IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for leave to appeal and/or special leave to appeal from the judgment of the High Court of the North Western Province, Holden in Chilaw, under and in terms of section 31DD of the Industrial Disputes Act No. 43 of 1950 (as amended).

SC Appeal:19/2015

SC No: SCHCLA10/14

High Court No: HCALT 01/2012

Labour Tribunal Application No.28/1421/ Chilaw

Dehiwattage Rukman Dinesh Fernando,

No. 552/A, Dandugama Road, Ja-Ela.

Applicant

Vs.

Union Apparel (Pvt) Ltd,

No. 184/01, Negombo Road,

Mudukatuwa, Marawila.

Respondent

AND BETWEEN

Union Apparel (Pvt) Ltd,

No. 184/01, Negombo Road,

Mudukatuwa, Marawila.

Respondent-Appellant

Vs.

Dehiwattage Rukman Dinesh Fernando,

No. 552/A, Dandugama Road, Ja-Ela.

Applicant

AND NOW BETWEEN

Union Apparel (Pvt) Ltd,

No. 184/01, Negombo Road,

Mudukatuwa, Marawila.

Respondent-Appellant-Appellant

Vs.

Dehiwattage Rukman Dinesh Fernando,

No. 552/A, Dandugama Road, Ja-Ela.

Applicant-Respondent-Respondent

Before: Buwaneka Aluwihare PC, J.
P. Padman Surasena J.
E. A. G. R. Amarasekera J.

Counsel: Dhanya Gunawardena for the Respondent-Appellant-Appellant.

G. R. D. Obeysekara with Lal Perera instructed by Unica Fonseka for the Applicant-Respondent-Respondent.

Argued on: 23. 10. 2019

Decided on: 28. 10. 2021

JUDGEMENT

Aluwihare PC, J.,

The present appeal seeks to challenge the judgment of the High Court by which, the learned High Court Judge had affirmed the Labour Tribunal's findings that the termination of services of the Applicant-Respondent-Respondent (hereinafter referred to as the 'Applicant') was unjust and therefore the Applicant was entitled to compensation.

The Applicant, in his application made to the Labour Tribunal had averred that he had been employed as the 'Manager-Packing' of the Respondent-Appellant-Petitioner Company (hereinafter sometimes referred to as the 'Appellant-Company') since 25th March 2003 and had alleged that when he reported to work on 3rd April 2008, he was served with a letter of suspension from service ('අ2'). He had been told that a domestic inquiry would be held on 8th April 2008 regarding

the same. A domestic inquiry, however, had not been held as intimated, and the Applicant's services had been terminated by letter dated 22nd April 2008 ('අ3'). The reason given for the dismissal of the Applicant had been, his failure to ensure that the polybags used for packing the garments ordered by an international buyer, 'Next' were in compliance with the specifications and other requirements stipulated by the said international buyer ['Next'] and another buyer 'Regatta' and that the Applicant failed to carry out his duties up to their expectations. The Applicant on the other hand claimed, that the termination of his services without holding a domestic inquiry amounts to unjust and unfair termination of services.

The Appellant-Company in its answer to the Labour Tribunal stated *inter alia* that the Applicant as the 'Manager-Packing', was entrusted with the vital responsibility of packing finished garments according to the buyer's specifications ensuring the degree of quality required. Their position was that, if the 'Manager-Packing' fails to carry out the packing as required, it would result in a loss of business, financial loss and loss of valuable clients and / or buyers in the context of the highly competitive garment manufacturing industry, in addition to the risk of the buyers rejecting the said orders and possible discontinuation of procuring garments from the Appellant-Company.

The Appellant-Company had called as witnesses the Human Resources Manager G. G. Samarasekera and Packing Officer K. N. Wijeratne of the factory. In the course of their evidence, they had mainly explained the adverse consequences of the Packing Manager failing to meet the specifications of the buyer. The documents marked 'අ4' and 'අ5' had been submitted to demonstrate that two international buyers, 'Regatta' and 'Next' had complained about the deviation from the procedures of loading the cartons of finished garments into the containers. The Applicant had been warned previously by 'අ1' (dated 29th September 2009), not to deviate from the rules and procedures that are required to be adhered to, when packing the relevant orders.

