1975 *Present :* **Perera, J. and Vythialingam, J.**

THE CEYLON TRANSPORT BOARD, Employer-Appellant, *and* A. H. WIJERATNE, Applicant-Respondent

S.C. 55/73—Labour Tribunal Case, 14/340/71

Industrial Disputes Act—Section 33 (5)—Compensation in lieu of reinstatement—Basis of computation—Duty of the Tribunal.

Held : In making an order for the payment of compensation to a workman in lieu of an order for reinstatement under section 33 (5) of the Industrial Disputes Act, a Labour Tribunal should take into account such circumstances as the nature of the employer's business and his capacity to pay, the employee's age, the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal including the nature of the charge levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place.

"The amount however should not mechanically be calculated on the basis of the salary he would have earned till he reached the age of superannuation and should seldom if not never exceed a maximum of three years' salary ".

APPEAL from an order of a Labour Tribunal.

N. Satyendra with *P. Suntheralingam* for employer-appellant.

H. W. Jayawardena with *H. L. de Silva* for applicant-respondent.

Cur. adv. vult.

February 12, 1975. VYTHIALINGAM, J.—

THE applicant-respondent made an application dated 20th May, 1971, alleging that the termination of his employment by the respondent-appellant with effect from 12.4.1971 was unlawful, unjustified, illegal, in violation of the basic principles of natural justice and contrary to the disciplinary rules of the Ceylon Transport Board and prayed for reinstatement with all back wages or for compensation for wrongful termination of employment and loss of career which he assessed at Rs. 242,500 for gratuity and other reliefs.

The respondent-appellant admitted that the applicant was dismissed with effect from 12th April, 1971, as the applicant respondent was reported to have been guilty of certain acts and/or conduct which was prejudicial to the interest or/and dangerous to the security of the lawfully established Government of Ceylon and of the Ceylon Transport Board. It was also averred that the applicant was subsequently suspended in terms of Regulation 1 (1) of the Regulations made under section 5 of the Public Security Ordinance and that by virtue of Regulation 1 (2) thereof the Labour Tribunal had no jurisdiction to inquire into the merits of the application.

The preliminary question of the Tribunal's jurisdiction was discussed on 24.7.1971 and parties agreed to make written submissions on 1.9.1971. In the meantime the employer by letter dated 1.7.1971 purported to suspend the workman under the provisions of regulation 1 (1) already referred to. The workman questioned the right of the employer to suspend him as his services had already been terminated and asserted that the action taken by the employer was mala fide with a view to depriving him of the remedies available to him in law. Thereafter by letter dated 12.8.1971 the employer purported to reinstate the workman but the latter refused to accept the reinstatement on the ground that the matter was before the Tribunal, and any settlement should be before the Tribunal where he would have an opportunity of ensuring that the offer of reinstatement was bona fide.

Thereafter on 1.9.1971 the question of jurisdiction was argued and after further written submissions had been made the President ruled on 11.1.1972 that the Tribunal had jurisdiction to hear and determine the application, and the matter was fixed for inquiry. The employer obtained two dates to lead evidence of an Inspector of Police apparently for the purpose of establishing its allegation that the termination of the workman's services was due to the fact that he was reported to be guilty of acts of subversion against the State and also of the Employer, the Ceylon Transport Board. No such evidence however was led and on

16.9.1972 the Counsel for the employer informed the Tribunal that the workman had already been reinstated and that the Tribunal could only make an order for compensation as an alternative to reinstatement.

The workman then led evidence. His position was that the offer of reinstatement was not bona fide but was only made to inveigle him back into service in order to take steps under the Emergency regulations and thereby deprive him of his rights under the law which he would have had if his services were unjustifiably terminated before action under the regulations were taken. After inquiry the President made order holding that the refusal of the applicant to accept reinstatement was for justifiable cause and since the applicant did not wish to be reinstated for reasons which the President had accepted he did " not consider it in the interests of both parties to reinstate the applicant back in his post ". He accordingly made order for the payment of compensation and gratuity. This will be noticed shortly.

On the evidence led before him the President could not have arrived at any other conclusion. On 1.9.1971 the Counsel for the employer withdrew the allegations on which the employer relied to justify the termination of the employment. No evidence was led to justify the termination. On the contrary, the employer had purported to reinstate the workman thus impliedly admitting that the termination was without just cause. The workman's position was that this offer of reinstatement was not bona fide but made with an ulterior motive. The termination of the employment was on 12.4.1971. The Emergency regulations were promulgated on 17th April, 1971 and even on 2nd June, 1971 the employer reiterated the position that the termination was in terms of his letter of appointment. But it was not till three months later that by letter dated 1.7.1971 that the employer decided to alter the termination of the services to one of suspension under the regulations.

By that time the workman's application was pending before the Tribunal. But regulation 1 (2) provided that the suspension of the services of an employee of a Public Corporation under paragraph (1) shall not be challenged before any court or any Tribunal, and the regulation was to have effect notwithstanding anything in any other law. Thereafter on 17.7.1971 the employer filed its answer taking up the position that by virtue of Regulation 1 (2) the Tribunal had no jurisdiction to inquire into the merits of the application. The object of altering the termination of the services to one of suspension under the regulations is at once apparent.

