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

In the matter of an Appeal from a Judgment of the Provincial High Court of the Southern Province holden in Galle dated 31st May 2019 in HC/LT/1138/2016, in terms of the Industrial Disputes Act and the High Court of Provinces (Special Provisions) Act No. 10 of 1990 read with the Rules of the Supreme Court, with Leave to Appeal obtained.

SC Appeal 61/2020

SC HCCA SPL LA 45/2019

SP HC/GA/LT/APL/1138/16

LT4/G/25/2013

Dhinayadura Jinadasa,
Moonugoda Road, Seenigama,
Hikkaduwa

Applicant

Vs.

The Trustee,
Sri Devol, Maha Devalaya,
Seenigama, Hikkaduwa.

Respondent

And Between

Dhisenthuwa Handi Sarath,
The Trustee,
Sri Devol, Maha Devalaya,
Seenigama, Hikkaduwa.

Respondent-Appellant

Vs.

Dhinayadura Jinadasa,
Moonugoda Road, Seenigama,
Hikkaduwa

Applicant-Respondent

And Now Between

Dhinayadura Jinadasa,
Moonugoda Road, Seenigama,
Hikkaduwa

Applicant-Respondent-Appellant

Vs.

Dhisenthuwa Handi Sarath,
The Trustee,
Sri Devol, Maha Devalaya,
Seenigama, Hikkaduwa.

Respondent-Appellant-Respondent

Before: Justice Vijith K. Malalgoda PC
Justice A.L.S. Gooneratne
Justice M. A. Samayawardhena

Counsel: Mr. Suren Fernando with Sajith Dias for the Applicant-Respondent-Appellant
Mr. D. V. R. Isuru Lakpura, for the Respondent-Appellant-Respondent

Argued on: **15.02.2021**
Judgment on: **09.07.2021**

Vijith K. Malalgoda PC J

The Applicant-Respondent-Appellant (hereinafter referred to as "The Appellant") has preferred an application before the Labour Tribunal of Galle on 07th February 2013 for alleged unlawful termination of his employment by the Respondent-Appellant-Respondent (hereinafter referred to as "The

Respondent") and sought an order for reinstatement with backwages, reasonable compensation and for all statutory entitlements for the loss of his employment as a Boatman in the Seenigama Devol Maha Devalaya.

At the conclusion of the trial before the Labour Tribunal, the learned President of the Labour Tribunal had come to a conclusion that the termination of the Appellant's service by the Respondent was in fact unjust. Further, considering the working history, nature of work and the income of the Appellant as a boatman, the learned President ordered the Respondent to pay Rs 2,100,000/= being the 7 years' salary, instead of making an order for reinstatement.

Being aggrieved by the said Order, the Respondent made an appeal to the Provincial High Court of Galle. By the judgment dated 31st May 2019, the learned High Court Judge partly allowed the Appeal and reduced the quantum of compensation to one year salary, i.e., Rs. 300 000/= considering the age of the Respondent and his future prospects as a boatman.

The Appellant preferred the instant application to this Court seeking to set aside the judgment of the High Court and to affirm the Order of the learned President of the Labour Tribunal. This court considering the submission by both parties, granted special leave on questions of law identified in sub paragraphs (d) and (e) of the Paragraph 11 of the Petition dated 10th July 2019, which are as follows;

(d) Did his Lordship of the High Court err in law in failing to recognize that the Order of the learned President of the Labour Tribunal was lawful, just and equitable?

(e) Did his Lordship of the High Court err in law in altering the quantum of compensation awarded?

When answering the 1st question referred to above, it is important to consider whether the order that was challenged before the High Court, which was delivered by the learned President of the Labour Tribunal was lawful, just and equitable.

When the Respondent appealed against the order of the Labour Tribunal to the High Court, the High Court made order to reduce the quantum of compensation, but did not interfere with the findings of the Labour Tribunal with regard to its decision that,

a) There was a Master-Servant relationship existed between the Applicant and the Respondent
b) The services of the Applicant was illegally terminated by the Respondent
c) The Labour Tribunal had decided to pay compensation instead of making an order for reinstatement

Even though the Appellant preferred the instant appeal before this court against the decision of the High Court to reduce the quantum of compensation without interfering with the rest of the order, the Respondent was satisfied with the said finding and did not appeal against the said order.

In the said circumstances it is not necessary for this Court to consider whether the order of the Labour Tribunal is lawful, just and equitable with regard to its finding on the above three issues which is not challenged in the instant application.

The only remaining issue that has to be looked by this Court is, whether the order made by the Labour Tribunal to pay Rs. 2100000.00 being seven years' salary instead of making an order of reinstatement, was lawful, just and equitable.

