STATE DISTILLERIES CORPORATION
v.
RUPASINGHE

SUPREME COURT.
FERNANDO, J.
DHEERARATNE, J.
GOONEWARDENA, J.
S.C. APPEAL NO. 91/93.
C.A. APPEAL NO. 482/86.
L.T. APPLICATION NO. 21/3050/86
JANUARY 25, 1994.

Industrial Disputes Act – Section 31 B (4) – Termination of a workman's services – Probationary period of employment – Whether confirmation is automatic at the end of probationary period – Reasons for termination – Meaning of "probation".

The question of law involved in this appeal was whether an employee, who is not expressly confirmed in service upon the expiry of the period of probation stipulated in his contract of employment, necessarily continues to be on probation even if the employer does not expressly extend his probation.

Held:

1. Employment to which the Industrial Disputes Act applies is no longer held "at pleasure"; and the benefit of the Act, as the definition of "workman" indicates, accrues to any person "who has entered into or works under a contract with an employer in any capacity", without any distinction as to whether he is on probation.

2. The acceptance of the principle that a Labour Tribunal has jurisdiction to examine whether a termination is *mala fide,* necessarily involves the corollary that the employer must disclose (to the tribunal) his reasons for termination; and that means that he should have had some reason for termination.

An employer who refuses to disclose his reasons for dismissal cannot be in a better position than if he had no reason, and must also be regarded as having acted *mala fide* or arbitrarily.

4. What then is the principal difference between confirmed and probationary employment? In the former, the burden lies on the employer to justify termination;

and this he must do by reference to objective standards. In the latter, upon proof that termination took place during probation the burden is on the employee to establish unjustifiable termination, and the employee must establish at least a *prima facie* case of *mala fides,* before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified.

5. The concept of probation is a period of trial, at the end of which the employer must judge the performance of the probationer; there can be no proper "trial" of a probationer unless the employer has given him (except in regard to obvious matters) adequate information and instructions, both as to what is expected of him, and as to his shortcomings and how to overcome them. It would hardly be just and equitable for an employer to say that an employee has not proved himself by relying on his failure to fulfil undisclosed expectations, or to remedy uncommunicated deficiencies.

6. At the end of the probationary period;

(1) if the employer is *bona fide* not satisfied with the work and conduct of the probationer (or perhaps even if he entertains a genuine doubt or suspicion), he can dismiss the probationer, or extend the probationary period;

(2) If the employer is in fact satisfied with the work and conduct of the probationer (if his opinion to the contrary is vitiated by *mala fides* in the wide sense), he cannot dismiss the probationer.

7. There is no inflexible rule providing for the automatic renewal of probation and that an inference of renewal can only be drawn in those cases in which the circumstances justify it.

8. If the contractual terms are ambiguous, or admit of more than one interpretation, both equity and the principles of interpretation concur in requiring that they be interpreted 'contra proferentem', against the Employer and in favour of the Applicant.

Cases referred to:

1. *Hettiarachchi v. Vidyalankara University* (1972) 76 N.L.R. 47.

2. *Moosajees Ltd. v. Rasiah* [1986] 1 Sri L.R. 365, 367, 369.

3. *Bandara v. Premachandra* S.C. 213/93 SCM 16.8.1993
4. *Ceylon Cement Corporation v. Fernando* [1990] 1 Sri L.R. 361, 368.
5. *Richard Peiris & Co. v. Jayatunga* CA No. 404/80 C.A.M. 9.9.1982 1 Srikantha L.R. 17, 21, 22.
6. *Ceylon Ceramics Corporation v. Premadasa* [1986] 1 Sri L.R. 287, 289.
7. *Elsteel Ltd. v. Jayasena* SC 20/88 SCM 6.4.1990.

APPEAL from judgment of the Court of Appeal.

Shirley Fernando P.C. with *Ms. V. J. Senaratne* for the Employer-Appellant-Appellant.

Applicant-Respondent-Respondent absent and unrepresented.

Cur. adv. vult.

March 02, 1994.

FERNANDO, J.

The question of law involved in this appeal is whether an employee, who is not expressly confirmed in service upon the expiry of the period of probation stipulated in his contract of employment, necessarily continues to be on probation even if the employer does not expressly extend his probation.