The Labour Tribunal had held that the termination of the Applicant was wrongful and ordered the Appellant-Company to pay Rs.420,000/- as compensation, to the Applicant (at page 181-187 of the Appeal brief). On appeal to the Provincial High Court by the Appellant-Company, the Learned High Court Judge had affirmed the award of the Labour Tribunal, by its judgment dated 12th December 2013 ('P1').

The Appellant-Company sought Leave to Appeal, and this Court granted leave on the following questions of law, referred to in sub-paragraphs (a), (c) and (i) of paragraph 10 of the Petition of the Appellant;

> *(a) Did the High Court misinterpret and misapply the established legal principles and/or decided case law submitted on behalf of the Petitioner in arriving at the Conclusion of 'P1'* [judgement of the High Court]*?*
>
> *(c)) Did the High Court fail to evaluate the evidence establishing the grave negligence of the Respondent and that the Respondent had been previously warned as to his negligence pertaining to the packing function?*
>
> *(i) Did the High Court err by holding that a domestic inquiry is mandatory under the established legal principles of Sri Lanka?*

Order of the Labour Tribunal

The Labour Tribunal had decided that the termination was unjust, based on several factors. Witness K. Wijeratne, Packing Officer, had stated that the responsibility of ensuring that the packing was done to meet the buyer's specifications rested entirely with the Manager-Packing, i. e. the Applicant, and that a loss would result to the Company if the Manager-packing failed to carry out the packing according to the given specifications. The witness had admitted that the Applicant held a position senior to him in the company hierarchy. The President of the Labour Tribunal, having considered the testimony of this witness, had been of the opinion that his evidence had no direct connection to the main issues of the case i.e. proving

the allegation against the Applicant, as the witness had given evidence only relating to the possible consequences of the Manager-Packing failing to meet a buyer's specifications. G. G. Samarasekera, the other witness who testified on behalf of the Appellant-Company, had been employed by the company about one and half years after the Applicant's services had been terminated and it had transpired in the course of his evidence that, he had had no personal knowledge of the orders in question. Furthermore, the learned President of the Labour Tribunal had observed that the witness had admitted that a domestic inquiry had not been held, although it was stated in 'එ2' that a disciplinary inquiry would be held regarding the Applicant on 08th April 2008.

The two emails, on the strength of the contents of which the Applicant's services had been terminated, purported to have been sent by 'Next' and 'Regatta' had been submitted by the witness as evidence subject to proof, on 16th October 2009 ('එ4' and 'එ5'). The learned President of the Labour Tribunal, however, had observed that even after a lapse of ten months, the Appellant-Company had failed to call Jude Virajith, the Manager of the Appellant-Company as a witness, who is said to have received the two emails from the buyers. This court is mindful of the fact that the provisions of the Evidence Ordinance have no application to proceedings before the Labour Tribunal. In the instant case, however, there was a duty on the Appellant-Company to establish a nexus between the impugned emails and the incident over which the services of the Applicant were terminated. As such this court cannot find fault with the learned President of the Labour Tribunal when he held that the Appellant-Company had failed to establish their position sufficiently with evidence

The Applicant, in his evidence, had accepted that the 'polybags' they manufactured had been longer than what was specified by 'Next'. However, he had maintained that the sample of the bags sent to 'Next' had been approved and the emails with the specifications sent by 'Next' had been submitted marked 'A4'. The Applicant had also maintained that the measurements of the bags would be checked by the

Quality Controller of the Stores Section and after packing would also be checked by the ordering agency before being shipped. The learned President of the Labour Tribunal had been of the opinion that this evidence given by the Applicant had neither been challenged nor contradicted by the Appellant-Company, thereby failing to justify the allegations on which the Applicant's services had been terminated.

The learned President of the Labour Tribunal had deemed it fit that the Applicant be paid compensation in terms of Sections 33(5) and 33(6) of the Industrial Disputes Act in lieu of reinstatement. Following **Associated Newspapers of Ceylon Ltd. v. Jayasinghe** 1982 2 SLR 595 where it was held that "*the essential question, in the determination of compensation for unfair dismissal is- what is the actual financial loss caused by the unfair dismissal, for compensation is an 'indemnity for loss'.* In the present case the President of the Labour Tribunal had been of the view that the Applicant should be paid the equivalent of 3 months' salary for each year of service with the Petitioner company.