On the 24th July, 1971 there was discussion of this matter before the Tribunal and the inquiry was adjourned to enable parties to make written submissions. It must have been apparent by then to the employer and its advisers that as long as the earlier order of termination stood there was no question of suspending the workman's services as he had already been dismissed and paid all terminal dues, including three months' salary in lieu of notice, his Provident Fund dues and 17 days' pay for annual leave not availed of. Hence by letter dated 8th August, 1971 the workman was reinstated with back wages from the date of his suspension.

The workman said that he feared that once the employer got him back into service action would be taken against him under the Emergency regulations and he would be bereft of his legal remedy. He gave evidence in regard to animosity between him and the Chairman of the Board and of certain other incidents. Mr. Satyendra submitted that this evidence does not bear examination. The President has considered this along with the fact that no evidence was led by the employer to contradict this evidence of the workman. There is, as I have pointed out, sufficient evidence in regard to the actions taken under the Emergency regulations by the employer to show that there was justification for the workman's attitude. Besides, this is entirely a question of fact on which this Court cannot interfere.

The facts in this case are clearly distinguishable from the facts in the case of *The Group Superintendent, Dalma Group, Halgranoya Vs. Ceylon Estate Staffs Union* (73 *N.L.R.* 575). In that case the employer had to close down a factory as an economy measure to meet the increasing expenditure on production. The workman who was the Factory Officer in this factory was offered the post of Senior Assistant Factory Officer of the employer's other factory where the Factory Officer was junior to him because the concerned workman was not familiar with the type of manufacture at this factory. He refused to accept this offer and was thereupon retrenched. The President held that the termination of employment was lawful and that the workman's refusal of alternative employment was not as in the instant case because of the fears of victimisation, but on grounds of prestige. He however ordered the ex gratia payment of Rs. 4,000 as compensation for loss of career in view of his enforced retrenchment. In appeal the order for the payment of ex gratia payment was set aside.

Moreover section 33 (5) provides that where the Tribunal considers that a workman should be reinstated, then, if the workman so requests the tribunal may, in lieu of the order for reinstatement, make an order for the payment of compensation

to that workman. This is a discretion vested in the Tribunal and in all the circumstances of this case the Tribunal has not exercised its discretion on any wrong basis, in directing that compensation should be paid in lieu of reinstatement. The question of that compensation now remains to be considered.

In his application the applicant claimed a sum of Rs. 242,500 as compensation for wrongful termination and loss of career. In his evidence he gave a breakdown of the calculation of this amount as follows :—

1. Salary for 11 years, i.e. till date of retirement at Rs. 1,200 p.m.	145,200
2. Loss of pension rights had he continued in Government Service up to 65 years at Rs. 250 p.m. for 180 months ..	45,000
3. Donation from Kegalle Society ..	20,000
4. Gratuity for 11 years	14,200
5. Loss of P.S.M.P.A. donation	6,000
Total ..	229,400

He also said that he had lost Provident Fund Contributions for the balance period of service. But the evidence is not clear as to how much it was. Probably it accounted for the balance sum to make it up to Rs. 242,500 which he originally claimed.

In his order the President has awarded the following sums :—

(1) 10 years' salary less 3 months' salary which he had received in lieu of notice ..	140,400
(2) Gratuity for a period of 10 years' at half month's salary for each year of service ..	6,000
Total ..	146,000

In the result he has made order for the payment of the grand total of Rs. 146,000. The reasons he has given for the order are that the workman has lost his pension rights and other benefits which would have accrued to him had he continued in Government Service, his 11 years' service under the employer and that he was now 51 years old and was unable to obtain employment elsewhere.

None of these reasons can stand the test of critical examination. The first reason is the loss of pension and other rights while he was in Government Service. The workman joined Government Service as a Depot Superintendent in the Rubber

Commissioner's Department. Thereafter he joined the Clerical Service and had put in 15 year's service and was in Grade II of the Executive Clerical Service drawing a sum of about Rs. 400 per mensem inclusive of all allowances, when on 10th October, 1957 he was seconded for service to the Ceylon Transport Board, the respondent-appellant. On 1.2.1960 he was appointed to the permanent service of the Board on a salary of Rs. 580. At the time of the termination of his services on 12.4.1971 he was drawing a salary of Rs. 1,200 p.m. and he said that his promotion to the next grade was due. He said that in terms of section 9 if the termination of his services was in the circumstances mentioned in 9 (3) (*b*) that is to say on retirement, ill-health, by abolition of post or on grounds approved by the Minister of Finance, he would have been able to get his pension for his service with the Government.

His position was that in the letter terminating his services no grounds were stated for such termination, and that no approval had been made by the Minister of Finance in terms of section 9 (3) (*b*) and as such he had lost his pension rights. In cross-examination it was suggested to him that he had lost his pension rights because he had refused to accept reinstatement. It is not clear as to what section 9 and section 9 (3) (*b*) are. The President has not referred to these sections or the effect of their provisions.

