IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Leave to Appeal under and in terms of Article 154 (3) (b) of the Constitution and in terms of the Provisions of Industrial Dispute Act No.43 of 1950 (as amended) from the order of the Provincial High Court of the Western Province dated 10.05.2010 (pronounced on 1st June 2010)

Inter Company Employees Union,
No.470, Kandy Road,
Peliyagoda, Kelaniya.

(On behalf of H. D. N. S. Karunaratne)

Applicant

SC (HC) LA No.36/10
H/C A L.T No.28/2008
L/T Case No. 13/642/2002
S.C. Appeal 101/10

Vs.

Asian Hotels Corporation Ltd.
C/o Trans Asia Hotel,
No.115, Sir Chittampalam. A Gardiner Mawatha,
Colombo 2

Respondent

and

H. D. N. S. Karunaratne
No.73/61, Saman Uyana
Battaramulla.

Applicant-Appellant

Vs.

Asian Hotels Corporation Ltd.
C/o Trans Asia Hotel,
No.115, Sir Chittampalam. A Gardiner Mawatha,
Colombo 2

Respondent-Respondent

AND NOW BETWEEN

Asian Hotels and Properties PLC
(Formerly known as Asian Hotels Corporation Ltd.)
No. 77, Galle Road,
Colombo 03.

Respondent-Respondent-Petitioner

Vs.

H. D. N. S. Karunaratne
No.73/61, SamanUyana
Battaramulla.

Applicant-Appellant-Respondent

BEFORE: WANASUNDERA P.C., J
ALUWIHARE P.C. J
SISIRA J. DE ABREW J.

COUNSEL: Mohamed Adamaly with Janaka Abeysundera and
K. Sivaskantharajah for Respondent-Respondent-Appellant

J. C. Boange for Applicant-Appellant-Respondent

ARGUED ON: 17.12.2016

DECIDED ON: 24.07.2018

ALUWIHARE PC J:

The Applicant-Appellant-Respondent (Hereinafter referred to as the Applicant) sought an order for reinstatement from the Labour Tribunal on the basis that his employment was unjustly terminated by the Respondent-Respondent-Petitioner-Appellant Company (hereinafter referred to as the Appellant-Company)

At the conclusion of the inquiry before the Labour Tribunal, the learned President of the Labour Tribunal had come to a finding that the termination of the Applicant's services by the Appellant-Company was in fact unjust. The President, however, instead of making an order for reinstatement, ordered that the Applicant be paid compensation of Rs.189, 156/-. In her order, the learned President had reasoned out as to why she was not ordering reinstatement of the Applicant. She has also set out the criteria as to the computation of the compensation ordered.

The Applicant, however appealed against the said award of the Labour Tribunal President to the High Court. The relief the Applicant sought from the High Court was twofold. The applicant sought an order to have him reinstated with full back wages and in the alternative enhanced compensation.

The learned High Court Judge by his judgment dated 10th May, 2010, enhanced the compensation to Rs.662, 046/-. The learned High Court Judge, however, did not order reinstatement of the Applicant.

The present appeal is by the Appellant-Company aggrieved by the judgment of the High Court enhancing the compensation.

Special leave was granted on the following questions of law:

(i) Has the learned High Court Judge erred in failing to apply the appropriate tests for the computation of compensation payable to an employee whose services have been wrongfully terminated?

(ii) Has the learned High Court Judge erred in law in failing to appreciate that the Respondent had failed to prove his losses before the Labour Tribunal and in particular had failed to demonstrate that he had attempted to mitigate his losses by seeking alternative employment and or that he was unable to obtain alternative employment and or that he was unemployable?

(iii) Has the learned High Court Judge erred in law in taking into account extraneous and irrelevant considerations, such as the fact that no Domestic Inquiry had been held prior to the termination of the Respondent's services, that he had no prior history of misconduct, etc., when considering the quantum of compensation payable to the Respondent?

The thrust of the Appellant's case was that the High Court had no basis to enhance the compensation ordered by the learned President of the Labour Tribunal and the High Court erred in law when it applied wrong criteria in the computation of compensation.

Thus, the only issue before this Court is to consider whether the High Court erred when it varied the compensation payable to the Applicant by enhancing the same.

For ease of reference I wish to place the manner in which the Labour Tribunal and the High Court computed the compensation payable in their respective orders.