Judgment of the Provincial High Court

The Learned Judge of the Provincial High Court has stated that the Appellant-Company had not demonstrated to court whether the international buyer, 'Next' rejected the garments or refused payment for the garments, and the amount of the loss, if any, caused to the Appellant-Company. The Learned Judge had made the same observations made by the learned President of the Labour Tribunal that the Human Resource Manager called as a witness had no knowledge about the incident as he had joined the Company after the Applicant's services had been terminated, that the other witness held a position junior to that of the Applicant and had not given evidence of any value, and that the Manager, Jude Virajith, had not been called as a witness regarding the emails ('එ4' and 'එ5') received by him from the international buyers.

Furthermore, the Learned High Court Judge had noted that the evidence given by the Applicant reveals that the Appellant-Company had taken on the particular order in issue, although it did not have the necessary equipment to pack the garments according to the buyer's specifications at their Factory in Marawila. When the Applicant and the Quality Manager had informed the management of the Appellant-Company that the required quality could not be achieved at their Factory, they had been directed to stitch the garments at the Marawila factory and to get them packed at the Avissawella Factory, as this was a special order which they could not afford to lose. The samples that were packed in Avissawella had been submitted to the Central Quality Controlling Institute for 'Next' and the approval obtained to proceed with manufacturing the order. After the order had been shipped, however, the Applicant had been informed by the Audit Officer that 'Next' had complained that the polybags used were too long. Thereafter the Applicant's services had been terminated.

The evidence given by the Applicant regarding the order, alleging that the Appellant-Company had taken on an order that they were ill equipped to produce and relied on the Applicant to somehow ensure that the order was produced, had not been challenged by the Appellant-Company. The Learned High Court Judge had formed the view that the Applicant had been made the 'scapegoat' for the decision of the higher management of the Appellant-Company in accepting an order that they were ill equipped to manufacture.

Referring to the principles of natural justice, the Learned High Court Judge had further deemed the conduct of the Appellant-Company, in informing the Applicant that a disciplinary inquiry would be held and then dismissing him without holding the said inquiry, was contrary to the principle that "no one should be condemned unheard."

Although the Learned High Court Judge was in agreement with the Appellant-Company's submission that the provisions of the Evidence Ordinance are not

applicable to industrial disputes before a Labour Tribunal, she had held that whereas '෎4' and '෎5' had been submitted subject to proof, evidence should have been adduced to prove the same. The Appellant-Company's submission that the compensation due to the Applicant had not been calculated correctly was dismissed on the basis that there was no need for such a calculation as evidence had been led on the loss that was caused to the Applicant by the termination of his services and that it had not been challenged.

Questions of Law

Question (a) : Misinterpretation and misapplication of established legal principles

I shall deal with the above question under 2 sub-headings; (a)(i) and (a)(ii).

(a) i. Computation of compensation

Whether the compensation was granted in the accepted manner and whether the standard of proof adopted by the High Court was correct are the main questions that have to be answered in making a finding in relation to the first question of law on which leave to appeal was granted, i.e. whether the High Court misinterpreted and misapplied the established legal principles and / or decided case law, submitted on behalf of the Appellant-Company.

The Appellant-Company in its written submissions has taken up the position that the Labour Tribunal has made no reference to the manner in which the compensation was calculated. The High Court on the other hand had been of the opinion that it was not so and had upheld the amount of compensation that had been awarded by the Labour Tribunal.

In **Jayasuriya v. Sri Lanka State Plantations Corporation** 1995 2 SLR 379, the very case relied on by the Learned President of the Labour Tribunal to state that it is the 'actual financial loss' that should be considered, Justice A. R. B. Amerasinghe has commented at length on the manner in which the amount of compensation should

be calculated. *"In determining compensation what is expected is that after a weighing together of the evidence and probabilities in the case,* ***the Tribunal must form an opinion of the nature and extent of the loss, arriving in the end at an amount that a sensible person would not regard as mean or extravagant but would rather consider to be just and equitable in all the circumstances of the case****. There must eventually be an even balance of which the scales of justice are meant to remind us.*