Based on the finding that was reached by the Labour Tribunal, that the services of the appellant who had worked as a boatman at Seenigama Devol Maha Devalaya had unjustly terminated, the Labour

Tribunal had decided to grant compensation in lieu of reinstatement, since by then the appellant was reaching the age of 65 years. In the absence of a specific service agreement between the two parties, deciding the age of retirement and the other service benefits, the only document the Labour tribunal relied was the letter of appointment which was produced marked as A-9. However, A-9 is silent on its effect on continued long service and consequences of terminating the continued long service. In those circumstances the Labour Tribunal whilst concluding the last drawn salary as Rs. 25000.00 based on the evidence placed before the tribunal, computed the compensation on a mechanical basis to make it seven years' salary, but had failed to give any reason as to how the seven-year period was calculated.

In the absence of an accepted legal regime in calculating compensation in lieu of reinstatement, the method that should be followed by the Labour Tribunal had been identified in a series of appellate decisions.

In the case of ***Jayasuriya Vs. State Plantation Corporation (1995) II Sri L.R.379*** *at page 381 Amarasinghe J* had identified the more logical method of computing the compensation as,

> "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……..
>
> ……. The essential question is the actual financial loss caused by the unfair dismissal because compensation is an indemnity for the loss. What should be considered is financial loss and not sentimental harm"

In the case of ***The Ceylon Transport Board Vs. Wijerathne 77 NLR 48*** *Vythialingam J* had gone into this issue in more detail and observed that,

> "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, 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 action were blame-worthy 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"

When granting compensation to the Appellant the Labour Tribunal was mindful of the decision in ***The Ceylon Transport Board Vs. Wijerathne*** (*supra*) and had referred to the guidelines identified in the said judgment as follows;

> "වන්දි නියම කිරීමේ දී සලකා බැලිය යුතු කරුණු සම්බන්ධව ඉතා පැහැදිලි ලෙස කරුණු ඉදිරිපත් කර ඇති නඩුවක් වනුයේ, The Ceylon Transport Board vs, Wijerathne (77 NLR 481) දරණ නඩුවයි. එම නඩුවේදී ඉදිරිපත් වූ නිගමනයන්, අනුගමනය කරමින් ශ්‍රේෂ්ඨාධිකරණය විසින් මඟපෙන්වීමක් ලබා දී තිබේ.
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> i. ව්‍යාපාරයේ ස්වභාවය.
> ii. සේවයාගේ ගෙවීමේ හැකියාව.
> iii. සේවකයාගේ වයස.
> iv. රැකියාවේ ස්වභාවය.
> v. ඔහුගේ සේවා කාලය.

vi. ඔහුගේ වර්තමාන වැටුප.

vii. ඔහුගේ අනාගත අපේක්ෂාවන්.

viii. සේවකයාගේ අතීත සේවා වාර්තාව.

ix. වෙනත් රැකියාවක් ලබා ගැනීමට ඇති ඉඩකඩ.

x. සේවය අවසන් කල අන්දම.

xi. ඉදිරිපත් වී ඇති චෝදනාවල තත්වය.

xii. වගඋත්තරකරුගේ ක්‍රියා කලාපයේ ස්වභාවය.

xiii. සේවය අවසන් වීම නිසා ඔහුට විය හැකි බලපෑම.

xiv. අහිමි වන අනාගත විශ්‍රාම ප්‍රතිලාභ.

xv. සේවය රහිතව සිටි කාලයේ ඉපයූ වැටුප හා වෙනත් කරුණු."

However, when calculating the compensation, whether the Labour Tribunal was in fact followed the said guidelines supported by the evidence led before the tribunal and made a just and equitable order is a matter that has to be considered at this stage. When considering the above I am further mindful of the following observation made by Amarasinghe J in the case of ***Jayasuriya Vs. Sri Lanka State Plantation Corporation***. *(supra)*

> "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."

It is also observed in the case of ***Sri Lanka State Plantation Corporation Vs. Lanka Podu Seva Sangamaya (1990) I Sri LR 84*** that;

> "An appeal lies against an order of a Labour Tribunal on a Question of Law. Thus, the Appeal Court may intervene if the Tribunal appears to have made a finding for which there is no evidence - a finding which is both inconsistent with the evidence and contradictory of it."

As revealed before the Labour Tribunal, the Appellant was 64 years old and was working as the chief boatman at the time his services were terminated in August 2012. Even though the Appellant had claimed that he was fit enough to work as a boatman even at the age of 64, no evidence was placed before the tribunal with regard to his future prospects and/or opportunities for obtaining alternative employment. It is also evident that, in the absence of any agreed retiring age, the Respondent had allowed the Appellant to work until he reached the age of 64 years. However, the Labour Tribunal had failed to give its mind to this aspect of the case. In the absence of an agreed retiring age between the parties, the Labour Tribunal should be more responsible to take into consideration the reasonable age when computing compensation.

