Ceylon Estate Staffs' Union,* 76 N.L.R. 457, a Divisional Court held that where the termination of employment was caused solely by the act and will of the employer in pursuance of his desire to sell the estate, the

employee, whose services are terminated for that cause, has a just claim to gratuity under section 31 B of the Industrial Disputes Act. In similar circumstances, under section 31 C and 33 (1) (*d*) of the Act, the relief of compensation is available to the discharged employee.

In the case of *United Engineering Workers' Union v. Devanayagam,* 69 N.L.R. 289 P. C., it was argued that section 31 B (1) of the Industrial Disputes Act gives a workman the right to apply only if he has a cause of action, i.e., if he is alleging a breach by his employer of the contract of service or some obligation imposed by law on his employer. The Privy Council rejected this argument and stated that it is not right to say that a workman can apply for relief under section 31 B (1) only if he has a cause of action such as wrongful termination. The Court emphasized the importance of sections 31 B (4) and 31 C (1) in the legislative scheme. Section 31 B (4) reads as follows :—

> "Any relief for 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."

Section 31 C (1) defines the powers and duties of a Tribunal on application and provides that "it shall be the duty of the Tribunal to make all such inquiries into the application and hear all such evidence as the Tribunal may consider necessary and make such order as appears to the Tribunal just and necessary."

Thus, a Labour Tribunal is vested with the unfettered discretion to do what it considers right and fair, whether the termination is lawful or not. A workman can apply for relief in respect of the termination of his employment even when the termination is in accordance with the terms of his contract and not in breach of them and is sanctioned by law. On such an application the Tribunal can order what it considers to be just and equitable even though that is in excess of the legal rights of the employee. A Labour Tribunal is thus entitled to grant compensation for loss of career if it thinks such relief is just and equitable in the circumstances, even though the termination is consequent to the exercise by the employer of his fundamental right to close down his business. If the employer's action, though justifiable in law, affects adversely the employee, the Tribunal is empowered to grant relief to the employee. The criterion is not law but justice and equity. The circumstances of, and the motive for, the closure are, of course, relevant to the decision on the question of compensation to the employee. By exercising his right to close down

his business, the employer may frustrate the employee's re-instatement, but he cannot escape his liability to pay compensation to the employee for loss of employment. The relief of compensation is not an alternative to re-instatement but is available even where re-instatement is not possible.

"In dealing with an application under section 31 B (1) (*a*) for relief or redress in respect of the termination of a workman's employment by his employer, a Labour Tribunal may, in making an order for compensation in respect of the termination of employment by the employer, take into account the possible limitation of the ultimate retiring gratuity which it might have been possible for the workman to obtain but for the untimely termination of his services by his employer."—per Tennekoon, J. in *The National Union of Workers v. The Scottish-Ceylon Tea Co. Ltd.* (78 N. L. R. 133 at 155 and 156). Section 31 B (1) (*a*) read with sections 31 C (1) and 33 (1) (*d*) invests the Labour Tribunal with powers to award compensation for loss of career.

It is a matter of significance that section 33 (1) (*d*) employs the term 'compensation' and not 'damages'. There is a distinction between the terms 'compensation' and 'damages' which is not to be ignored. "What is 'compensation'? The expression 'compensation' it not ordinarily used as an equivalent for 'damages'. It is used .... in relation to a lawful act which has caused injury. Therefore, that word would not include damages at large, such as injury to reputation."—per Lord Esher in *Dixon v. Calcroft* ((1892) 1 Q. B. 458 at 463). Compensation can be awarded irrespective of any default in law on the part of the employer. On the other hand, damages are pecuniary recompense awarded in reparation for a loss or injury caused by a wrongful act or omission. "'Damages' in English law imports the idea that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract or by the general law or legislation."—per Green M. R. in *Hall Brothers v. Young* ((1939) 1 K.B. 748 at 756). What is paid by the employer to the employee on his lawful discharge is 'compensation' in terms of the Act. In the statutory context, the word extends to any compensation recoverable from the employer in respect of the loss suffered by the employee. Mr. Kannangara placed some reliance on the dictum of Alles, J. in the *Superintendent, Dalma Group v. Ceylon Estate Staffs' Union,* 73 N.L.R. 574 at 575, that "compensation is payable only when a wrong has been done". This dictum is not based on any authority and should not be elevated into a decision. It is not 'compensation' but 'damages' that is payable "*only* when a wrong has been done".

Though both, as sanctioning rights, share much in common, have different orientation. ' Damage ' always signifies recompense given to a party for the wrong that has been done to him. On the other hand, ' compensation ' includes recompense for pecuniary loss or damage which involves no breach of duty. Under the Workmen's Compensation Ordinance, if personal injury is caused to a workman by accident arising out of and in the course of the employment, the employer is liable to pay compensation even though he has not committed any wrong. Under the Land Acquisition Act, compensation has to be paid by the State for what is acquired in terms of the law. Thus, compensation does not predicate a wrong.