While the expressed loss, in global terms of years of salary may in certain cases coincide with losses reckoned and counted and settled by reference to the relevant heads and principles of determining compensation, it is preferable to have a computation which is expressly shown to relate to ***specific heads*** *and* ***items of loss****. It is not satisfactory to simply say that a certain amount is just and equitable.* ***There must be a stated basis for the computation taking the award beyond the realm of mere assurance of fairness.*** *For a just and equitable verdict the reasons must be set out in order to enable the parties to appreciate how just and equitable the verdict is.* ***Where no basis for the compensation awarded is given, the order is liable to be set aside."*** (emphasis added)

In short, the court had been of the opinion that the Labour Tribunal must evaluate the evidence before it, to form an opinion as to the amount that could be said to be *just and equitable compensation* and the award is to be computed on the basis of specific heads or items of loss so that the order would not be open to challenge on the ground that it is arbitrary or without a sound rationale.

With due deference, when considering the award of the Labour Tribunal, it has to be noted that, although it was stated that the actual financial loss should be considered when awarding compensation, the Learned President of the Labour Tribunal has not elaborated **how** the actual loss was computed in this case. The Learned High Court Judge, at page 12 of the judgment, had expressed the view that, as evidence of the Applicant had been led regarding the loss that was caused

to him due to the loss of employment, there was no necessity to calculate the loss caused separately. However, that does not seem to be a sound view, as formulas and guidelines for computing the losses of a wrongfully terminated employee has been set by numerous judicial precedents in an attempt to introduce some degree of uniformity into the process. A plethora of factors such as whether the applicant obtained fresh employment, the period for which the applicant remained unemployed, the loss of retirement benefits has to be considered depending on the particular circumstances of each case. Furthermore, not only should those factors be relied on, but they should be explicitly stated in the judgment as having been relied upon in forming the judgment.

Observing that the Legislature has left in the hands of the Labour Tribunal, the discretion of determining the quantum of compensation on the basis of facts and circumstances of each case, Wijetunga J. in **Up Country Distributors (Pvt) Ltd., v. Subasinghe** [1996] 2 SLR 330 (at page 335) observed that *"…some degree of flexibility in that regard is both desirable and necessary if a tribunal is to make a just and equitable order.*" The case involved a situation where a workman prayed for reinstatement with back wages or compensation in lieu of reinstatement, and compensation was ordered taking into consideration, in particular, the workman's period of unemployment, his age at termination and the period of his service. In the case referred to, the High Court had been of the opinion that the Labour Tribunal had given due consideration to the authorities cited and the Supreme Court held that therefore it would be idle to contend that the basis for the award of compensation was not given. The Supreme Court however, emphasized that "*the tribunal should have dealt with the* ***criteria relevant to the computation of compensation in more explicit terms****, thus "taking the award beyond the realm of mere assurance of fairness" -per Amerasinghe, J. in Jayasuriya's case (supra).*" (emphasis added).

It has been submitted on behalf of the Appellant-Company that although compensation has been ordered by the learned President of the Labour Tribunal on

the concept of 'immediate loss' it ought to have been decided upon two questions, namely, 1. Did the worker obtain employment after the unjust termination, 2. How many months was the worker out of employment? (mitigation of losses). On the other hand, it was submitted on behalf of the Applicant that, as upheld in **Coats Thread Lanka (Pvt) Ltd. v. Samarasundara** 2010 (2) SLR 1 (at page 11) that if a workman is suspended pending a domestic inquiry he is entitled to his monthly salary, and that the workman has earned an income otherwise, does not vitiate the entitlement to receive the salary from the employer who has suspended his services. In the present case a domestic inquiry has not been held although the Applicant was informed that a domestic inquiry would be held.

Further, on behalf of the Appellant-Company it has been pointed out that the facts necessary for computing the compensation due to the Applicant were not submitted to the Labour Tribunal by the Applicant. The case of **The Ceylon Transport Board v. Wijeratne** 77 NLR 481 was referred to, where a comprehensive list of factors that the Labour Tribunal may consider in awarding compensation were recognized by the court; "*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.*"

As cited with approval in **The Ceylon Transport Board v. Wijeratne** 77 NLR 481, Weeramantry J. in the case **The Ceylon Transport Board v. Gunasinghe** 72 NLR 76 at page 83 has emphasized the importance of true facts in making a just and

equitable order as to compensation; "*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.*"