Assuming, however, that the position has been correctly set out by the workman it is quite clear that the workman has not lost his pension rights if any. The employer himself has withdrawn the charges and offered reinstatement ; thus indicating without any doubt that the termination of his services was not due to any fault on the part of the workman which would have disentitled him to his pension. This has been strengthened by a definite finding by the Labour Tribunal and now affirmed by this Court that the termination of his service was unjustified and that his refusal to accept the offer of reinstatement was justified.

In the circumstances the termination must be held to come within the words " retirement "in section 9 (3) (*b*). In any event it is difficult to conceive of the Hon. Minister of Finance not giving his approval in terms of the section in view of the concurrent findings of the Labour Tribunal and of this Court. The only ground for the termination of his services was the alleged reports of his involvement in subversive activities. He was not taken into custody by the authorities, nor even questioned by the Police or anyone else in regard to these alleged reports. In any event, no evidence was led to show that an

application to the Hon. Minister of Finance for the payment of pension was made or that it was turned down. As Gratien, J. pointed out at page 485 in *The Attorney-General Vs. Sabaratnam,* (57 N.L.R. 481 at 485) " Courts of Justice have always assumed so far without disillusionment, that their declaratory decrees against the Crown will be respected." The workman has therefore failed to show that his pension rights have been lost and the President could not and should not have taken this into account in the assessment of the compensation payable to the workman.

The workman also said that he had lost some benefits from the Kegalle Society and that had he continued to be a member of the Society he would have been able to withdraw a donation of Rs. 20,000. There was no evidence led to show that this was so or as to what the society was or why he had ceased to be a member. Nor was there any evidence in regard to the loss of a donation of Rs. 5,000 from the P.S.M.P.A. Nor was there anything to show that the loss of these benefits was directly attributable to the termination of his services by the employer. The President himself has not singled out these benefits he is said to have lost and given any consideration to them.

The President also said that the workman was 51 years old and that he had not been able to obtain employment elsewhere. At the time that he gave evidence the workman said he was fifty-one years old. But nowhere in his evidence did he say that he was unemployed or that he had not been able to secure employment elsewhere. He did not produce any evidence that he had tried to obtain alternative employment and was unsuccessful or that having regard to his qualifications, his aptitude and his special suitability for any particular type of work it was not possible to him to secure alternative employment. He did not even say so. So that the President's statement in regard to this matter is based on pure conjecture and is based on no evidence at all. Except for the bald statements the President has also given no reasons for the acceptance of the workman's position that he has lost his pension rights and other benefits and the President has also based his findings that the workman has not been able to secure employment elsewhere on no evidence at all. There was no warrant therefore to award compensation on the basis that he would continue to be unemployed for the rest of his life.

As Weeramantry, J. pointed out in the case *The Ceylon Transport Board Vs. Gunasinghe* (72 *N. L. R.* 76) at page 83, " Proper findings of fact are a 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. "

In regard to the giving of reasons for its findings Siva Supramaniam, J. said in the Court of Appeal in the case of *Brooke Bond (Ceylon) Ltd. Vs. Tea, Rubber, Coconut and General Produce Workers' Union* (*77 N. L. R. 6*) at page 9 " Where an appeal lies from the order of a Tribunal to a higher Court, though the appeal may be on a question of law, it is the duty of the tribunal to set down its findings on all disputed questions of fact and to give reasons for its order. Questions of law must necessarily be considered in relation to the facts and it would be impossible for a Court of Appeal to discharge its functions properly unless it has before it the findings of the original tribunal on the facts as well as its reasons for the order it has made ".

The mere fact that the evidence in regard to the loss of pension rights and of other benefits was not contradicted by any evidence led on behalf of the employer does not absolve the Tribunal from critically examining it and testing its veracity. Indeed in terms of section 31 (*c*) (1) it is the duty of the Tribunal to make all such inquiries into the application and hear all such evidence as it may deem necessary untrammelled by the rules of evidence and after adopting such procedure subject to the rules made by the Minister as it may deem necessary and thereafter make such order as may appear to the Tribunal to be just and equitable.

As Tennekoon, J. as he then was, pointed out " The tribunal must decide all questions of fact, ' solely on the facts of the particular case, solely on the evidence before him and apart from any extraneous considerations '. In short, in his approach to the evidence he must act judicially. It is only after he has so ascertained the facts that he enters upon the next stage of his functions which is to make an order that is fair and equitable, having regard to the facts so found. " *Ceylon Transport Board Vs. Ceylon Transport Workers' Union—71 N. L. R. 158 at 163, 164.*

In these circumstances it is competent for this Court to interfere with the findings of the Tribunal in regard to the assessment of the compensation payable to the workman in the facts and circumstances of this case. For, as Lord Normond pointed out in the case of *Inland Revenue Vs. Fraser (1942) Tax cases 498 at 501* : " 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 or contradictory of it."
In the instant case the order of the Tribunal suffers from all the defects mentioned by Lord Normond on which this Court has the power to interfere.