The President of the Labour Tribunal had held that although the termination of the services of the applicant was unjust, the Appellant Company had lost trust in the applicant, the premise on which the Labour Tribunal President decided not to order reinstatement. In lieu of reinstatement, the President decided to compensate the Applicant. Accordingly, the Labour Tribunal President had ordered the Appellant Company to pay 4 months basic salary (which was Rs.4, 299) for each year the applicant had served the Appellant Company (11 years) and had awarded Rs.189, 156 as compensation.

In appeal, the learned High Court Judge, enhanced the compensation payable to the Applicant to Rs.662, 046/stating that the 'criteria' relied upon by the learned President of the Labour Tribunal to compute the quantum of compensation was not clear.

The learned High Court Judge had ordered that the Applicant be compensated by payment of 12 times (the number of years he served Appellant company) the total salary he would have earned for a year and in addition the salary he would have

earned from the date of termination up to the date of the order of the learned High Court Judge. The computation, however, appears to be mathematically inaccurate. Nevertheless, I do not wish, to delve into the accuracy of the computation of compensation in this judgement.

As referred to earlier, the Appellant's grievance is that the decision of the High Court Judge is flawed as the legal principles relating to computation of compensation had been wrongly applied.

The following issues were raised on behalf of the Appellant at the hearing:

(1) The judgment of the High Court had not cited any basis or reasons for enhancement of compensation.

(2) It is trite law that the appellate jurisdiction of the High Court would be exercised to correct serious errors of law and substitution of the view of the High Court in place of the Labour Tribunal was wrong.

(3) The learned High Court Judge had totally ignored the relevant case law that had laid down the tests with regard to computation of compensation.

(4) The relief granted by the High Court is over and above what had been sought by the Applicant.

(5) The mathematical error referred to above and the awarding compensation inclusive of the time taken for the hearing of the appeal.

It was contended on behalf of the Appellant that an unlawful termination does not automatically entitle a workman to compensation. The worker, on the contrary, must establish his losses through evidence.

It was pointed out that the learned High Court Judge, in his judgement had merely said that "the applicant is entitled to receive the full salary for the entire period the applicant lost his employment". The only reason that can be gleaned from the judgment of the learned High Court Judge to enhance the compensation appears to be an observation made by the learned President of the Labour Tribunal in her award. The learned President has stated that "almost all the witnesses had spoken about the Applicants antecedents in complimentary terms". The learned counsel for the Appellant submitted that it was based on this reasoning, that the learned High Court Judge enhanced the compensation by four hundred percent and this factor is not relevant to decide the quantum of compensation to be awarded.

The learned counsel cited several decisions in support of the points urged. *The Ceylon Transport Board Vs Gunasinghe - 72 NLR pg. 76, The Ceylon Transport Board Vs. Wijeratne- 77 NLR 181, Caledonian (Ceylon) Tea & Rubber Estate Vs. Hillman- 1979 1 NLR 421, Ceylon Cinema and Films Studio Employees Union Vs. Liberty Cinema 1994 3 NLR 121 and Jayasuriya Vs. Sri Lanka State Plantation Corporation 1995 – 2 SLR 379,* are some of the cases to which the attention of this court was drawn by the learned counsel.

One decision both the Appellant as well as the Applicant Respondent relied on, in asserting their respective positions, was ***Jayasuriya Vs. Sri Lanka State Plantations Corporation***. In the said decision, his Lordship Justice Dr. Amarasinghe had exhaustively dealt with the issue of deciding the quantum of compensation that is to be awarded.

The first issue this court has to address is whether the learned judge of the High Court applied the appropriate tests for the computation of compensation payable to the Applicant and whether the enhancement of compensation was made without any legal basis.

The Industrial Disputes Act no doubt provides for the payment of compensation in lieu of reinstatement. The Act, however, does not provide any criteria on which the computation of compensation is to be made. This was pointed out by His Lordship Justice Vythialingam in the case of ***Ceylon Transport Board Vs. Wijeratne 77 SLR 181***. In this regard Justice Sharvananda (as he then was) in the case of ***Caledonian (Ceylon) Tea and Rubber Estate Ltd. Vs. Hillman*** held that:-

"The Legislature has wisely given untrammelled discretion, to the Tribunal to decide what is just and equitable in the circumstances of each case. Of course, this discretion has to be exercised judicially. It will not conduce to the proper exercise of that discretion if this court were to lay down hard and cast rules which will fetter the exercise of the discretion, especially when the legislature has not chosen to prescribe or delimit the area of its operations. Flexibility is essential. Circumstances may vary in each case and the weight to be attached to any factor depends on the context of each case".