Apart from the evidence of the Applicant led at the Labour Tribunal where the Applicant stated his period of employment with the Appellant-Company, his salary and age and that he has one daughter, that she was due to be born at the time his services were terminated, that she is two and half years at the time of giving evidence, and that his wife is unemployed (pages 98-99 of the Appeal brief) no other facts were adduced to aid the Labour Tribunal in making a decision as to compensation. In **Jayasuriya** (*supra*) the Supreme Court stipulated that "*The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss.*"

The courts have upheld the expectation that a tribunal would specify in detail, to the extent possible, the specific heads on which the compensation was computed and, that the burden of adducing evidence to enable the court to compute the loss in such a meticulous manner is with the employee whose services have been terminated. As the employee in this case has starved the Labour Tribunal of the information necessary to make a well laid out computation, the Tribunal cannot be faulted for failing to set out the specificities. Furthermore, based on the details provided to the Labour Tribunal, it cannot be said that the computation of compensation is totally disproportionate to the alleged loss, and we do not wish to disturb the order of the Labour Tribunal as to the amount of compensation.

(a) ii. The applicable burden of proof and standard of proof

The Industrial Disputes Act does not state on whom the burden of proof should lie in a labour matter before the labour tribunals or courts. The Appellant-Company argued that the burden of proof applicable here is the burden referred to in Section 101 of the Evidence Ordinance, i.e. a party must bear the burden of establishing the facts on which he relies for the remedy he seeks. Thus, the Appellant-company argues that the burden of proving that the Applicant was wrongfully terminated would be recumbent on the Applicant himself.

Regarding the standard of proof in labour matters, courts have taken the stance that the balance of probability is the standard commensurate with ensuring that labour relations are not sabotaged by the adjudication. In **Piyasena Silva v. Ceylon Fisheries Corporation** (1994) 2 Sri LR 292 it was recognized that the standard of proof in labour matters is the balance of probability. In **Associated Battery Manufacturers (Ceylon) Ltd.** 77 NLR 541 the reason for adopting a balance of probability was explained (at page 553) "*The whole object of labour adjudication is that of balancing the several interests involved, that of the worker in job security, since loss of his job may mean loss of his and his family's livelihood; that of the employer in retaining authority over matters affecting the efficient operations of the undertaking; that of the community in maintaining peaceful labour relations and avoiding unnecessary dislocations due either to unemployment or unproductive economic units. Each is equally important.* ***None of these objectives can be achieved by the adoption of the standard of proof required in criminal cases*** *in the determination of the facts which have to be established before a Labour Tribunal before it can exercise its jurisdiction to make an order which in all the circumstances of the case is just and equitable.*" (emphasis added). A similar view was expressed in **The Batticaloa Multi-Purpose Cooperative Societies Union Ltd. v. Velupillai** 71 NLR 60 "*in proceedings before labour tribunals the strict degree of proof as in a Court of law is not required...*".

The law relating to the burden of proof in labour matters has developed by way of judicial precedent which has stated that; "*The* ***burden is on the employer to justify the termination*** *on the principle that 'he who alters the status quo and not he who demands its restoration, must explain the reasons for such alteration.*" (*Vide* S. R. De Silva, The Legal Framework of Industrial Relations in Ceylon, at page 570-571). The case of **Gunasekara v. Latiff** [1999] 1 SLR 365 where it was held by the Court of Appeal that "*While S. 101 Evidence Ordinance is concerned with the duty to prove a case as a whole, viz the overall burden of proof S. 103 regulates the burden of proof as to a particular fact, however the devolution of the overall burden is governed by S. 102 which declares that* ***the burden of proof lies on that person who would fail if no such evidence at all were given on either side.***" was quoted in support of this stance. The case of **Gunasekara v. Latiff** involved a Declaration of Title, where the questions of who should begin the case, and on whom the burden of proof lies was commented on. However, before the Labour Tribunal, the Appellant-Company has argued that the provisions of the Evidence Ordinance do not apply to cases at the Labour Tribunal, a view which was endorsed by the High Court as well. It seems to be a contradictory position adopted by the Appellant.

