1972 *Present :* **Rajaratnam, J.**

M. I. AKBAR, Appellant, *and* AIR CEYLON LIMITED, Respondent

S. C. 128/69—Labour Tribunal Case No. 1/26937

Labour Tribunal—Allegation against an employer—Standard of proof necessary—Requirement of a standard of fairness—Tribunal's order should not be unjust and inequitable—Admissibility of legally inadmissible evidence—Limitations on it—Proceedings before a Labour Tribunal—Long delay—Difficulty then of making a just and equitable order.

[1] *(1916) 19 N. L. R. 289.*

The services of the applicant-appellant were terminated by his employer (Air Ceylon Ltd.) on the ground that he had solicited a bribe from a passenger. The President of the Labour Tribunal upheld the dismissal, although two material witnesses who had made certain statements to the Officer in Charge of Air Ceylon Ltd. implicating the appellant were not called to give evidence at the inquiry. The President relied strongly on the statements (R1, R2 and R3) which had been made to the investigating officer by the witnesses who did not give evidence. These statements, however, were not satisfactorily recorded and, therefore, their value was reduced to a considerable extent.

Held, (i) that, although Labour Tribunals are not bound by the provisions of the Evidence Ordinance, the statements R1, R2 and R3 were of diminished value by reason of the fact that they had not been properly recorded by the investigating Officer-in-Charge at a proper inquiry.

(ii) that, although a Labour Tribunal can act on evidence which is legally inadmissible under the Evidence Ordinance, the use of such inadmissible evidence must at no time lead the Tribunal to make an unjust and inequitable order. The Tribunal must not ignore the rules of prudence and fairness in circumstances where, for instance, there is a confession to a Police officer or the evidence of an accomplice. In the present case the whole act of receiving a bribe was enacted solely by a peon employed in Air Ceylon Ltd.

(iii) that, in regard to the standard of proof necessary to prove an allegation against an employer that he wrongfully dismissed a workman, there is a standard of fairness that has to be applied whether or not misconduct involving moral turpitude is alleged against the workman.

Observations on the need for avoiding long delay in the disposal of proceedings before a Labour Tribunal.

APPEAL from an order of a Labour Tribunal.

Elmo B. Vannitamby, with *R. Ravindra,* for the applicant-appellant.

Mark Fernando, for the employer-respondent.

Cur. adv. vult.

July 21, 1972. RAJARATNAM, J.—

The applicant-appellant in this case was a traffic clerk drawing a monthly salary of Rs. 250 in Air Ceylon Limited. He had his employment from 1957 till his services were terminated on 9.1.1966. The employer's position was that on a complaint made by a passenger that the applicant had taken a bribe to issue a ticket on the 9th of September 1965 a preliminary inquiry was held and he was interdicted on the same day by the General Manager and subsequently after further inquiry held by the Chairman on the 21st of October his services were terminated with effect from September 1965. The applicant asked for re-instatement and back wages. After inquiry the President

dismissed the application holding that the termination of the services of the applicant was justified for the reason that the applicant in fact solicited a bribe in the performance of his official duties. The employer-respondent in this case called witnesses to prove the case against the applicant. According to that evidence Mr. Varney who was a passage Supervisor of the Booking Office saw a Peon named Pelis walking out of the office and receiving some money from a passenger who had been attended to earlier by the applicant. Whereupon he went up to the Peon who had three Rs. 5 notes in his possession. When he was asked what it was he replied that he had been requested by the applicant to collect this money from the passenger. The Peon Pelis appeared not to know why he was asked to collect this money from the passenger. This matter was reported to Mr. Rajapakse who was the Officer-in-charge according to whom he immediately sent for the applicant and also questioned the passenger, one Mr. Subramaniam, why he gave the money to Pelis. The applicant denied he asked Pelis to collect any money on his behalf but Subramaniam supported the Peon that the money was given to Pelis on behalf of the applicant. It transpired that Subramaniam was not the passenger but it was Nadesa Nadar whom he accompanied. Nadesa Nadar also was questioned and his statement was recorded. The statement of Subramaniam in question and answer form was produced as R1. The statement of Subramaniam in narrative form was produced as R2 and the statement of Nadesa Nadar was produced as R3. According to these statements R1, R2 and R3 both Subramaniam and Nadesa Nadar lend support to peon Pelis' evidence. There were translations of R1, R2 and R3. The original documents however were in Tamil and only R1 was counter-signed by Rajapakse who admitted he knew no Tamil. I have looked at the originals which purport to be in the handwriting of Subramaniam and Nadesa Nadar and the only comment I have to make is that they do not give the appearance to have been written out in the manner deposed to by Rajapakse. The applicant gave evidence and denied that he had ever solicited any money from either Subramaniam or Nadesa Nadar and his position was that peon Pelis who announced two gentlemen as prospective passengers when he came to office in the morning could have received this gratification for himself and thereafter when he was caught red-handed by Varney, shifted the responsibility on to him. He however conceded that at about the time that he handed over the ticket to these two gentlemen he had given 25 cents to Pelis to buy 3 Four Aces cigarettes and thereby accounted for Pelis leaving the office. Apart from the aforesaid statements of Subramaniam and Nadesa Nadar there was no other evidence except the testimony of Pelis to implicate the applicant.