Counsel for the appellant drew the attention of this Court to the provision of section 33 (1) (d) as it stood prior to the amendment effected by Act No. 4 of 1962. The original unamended section 33 (1) (*d*) of the Industrial Disputes Act provided that the order of a Labour Tribunal may contain a decision " as to the payment by an employer of compensation to *any workman as an alternative to his re-instatement.* " The section was construed by a Divisional Bench in *Taos Ltd. v. P. O. Fernando,* 65 N.L.R. 259 as follows :

> "In the instant case there was no decision as to re-instatement and the Industrial Court had no power to make a decision for the payment of compensation. The power to make an order for compensation is confined to a case in which there is a decision as to re-instatement. The decision as to payment of compensation to a worker must be an alternative to a decision as to re-instatement. Without a decision as to re-instatement, there can be no decision as to compensation. "

The Industrial Disputes (Amendment) Act, No. 4 of 1962, amended section 33 (1) (*d*) by the deletion of the words " as an alternative to his re-instatement. . "According to this amendment, a decision as to the payment of compensation to a worker is no more postulated as an alternative to a decision as to re-instatement. The Divisional Bench judgment did not consider the effect of the amendment. Counsel submitted that as the law originally stood, prior to the amendment, an order for compensation could be made only as an alternative to an order for re-instatement and that the connotation of the word ' compensation ', in that context, thus came to be determined once and for all. He contended that a Tribunal can award re-instatement only if the termination of the employee's services is found to be *mala fide* or unjustifiable and on such a preliminary finding, the Tribunal may, as a matter of discretion, determine, according to the circumstances, whether re-instatement or compensation would be the proper

relief. Once it is found that a workman has been wrongfully or illegally discharged or dismissed, he is normally entitled to claim re-instatement. But this remedy is not absolute or of universal application. There can be cases where it might not be expedient, because of the presence of unusual features, to direct re-instatement, and a Tribunal may think the grant of compensation instead may meet the ends of justice. A Tribunal may have reasons why it does not think it proper to re-instate a workman and may come to the conclusion that compensation in lieu of re-instatement would be adequate relief. Counsel submitted that if compensation is an alternative to re-instatement, it would follow that the grant of compensation is conditioned on a preliminary finding that the dismissal or discharge was wrongful and the Tribunal will have no jurisdiction to award compensation if it finds that the termination was not wrongful but is justified. If this Court is to apply today the unamended provisions of section 33(1) (d) of the Industrial Disputes Act, as it stood prior to the amendment effected by Act No. 4 of 1962, I can appreciate the validity of Counsel's argument. But this appeal has to be decided under the amended section 33(1) (*d*) which, in its present form, does not condition the grant of compensation as an alternative to re-instatement. As section 33(1) (*d*) stands amended today, the order for compensation is not limited to instances where it would be an alternative to re-instatement, and hence its grant is not regulated by factors relating to re-instatement, such as that the discharge complained of should have been wrongful. A Tribunal would have jurisdiction to award compensation to a discharged workman even where it finds that the discharge is *bona fide* and justifiable and no breach of duty on the part of the employer is involved. Social justice or fair labour practice is the justification for the grant. Mr. Kannangara further submitted that though the Industrial Disputes (Amendment) Act No. 4 of 1962 amended the original section 33(1) (*d*) by deleting the words " as an alternative to re-instatement ", it has not altered the connotation which the word ' compensation ' had acquired in the context of the unamended section and that the concept of ' compensation ', in spite of the repeal effected by the amendment, still continued to suffer the limitation born from its association with re-instatement as an alternative thereto. I cannot accept this submission. On this submission, the Legislature has not achieved anything by the amendment, and the amendment would appear to be superfluous. The object of the amendment is clear. In my view, it was because the Legislature found that in the collocation " compensation as an alternative to re-instatement " the word ' compensation ' might be construed to suffer under the limitations which circumscribed the grant of re-instatement and since

it desired to release 'compensation' from the said limitations and restore the ordinary legal concept of 'compensation' that it amended the provisions of section 33(1) (*d*) delinking the relief of 'compensation' from 're-instatement'. The ordinary legal signification of 'compensation' has been restored. Consequently, it is no longer necessary to establish wrongful termination for the grant of compensation under section 33(1) (*d*) of the Act.

For the reasons stated above, I agree with the President, Labour Tribunal, that the appellant is liable to pay compensation to the respondent for loss of employment resulting from the sale of the estate in which the respondent was functioning as Superintendent.