Thus, it seems that there is no specific formula that has to be applied in the computation of the compensation that is to be paid. In my view the Tribunal is required to take into consideration facts and circumstances peculiar to each case, which may have a bearing on the amount of compensation to be awarded but keeping within the broad concept of just and equitable. Equally, the Tribunal must provide reasons for considering a particular sum just and equitable in a particular case.

In the case of ***Brook Bond (Ceylon) Ltd v. Tea, Rubber, Coconut and General Produce workers Union*** 77 NLR 6, the court held:

"For an order to be just and equitable it is not sufficient for such order merely to contain a just and equitable verdict. The reasons for such verdict should be set out to enable the parties to appreciate how just and equitable the order is. ***In the absence of reasons, it would not be a just and equitable order."***

Thus, the failure to give reasons might lead a party to conclude that the order was arbitrary. On the other hand, giving reasons would also lead the Tribunal to address its mind to the relevant considerations leading to its award as observed by De Kretser J in the case of ***Adams Peak Tea Estates Ltd v. Duraisamy*** SC 11/69 (SC Minutes of 26th October 1969).

In the present case, to reiterate-the gravamen of the Appellant is that the learned High Court Judge fell into error, when he acted beyond the pale of this threshold.

The learned High Court Judge in varying the amount of compensation ordered by the Labour Tribunal had not referred to any criteria as to why he ordered 12 years salary as compensation as oppose to '4 months salary for every year the applicant was employed under the Appellant (11 years)'-which was the formula adopted by the learned President of the Labour Tribunal.

The learned High Court judge had merely ordered enhanced compensation on the basis that the termination of the services of the Applicant was unjust and serious prejudice had been caused to the applicant. He had not given any reason whatsoever to say why the computation of compensation ordered by the learned President of the Labour Tribunal is erroneous or tainted with illegality. In fact both forums have arrived at the same conclusion—that the termination was

unjust. If the Learned High Court judge took it upon himself to enhance the compensation on the basis that serious prejudice has been caused to the Applicant without deviating from the material findings made by the Labor tribunal, it was incumbent on the learned High Court judge to substantiate what particular factor warranted the enhancement of compensation.

All what the Learned High Court Judge had done was to substitute the computation of compensation of the President of the Labour Tribunal with his own computation. In this respect the decision in the case of ***Jayasuriya v. Sri Lanka State Plantation Corporation*** *(supra)* is elucidating. It had been held that the Industrial Disputes Act No. 43 of 1950 Section 31D states that the order of a Labour Tribunal shall be final and shall not be called in question in any court except on a question of law. While appellate courts will not intervene with pure findings of fact, they will review the findings treating them as a question of law, if it appears that the Tribunal has made a finding wholly unsupported by evidence, or which is inconsistent with the evidence and contradictory of it; or where the Tribunal has failed to consider material and relevant evidence; or where it has failed to decide a material question or misconstrued the question at issue and had directed its attention to the wrong matters; or where there was an erroneous misconception amounting to a misdirection; or where it failed to consider material documents or misconstrued them or where the Tribunal has failed to consider the version of one party or his evidence; or erroneously supposed there was no evidence.

In the instant case, if the learned High Court Judge thought it fit to increase the compensation, there ought to have been some compelling ground which in the opinion of the High Court judge, which the learned President of the Labour Tribunal had overlooked or ignored. It is only in such instances would the Appellate body derive the authority to substitute a factual finding without being

repugnant to the Industrial Disputes Act. Moreover, even if there appears to be an unsubstantiated conclusion, where the factual intervention is one relating to compensation, the Appellate body must satisfy itself of the threshold issue, namely the extent of loss.

Dr. Amerasinghe J. explanation in ***Jayasuriya v. Sri Lanka State Plantation Corporation*** *(supra)* is on point.