The Applicant-Respondent-Respondent ("the Applicant") was employed as a labourer by the Employer-Appellant-Appellant ('the Employer') with effect from 1.4.80, on probation for a period of three years; he was interdicted on 6.9.84, upon an allegation that he had, without authority, removed even bottles of spirits from the work place; and after inquiry, his services were terminated, admittedly on that charge alone, by letter dated 13.12.85 in which the Employer made no claim that the Applicant was yet on probation. The Court of Appeal upheld the finding of the Labour Tribunal that the Employer had failed to establish this charge and confirmed the order for reinstatement. It would seem from the evidence that but for the unproven allegation against him, the contention that the Applicant was yet on probation might never have been raised.

Both in the Tribunal and in the Court of Appeal the Employer sought to justify the termination on the alternative basis that, despite the original probationary period having lapsed long before, the Applicant was still on probation, and that he could be dismissed without any reason.

Although the question was not expressly determined, the Labour Tribunal seems to have considered that the Applicant was not on probation because it observed:

> "On the expiry of 3 years [the period of probation] was not extended and no evidence was led to indicate any lapse on his part."

The Court of Appeal held that the period of probation came to an end on 1.4.83 because the Employer had neither extended the period of probation in terms of clause 2 of the letter of appointment nor found the Applicant's work or conduct unsatisfactory in terms of clause 4, and stated:

> "In my view the Applicant cannot be treated as a probationer under any circumstances."

Special leave to appeal was granted "on the limited question whether the Court of Appeal was correct to take [that] view".

It is necessary to scrutinize several provisions of the letter of appointment issued to the Applicant:

> "2. Your appointment is subject to a probationary period of three years from the date of your appointment. The Board of Directors of the Corporation has the right to extend the probationary period ...
>
> 4. For the confirmation of your appointment, what is expected of you is, *inter alia*, passing the [prescribed] Sinhala proficiency

test and satisfactory work and conduct during the probationary period.

If during that period your work and conduct are unsatisfactory, the Corporation has the right to terminate your services without informing you of any reason and without compensation in lieu of notice.

If you fail to pass the Sinhala proficiency test, the increments due to you will be withheld until you pass the test. At the end of the probationary period if you have not acquired the required standard of proficiency in Sinhala, your services will be terminated without any notice and without any compensation in lieu...

8. You are required to produce a certificate that you are physically fit for service from a registered medical practitioner approved by the Corporation. If according to such medical certificate you are not fit for service, your appointment will not be operative."

Learned President's Counsel for the Appellant relied on *Hettiarachchi v. Vidyalankara University* [1]. In that case there was proof of such misconduct as would have justified termination; further, a request made by the workman, after the expiry of the probationary period, that he be confirmed in service, did not receive a reply, and this was regarded by Wimalaratne, J., as suggesting the inference that the workman himself understood that he had not been confirmed. It was in that context that he observed:

"... a person appointed to a post on probation cannot claim automatic confirmation on the expiry of the period of probation, unless the letter of appointment provides that the appointer shall stand confirmed in the absence of an order to the contrary. If a probationer is allowed to continue on probation after the period of probation has expired, he continues in service as a probationer."

However Counsel was compelled to concede that this was not an inflexible rule, and would not necessarily apply if, for instance, five years had elapsed or if it was inconsistent with the terms of the contract. It is therefore opportune to reconsider the principle laid down in that case.

PROBATION

Under the common law an employer had an absolute right to terminate the contract of employment (subject only to an obligation as to notice or payment in lieu); that rule was necessarily applicable to probation. One consequence of the Industrial Disputes Act, at least as amended in 1957, was to abridge that right, and to confer on an employee the right to challenge an unjustified termination and to obtain reinstatement. Thus employment to which that Act applies is no longer held "at pleasure"; and the benefit of that Act, as the definition of "workman" indicates, accrues to any person "who has entered into or works under a contract with an employer in any capacity", without any distinction as to whether he is on probation.

Nevertheless, there are differences between confirmed and probationary employment, and especially in regard to the termination thereof. **Probation,** as the word implies, is a period during which an employee is "tried" or tested", and given the opportunity of "proving" himself, in relation to his employment. As observed by Moonemalle, J., in *Moosajees Ltd. v. Rasiah* [2]:

> "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 [probationer] must perform his services to the satisfaction of his employer. The employer, therefore, is the sole judge to decide whether the services of a probationer are satisfactory or not."

(A good example is the scheme of probation in the public service, set out in some detail in Chapter II, section 11, of the Establishments

Code, which I had occasion to consider in *Bandara v. Premachandra*, [3] in relation to public office held "at pleasure".) Probation, as Wijetunga, J., pointed out in (*Ceylon Cement Corporation v. Fernando* [4] is:

> "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 his 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."