The President in assessing the compensation payable in this case has awarded full salary for the balance workspan of the workman till he reaches the age of superannuation. Judging by the cases that have come up in appeal in recent months this appears to be a commonly accepted standard among Presidents of Labour Tribunals and very large sums have been awarded to workmen by way of compensation on this basis. In a recent case a Superintendent of an estate whose services were held to have been unjustifiably terminated was awarded compensation in a sum of Rs. 240,000 odd. In another case an Accountant-Secretary in a Mercantile establishment was similarly awarded a sum of Rs. 166,000 odd and in the instant case the compensation has been assessed at Rs. 146,500. In the circumstances it is necessary and desirable to consider the nature of the compensation payable for unjustified termination of employment and the basis of its computation.

But before doing so it would be useful to examine the basis on which compensation has been awarded in some of the recent cases in order to ascertain if any definite principles emerge from such decisions. In the case of *The Highland Tea Co. of Ceylon Ltd. and another Vs. The National Union of Workers (70 N. L. R. 161)* the President held that the termination of the employment of an estate labourer was unjustified. But he did not order reinstatement and, instead, taking into consideration the period of service of the labourer which was about five years, ordered the employer to pay her Rs. 300 as compensation. Alles, J. however, set aside that part of the order holding the dismissal to be wrongful but did not interfere with the order for payment of compensation as "the President had not erred in law in making the order of compensation in this case which is an order which he was entitled to make under the provisions of the law."

But it is clear that this was not an order for the payment of compensation but for payment of gratuity because it has been repeatedly held that no compensation can be ordered where the dismissal is justified—*T. B. D. Ramblan Vs. The Ceylon Press Workers' Union* (75 *N. L. R.* 575). Alles J. himself explained this in a later case where he said, "In the Highland Tea Co. of Ceylon Ltd. Vs. The National Union of Workers, I have not interfered with the order of the President who granted to the

innocent spouse one month's wages for every year of service as compensation.... This 'compensation' must not be considered as a recompense for the lawful termination of the services of the innocent spouse for to so hold would, in the words of T. S. Fernando, J. in the High Forest Case (66 N. L. R. 14) amount to 'lawfully making an order the effect of which is to sanction the breach of the law of this land'. This payment is more in the nature of some kind of compensation for past services in keeping with the spirit of labour practice prevailing today." *The Ceylon Workers' Congress Vs. The Superintendent of Roebery Estate (70 N. L. R. 211 at 213).*

The same is true also of the case of *Uplands Tea Estates Ltd. Vs. The Ceylon Workers' Congress (72 N. L. R. 68)*. In that case the Union did not ask for reinstatement at the inquiry but left the question of payment of compensation in the hands of the President who awarded compensation on the basis of their past services. Alles, J. in dismissing the appeal said that the payment in this case was more akin to the payment of gratuity than compensation.

In the case of *Nanayakara Vs. Hettiaratchi* (74 *N. L. R.* 185) the workman was awarded a sum of Rs. 3,255 as compensation on the ground that his services were unjustifiably terminated and as the President considered his reinstatement inappropriate. apparently because the workman held a position of trust and confidence. At the time of the termination of his services the workman was drawing a monthly salary of Rs. 465 and the compensation awarded works out to seven months' salary although the workman had put in nine years' service with the employer.

In appeal Wijayatilake, J. quoting a passage from the Indian case of *S. S. Shetty Vs. Bharatha Nidhi Ltd.* which will be discussed later, said that the President had not set out any of the matters referred to in the passage. Applying the principles set out in the Indian case and apparently taking into consideration the age of the workman, the number of years of service, the assistance he had rendered to the employer in his business and otherwise and the ability of the employer to pay he increased the amount to Rs. 4,255.

In the case of *United Industrial Local Government and General Workers' Union Vs. The Independent Newspapers Ltd* (75 *N. L. R.* 529) the Tribunal held that the termination of employment was unjustified and ordered the payment of a sum of

Rs. 1,500 as back wages. In appeal the Supreme Court allowed an option to the employer to pay an additional sum of Rs. 1,000 as compensation in lieu of reinstatement. The Court of Appeal held that it had power to do so. The basis on which this amount was calculated was not set out.

Coming to more recent cases in the case of *The Riverside Estate Co. Ltd. Vs. The Ceylon Workers' Congress, S.C. 147/72, S.C. Minutes 10.10.1974* an estate labourer was awarded a " small ex gratia payment of Rs. 1,000.00 " in lieu of reinstatement. This Court did not interfere with the order. There was however no indication of the basis on which the compensation was calculated. In the case of *Bellagama Vs. The Co-operative Wholesale Establishment,* S.C. 64 and 73/71, S.C. Minutes 4.12.74 one year's salary was awarded having regard to the age of the workman, the charges against him, his capability, his terminal salary and the capacity of the employer to pay.

