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

In the matter of an Appeal under Section 31DD of the Industrial Disputes Act (as amended)

P. R. S. E. Corea,

No. 343/14, Ranwala,

Kegalle.

Applicant

S.C. Appeal No. 91/2017

SC/HC/LA/77/2016

HCALT No. 672/2013

L.T. Case No. 21/Add/483/2005

Vs.

Sri Lankan Airlines Limited,

Level 19-22, East Tower, World Trade Center,

Echelon Square, Colombo 1.

Respondent

AND BETWEEN

Sri Lankan Airlines Limited,

Level 19-22, East Tower, World Trade Center,

Echelon Square, Colombo 1.

Respondent-Appellant

Vs.

P. R. S. E. Corea,

No. 343/14, Ranwala,

Kegalle.

Applicant-Respondent

AND NOW BETWEEN

Sri Lankan Airlines Limited,

Level 19-22, East Tower, World Trade Center,

Echelon Square, Colombo 1.

(also of Bandaranaike International Airport, Katunayake)

Respondent-Appellant-Appellant

Vs.

P. R. S. E. Corea,

No. 343/14, Ranwala,

Kegalle.

Applicant-Respondent-Respondent

Before: Hon. P. Padman Surasena, J.

Hon. Janak De Silva, J.

Hon. Mahinda Samayawardhena, J.

Counsel:

Manoli Jinadasa for the Respondent-Appellant-Appellant

T.I Sapukotanage for the Applicant-Respondent-Respondent

Written Submissions:

04.08.2017 by the Applicant-Respondent-Respondent

Argued on: 05.05.2022

Decided on: 02.02.2024

Janak De Silva, J.

The Applicant-Respondent-Respondent ("Respondent") was employed as a Ground/cum Flight Steward with the Respondent-Appellant-Appellant ("Appellant") from 21.09.1992.

On 17.03.2005 whilst operating as the Senior Flight Steward in UL 505 CMB/LON flight, the Respondent was accused of sexually harassing a Flight Stewardess, who for the purposes of this appeal shall be referred to as "X". The factual circumstances constituting sexual harassment by the Respondent as alleged by X is set out in the charge sheet as follows:

i. The Respondent did hold X from her midriff and did kiss her on the cheek on two occasions.

ii. The Respondent did grab her by the buttocks in the galley as well as in the cabin on several occasions.

iii. The Respondent did stick his tongue out and lick his lips in an insinuating manner several times.

iv. By acting in the manner referred to in i, ii, and iii above, the Respondent did tarnish the image of the Appellant and caused the Appellant to lose confidence in the Respondent.

The Respondent was found guilty of the charges at a disciplinary inquiry conducted on 07.09.2005. His services were thereafter terminated.

The Respondent filed an application at the Labour Tribunal ("Tribunal") on 28.11.2005, seeking reinstatement with back wages.

The Chief Steward (Purser) of the flight, In-Flight Services Delivery Manager and Production Development Manager of the Appellant testified on behalf of the Appellant. The Respondent testified on his behalf and summoned another Cabin Manager to testify.

After the inquiry, the Tribunal held that the termination of services of the Respondent was not just and equitable. The Tribunal ordered reinstatement without back wages subject to one year of probation on the premise that being without work for a period of 8 years, is sufficient punishment as there had been other employees who had received lesser punishment for similar misconduct. The Tribunal order is dated 22.10.2013.

The Appellant appealed to the Provincial High Court of the Western Province holden in Negombo which was dismissed.

Leave to appeal has been granted on the following questions of law:

a. Whether the relief awarded to the applicant by the Provincial High Court and the Labour Tribunal is just and equitable and/or consistent with the principles of law, considering the facts and circumstances of the case?

b. Whether the Provincial High Court and the Labour tribunal erred in law in the analysis of the evidence and reached findings that are unsupported by evidence and/or perverse?