In the written submissions filed before the Labour Tribunal on behalf of the Applicant, it has been argued that per Section 5(c) of the Evidence Special Provisions Act No. 14 of 1995 and Section 104 of the Evidence Ordinance, the burden of proving the emails is on the Appellant-Company. On the other hand, in the written submissions on behalf of the Appellant-company, it has been submitted that as the Applicant has admitted the fact, that he received the email 'එ5' sent by Kelum Warnapatabendi, Senior Product Technologist for 'Next' in Sri Lanka (at page 11 in the evidence given on 9th February 2011) there is no necessity for it to be proved by the Appellant-Company. Nevertheless, the opinion of the Learned High Court judge in this regard, that if the emails 'එ4' and 'එ5' were submitted

subject to proof then evidence should be called to prove the same, is the sound approach.

The High Court had been of the opinion that the evidence given by witness K. N. Wijeratne cannot be attached any value in deciding whether the Applicant was in fact guilty of the conduct which led to his termination. This was due to the concern that the witness held a position subordinate to the Applicant and would not be sufficiently knowledgeable about the job duties of the Applicant to be in a position to comment on the Applicant's performance in meeting the responsibilities of the Applicant's position as Packing Manager. However, it is more probable that the witness as a Packing Officer with many years of experience would have come to know the job duties of a Packing Manager from working with and under the instructions of the Packing Manager.

Considering the above I am of the opinion that the High Court has neither misinterpreted nor misapplied established legal principles or decided case law and thus answer the Question of law referred to in subparagraph (a) in the negative.

Question (i)

Now I turn to Question *(i) "Did the High Court err by holding that a domestic inquiry is mandatory under the established legal principles of Sri Lanka?"* and then to Question *(c) Did the High Court fail to evaluate the evidence establishing negligence on the part of the Applicant*, as some factual observations are common to both.

In the Sri Lankan Labour Law regime, there is no statutory requirement to conduct a domestic inquiry prior to the termination of a workman. Where there is no collective agreement or a clause in the contract of employment that a domestic inquiry should be held in the event of termination, it is not mandatory to hold a

domestic inquiry. However, it has come to be recognized that holding a domestic inquiry could be beneficial to both the employer and the employee.

There may be instances where it is plain that the employee in question is guilty of a conduct that warrants termination and could be dismissed without any need for further investigations. Therefore, it would be an additional burden to require employers to hold domestic inquiries by default in all instances.

Holding a domestic inquiry is however a salutary practice. S. R. De Silva in 'Law of Dismissal' [The Employers' Federation of Ceylon, Monograph No. 8, Revised Edition 2004] commenting on the desirability of holding domestic inquiries states "*Punishment of an employee, whether by dismissal or otherwise, without following a disciplinary procedure which involves the giving of an opportunity to an accused employee to exculpate himself is, prima facie, arbitrary. Many labour courts today may view disciplinary action without a show cause letter followed by an inquiry, where necessary, as being arbitrary, since such action must be assumed to be taken without the employer having satisfied himself about the guilt or otherwise of the accused employee."* Listing several reasons for the desirability of holding a domestic inquiry, S. R. De Silva has advanced the view that even where guilt can be established without a domestic inquiry, holding a domestic inquiry could be beneficial (*vide* paragraph 41).

In **All Ceylon Commercial and Industrial Workers' Union v. Weerakoon Bros Ltd**. [Sri Lanka Gazette No. 90 of 14. 12. 73] the court accepted that the dismissal of employees without holding a domestic inquiry could be reviewed for correctness as it was against the principles of natural justice. As there were no allegations of mala fide against the employer, in **All Ceylon National Milk Board Trade Union v. The Board of Directors, CWE** [Gazette No. 261/10 of 07. 09. 1983] the absence of a domestic inquiry was not considered to be an issue regarding the justification of the dismissal. However, in **St. Andrews Hotel v. Ceylon Mercantile Union** CA

138/85 decided on 01.04.1993 it was recognized that a dismissal cannot be set aside as wrongful solely on the basis that no domestic inquiry was held.

Therefore, it appears that while a domestic inquiry is desirable, in certain cases, due to the nature of the circumstances a domestic inquiry could be dispensed with.

