

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

In the matter of an appeal in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka and the Provisions of the Industrial Disputes (Amendments) Act No. 32 of 1990 as subsequently amended.

SC/Appeal/106/2009  
SC/SPL/LA/35/2009  
WP/HCCA/KAL No. 21/2006  
HCA (LT) 05/2006  
LT.25/PN/507/2002

M.D.Gunasena & Co. Ltd.,  
217, Olcott Mawatha,  
Colombo 11.

**Employer-Appellant-Appellant**

Vs.

Somaratne Gamage ,  
4/101, Padukka Road,  
Horana

**Applicant-Respond-Respondent**

Before	:	Tilakawardane, J Imam, J Dep, PC J
Counsel	:	Shirley M. Fernando PC with Ruwn D.V. Dias Instructed by Palitha Perera for the Employer- Appellant-Appellant.  W. Premathilake with Padma S. Perere for the Applicant-Respondent-Respondent.
Argued on	:	19-10-2011
Decided on	:	07-09-2012

**Priyasath Dep, P.C, J.**

This is an Appeal preferred against the Judgment dated 22- 01-2009 of the Provincial High Court of Kalutara affirming the Judgment of the Labour Tribunal of Panadura in Case No LT/PN/25/507/2002 which reinstated the Applicant-Respondent-Respondent.

The Applicant –Respondent-Respondent (hereinafter referred to as “Applicant”) filed an Application in the Labour Tribunal of Panadura under Section 31B of the Industrial Disputes Act challenging the termination of his services by the Respondent-Appellant-Appellant (hereinafter referred to as “Respondent –Appellant”) The Applicant was employed by the Respondent-Appellant as its Manager of the Horana Branch. He was employed in that capacity from 27<sup>th</sup> December 1994 and his services were suspended on 18.09.2000. By the letter dated 24-11-2011 his services were terminated with effect from 18. 09.2000. The Applicant alleged that his services were terminated unlawfully and claimed reinstatement with back wages or in the alternative compensation considering his past employment and the period he could be employed in the establishment in the future.

The Respondent-Appellant in its answer admitted termination and alleged that the termination was justified and that the Applicant is not entitled to any relief. The Respondent –Appellant stated that before terminating the services of the applicant a domestic inquiry was held by a retired judicial officer who found the applicant guilty of following acts of misconduct:

1. Failure to pay exhibition sales commission money to places where exhibition sales were conducted and where the money was collected by the Applicant for such payment.
2. Failure to pay sales promotion officer, C. Rajapakse the full sum payable to him on account of exhibition commissions.

In the letter of termination dated 24<sup>th</sup> November 2001 it was stated that that the Applicant was guilty of charges of serious nature which amounts to misappropriation of company’s money.

In the replication the Applicant refuted the allegations made against him. The Applicant alleged that the domestic inquiry was not properly conducted and he was not allowed to continue with his cross-examination of the principal witness and the inquiry was abruptly concluded.

In the inquiry held by the Labour Tribunal, in order to justify termination the Respondent called Chaminda Rajapakse, sales promotion officer to prove the charges to which the Applicant was found guilty at the domestic inquiry. The said Chaminda Rajapakse gave evidence on several days and he was cross examined by the Applicant. Before the conclusion of his cross-examination the said witness Chaminda Rajapakse passed away. At this stage an application was made on behalf of the Applicant to expunge the evidence of this witness from the proceedings as he did not conclude his evidence. It is the position of the Applicant that he was prevented from cross-examining this witness on important

matters due to his sudden death. The President of the Labour Tribunal overruled the objection and proceeded with the inquiry. The Labour Tribunal is not prevented from considering Rajapakse's evidence subject to the infirmity that the Applicant could not complete his cross-examination which will no doubt affect the probative value of his evidence. The Respondent did not call other witnesses to supplement or substitute the evidence of Rajapakse.

The Applicant gave evidence and produced documents marked A1 –A59 and concluded his evidence. He did not call witnesses to support or corroborate his evidence. After the conclusion of the inquiry the Labour Tribunal ordered the reinstatement of the Applicant without a break in service and ordered the appellant to pay one year's salary as compensation. The learned President held that there was no evidence to prove Charge (1) leveled against the Applicant at the domestic inquiry. In relation to charge (2) where the Applicant did not pay the full sum payable to Chaminda Rajapakse as his exhibition commission it was established that Chaminda Rajapakse had wrongfully failed to return books worth over Rs. 12,000/- given to him for exhibitions. It was revealed in evidence that the Applicant had sent several reminders to Rajapakse to return books. He made a complaint against Rajapakse to the police after obtaining instructions from his seniors. The Applicant had deposited the money in the company account and he did not misappropriate that sum. The Labour Tribunal held that the Applicant was not guilty of misconduct.