In the case of *Glaxo Allenbury Ceylon Ltd. Vs. P. De La Salle Fernando, S.C. 250/71, S.C. Minutes 22nd October, 1974* the applicant who was in receipt of a salary of Rs. 396 claimed a sum of Rs. 86,000 as compensation calculated on the basis of the loss of salary for the rest of his workspan. Rajaratnam, J. said " In our view this claim is fantastic. We find it difficult to hold that a just and equitable order can contain such a harsh order against an employer to pay the employee for the rest of his workspan after he has forfeited his employer's confidence. Again if this is reasonable it follows that a workman who forfeits the confidence of his employer by his own acts is in a more fortunate position than a workman who continues to work for his employer retaining his confidence. The former need not work for the rest of his workspan for his salary and nothing will prevent him from securing another employment while the latter will have to sweat for his employer and face all the hazards of an employment such as retrenchment and a breakdown of the business. " The workman was accordingly awarded an amount equivalent to three years' salary.

Perhaps the only case in which this Court affirmed an order of a Labour Tribunal to pay compensation calculted on the basis of the salary the workman would have earned up to the date of retirement is in the case *No. S.C. 142/73—S.C. Minutes 5.11.70.* But Rajaratnam, J. made it quite clear that it was not to be taken as authorising the calculation of compensation on that basis in every case. The judgment must be limited to the facts and circumstances of the particular case. The workman concerned was a staff assistant in a firm and had only five years to go before retirement. The possibility of his securing suitable alternative employment was also remote.

Two other cases in which Wijayatilake, J. awarded comparatively large amounts may now be noticed. The first is the case of *Wijaya Textiles Ltd. Vs. General Secretary, National Employees' Union (73 N. L. R. 405)* in which the compensation was fixed by Wijayatilake, J. at two weeks wages for every month at the rate of Rs. 167 per month from the date of dismissal 27.4.1964 till 31.1.1970, the judgment of the Supreme Court having been delivered on 27th January, 1970. The other is the case of *The Superintendent, Weoya Group, Yatiyantota Vs. The Ceylon Estates Staffs' Union* (74 N. L. R. 189) in which compensation was awarded in a sum calculated on the basis of Rs. 250 per month from the date of termination (1.11.1965) till the end of February, 1971, the month in which the judgment of the Supreme Court was delivered.

It will be seen that in none of these cases was compensation awarded based on the balance workspan of the workman concerned. How then did the present tendency among Presidents of Labour Tribunals arise ? Probably this is due to a misunderstanding of the case of *Raymond Vs. Ponnusamy.* In that case an estate Superintendent drawing a salary of Rs. 1,500 claimed Rs. 40,000 as compensation for the wrongful termination of his services. He was 56 years old at that time and was awarded Rs. 6,500 by the President. In enhancing this amount, Sirimane, J. said, " The learned President has granted Rs. 6,500 as compensation without stating any basis on which he reached that figure. On the actual salary which the appellant received, he would have earned at least a sum of Rs. 72,000 before he reached his retiring age. It would have been exceedingly difficult to obtain employment as Superintendent after his dismissal particularly in view of the age of the appellant. I think that a sum of Rs. 40,000 which the appellant has claimed is reasonable. "

The reference in the judgment to the amount the workman would have earned had he continued in service till the age of retirement has probably been misconstrued by Presidents of Labour Tribunals as sanctioning calculation of compensation on that basis in all cases of unjustified termination. The judgment however must be confined to the facts and circumstances of the particular case. The workman was 56 years old and had only a few years left before retirement. Considering his age and the type of work he was engaged in. it would, as Sirimane, J. pointed out " have been exceedingly difficult to obtain employment as a Superintendent after his dismissal ". So that, that case is no authority for the proposition that compensation should be calculated on the basis of the balance workspan left of the workman concerned.

While it is true to say that a workman can normally expect that his employment will be continued to the time of his reaching the age of superannuation yet as pointed out in Shetty's case he cannot claim this as a right. He may die. His services may be terminated for misconduct or on account of retrenchment. The business may cease to exist or close down. So that this is only a mere expectation and it would not be just or equitable to compensate him on the basis that he would necessarily have continued in employment till he retired. Besides, he may be successful in obtaining alternative employment on an equivalent basis.

Even in India I am not aware of, and no such case has been cited to us, where the Indian Courts have awarded compensation based on the salary which a workman would have earned if he had continued in service till the age of retirement, although it has been held that this is a fact which should be taken into account. In the case *S. S. Shetty Vs. Bharat Ndihi Ltd. 1958 A. I. R. S. C. 12* the workman claimed a sum of Rs. 32,388 as compensation being the sum he could have earned if he had continued in service till the age of retirement. He had about nine and half years of service left. The Supreme Court assessed the compensation at Rs. 12,500 which works out to about three and a half years' salary. It was held that compensation was not to be computed on the basis of breach of contract or of tort committed by the employer in not implementing the direction for reinstatement.