The emails marked 'ඵ4' and 'ඵ5' point to the faults/negligence of the Applicant in carrying out his duties, but shortcomings by other quarters too are mentioned in the emails. In 'ඵ4' sent by Sampath Erahapola the local agent for Regatta, several shortcomings are listed out; that there were broken stitches in many of the garments, that the workers were on continuous night shifts thereby affecting their productivity, that there was no management level involvement even after re-screening, that internal audits were failing to correct the defects in the order prior to shipping, and that there was no assurance of quality from the Quality Assurance Department. The only shortcomings that can be directly connected to the Applicant were, that there was a delay in starting the packing despite being advised to commence the packing in good time, and that the Packing Manager was not present in the Factory while the work was going on. In 'ඵ5' sent by Kelum Warnapatabendi, the Senior Product Technologist for 'Next' in Sri Lanka it has been stated that "*I have given you an approved sample for packing/presentation. All your seniors (specially Packing Manager) are well aware with the requirements.*" Loading the goods to the container without pre-final approvals and ignoring Quality Assurance comments of unloading the goods for inspection had been pointed out as shortcomings.

From the above comments in the emails, it can be seen that there were several shortcomings regarding the Regatta order for which the Applicant cannot be held to be singularly liable. It should be noted that the senior management was aware of the shortcomings but had made no meaningful involvement in remedying them. The evidence led at the Labour Tribunal fails to conclusively shed light on whether the length of the polybags was not as required due to the negligence of the

Applicant or the Quality Assurance Department or due to circumstances beyond their control, such as directions from the higher management concerned with cost cutting.

If the emails were the reason for dispensing with the requirement of holding a domestic inquiry, the contents of the two emails themselves bear evidence that there were several shortcomings in the production process of the Appellant's Factory for which the Applicant could not be held solely responsible. What is more, it could have been that the issues in the production process themselves could have affected the quality of the Applicant's performance. For instance, the Applicant's evidence led before the Labour Tribunal (page 91) has shown that the Applicant was saddled with the extra duty of attempting to procure certain machines that were required for the process of manufacturing the 'Next' order. Applicant had said that he made an unsuccessful attempt to get the required machinery from one of their establishments in Pita-Kotte and failing that they obtained the machinery from their Marawila Factory and found the machines mechanically defective and finally had to go to a Factory in Avissawella to perfect the order (page 153). The evidence of the Applicant to this effect was not contested by the Appellant-Company. In this backdrop the observation made by the High Court that the Applicant has been made a 'scapegoat' for the issues caused by the misguided decisions of the higher level of management in accepting an order that the Petitioner Factory was ill equipped to manufacture, seems justified.

What the High court has endeavoured to do, is to point out the dictates of natural justice that require a domestic inquiry in the circumstances of the present case, where there has not been conclusive evidence that the conduct of the Applicant was so serious as to justify termination. Further the High Court has noted that the conduct of the Appellant-Company in informing the Applicant that a domestic inquiry would be held and then postponing the inquiry to a later date and thereafter handing over a letter of termination on the day the Applicant went to the factory to face the domestic inquiry has unjustly prevented the Applicant from

presenting his side of the story *vis a vis* the alleged shortcoming on his part. Where the two emails themselves are insufficient to provide clout to the decision to terminate the Applicant, and in fact point to larger issues that have negatively affected the performance of the factory, the High Court cannot be faulted for holding that the lack of a domestic inquiry, especially where one had originally been scheduled, takes away from the justification of the termination of the Applicant's services.

Although as a matter of 'law' the High Court holding that the termination of the services of the Applicant without a domestic inquiry is both unjust and unreasonable is a misdirection on its part, this court is of the view that this was a classic case that cried for holding of a domestic inquiry before termination.

Although I answer the question of law referred to in subparagraph (i) of Paragraph 10 of the petition in the affirmative, I hold that the misdirection on the part of the learned High court is not grave enough to set aside the judgment of the learned High Court Judge.

Question (c)

Now I shall consider whether the High Court failed to evaluate the evidence establishing the grave negligence of the Applicant. The gravamen of the Appellant-Company's submissions to the Labour Tribunal was that loss would be caused to the company due to the negligence of the Applicant. However, that a loss was in fact caused, and if so, the amount of such loss was not submitted nor proved by the Appellant-Company. The two emails marked '෴4' and '෴5' said to be sent by the local agents for the international buyers 'Next' and 'Regatta' have not been proved by calling Jude Virajith, the Manager of the Appellant-Company who had received and forwarded the e-mails, to give evidence, thus, diminishing the probative evidentiary value of the contents of those e-mails.