The President at the inquiry believed Pelis and stated that he was satisfied beyond reasonable doubt that the applicant solicited the bribe on the oral testimony of the witnesses for the respondent and dismissed the application.

Two points were urged before me by the learned Counsel for the applicant, (1) that the documents R1, R2 and R3 had been wrongly admitted in evidence because neither Subramaniam nor Nadesa Nadar was called at the inquiry before the Tribunal and further the person who translated R1, R2 and R3, one Benedict was not called. (2) The charge against the applicant involved moral turpitude and it should have been proved beyond reasonable doubt as was decided in the case of *Ceylon University Clerical and Technical Association, Peradeniya v. University of Ceylon, Peradeniya,*[1] 72 N. L. R. p. 84, and further that Pelis should have been treated as an accomplice as it was he who was found receiving the money. With regard to the first submission learned Counsel for the applicant cited the case of *Ceylon Workers' Congress (on behalf of K. Ramasamy) v. The Superintendent of Kallebokka Estate,*[2] 63 N. L. R. p. 536, where Tambiah J. held that although the provisions of the Evidence Ordinance are not applicable at such inquiries, it is incumbent upon the tribunal to follow principles of natural justice. It is submitted on behalf of the applicant that Subramaniam and Nadesa Nadar were not called as witnesses and therefore their statements should never have been admitted by the President. I find that R1, R2 and R3 were admitted at the inquiry and summons had been sent out on Subramaniam and Nadesa Nadar and Mr. Advocate Isidore Fernando who appeared for the respondent had moved that these two persons be noticed through the Police for the next date of inquiry. On one of the dates Mr. Advocate Isidore Fernando asked for an adjournment informing the President that since these two witnesses were absent he cannot proceed further without them. On a subsequent date it was reported that summons was served on Subramaniam and that notice also had been served on the other witness Nadesa Nadar through the Police (p. 30 of the Record). Nevertheless these two witnesses were not made available at the inquiry. Complaint was made that the statements purported to be the statements of these two witnesses were statements of witnesses whom the applicant did not have the opportunity to cross-examine and they were untested. Placing great reliance on the observations and the decision of Tambiah J. in the case reported in 63 N. L. R. 536, learned Counsel for the applicant submitted that the admission of these documents was contrary to the principles of natural justice. I am not able to agree with the