The next question that has to be decided is the quantum of compensation. Counsel for the appellant brought to the attention of this Court the two judgments of Vythialingam, J. in *Ceylon Transport Board v. Wijeratne,* 77 N.L.R. 481, and in S.C. 33/73 L.T. 14/359/70 (S.C. minutes of 21.3.75), which considered the factors that should be taken into account in computing the compensation that is payable in lieu of re-instatement in terms of section 33 (5) of the Industrial Disputes Act. I agree with Vythialingam, J. that " the amount should not mechanically be calculated on the basis of the salary he should have earned till he reached the age super-annuation ". But I cannot subscribe to the proposition that the amount " should seldom, if not never, exceed a maximum of three years' salary " (77 N.L.R. 491 at 498 and 499). The Legislature has wisely given untrammelled discretion to the Tribunal to decide what is just and equitable in the circumstances of each case. Of course, this discretion has to be exercised judicially. It will not conduce to the proper exercise of that discretion if this Court were to lay down hard and fast rules which will fetter the exercise of the discretion, especially when the Legislature has not chosen to prescribe or delimit the area of its operation. Flexibility is essential. Circumstances may vary in each case and the weight to be attached to any particular factor depends on the context of each case. It is to be noted however that in Case No. S.C. 33/73 L.T. 14/359/70, Vythialingam, J. subsequently departed from the limitation of three years and awarded five years' salary as compensation.

The applicant was 41 years old when his services were terminated and his remuneration was Rs. 1,800 per mensum plus the usual allowances. He was entitled also to certain fringe benefits as free occupation of the estate bungalow and bonus. The evidence shows that he was collecting every year a substantial

amount as bonus, e.g., Rs. 3,000 for 1960/61, Rs. 3,000 for 1961/62, Rs. 1,800 for 1963/64. If the applicant had continued to be in service and retired in the normal course at the age of sixty, he would have further earned a tidy amount by way of employer's contribution to the Provident Fund and become entitled to a retired gratuity. At the time of the termination, the applicant had reached the stage of a senior managerial position in the business of running estates, and it was certainly difficult for him to find suitable alternative employment. Consolidated Commercial Agencies Ltd., who were the agents in Ceylon of the appellant, had, in their letter dated 7th October, 1965 (marked R. 23), referring to the question of compensation payable to the respondent for loss of career, advised the appellant as follows :

> " As regards compensation for loss of career, the position in Ceylon is very different from that obtaining in the United Kingdom as the opportunities of employment in this country are far less than in Britain and there is no unemployment relief. "

The respondent has referred to the powerful forces that he had to contend with in his search for employment. His evidence is as follows :

" *Q.* Have you tried to secure alternative employment ?

A. I have tried very hard to get employment in some other agency. I have tried at Carson Cumberbatch and Co., Whittals, Aitken Spence, George Steuarts, Shaw Wallace, and I was called up for several interviews. Although they were quite satisfied that I was suitable, I did not get the billet.

Q. Why do you make that statement ?

A. The main reason may be that I am in this Court. Agency Houses gang up and they could always refer to my last employer. That is the reason I have not got a billet up to date.

Q. All these companies you referred to are Agency Houses ?

A. Yes. "

The relevancy of this evidence lies in the fact that the great majority of estates are run by Agency Houses and recruitment of planters is done by these Agency Houses. The appellant led no evidence to contradict the respondent's evidence regarding his inability to secure alternative empolyment because of the gang-up by the Agents.

At the sale of Selegama Estate, the appellant had arranged with the purchasers, *inter alia,* for the taking over and employing the members of the labour force and of the sub-ordinate staff, but had significantly failed to make arrangements for the employment of the applicant in the service of the purchaser.

There is no evidence that the sale of Selegama Estate, in which the applicant was employed, was involuntary or forced by circumstances, or that the employer had suffered any financial loss by the sale. It can be appreciated that if the employer was forced by circumstances to sell the estate in order to avert a financial loss to him, as in the case where the market was falling, or if the estate was sold at a loss, then, of course, the Superintendent has got to share the misfortune. But, in this case, it would appear that the appellant sold the estate to enrich itself and reaped a profit. There is no question of any financial incapacity in the appellant to pay compensation for loss of future earnings.

The President, in arriving at the amount of compensation payable to the applicant, has given his consideration to the aforesaid relevant factors and has ordered the appellant to pay the respondent a sum of Rs. 216,000 (which sum repersents 10 years' salary at Rs. 1,800 per mensem) as compensation. It is to be noted that neither before the Labour Tribunal nor before us was any issue of retrenchment in terms of the Industrial Disputes Act raised.

In the view of this Court, the grant of Rs. 216,000 errs on the excessive side. A just and equitable decision, in the circumstances, would be to order the appellant to pay Rs. 151,200, representing seven years' salary, as compensation to the applicant-respondent. It is a matter of relevancy to note that the applicant has to date not had the benefit of any compensation for more than eleven years, viz., from February 1966 when his services were terminated by appellant.

Subject to the aforesaid variation in the amount of compensation, the appeal is dismissed with costs fixed at Rs. 1,050. The employer-appellant shall deposit the total sum of Rs. 157,250 (Rs. 151,200 plus Rs. 5,000 (costs ordered by the Labour Tribunal) plus Rs. 1,050 (costs of appeal)) with the Assistant Commissioner of Labour, Colombo South, to the credit of the applicant-respondent within one month of the record being returned to the Labour Tribunal.

WANASUNDERA, J.—I agree.

Appeal dismissed subject to variation in amount of compensation.