Let me address these two questions by reference to the following extract from the order of the Tribunal:

> “ඉල්ලුම්කරු විනිශ්චය සභාව ඉදිරියේ සාක්ශි දෙමින්; තමන්ට එරෙහි යථෝක්ත චෝදනා ප්‍රතික්ෂේප කර තිබුනද [redacted] නැමැති සිය සහෝදර ගුවන් සේවිකාව තමන්ට එරෙහිව වාචිකව මෙන්ම ලිඛිතව (ආර්.1) මෙවන් බරපතළ අසත්‍ය චෝදනාවක් ඉදිරිපත් කිරීමට පැහැදිලි හේතුවක් විනිශ්චය සභාවට ඉදිරිපත් කිරීමට අපොහොසත් වී ඇත. ස්වකීය තරබාරුකම හා බර වැඩිවීම හේතු කොටගෙන වගඋත්තරකරු තමන් හා අමනාපයෙන් පසුවූ බැවින් යථෝක්ත ගුවන් සේවිකාව ලවා තමන්ට එරෙහිව මෙවැනි අසත්‍ය චොදනාවන්

ඉදිරිපත් කර ඇති බව ඉල්ලුම්කරු තවදුරටත් විනිශ්චය සභාව ඉදිරියේ සාක්ෂි දෙමින් ප්‍රකාශ කර තිබුනද; එකී හේතුව මත ඔහුට එරෙහිව මෙවන් බරපතළ චෝදනාවක් ඉදිරිපත් කර ඔහුගේ සේවය අවසන් කිරීමට වගඋත්තරකරු කටයුතු කළ බවට වූ ඉල්ලුම්කරුගේ සාක්ෂිය මෙම විනිශ්චය සභාවට එලෙසින්ම පිළිගත නොහැකි බවත්, ඉල්ලුම්කරු තවදුරටත් විනිශ්චය සභාව ඉදිරියේ සාක්ෂි දෙමින් ප්‍රකාශ කළ අන්දමින් ප්‍රශ්නගත ගුවන් ගමනේදී ඉල්ලුම්කරුගේ ඉහළ නිළධාරියා වශයෙන් සේවය කළ ප්‍රධාන ගුවන් සේවක [redacted] යන අය ඉල්ලුම්කරුට එරෙහිව මෙම විනිශ්චය සභාව ඉදිරියේ අසත්‍ය සාක්ෂි ප්‍රකාශ කළ බවට පිළිගත හැකි කිසිදු සාක්ෂියක් ඉල්ලුම්කාර පක්ෂය විසින් විනිශ්චය සභාවට ඉදිරිපත් කර නොමැති බවත්, ඉල්ලුම්කරු ගුවන් ගමන් වලදී තමන් හා සේවයේ නියුක්ත ගුවන් සේවිකාවන් අපහසුතාවයට පත්වන අන්දමින් කටයුතු කර ඇති බවට වගඋත්තරකාර පක්ෂයේ සාක්ෂිවලින් තවදුරටත් අනාවරණය වන බවත් සහ ප්‍රශ්නගත දිනයේ ඉල්ලුම්කරු මත්පැන් සහ සිගරට් ගඳ වහනය වෙමින් සේවයේ නියුක්තව සිට ඇති බවට සාක්ෂි වලින් අනාවරණය වන බවත් මෙහිලා සැලකිල්ලට ගතයුතුව ඇත.