[1] *(1968) 72 N. L. R. 84.* [2] *(1962) 63 N. L. R. 536.*

learned Counsel that in every case such an admission contrary to the rules of evidence by itself is a violation of the fundamental principles of natural justice. Certainly the admission of these documents was not contrary to law as a strict compliance of the Evidence Ordinance is not obligatory in the Labour Tribunals but in the circumstances of this case I find that the statements of these two witnesses were statements made in Tamil to Rajapakse who knew no Tamil and the person who translated these statements, one Benedict, as I have referred to earlier was not called as a witness. Secondly a rather unsatisfactory procedure has been adopted to record these statements by Rajapakse. The detection by Varney does not in any way implicate the accused as it was the peon Pelis who was found receiving the money. If what Pelis said was true it would have been more helpful if Varney allowed Pelis to proceed into the office and hand over the money to the applicant. To say the least this detection was rather premature to catch the applicant. On the other hand Varney, thereafter Rajapakse, were both content to rest with Pelis' explanation. It is not improbable that Pelis shifted his guilt to the applicant nor is it improbable that Subramaniam and Nadesa. Nadar caught in the act of giving a gratification explained their conduct by stating that they did so at the request of an officer in the Booking Office rather than at the request of a peon in the verandah fearing that they may have their tickets cancelled. It cannot be said that it would have made no difference at all if the applicant was given an opportunity to cross-examine these two witnesses. The procedure for inquiry into the conduct of Air Ceylon employees is laid down in a circular marked A1 which was produced by the applicant through Mr. Tissa de Fonseka according to whom the normal procedure was not followed in this case as far as he was aware for the reason that an on the spot inquiry was necessary as the passengers were leaving. The answer of the employer stated that the applicant was discontinued after an inquiry held by the Chairman to which inquiry Mr. Akbar was present on notice. The applicant denied that there was any such inquiry held by the Chairman Mr. de Zoysa except for the fact that Mr. de Zoysa called him one day to his office and asked him a few questions. This was rather in the nature of an interview rather than an inquiry contemplated in A1. I find again that on the 30th of July 1968 in the course of the proceedings Mr. Isidore Fernando made an application to lead the evidence of the Chairman on the next date, when the applicant's Counsel objected and asked for costs. On the next date however Mr. de Zoysa was not called nor was any mention made about his not being called. It is unfortunate that the Air Ceylon authorities did not hold a

proper inquiry to record the evidence of Subramaniam and Nadesa Nadar which was through no fault of theirs. On the other hand the statements that were in fact recorded were not too satisfactorily recorded. The only document that has the signature of Rajapakse was R1. The questions put to Subramaniam in R1 were too much in a leading form. The signature of Nadesa Nadar in R3 appears against a cross presumably to indicate where Nadesa Nadar should sign and in the totality of the evidence of Rajapakse it is difficult to be impressed with the mode and manner these statements were recorded. In addition to all this the absence of the interpreter or the translator is also a point which reduces the value of these documents to a considerable extent. Learned Counsel appearing for the respondent strenuously argued that the Labour Tribunals not being bound by the provisions of the Evidence Ordinance, these documents could have been admitted. I agree with this argument whole-heartedly but at the same time I cannot ignore the unsatisfactory nature of these statements and the recording of these statements. In this context, the applicant not being given a chance at the inquiry to cross-examine the witnesses at the Tribunal when they supplied the most vital evidence against him through their statements is a sad feature in this case. The question is whether as a matter of law these documents R1, R2 and R3 could have been admitted. My answer is that they could have been but the value of these statements was much diminished for the reasons I have stated above. Though their value was diminished, it is an inescapable conclusion that they had a telling effect on the mind of the President to arrive at a finding against the applicant. Apart from prevailing upon me to diminish the value of these statements learned Counsel for the applicant has not convinced me that these documents were inadmissible in the Tribunal. The second point however that where the allegation involves moral turpitude it must be proved beyond reasonable doubt has engaged my most anxious consideration. In the case reported in 72 N. L. R. p. 84[1] Wijayatilake J. has laid down this rule in a considered judgment. In this case the man who was caught redhanded receiving the money was Pelis and not the applicant. It is not unlikely as I stated earlier that Pelis as well as the passengers implicated the applicant to get out of a difficulty when they were caught in the act of giving and receiving a gratification. I find it difficult to form the view on all the evidence that had been led that the guilt of the accused has been proved beyond reasonable doubt. At the same time I do not think that this case is without suspicion. In my view this is a

[1] *Ceylon University Clerical and Technical Association, Peradeniya v. University of Ceylon, Peradeniya (1968) 72 N. L. R. 84.*

case where the allegation has not been proved beyond reasonable doubt judged by any objective standard. The President on the other hand has stated in his order that he holds that the employer-respondent has proved the guilt of the applicant beyond doubt. He also observed that even without the statements R1, R2 and R3 he has no difficulty in arriving at this conclusion. In the case reported in 72 N. L. R. 84 the President whose order was set aside had observed that in Labour Tribunal matters unlike in criminal cases it is sufficient to prove the allegation by a preponderance of probability.

In the circumstances of this case was the President entitled to make a finding that apart from R1, R2 and R3, the respondent had proved that the applicant did solicit a bribe and that proof has been beyond reasonable doubt ? It was the peon Pelis who was seen accepting the money in the verandah and it was the peon Pelis who was caught and questioned. On his sole testimony by any objective standards can it be said that the guilt of the applicant has been proved beyond reasonable doubt ? In my view, it has not been so proved.