Bhagwati, J. in the course of his judgment indicated the factors which the Tribunal has to take into consideration in computing the money value of the benefit of reinstatement. He said at page 17, " The Industrial Tribunal would have to take into account the terms and conditions of employment, the tenure of service, the possibility of termination of the employment, at the instance of either party, the possibility of retrenchment by the employer or resignation or retirement by the workman and even of the employer himself ceasing to exist or of the workman being awarded various benefits including reinstatement under the terms of future awards by Industrial Tribunals in the event of industrial disputes arising between the parties in the future. " This passage was quoted with approval and applied by Wijayatilake, J. in Nanayakkara's case (supra).

Bhagwati, J. continued at page 19, " In computing the money value of the benefit of reinstatement the Industrial Tribunal would also have to take into account the present value of what his salary, benefits etc. would be till he attained the age of superannuation and the value of such benefits would have to be computed as from the date when such reinstatement was ordered

under the terms of the award. " It is to be noted that this has to be taken into account as Sirimane, J. did in Raymond's case (supra) and not that the compensation must be the amount so determined. For Bhagwati, J. said further, " Having regard to the consideration detailed above it is impossible to compute the money value of this benefit of reinstatement awarded to the appellant with mathematical exactitude and the best that any tribunal or Court would do under the circumstances would be to make as correct an estimate as is possible bearing of course in mind all the relevant factors pro and con. " The sum awarded was about one third of what the workman concerned could have earned in the balance period.

In the case of *Assam Oil Co. Ltd. Vs. Its Workman 1960,* A. I. R. S. C. 1264 the workman was previously employed in another company and was taken over by the employer which had a small office in Delhi. Her services were terminated after she had been in employment for two years. Taking into consideration the fact that she was two years in service and had previously been in employment which she gave up to join the present employer and the payment of certain sums to her by the employer and of her own earnings in alternate employments the Court held " that it would be fair and just to direct the appellant to pay a substantial amount of compensation to her, " and directed the employer to pay her Rs. 12,500 which represented about two years' salary.

In a similar case of a stenographer who had been in employment for about a year and taking into consideration that he had not been induced to give up any other job and that it was not too difficult for competent stenographers to obtain suitable employment compensation in a sum equivalent to one year's salary was awarded—*Ruby General Insurance Co. Vs. Chopra 1970 1 L. L. J. 63.* The case of *Uttakal Machinery Ltd. Vs. Shanti Patnaik 1966, A. I. R. S. C. 1051* was also a case of a lady secretary who had been in employment for only five months and distinguishing the facts from the facts in the Assam Oil Co. case and also taking into consideration the unusual manner of her appointment which was at the instance of the Chief Minister of the Province, she was awarded a sum of Rs. 4,800 which was equal to one year's salary. The Tribunal had awarded her compensation equal to two year's salary.

In the case *Workman of Charottar Gramodhar Shakkari Mandal Ltd. Vs. Charottar Gramodhar Sakkari Mandal Ltd.* referred to in Chopra's case C. A. Vaidialingam, J. affirmed in the Supreme Court an order of Tribunal awarding the workman 7½ months' salary as compensation in lieu of reinstatement. Finally in the case of *Hindustan Steels Ltd. Rowrkela 1970, 1 L. L. J. 223* the workman was awarded compensation in a sum

equal to two years' salary. It will thus be seen that the compensation has generally been the equivalent of two years' salary and has seldom exceeded three years' salary.

In England The Royal Commission on Trade Unions Employers' Associations reported at page 149 para 554 "while we do not favour a scale of compensation, we think it desirable for practical reasons to fix a ceiling to the amount of compensation which can be awarded. This will make it easier for employers to insure against the risk of being obliged to pay compensation which can be awarded. It would, in our view, be reasonable to provide that the maximum should be an amout equal to the employees' wages or salary for two years; and that, as in the case of compensation under the Redundancy Payments Act, in the compensation of this amount there should be ignored wages or salary in excess of £ 40 a week." Command Paper No. 3623 June 1968.

This has been carried into effect in The Industrial Relations Act 1971 which provides in section 116 and 118 (1) that "the amount.... shall.. be.. such.... as the.... tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party.... " up to a maximum limit of £4,160 or two years' pay whichever is the less—section 118 (1). These provisions were explained in the case of *Norton Tool Company Ltd. Vs. Tewson 1973, 1 All E.R. 183.* Sir John Donaldson said in the National Industrial Relations Court "The Court or Tribunal is enjoined to assess compensation in an amount which is just and equitable, in all the circumstances, and there is neither justice nor equity in a failure to act in accordance with principle. The principles to be adopted emerge from the section. First the object is to compensate, and compensate, fully, but not to award a bonus....Second the amount to be awarded is that which is just and equitable in all the circumstances having regard to the loss sustained by the complainant. "Loss" in the context of the section does not include injury to pride or feelings. The discretionary element is introduced by the words having regard to the loss. This does not mean that the Court or Tribunal can have regard to other matters but rather that the amount of the compensation, is not precisely and arithmetically related to the proved loss. The loss sustained by the workman was considered under the following heads : Immediate loss of wages, the manner of dismissal, future loss of wages, and loss of protection in respect of unfair dismissal or dismissal by reason of redundancy.