If the employee is found wanting in respect of his work, conduct, temperament, compatibility with the organization and his fellow employees, or any other matter relevant to his employment, the **employer is entitled to dismiss him.**

However, that right is not absolute, unfettered or unreviewable. While the employer is undoubtedly the sole judge as to whether the probationer has proved himself, yet his subjective decision is liable to limited scrutiny and review. It has been held that "any employer should have the right to discontinue the probationer **if** he does not come up to the expectations of the employer": *Richard Peiris & Co. v. Jayatunga* [5], cited with approval in *Moosajees Ltd. v. Rasiah* [2] and that "the services of a probationer can be terminated **if** his services are not considered satisfactory": *Ceylon Ceramic Corporation v. Premadasa* [6]. It follows, therefore, that the condition precedent to the exercise of the right to dismiss a probationer is that the employer has in fact, found him not to be satisfactory or not up to expectations. This is clear from *Ceylon Cement Corporation v. Fernando* [4]:

> "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 (p. 368)

This is confirmed in the several observations in those decisions to the effect that a probationer cannot be dismissed "wantonly" (or "arbitrarily"), or through ulterior motives, such as "victimization", or for "irrelevant reasons" In *Richard Peiris & Co. v. Jayatunga* [5] and *Moosajees Ltd. v. Rasiah* [2] and by their unequivocal recognition that the employer's decision can be set aside if vitiated by *mala fides* which includes arbitrariness, ulterior motives, irrelevant considerations and the like.

Although there are observations to the effect that the employer does not have to give any **reasons,** this only means that he need not **state** any reasons (i.e. disclose any reasons) to the probationer; it does not mean that the employer can dismiss a probationer even if he does not **have** any reasons. The fact that in almost all those cases the Court did examine the reasons relied on by the employer, in order to determine whether the dismissal was *mala fide*, establishes not only that there must in fact be a proper reason for termination, but that it must be disclosed in proceedings in which the dismissal is challenged, so as to enable a judicial determination as to whether the termination was *mala fides*. The acceptance of the principle that a Labour Tribunal has jurisdiction to examine whether the termination is *mala fide*, necessarily involves the corollary that the employer must disclose (to the Tribunal) his reasons for termination; and that means that he should have had some reason for termination. It was held in *Richard Peiris & Co. v. Jayatunga* [5] that *mala fides* can be inferred from irrelevant reasons; if so, dismissal without any reason must also lead to an inference of *mala fides*. And an employer who refuses to disclose his reasons for dismissal cannot be in a better position than if he had no reason, and must also be regarded as having acted *mala fide* or arbitrarily.

What then is the principal **difference** between confirmed and probationary employment? In the former, the burden lies on the employer to justify termination; and this he must do by reference to objective standards. In the latter, upon proof that termination took place during probation the burden is on the employee to establish

unjustifiable termination, and the employee must establish at least a *prima facie case of mala fides*, before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified.

In two of the decisions cited, the view was taken that "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". However, that was no more than *obiter*, because in both cases the Court did come to the conclusion, after examining the evidence, that the deficiencies of the probationer had in fact been brought to his notice. Besides, that view is inconsistent with the concept of probation as being a period of trial, at the end of which the employer must judge the performance of the probationer. There can be no proper "trial" of a probationer unless the employer has given him (except in regard to obvious matters) adequate information and instructions, both as to what is expected of him, and as to his shortcomings and how to overcome them. It would hardly be just and equitable for an employer to say that an employee has not proved himself by relying on his failure to fulfil undisclosed expectations, or to remedy uncommunicated deficiencies.

I am therefore of the view that at the end of the probationary period–

(a) if the employer is *bona fide* not satisfied with the work and conduct of the probationer (or perhaps even if he entertains a genuine doubt or suspicion), he can dismiss the probationer, or extend the probationary period;

(b) if the employer is in fact satisfied with the work and conduct of the probationer (or if his opinion to the contrary is vitiated by *mala fides* in the wide sense), he cannot dismiss the probationer.

I must confess that in *Elsteel Ltd. v. Jayasena* [7] although I held that a dismissal during a probationary period was unjustified (on the basis of the contractual terms), I did assume, incorrectly as it now turns out, that **these decisions** recognized a somewhat broader right of the employer in regard to the termination of probationary employment without having to establish good cause, as well as the extension of probation.