I hold that where by all objective standards there is a reasonable doubt and the allegation in the circumstances as in this case remains unproved, it is an error of law to arrive at a finding that the allegation has been proved beyond reasonable doubt. Quite apart from the necessary measure of proof, it is unfair and unjust to make such a decision which affects the livelihood and reputation of an employee. If Pelis who was caught redhanded was discontinued on the charge that he accepted a bribe and he gave the explanation he did, there again the charge will remain unproved. No human mind without the powers of divination on this limited evidence can find the allegation against the applicant or Pelis proved.

It was held in the case of *Guillain v. Commissioner of Income Tax,*[1] 51 N. L. R. p. 241 at 247, " this Court can interfere only if there is some error of law—it being, of course, an error of law if a finding of fact is arrived at with no evidence to support it. It is not an error of law to arrive at a finding of fact where there is, so to speak, evidence both ways ". With great respect I agree with this observation. At the same time there is a rule of evidence that the testimony of an accomplice must be presumed to be untrustworthy. No doubt the President of the Labour Tribunal need not adhere to the rules of evidence at the inquiry by the Tribunal and he is permitted to follow his own procedure and the rules of evidence do not bind him. But these wide powers are given to him so that he can ultimately make all

[1] *(1949) 51 N. L. R. 241 at 247.*

inquiries which he considers necessary and make a just and equitable order. This does not mean for a moment that he can throw caution and rules of prudence to the wind and arrive at his ultimate finding. The President can act on the confession made by an accused person to a Police officer and likewise he can on the evidence of an accomplice but that does not mean that he can act without cautioning himself. In the case of *Ceylon Transport Board v. Gunasinghe*[1], 72 N. L. R. 76 at 80, Weeramantry J. observed " where the conclusion reached on the evidence is so clearly erroneous that no person properly instructed in the law and acting judicially could have reached that particular determination ..... a Tribunal which has made a finding of primary fact that is wholly unsupported by evidence has erred in point of law ..... " and again at page 83 he made the further observation " proper findings of fact are necessary basis for the exercise by Labour Tribunals of that wide jurisdiction given to them by statute of making such orders as they consider to be just and equitable. Where there is no such proper finding of fact the order that ensues would not be one which is just and equitable upon the evidence placed before the Tribunal, for justice and equity cannot be administered in a particular case apart from its own particular facts. I am strengthened in the conclusion I have formed by a perusal of the judgment already referred to, of my brother Tennekoon, who has observed that it is only after the ascertainment of the facts upon a judicial approach to the evidence that a Labour Tribunal can pass on to the next stage of making an order that is fair and equitable having regard to the facts so found ".

Inadmissible evidence with regard to the Evidence Ordinance can be made use of by the President in a Labour Tribunal inquiry. But the use of such inadmissible evidence must at no time lead the Tribunal to make an unfair and inequitable order. The Industrial Disputes Act gives a free hand to the President of a Labour Tribunal to over-ride all rules of evidence known to the law to arrive at a just and equitable order but this does not mean that at a Labour Tribunal inquiry the President can ignore the rules of prudence and caution in circumstances where, for instance, there is a confession to a Police officer or the evidence of an accomplice. In this particular case can it be held in a just and equitable order that Pelis who was caught redhanded should be believed any more than the applicant who denied the allegation ? There may be circumstances in which an accomplice can be believed even without corroboration but certainly in the present circumstances

[1] *(1968) 72 N. L. R. 76 at 80.*

where the whole act of receiving a bribe was enacted by Pelis alone, to say that the President was not bound by the rules of evidence and therefore free to accept Pelis' evidence as true is tantamount to say that under the Industrial Disputes Act a President of a Labour Tribunal is empowered to make a just and equitable order without adhering to rules of prudence and fairness. Learned Counsel for the respondent with great skill and ability argued that it was not necessary to prove an allegation which involves moral turpitude beyond reasonable doubt. He cited many authorities for this proposition. In *Bater v. Bater*,[1] (1950) 2 A. E. R. 458 at 459, Lord Denning observed :—

> " The degree (of proof) depends on the subject-matter. A civil Court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal Court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. Likewise, a divorce Court should require a degree of probability which is proportionate to the subject-matter."