Statutory provision in regard to the assessment of compensation in lieu of reinstatement varies with different countries. A survey conducted by the International Labour Office in 1974

noted that "Where compensation is awarded either in lieu of reinstatement or as the principal remedy the legislation in some cases leaves the calculation of the amount of compensation to the entire discretion of the competent body ; in other cases, while it leaves this calculation to the discretion of the competent body it indicates certain factors which must be taken into account in the compensation, specifies a minimum amount of compensation or lays down a maximum amount of compensation " which however in no case extends to the balance workspan. The factors which have to be taken into consideration are inter alia wages, length of service, loss of career prospects, circumstances of dismissal, age, nature of the work and custom—*Report III (Part 4B to the 59th Session 1974 page 50 para 97*. The Industrial Relations Act 1971 has now been repealed and replaced by the Trade Union and Labour Relations Act 1974 which has raised the maximum compensation payable to £ 5,200.

What then is the basis on which compensation is to be computed which can be gathered from a consideration of these cases ? Although our Industrial Disputes Act provides for the payment of compensation in lieu of reinstatement it does not lay down the basis on which it is to be computed. In this connection it is important to remember that where this is so much a matter for the exercise of the Tribunal's discretion and depends on the peculiar facts and circumstances of each individual case it is undesirable to confine that discretion within too narrow and rigid limits.

For, as Gajendragadkar, J. pointed out in the Indian Supreme Court in *Diwan Badri Das Vs. Industrial Tribunal, Punjab et al (1963) A. I. R. S. C. 630* at page 634, "If industrial adjudication purports to lay down broad general principles it is likely to make its approach in future cases inflexible and that must always be avoided. In order that industrial adjudication should be completely free from the tyranny of dogmas or the subconscious pressure of preconceived notions, it is of utmost importance that the temptation to lay down broad principles should be avoided. In these matters there are no absolutes and no formula can be evoked which would invariably give an answer to different problems which may be posed in different cases on different facts."

It is true that Viscount Dilhorne said at page 296 in Devanayagam's case "In each case the award has to be one which appears to the arbitrator, the Labour Tribunal, or the Industrial Court just and equitable. No other criterion is laid down. They give an unfettered discretion to do what they think is right and fair." But as pointed out by H. N. G. Fernando, C.J., in th ecase of *Municipal Council Colombo Vs. Munasinghe, 71*

N. L. R. 223 at 225 " When the Industrial Disputes Act confers on an arbitrator the discretion to make an award which is just and equitable the legislature did not intend to confer on an Arbitrator the freedom of a wild horse. An award must be just and equitable as between the parties to the dispute. "

Referring to the passage in the judgment of Lord Dilhorne in Dewanayagam's case quoted above Siva Supramaniam, J. said in the Brooke Bond case (supra) at page 11 " The use of the phrase ' unfettered discretion ' has unfortunately given rise to much misunderstanding and Labour Tribunals have sometimes acted as if the phrase meant an arbitrary exercise of discretion. As pointed out by Weeramantry, J. in the Ceylon Transport Board Vs. Gunasinghe (supra) ' The decision in United Engineering Workers' Union Vs. Devanayagam does not free Labour Tribunals from the duty of acting judicially '. Further, considerations of justice and equity must necessarily act as fetters on the exercise of that discretion. "

In the case of *Ward Vs. James 1965, 1 All E.R. 564 dealing* with the question of laying down principles for the exercise of discretion Lord Denning, M.R. said at page 571, " The cases all show that, when a statute gives a discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. Nevertheless the courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those considerations which should be ignored. This will normally determine the way in which the discretion is exercised and thus ensure some measure of uniformity of decision. From time to time the considerations may change as public policy changes, and so the pattern of decision may change. This is all part of the evolutionary process. "

In view of the uncertainty which seems to prevail in regard to this matter it is desirable to state what the factors are which ought to be taken into consideration when assessing the amount of compensation payable. Under the ordinary law of master and servant the master who wrongfully dismisses his servant is liable to pay such damages as will compensate him for the wrong that he has sustained. " They are to be assessed by reference to the amount earned in the service wrongfully terminated and the time likely to elapse before the servant obtains another post for which he is fitted. If the contract expressly provides that it is terminable upon e.g. a month's notice the damages will ordinarily be a month's wages ......No compensation can be claimed in respect of the injury done to the servant's feelings by the circumstances of his dismissal, nor in respect of extra difficulty of

finding work resulting from those circumstances. A servant who has been wrongfully dismissed must use diligence to seek another employment, and the fact that he has been offered a suitable post may be taken into account in assessing the damages." (Chitty on Contracts, 21st Edition, Vol. 2, page 559 para 1040.)

If however the contract of employment is for a specific term, the servant would in that event be entitled to damages the amount of which would be measured prima facie and subject to the rule of mitigation, in the salary of which the master had deprived him. Vide *Collier Vs. Sunday Refree Publishing Co. Ltd.* (*1940, 4 All E.R. 234.*) He would then have been entitled to the full salary and of all the benefits which would have accrued to him had he continued in the employment for the full term contracted for.