AUTOMATIC EXTENSION OF PROBATION

The decision in *Hettiarachchi v. Vidyalankara University* [1] that there was an automatic renewal of probation is inconsistent with the concept of probation which, as outlined by Moonemalle, J., implies that – at least in equity – a probationer would have legitimate expectation of confirmation if his work and conduct was to the satisfaction of the employer. If at the end of a long probationary period, an employee had not been expressly confirmed, but it is nevertheless proved, for instance, that internal performance appraisals were uniformly favourable, that increments had regularly been recommended, that frequent commendations had been issued, and that there was nothing against him, how can it be said, months or years later, that he had not duly proved himself? That would be contrary to all notions of justice, equity and fairness between employer and employee. In such circumstances the employer should have confirmed the employee in service (unless there were extraneous circumstances, such as financial incapacity, which justified refusal); and if he did not, equity must regard as done that which ought to have been done. Where an employee had manifestly proved himself during his probationary period, having regard to the purpose of probation, dismissal (in the absence of exceptional circumstances) would be *mala fide;* likewise, in such a situation, an be **express** extension of probation (in lieu of such dismissal) would be neither just nor equitable: for if the employee has already "proved" himself, how can he be required to prove himself again? If in such circumstances an express extension would not be proper, it must follow that an extension cannot be **implied.**

I am fortified in my view that there can be no such "irrebuttable presumption of renewal", by a consideration of the anomalous consequences of any such presumption. Is such a renewal to be presumed for a like term as the original, or for an indefinite period? If it is for a like period, can the presumption again be drawn at the end of the extended period? And yet again? Should a Tribunal, with power to give relief against the (harsh) terms of a contract of employment, apply such a presumption merely because a contractual term provides for a probationary period? Probation implies the need for "testing", and that is so whether it is the original or an extended probationary period. Hence the purpose of an extension will not be achieved unless the employee has been made aware of what is expected of him and of his deficiencies. Where the employer has not expressly alleged, and the circumstances do not suggest, a need for further "testing", a presumption of renewal is not justified.

On the other hand, if at the end of a short period of probation it transpires that the employee had been made aware of his deficiencies and faults but without avail, the circumstances would justify an inference that the employer was not satisfied, and it would be just and equitable to infer a renewal - but not for an indefinitely long period.

I am therefore of the view that there is no inflexible rule providing for the automatic renewal of probation and that an inference of renewal can only be drawn in those cases in which the circumstances justify it. There is no evidence of any deficiency on the part of the Applicant or even of any doubt or suspicion by the Employer, as to his work, conduct or any other relevant matter, during the probationary period of three years. Having regard to the nature of his employment it would be unreasonable to infer that the Employer was not satisfied. Accordingly, the Applicant's probation cannot be deemed to have been renewed on 1.4.85.

CONTRACTUAL TERMS AFFECTING EXTENSION

Employer and employee can make express provision as to probation, and confirmation, renewal or dismissal upon the expiry of

probation. By agreement, the rights which either party would otherwise have may be enlarged or restricted. Thus they may agree that the employer has an unconditional right to extend the probationary period **or** that extension can only be for reasons previously disclosed to the employee; that unless and until expressly confirmed, an employee will continue to be on probation, **or** that if the employer does not dismiss the employee or expressly extend probation, the employee will be deemed to have been confirmed. *Prima facie*, such terms will be valid (subject, perhaps, to the provisions of section 31B (4)). Thus the contractual provisions may even confer on an employee a right to confirmation upon satisfying specified conditions (e.g. section 11 of the Establishments Code: *Bandara v. Premachandra* [3]; see also *Elsteel Ltd. v. Jayasena* [7]).

In the case before us, the contract places two hurdles in the way of an implied or automatic renewal:

1. By clause 2, the Employer expressly reserved the right to extend probation but failed to provide that the non-exercise of that right would also result in an automatic extension. Did the contract therefore exclude any presumption of automatic renewal?

2. By clause 4, the employee was given an expectation that he would be confirmed if he satisfied certain conditions, and provision was made for dismissal if he did not. Did this mean that if he did satisfy the stipulated conditions, the employee was entitled to confirmation? Or at least that he would not be dismissed?