ඉහත මා විසින් දක්වා ඇති සියළුම කරුණු හා මෙම නඩුවේ දෙපාර්ශවය විසින් මෙහෙයවා ඇති සියලුම සාක්ෂි සැලකිල්ලට ගනිමින්; ඉල්ලුම්කරුට ඉදිරිපත් කර ඇති චෝදනා පත්‍රයෙහි දක්වා ඇති අන්දමේ බරපතළ හා පිළිකුල් සහගත ලිංගික හිරිහැරයක් ඉල්ලුම්කරු විසින් උක්ත ගුවන් සේවිකාවට සිදුකර ඇති බවට සකාෂ්‍යතා වඩිබර සාක්ෂි මත මෙම විනිශ්චය සභාව ඉදිරියේ ඔප්පු කිරීමට වගඋත්තරකාර පක්ශය අපොහොසත් වී ඇතද **<u>ඉල්ලුම්කරු යථෝක්ත දින වාචිකව හා සිය කායික හැසිරීමෙන් උක්ත ගුවන් සේවිකාවගේ දෛනික රාජකාරී වලට බධාවන අන්දමින් හා ඇයගේ පුද්ගලිකත්වයට හානිවන අන්දමින් හැසිරී ඇති බවත්</u>**, එදින මේ හා සමාන සිදුවීමක් ප්‍රශ්නගත ගුවන් ගමනේදී සිදුව ඇති බවට වාර්තා වී තිබුනද ඊට වගකිවයුතු සේවකයාට එරෙහිව කිසිදු විනයානුකූල ක්‍රියාමාර්ගයක් ගැනීමට අපොහොසත් වීමෙන් හා ඉල්ලුමකරුගේ සේවය අවසන් කිරීමෙන් අනතුරුව වාර්තා වී ඇති ඒ හා සමාන සිදුවීම් වලට වගකිවයුතු නිලධාරීන් හට ලඝු විනයානුකූල ක්‍රියාමර්ග අනුගමනය කිරීමෙන් වග උත්තරකරු සිය සේවකයින් හට දෙයාකාරයකින් සළකා ඇති බවත්, ඉල්ලුම්කරුගේ මෙන්ම සාක්ෂි මගින් නම් අනාවරණය වී ඇති අනෙකුත් සේවකයින්ගේ හැසිරීමෙන්ද වගඋත්තරකාර ආයතනයේ කීර්තිනාමයට කැළලක් සිදුවී

තිබුනද ඉල්ලුම්කරුගේ සේවය පමණක් අවසන් කිරීමට වගඋත්තරකරු විසින් ගන්න ලද තීරණය යුක්ති සහගත හා සාධාරණ නොවන බවත් මා තීරණ කරමි.'' (emphasis added)

The Tribunal holds that the Respondent has failed to explain why X had made a grave and false complaint against him. Indeed, it is inconceivable why X, against whom the Respondent made no allegations of malice or bad faith, would come forward to make such a grave complaint without any foundation. It is certainly not a path that a women will lightly take in our society without any basis due to the stigma it brings unless motivated by mala fides.

The Tribunal further holds that the Respondent has failed to tender any evidence to establish that the Purser of the flight had given false testimony against him. The Purser testified that another flight stewardess had told him of the incident and he immediately went and spoke to X to inquire about the incident. He found her in a state of distress overcome with sadness and unable to explain the incident in detail. It was a natural state of mind for a young flying stewardess who had to face such a situation after being in service for just about a year. The Purser further testified that the Respondent appeared to be intoxicated and that his breath smelled of cigarettes and alcohol. In terms of the company policy of the Appellant, a crew member cannot consume alcohol within ten hours of a scheduled flight. The Purser had made an entry of this incident in the Voyage Report which was marked in evidence.

However, the Tribunal concluded that the Appellant had failed to establish, on a balance of probability, the grave and disgusting sexual harassment charges against the Respondent. Nevertheless, the Tribunal has concluded that the Respondent has, by his physical and verbal actions, acted in a manner that disrupted the work of X and harmed her personality.

In this context, we must examine what is meant by sexual harassment. It is a criminal offence in terms of section 345 of the Penal Code which reads as follows:

> *"Whoever, by assault or use of criminal force, sexually harasses another person* ***or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment****…"* (emphasis added)

Explanation 1 therein states that unwelcome sexual advances by words or action used by a person in authority, to a working place or any other place, shall constitute the offence of sexual harassment.

Given that sexual harassment is a criminal offence, such conduct amounts to a serious misconduct at the workplace. I must hasten to add that sexual harassment can take place against both men and women.

In ***Vishaka v. State of Rajasthan and Ors.*** **[AIR 1997 Supreme Court 3011]**, The Supreme Court of India held that:

> *"Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:*
>
> *a) physical contact and advances;*
>
> *b) a demand or request for sexual favours;*
>
> *c) sexually coloured remarks;*
>
> *d) showing pornography;*
>
> *e) any other unwelcome physical verbal or non-verbal conduct of sexual nature."*

Female sexuality includes issues pertaining to personality. Hence it is evident that the conclusions of the Tribunal support a finding of sexual harassment of X by the physical and verbal actions of the Respondent.