In a case of fraud it was observed in *Hornal v. Neuberger*[2], (1956) 3 A. E. R. 970 at 973, that—

> " the more serious the allegation the higher the degree of probability that is required ; but it need not, in a civil case, reach the very high standard required by the criminal law. "

Lord Denning in the case of *Blyth v. Blyth*[3], (1966) 1 A. E. R. 524 at 536, again observed—

> " We should not say that adultery must be proved with the same strictness as is required in a criminal case....so far as the grounds of divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability. "

With great respect I agree with all these observations, but none of these observations are inconsistent with the human requirements in a Labour Tribunal inquiry that a yardstick of fairness must be used on behalf of both parties before arriving at a finding which by law is required to be a just and equitable order.

I have considered the question of the standard of proof necessary to prove an allegation against an employer and with the assistance of all the decisions and observations made by very

[1] *(1950) 2 A. E. R. 458 at 459.* [2] *(1956) 3 A. E. R. 970 at 973*
[3] *(1966) 1 A. E. R. 524 at 536.*

learned Judges I am of the view that there is a standard of fairness that has to be applied whether it is a case of misconduct involving moral turpitude or not. Because it is only if a yardstick of fairness is used that the Tribunal can ultimately arrive at a conclusion that leads to a just and equitable order. The next question before me is whether the documents R1, R2 and R3 added any weight to the evidence of Pelis. In my view the manner in which these statements were recorded and the fact that there was no proper inquiry according to the circular marked A1 and above all the fact that Subramaniam and Nadesa Nadar were also participants in the act of giving a bribe which exposed them also to a charge under the Bribery Act, the reasonable possibility that they made their statements to save themselves, the fact that the applicant had no opportunity to cross-examine them at a proper inquiry—all these factors cumulatively lead me to the view that the aforesaid documents do not add any weight to Pelis' evidence. As I mentioned earlier this case does not at its highest go beyond the region of suspicion and the allegation is not proved against the applicant though the Tribunal has held that the allegation is proved beyond reasonable doubt. I hold that this Court can interfere with the finding as there has been no just and equitable order made as required by law. The facts as testified to by the witnesses called at the inquiry exposed Pelis, Subramaniam, Nadesa Nadar or the applicant to a charge under the Bribery Act but on the evidence available I do not think a charge could have been successfully maintained against any one of them but comparatively there was a stronger case against Pelis than against the applicant. However it is not in the best interest of the employer-employee relationship that I should set aside the order of the President and make order that the applicant should be re-instated without giving the employer the alternative of terminating his services on payment of back wages and other attendant benefits up to the date of termination and also compensation in a sum to be computed by the Labour Tribunal on the basis of his period of service.

I am making an order for re-instatement without back wages as the applicant himself has been on his own evidence responsible for the peon Pelis to be out of the office and get to the verandah to buy cigarettes for him, an errand that could have been postponed till the official duties were done by him. It does not speak well for the applicant's sense of discipline for him to have sent the peon Pelis to buy cigarettes for him as soon as he

came to office for his duties, and thus afford an opportunity for this alleged incident to take place. It will not be just and equitable for the employer to pay back wages *if the applicant is reinstated.*

On the other hand if he is not reinstated, the employer is ordered as an alternative to reinstatement to pay the applicant back wages which will be limited to Rs. 9,000 and other attendant benefits up to the 9th of January 1968 and also compensation in a sum to be computed by the Labour Tribunal on the basis of his period of service.

It is a matter for comment in this case that a long delay in the final determination of an action in the Labour Tribunal creates a situation when it makes it difficult and sometimes impossible to make a just and equitable order. The inquiry with this application took more than 3 years and it is now being disposed of after 6 years. If I order back wages for this whole period, if there is no re-instatement, it will be unfair by the employer and if I do not, it will be unfair by the employee and it is for this reason that I limit the period of back wages to 3 years. This case has given me considerable anxiety on this point owing to this unreasonable delay of 6 years and more. I hope such matters are disposed of finally with speed and the Tribunals which deal with these matters, bear in mind the hackneyed but nevertheless true saying that justice delayed is justice denied.

I therefore set aside the order of the President and alter it thus :

1. The applicant to be re-instated or in the alternative and in lieu of re-instatement

2. the applicant to be paid back wages limited to Rs. 9,000 and other attendant benefits up to the 9th of January 1968 and also compensation in a sum to be computed by the Labour Tribunal on the basis of his period of service.

3. Costs fixed at Rs. 315.

Appeal allowed.