Some general considerations apply to the interpretation of this contract. It is a document prepared and tendered by the Employer to the Applicant who had little choice in the matter; mainly because he was not in an equal bargaining position. If its provisions are clear, however disadvantageous to the Applicant, he is contractually bound, although a Labour Tribunal does have power under section 31B (4) to give some equitable relief against harsh terms. If the contractual terms are ambiguous, or admit of more than one interpretation, both equity and the principles of interpretation concur

in requiring that they be interpreted *contra proferentem,* against the Employer and in favour of the Applicant. If in respect of an eventuality which could and should have been anticipated, two alternative provisions might have been made – one favourable to the Employer, the other to the Applicant – the Court ought not imply the former; because the Employer having been in a position to do so, refrained from including the provision advantageous to himself. I respectfully disagree with the contrary approach of Wimalaratne, J., (in *Hettiarachchi v. Vidyalankara University* at p. 48) that, because there was no express provision in the letter of appointment to the effect that on the expiry of the probationary period the employee shall stand confirmed, there was an automatic renewal of probation. That interpretation gives the employer the benefit of the ambiguity or uncertainty arising from his own, avoidable lapse.

The *contra proferentem* rule must be applied to clause 2 with the result that automatic renewal is **excluded.** Even otherwise, the parties having provided for express extension, the failure to provide for implied extension must be treated as deliberate, for *expressio unius exclusio alterius.* Further clause 4 gave the Applicant an expectation of confirmation if certain stipulated conditions were fulfilled; it was open to the Employer to have provided that, if not expressly confirmed, the Applicant would continue to be on probation. The Employer's omission cannot ensure to his benefit. I therefore hold that the contract excluded the automatic renewal of probation, so that after April 1983 the Applicant continued in service as a confirmed employee, which status was unaffected by subsequent events.

Learned President's Counsel finally contended that the Applicant had failed to tender a medical certificate in terms of clause 8. This was not a ground relied on in the letter of termination. The first occasion on which this lapse was pointed out to the Applicant was by a letter dated 12.7.83 – after the initial probationary period had expired – and that could not give rise to a retrospective inference of renewal of probation. Moreover, the Employer himself did not regard this as a matter warranting the cessation of the employment, as by that letter the Applicant was only informed that if he failed to furnish

that certificate his salary would be stopped from August 1983; a threat which apparently was not carried out. Even if the Employer might have been entitled to rely on this as a matter justifying the extension of probation, action should have been taken on that basis during or at the end of the probationary period; failing which, that right must be deemed to have been waived.

The appeal is dismissed, but without costs as the Applicant was absent and unrepresented.

DHEERARATNE, J. – I agree.

GOONEWARDENE, J.

In my view this appeal as argued for the appellant turns on the question as to whether the respondent workman was, at the time his services were terminated, in permanent employment or conversely on probation prior to confirmation in employment. The decision as to that I think must rest primarily upon a consideration of the letter of appointment issued by the appellant Corporation to the respondent and produced marked R3 before the Tribunal. The relevant part of it reads thus:

> "2. Your appointment is subject to a probationary period of three years from your date of appointment. The Board of Directors of the Corporation reserves the right to extend the period of probation"

The document is silent as to whether, after the expiration of the probationary period of three years, the workman was to be notified that he had been confirmed in employment and the fact that he had not been so informed has not been disputed. The question then is whether, in these circumstances the workman continued to be on probation or whether on the other hand he had to be treated as being in permanent employment. Since the Board of Directors of the Appellant Corporation reserved the right to extend the probationary period of three years, upon the exercise of any such right, to my mind two things had to be done. Firstly, the Board of Directors of the Corporation should have decided that his period of probation had to be extended and as regards that there is no material that I have been able to see which indicates that such a decision was made. Secondly, such decision once made should have been **communicated** to the respondent, there being a duty then on the Board to do so. No such decision had been communicated to the workman. Thus where we are concerned with a condition contained in the letter of appointment, whatever the earlier decided cases may say, I cannot take the view that the workman respondent continued to be on probation by reason of his not having been informed of his

confirmation, because to say so would be to say in effect that the Board of Directors made such a decision in the exercise of their right and were entitled to give effect to such a decision although not communicated to the workman. If such was possible, logically there is no reason why the workman could not have been kept on probation throughout the entirety of his career without being informed whether he was on probation or he had been confirmed in his employment, even if he had not been dismissed from employment as was done here.

That being the view I take, it is not permissible for the appellant employer to contend that at the time of termination of his employment the workman was on probation. I think the appeal of the employer must fail and accordingly it should be dismissed although without costs.

Appeal dismissed.