Nevertheless, the Tribunal concluded that the termination of his services was not just and equitable. It was so held as the Appellant had allegedly treated other employees who were similarly situated to the Respondent differently without terminating their services.

However, as the learned counsel for the Appellant submitted, the other instances relied on by the Respondent cannot be put on equal footing with the misdemeanor of the Appellant.

One such instance was where another flying stewardess, who is referred to as Y for the purposes of this judgment, who was on the same flight had complained of having been harassed by another flying steward. However, evidence was led to establish that although Y had also initially complained to the Purser, she had later refused to make any written complaint of the incident. She had indicated that she is capable of handling herself and does not wish to pursue with a complaint. The Appellant cannot be expected to take further steps in the absence of a complaint from the aggrieved party.

In this case, X made a written complaint that was marked as R1 at the inquiry without any objection. In fact, the Respondent identified it as having been signed by X. No doubt, X did not testify before the Tribunal. However, the Appellant explained the absence. X had by then resigned from service. The complaint R1 had the full details of the incident as narrated by X. Although the Appellant gave an undertaking sometime after R1 was marked, that X would be summoned as a witness, that cannot negate the evidentiary value of the contents of R1 which was marked without subject to proof. Moreover, R1 was shown to the Respondent during cross-examination and he admitted that it was given by X.

Another incident relied on by the Respondent is where another flying stewardess had complained that a Purser had visited her room on a stopover in Bangkok and propositioned her. The said Purser had apologized to the flying stewardess and had not been assigned duties for over six months and had only short flights for a year. This incident happened off duty and moreover, there was no written complaint made by the flying stewardess.

In ***General Manager, Ceylon Electricity Board & Another v. Gunapala*** **[(1991) 1 Sri.L.R. 304]** the applicant was proved to have consumed liquor in contravention of the circular while on duty. It was held that the fact that other employees who were found to have consumed liquor were not similarly-dismissed from service is not relevant in deciding whether the termination of the services of the Applicant was just and equitable.

Moreover, in ***Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya*** **(65 NLR 566)**, a workman employed by the Ceylon Transport Board was dismissed because he had broken a rule which provided that any employee who removed a vehicle belonging to the Board, either without authority, or without a driving licence, would be dismissed. It was held that the fact that, about a year later, the Board did not dismiss, but merely transferred and warned, another employee for a similar offence was not proof of discrimination against the workman in that case.

A similar approach has been taken by the Employment Appeals Tribunal of UK. In ***Kay v. Cheadle Royal Healthcare Ltd.*** **[Appeal No. UKEAT/0060/11/CEA, Decided on: 12.09.2011]** it was held:

> *"The Tribunal plainly thought that Ms. Thomas ought also to have been disciplined, and it was critical of part of the reasoning given by the Respondent for not doing so. But in the end, the true question was whether it was unfair to dismiss the Claimant, applying of course the test under section 98(4) of the 1996 Act. The Tribunal correctly asked itself this question and concluded that the inconsistent*

treatment was not such as to make the dismissal unfair. We see no error of law in this conclusion. Indeed on the basis of the findings in the letter of dismissal while the Respondent may be criticised for not disciplining Ms. Thomas it cannot in our view be criticized for dismissing the Claimant. The findings in that letter plainly merited dismissal."

The burden to be discharged by the Appellant then is to establish that the impugned misconduct justifies the termination of the Respondent. As the learned counsel for the Appellant correctly submitted, the question that the Tribunal should have asked is whether the termination of the Respondent is just and equitable for such misconduct. If the termination is just and equitable, it matters not that other employees have not been punished.

However, if termination may not be the only punishment that could have been meted out, then the fact that others who are similarly circumstanced have been given a different punishment is a relevant factor.