"*While it is not possible to enumerate all the circumstances that may be relevant in every case, it may be stated that the essential question, in the determination of compensation for unfair dismissal, is this: What is the actual financial loss caused by the unfair dismissal ?, for compensation is an "indemnity for the loss". (Per Soza, J. in Associated Newspapers of Ceylon Ltd. v. Jayasinghe (48)). Now, losses can be of various kinds; but the matter for consideration in this kind of case is the financial loss, and not sentimental harm caused by the employer. […] With regard to financial loss, there is, first, the loss of earnings from the date of dismissal to the determination of the matter before the Court, that is, the date of the Order of the Tribunal, or, if there is an appeal, to the date of the final determination of the appellate court. The phrase "loss of earnings" for this purpose would be the dismissed employee's pay (net of tax), allowances, bonuses, the value of the use of a car for private purposes, the value of a residence and domestic servants and all other perquisites and benefits having a monetary value to which he was entitled. The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss he had incurred. For instance, if an employee claims that he would have earned more than his basic salary, he must adduce supporting evidence such as the fact that there was a general wage increase from which he would have benefited, and/or that he was on a regular ladder of promotion along which he would have progressed, and/or that he had special qualifications or opportunities which would have led to an improvement in his conditions of service during the*

relevant time. Otherwise, it must be assumed that he would continue to earn at the same rate as at the time of the termination of his services."

Accordingly, there can be no question that in an appeal against a Labour Tribunal decision on compensation, the Appellate body has two questions to answer. Firstly, whether the appellant has discharged the burden of proving financial losses; Secondly, whether there is a glaring failure on the part of the Labour Tribunal to evaluate the said evidence to the effect that the compensation remains substantially unsupported? It is only if both questions are answered in the affirmative, in my considered view, could the appellate body venture to review and substitute the compensation, where substitution is necessary.

In the case before us, the learned High Court judge fell into error by not taking into consideration the fact that the Applicant had not established losses before the Labour Tribunal. The Applicant Respondent had admitted in the written submissions filed on his behalf that he failed to lead separate and adequate evidence before the Tribunal to substantiate his losses. As stated earlier, the burden is squarely on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss the employee had incurred. It is only when the employee discharges the burden could the Tribunal proceed to determine an equitable amount as compensation based on the whole gamut of evidence led by both parties.

Notwithstanding the failure to inform himself of this threshold issue, the learned High Court judge still had an obligation to state the reasons for substituting the compensation.

As adverted to earlier, it is not possible to come out with an exhaustive list of factors or the circumstances that should be taken into account in determining

the quantum of compensation. It is a matter left to the discretion of the Court which the Court must exercise judicially. (cf. Sharvananda J. in ***Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. Hillman***) It is not satisfactory to simply say that a certain amount is just and equitable. There should be a stated basis for the computations, supported by the factors taken into consideration, in arriving at the amount of compensation awarded. In the case of ***Brook Bond (Ceylon) Ltd v. Tea, Rubber, Coconut and General Produce workers Union*** *(supra)* it was held that "*for an order to be just and equitable it is not sufficient for such order merely to contain a just and equitable verdict. The reasons for the verdict should be set out to enable the parties to appreciate how just and equitable the order is. In the absence of reasons, it would not be a just and equitable order*."

I wish to state at this point that the requirement to give reasons is applicable to both the learned High Court Judge and the President of the Labour Tribunal. There ought to be an appreciation of factors or circumstances which assisted the tribunal to compute the loss caused to the applicant. Such a practice allows the parties to appreciate how just and equitable the order is. It is also significant to do so as their awards of the Labour Tribunals are reviewable.

In the present case the learned High Court judge fell into error when he varied the order of compensation awarded by the learned President of the Labour Tribunal without stating any basis for doing so. He makes a cursory reference to the prior conduct of the Applicant which is extraneous to determine the financial losses.

For the reasons set out above, I hold all three questions of law raised in this matter in favour of the Appellant and accordingly I set aside the judgement of the learned High Court Judge dated 10-05-2010 and affirm the findings of the learned President of the Labor Tribunal.

The Applicant would be entitled to the compensation awarded by the Learned President of the Labour Tribunal with accrued interest and any other statutory dues the Applicant would be entitled to, under the law.

The appeal is allowed and in the circumstances of the case I make no order as to costs.

Judge of the Supreme Court

Justice Eva Wanasundera P.C
I agree

Judge of the Supreme Court

Justice Sisira J. De Abrew
I agree

Judge of the Supreme Court