The written submissions on behalf of the Applicant were that the Appellant-Company failed to lead direct evidence and prove before the Labour Tribunal the charge against the Applicant in compliance with the Evidence Ordinance. In the written submissions **Rodrigo v. Central Engineering Consultation Bureau** 2009 (1) SLR 248 was cited to point out that it is the Appellant-Company that should adduce evidence to prove the serious allegations against the Respondent. "*In Labour Tribunal proceedings where the termination of services of a workman is admitted by the respondent,* ***the onus is on the latter to justify termination by showing that there were just grounds for doing so and that the punishment imposed was not disproportionate to the misconduct*** *of the workman. The burden of proof lies on him who affirms, and not upon him who denies as expressed in the maxim* ei incimbit probatio, qui dicit, non quinegat."

An act of misconduct was defined in the Indian case **Shalimar Rope Works Mazdoor Union v. Shalimar Rope Works Ltd** 1953 (2) LLJ 876 thus; "*An act should be regarded as an act of* ***misconduct*** *if it is inconsistent with the fulfillment of express or implied conditions of service or if it has a material bearing on the smooth and efficient working of the concern.*" Justice Priyasath Dep PC, as he then was, in **Gamage v. M. D. Gunasena** (2013) SLR 143 was of the opinion that "*The implied conditions of service include conduct such as obedience, honesty, diligence, good behavior, punctuality, due care. Therefore, 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 degree of misconduct which justifies termination necessarily depends on the "*nature of the business and the position held by the employee*" **Jupiter General Insurance Co. Ltd. v. Shroff** (1973) 3 AEHR 67 as quoted in **H. G. Jayasekera v. The Ceylon Transport Board** CGG 14, 359 of 26.03.65 at para 24.

The Applicant has accepted that as Packing Manager he is the officer entrusted with the final responsibility of packing. However, giving evidence before the

Labour Tribunal (at pages 85-90) the Applicant's uncontested stance was that two meetings were held with the participation of the higher management of the factory, the Quality Assurance Manager and the Applicant himself, before commencing the production of the 'Next' order where he and the Quality Assurance Manager had raised the concern that the Appellant-Company's factory was not equipped to produce the order to the standard of quality expected by the international buyer.

Furthermore, regarding the length of the polybags being in excess of the specifications, the High court has questioned whether the quality controller of the factory has no responsibility for preventing the shipment of the goods that do not meet quality standards, and what the job duties of the Packing Manager were. These are valid concerns as they play an imperative role in identifying whether the Applicant was singularly responsible for the polybags being longer than as specified and therefore liable for any damage caused, thereby justifying his termination. Facts adequate to conclusively answer these questions have not been adduced.

The second limb of Question (c) is whether the High Court failed to evaluate the evidence that the Applicant had been previously warned as to his negligence pertaining to the packing function. Neither the Labour Tribunal nor the High Court in its judgment has referred to the previous warning given to the Applicant by letter dated 29th September 2007 marked 'වි1'. The Applicant had loaded cartons of clothing of a Regatta order into the container without the prior approval or permission of the Regatta representative one Sampath, and he had been warned not to deviate from the proper rules and procedures and that if such an incident is reported in the future, action would be taken against him as it is a serious offence.

However, the present allegation is not relating to the loading of finished goods but an allegation totally unconnected. In the present case, whether the Applicant was negligent, has not been established by the Appellant-Company to the degree of

proof required. The inevitable inference that can be drawn from this is that there was no justifiable basis for the termination of the Applicant. On a side note, had a disciplinary inquiry been held, this question of the bona fides of the Appellant-Company and the dearth of evidence before the Labour Tribunal could have been avoided.

Thus, I answer the questions of law (a) and (c) in the negative. The question of law (i) is answered in the affirmative, however due to the reasons delineated in this judgement, I hold that no substantial prejudice has been caused to the Appellant.

Accordingly, I dismiss the appeal subject to costs.

Appeal dismissed.

Judge of the Supreme Court

P. Padman Surasena J.

I agree.

Judge of the Supreme Court

E. A. G. R. Amarasekara J.

I agree.

Judge of the Supreme Court