Being aggrieved by the Order of the Labour Tribunal the Respondent filed an appeal to the Provincial High Court of Panadura. The Provincial High Court of Panadura affirmed the Order of reinstatement made by the Labour Tribunal. At the time of the judgment, it was revealed that the applicant had only one year to serve in the establishment before reaching the retiring age of 55. In view of this fact the High Court ordered the Respondent to pay four years salary as compensation or else the applicant to be employed by the Respondent Appellant for a period of four years.

Being aggrieved by the Order of the Provincial High Court, the Respondent Appellant appealed against the order to the Supreme Court and obtained leave on following questions of law;

Questions of Law;

- (a) Is the Judgment of the Provincial High Court and the Order of the President of the Labour Tribunal vitiated by the fact that it is contrary to the mandatory provisions of the Industrial Disputes Act, which requires that such order should be just and equitable, particularly as the said employee himself has not asked for enhancement of relief ?
- (b) Is the Judgment of the said Provincial High Court and the Order of the President of the Labour Tribunal vitiated by the failure to judicially evaluate the evidence led at the inquiry before the Labour Tribunal ?

In considering the first question of law it is necessary to ascertain whether the orders of the Labour Tribunal and the High Court are just and equitable particularly for the

reason that the Employee (Applicant) did not ask for enhanced relief. The Applicant in his application to the Labour tribunal specifically prayed for reinstatement with back wages and in the alternative adequate compensation considering his period of service and also the prospect of future employment in the respondent company. The Labour Tribunal ordered reinstatement with effect from 15.06.2006 without a break in service and also compensation amounting to one year's salary. This order is well within the powers of the Labour Tribunal.

The Respondent-Appellant did not comply with the order of the Labour Tribunal and exercised its statutory right to appeal against the said order. The High Court upheld the findings of the Labour Tribunal. Considering the fact that the Applicant had only one year to serve in the respondent company before reaching the retirement age, ordered the respondent company to pay 4 years salary unless it allows the applicant to continue for four years in the company. It is to be observed that the applicant's services were terminated in September 2000. The said termination was held to be unjust. In such circumstances, the Labour Tribunal has the power to order reinstatement with back wages. However, Labour Tribunal did not order back wages. Therefore, Respondent- Appellant cannot complain that the order is not a just and equitable order. The applicant was out of employment from 2000 due to unlawful termination of his services. If he was reinstated in 2006 as ordered by the Labour Tribunal the applicant could have served more than four years in the company before reaching the retirement age. In such circumstances one cannot state that the order of the High Court to pay four years salary as compensation is not a just and equitable order. It is well within the powers given by the Industrial Disputed Act and falls within the reliefs prayed for by the applicant.

In the second question of law the Respondent- Appellant alleged that the President of the Labour Tribunal and the honorable judges of the High Court failed to judicially evaluate the evidence led at the inquiry before the Labour Tribunal.

The Labour Tribunal as well as the High Court after examining the evidence came to the conclusion that the Applicant was not guilty of misconduct. The question that arises is whether the evidence was properly evaluated and the finding could be supported by the evidence led at the inquiry.

It is necessary at this stage to briefly refer to the alleged misconduct and the evidence led to establish that fact. The main allegation against the Applicant is that he had failed to pay Sales Promotion officer, C. Rajapakse the full sum due to him as exhibition commission. The Applicant giving evidence admitted that he received Rs. 15216.91 as sales commission payable to C. Rajapakse, the sales promotion officer. The money was deposited in the bank account of the branch. Applicant was required to pay money out of daily proceeds of the branch. Accordingly on 9<sup>th</sup> April 1999 he paid Rs. 5216.90 and another sum of Rs. 5000/- was paid on 28<sup>th</sup> April 1999. He withheld Rs. 5000/- and retained that money in the bank account of the branch because the sales promotion officer C.Rajapakse failed to return books worth Rs. 12000/- given to him for exhibitions. It was revealed that in spite of several reminders, C. Rajapakse did not return the books and the applicant made a complaint to the police.