Let me now consider the gravity of sexual harassment. In so far as sexual harassment in general is concerned, I would like to quote with approval Gooneratne J. in ***Manohari Pelaketiya v. H.M. Gunasekera, Secretary, Ministry of Education and Others*** **[S.C. (F/R) 76/2012, S.C.M. 28.09.2016]** where he observed (at page 13):

"I observe that continuous abuse and sexual harassment over a period of time would cause physical and mental damage to any human being. It is not possible for a female to resist such abuses unless she is a strong personality who could react and retort to such abuses and harassment and make the abuser to shamelessly withdraw, being exposed to the public at large of his indecency. Continuous threats and abuses could also make a person unwell both physically and mentally. My views expressed on the aspect of abuses would be endorsed by any law abiding citizen, and it should be so."

I had occasion previously to pen down my views on sexual harassment at the workplace in ***Brandix Apparel Solutions Limited v. Fernando*** **[S.C. Appeal 60/2018, S.C.M. 05.05.2022]**, where I held that:

> *"It should be noted that it is the duty of an employer to provide a safe and supportive work environment for its employees. The productivity of the employee and the company will not increase unless such an environment exists. Sexual harassment in any form should be dealt with severely because it will otherwise pollute the working environment and affect employee morale."*

It is important to observe that Article 11(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which Sri Lanka has signed and ratified without any reservation, requires States Parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on basis of equality of men and women, the same rights including the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

The CEDAW General Recommendation No. 19: Violence against Women, in its recommendation on Article 11, states that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Article 14(1)(g) of the Constitution recognizes that a citizen has the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise. The fundamental right to engage in a lawful occupation, profession, trade, business or enterprise is dependent on the creation of an environment free from sexual harassment.

In ***Manohari Pelaketiya v. H.M. Gunasekera, Secretary, Mininstry of Education and Others*** (supra.), Court was of the view (at page 16) that sexual harassment or work place stress and strain occasioned by oppressive and burdensome conduct under colour of executive office would be an infringement of the fundamental rights of the Petitioner in that case.

Article 4(d) of the Constitution requires the fundamental rights which are by the Constitution declared and recognized to be respected, secured and advanced by all the organs of government. The Appellant is a state-owned enterprise and hence bound by this positive obligation. Thus, it must adopt a zero-tolerance policy towards any form of sexual harassment. Where any employee is found guilty of such sexual harassment, even for the first time, the Appellant is justified in terminating his or her services. In my view, this applies to both the public and private sectors.

The conduct of the Respondent amounts to grave misconduct. It formed part of a revolting culture amongst some flying stewards at Sri Lanka Airlines. There had been many oral complaints of sexual harassment during the period 2004-2005. In addition to the complaints, around 100-200 flight stewardesses had resigned during this period. Later the management of Sri Lanka Airlines had taken necessary steps to constitute a committee to further investigate these complaints. There it was observed that a majority of the complaints were directed against the Respondent which consisted of about 80 complaints.

In fact, the witness, a Cabin Manager, summoned on behalf of the Respondent testified that a lot of complaints on sexual harassment had been received during his service period. He stated that a lot of complaints were received against the Respondent on sexual harassment [Appeal Brief page 691].

Moreover, the bad record of the Respondent was clearly manifest in the evidence. The Respondent had been warned repeatedly, punished and grounded on several occasions due to misconduct including neglect of duties, leave without notice and excessive absenteeism. His probationary period had been extended due to his poor performance, he had to re-sit all exams as he could not meet the standards when tested and on a second appraisal he was found wanting.

The Respondent also constantly took no pay leave, was warned for reporting late for flights and did not follow the rules and regulations of the Appellant. He was even transferred to the airport service department (grounded) due to misconduct.

For the foregoing reasons, I answer the two questions of law in the affirmative.

The learned President of the Tribunal erred in holding otherwise. So did the High Court in affirming the order of the Tribunal.

Accordingly, I set aside both the judgment of the High Court of Negombo dated 19.10.2016 and order of the Tribunal dated 22.10.2013.

I hold that the termination of the services of the Respondent is just and equitable.

Appeal allowed. Parties shall bear their costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree.

Judge of the Supreme Court