In the field of industrial relations it is today generally accepted that the worker should be given greater protection against unfair dismissal. As the Royal Commission on Trade Unions and Employers' Association pointed out "Ideally the remedy available to an employee who is found to have been unfairly dismissed is reinstatement in his old job." Command paper No. 3623, June 1968, page 148 para 551. However, there may be circumstances in which reinstatement may be undesirable and our Act recognises this and provides for the payment of compensation, in lieu of reinstatement.

The Labour Tribunal should normally be concerned to compensate the employee for the damages he has suffered in the loss of his employment and legitimate expectations for the future in that employment, in the injury caused to his reputation in the prejudicing of further employment opportunities. Punitive considerations should not enter into its assessment except perhaps in those rare cases where very serious acts of discrimination are clearly proved. Account should be taken of such circumstances as the nature of the employer's business and his capacity to pay, the employee's age, the nature of his employmnt, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal including the nature of the charge levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights and any other relevant considerations. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place. The amount however should not mechanically be calculated on the basis of the salary he would have

earned till he reached the age of superannuation and should seldom if not never exceed a maximum of three years' salary.

Applying these principles to the instant case the workman was summarily dismissed with three months' salary in lieu of notice without any charges being framed against him and without any inquiry whatever. Nor was he given an opportunity of meeting these charges or explaining his conduct. In the answer filed by the employer before the Labour Tribunal it was stated that the dismissal was due to reports having been received that he was guilty of acts and conduct prejudicial to the interests and dangerous to the security of the lawfully established government of Ceylon and to the employer which is a government corporation having a monopoly of bus transport throughout the island.

It is common knowledge that commencing from 5th April, 1971, there was an armed uprising which a Criminal Justice Commission has now held to be a conspiracy to overthrow the layfully established government of the country. H. N. G. Fernando, J. described this uprising as follows : " This Court cannot ignore the fact that there had been early this year an actual armed insurrection in Ceylon in an attempt to wrest power by force, that this attempt was put into action in numerous areas, that it had to be resisted by the Armed Forces of the State with foreign assistance and that many lives were lost during these operations " —*Hirdramani Vs. Ratnavale (75 N. L. R. 67 at page 84.)*

Referring to this uprising Alles, J. said " I think it would be no exaggeration to state that never before in the history of this country, in recent times, had there been such a serious state of civil disturbances as that which occurred in the dark days of April last year " *Gunasekera Vs. Ratnavale (76 N. L. R. 316 at 319)*. The charge was obviously one of involvement in this uprising and was the most serious charge that could have been levelled against an individual. Yet the employer made no attempt to establish the charge and did not even produce the reports which were alleged to have been received to establish its bona fides. Although some 14,000 odd persons were taken into custody and many were questioned in connection with this uprising the workman concerned was not taken into custody nor even questioned. The fact that such a charge was levelled against him even though not proved is bound to affect his future employment prospects.

The workman has completed 11 years' service with the employer and starting with an initial salary of Rs. 580 at the time of the termination of his services he was on receipt of a monthly salary of Rs. 1,200. He has apparently no academic or professional qualifications. He was employed in an administrative capacity. Having regard to these factors and his age it is unlikely that he

will be able to secure suitable alternative employment on the same salary and with the same prospects. He had also given up service with the Government where he had put in sixteen years' service to take up appointment with the Board.

The question now is whether to send the case back to the Labour Tribunal to compute the amount of compensation payable on the basis indicated in this judgment or whether we should ourselves make the order. As Shellat, J. pointed out in the Hindustan Steels Case (supra) at page 235 " If the case is remanded and the tribunal on such remand passes an order of compensation and fixed the amount such a course would mean further proceedings and a possible appeal. That would mean prolonging the dispute which would hardly be fair to or conducive to the interests of the parties. In these circumstances we decided that it would be more proper that we ourselves should determine the amount of compensation which would meet the ends of justice. "

In the Independent Newspapers Ltd. Case (supra) where the Supreme Court itself assessed the amount of compensation payable the Court of Appeal held that. " In making that order, therefore, the Supreme Court cannot be said to have acted in excess of its jurisdiction. " In the Vijaya Textiles case Wijayatilake, J. said, " I have given anxious consideration as to whether I should send this case back to the Labour Tribunal to fix the compensation but I think to avoid further delay it would be satisfactory if I fix the quantum to be paid for the period of this dismissal, " and he proceeded to do so. So also in the case of the Ceylon Estate Staffs Union (supra). In Nanayakara's case the compensation awarded by the Tribunal was increased while in Shanthi Patanak's case the Indian Supreme Court halved it.

While in some cases the Court remitted the cases to the Labour Tribunal for the assessment of compensation, nevertheless there is ample precedent for this Court itself to asses the amount of compensation payable. Taking into consideration all the factors I have already mentioned I consider it just and equitable that the employer should pay a sum equal to three years' salary at Rs. 1,200 per mensem or Rs. 44,200. Subject to this variation the orders made by the President are affirmed. In all the circumstances of this case each party will bear its own costs of appeal.

MALCOLM PERERA, J.—I agree.