It is to be noted that the balance Rs. 5000/- due to C. Rajapakse was kept in the bank account of the branch. Therefore, one cannot state that the Applicant misappropriated that sum. He did not appropriate or convert that money for his use. He did not release the balance money to the sales promotion officer due to the reason that Rajapakse did not return the books belonging to the company in spite of several reminders sent to him. The Applicant's decision to retain that money in the Branch account is a sound and a prudent financial decision which is in the best interest of the Respondent-Appellant. On the other hand had the Applicant retained the money with him without paying Chaminda Rajapakse he is certainly guilty of misappropriation. In that background the Labour Tribunal as well as the High Court had to determine whether the conduct of the Applicant amounts to a misconduct or.

The Respondent-Appellant in order to justify the termination called the sales promotion officer C. Rajapakse to give evidence against the Applicant.-Respondent. He admitted that he retained the books with him and the applicant send reminders to him and also made a complaint against him.

The question that arises is whether the conduct of the applicant amounts to misconduct or not. If the applicant is found guilty of misconduct the next question that arises is whether it amounts to a grave or serious misconduct that warrants a dismissal.

Misconduct is not defined in the Industrial Dispute Act. In the absence of a definition it is necessary to refer to case laws in Sri Lanka and in other jurisdictions. Sri Lankan and Indian Courts have followed the English case law. As far back as 1886 *Pearce v. Foster* [(1886)17QBD 536, 5LJ QB306], laid down the law thus "The test is that the misconduct must be inconsistent with the fulfillment of the express or implied conditions of service in order to justify dismissal". This was followed in *Shalimar Rope Works Mazdoor Union v. Shalimar Rope Works Ltd.* 1953(2) LLJ 876, a case very often cited in our courts.

A slightly different test was laid down in *Laws v. London Chronical Ltd.* [1959-2 ALL ER 285, 1959-1WLR 698]. In that case it was held that "the misconduct must be inconsistent with the fulfillment of the express or implied conditions of service or such as to show that the servant had disregarded the essential conditions of the contract of service."

The implied conditions of service includes conduct such as obedience, honesty, diligence, good behavior, punctuality, due care. Therefore following acts such as disobedience, insubordination, dishonesty, negligence, absenteeism and late attendance, assault are treated as acts of misconduct which are inconsistent with the implied conditions of service.

The next question that arises is the degree of misconduct which will justify termination. In *Clouston and Co. Ltd. V. Cory*, 1906AC 122 the Privy Council stated "now the sufficiency of the justification depended upon the extend of misconduct. There is no fix rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the

determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfillment of the express or implied conditions of service will justify dismissal”

The Indian case of Sharda Prasad Tiwari and others v. Divisional Superintendent, Central Railway, Nagpur Division (1961 AIR Bombay 150-154) followed the principles laid down in English cases cited above and proceeded to enumerate the acts or conduct of a servant which may amount to misconduct. In the light of the above authorities this court has to ascertain whether the Applicant –Respondent is guilty of misconduct or not. I find that for the reasons stated above, Applicant Respondent’s conduct is not inconsistent with the fulfillment of the express or implied conditions of service. The Appellant –Respondent failed to establish this fact. The Applicant did not commit any act of misconduct and therefore termination of his services is not justified.

I am of the view that the findings of both the Labour Tribunal and the High Court are correct and in accordance with the law.

The Provincial High Court of Panadura affirmed the order of reinstatement made by the Labour Tribunal. At the time of the judgment it was revealed that the applicant had only one year to serve in the establishment before reaching the retirement age of 55. In view of this fact the High Court ordered the Respondent to pay four years salary as compensation unless the applicant to be employed by the Respondent Appellant company for a period of four years. The applicant had now passed the retirement age and the relations between the applicant and the respondent had strained due to protracted litigation. Therefore the alternative relief of employing the applicant for a further period of four years is not desirable and for that reason that part of the judgment is set aside.

Subject to the above variation the judgment of the Provincial High Court of Panadura is affirmed. Respondent appellant is ordered to pay four years salary calculated on the basis of Rs 6800 per month as compensation in lieu of re instatement and a further sum of Rs 39,000/= as ordered by the High Court..

Appeal dismissed. I order Rs, 75,000/- costs to be paid by the Respondent Appellant - Appellant to the Applicant-Respondent - Respondent.

Judge of the Supreme Court

Shiranee Tilakawardana, J.

I agree

Judge of the Supreme Court

S.I. Imam, J.

I agree

Judge of the Supreme Court