S. R. de Silva had considered the question of retiring age in the absence of a written agreement as follows;

> "……. While there is no law relating to the age of retirement, the general practice has been to retire such employees at 55. There are, however, exceptions. In the plantation industries (tea and rubber) the age of retirement of manual workers has been prescribed as 60 for males and 55 for females.

> Where the age of retirement is not covered by the contract of employment or a collective agreement; it is not unusual to find cases involving the justification of retirement being the subject matter of application to Labour tribunal. It could fairly and safely be assumed that retirement at the age of 60 would not be regarded as unreasonable by a Labour tribunal, even if retirement at that age was not contracted for."
>
> ['**The Legal Framework of Industrial Relations in Ceylon**' by S.R De Silva at page 586]

In the case of ***Elpitiya Plantations Ltd Vs. Ceylon Estates Staff Union and others (2004) 1 SLR 239***, it was held that the optional age of retirement with the employer was 55 years, subject to the annual extensions until 60 years which is the compulsory age of retirement and the extensions of services may be given is a discretion on the part of the employer. Therefore, it was further held that the termination of the workman's service at 55 years was not just or inequitable.

In the case of ***M/S. British Paints (India) Ltd Vs, Workmen 1966 AIR 732***, it was held that,

> "Considering that there has been a general improvement in the standard of health in this country and also considering that longevity has increased, fixation of age of retirement at 60 years -appears to us to be quite reasonable in the present circumstances. Age of retirement at 55 years was fixed in the last century in government service and had become the pattern for fixing the age of retirement everywhere. But time in our opinion has now come considering the improvement in the standard of health and increase in longevity in this country during the last fifty years that the age of retirement should be fixed at a higher level, and we consider that generally speaking in the present circumstances fixing the age of retirement at 60 years would be fair and proper, unless there are special circumstances justifying fixation of a lower age of retirement."

In the case of ***Guest, Keen, Williams Private Ltd Vs P. J. Sterling and Others 1959 AIR 1279*** it was observed that,

> "In fixing the age of superannuation industrial tribunals have to take into account several relevant factors. What is the nature of the work assigned to the employees in the course of their employment? What, is the nature of the wage structure paid to them? What are the retirement benefits and other amenities available to them? What is the character of the climate where the employees work and what is the age of superannuation fixed in comparable industries in the same region? What is generally the practice prevailing in the industry in the past in the matter of retiring its employees? These and other relevant facts have to be weighed by the tribunal in every case when it is called upon to fix an age of superannuation in an industrial dispute."

However, as revealed before the Labour Tribunal, at the time of the Appellant's services were terminated, he has already passed the retirement age but admittedly he was engaged in a very responsible job.

Even though he has more experience and fitness to work as claimed by him, this does not mean that he should continue with his job until he feels unfit, in the absence of an agreed retiring age between the employer the employee. The learned President of the Labour Tribunal should have mindful of this aspect when computing compensation

Therefore, the learned President of the Labour Tribunal should have considered the financial loss caused to the Appellant as well as the retirement age or current age of the Appellant when computing the compensation, because it is erroneous to assess the compensation based on the uncertain loss and indefinite period for retirement.

When considering the above it is observed that there is no reasonable basis in computing compensation based on 7 years' wages as the Appellant was terminated at the age of 64 and thus, he does not have any future losses on the termination of the employment. Therefore, this court is of in the view that the Appellant cannot be reinstated because of his current age and on the other hand, awarding compensation as Rs 2,100,000 being 7 years' salary is erroneous and excessive.

When awarding 7 years' salary as compensation, the learned President of the Labour Tribunal had also considered the fact that the Appellant was not paid EPF and gratuity by the employer but, payment of statutory dues cannot be considered in granting compensation since there is a statutory remedy available for non-payment of such dues.

When the Respondent appealed against the findings of the Labour Tribunal to the High Court, the High Court Judge while reducing the amount of compensation ordered by the Labour Tribunal had stated that;

> "Yet, considering the age of the Respondent (now the Appellant) and his future prospects as a workman, the compensation awarded by the learned President of the Labour Tribunal should be declared to be excessive.
>
> As such, having considered the age and the future prospects of the workman based on the nature of the work engaged by him, I hereby vary the amount of compensation to the sum of Rupees Three Hundred Thousand which is equivalent to one year salary of the Respondent"

However, the learned High Court Judge in reducing the amount of compensation ordered by the learned President had not provided sufficient grounds as to why he reduced the 7 years' salary of the Appellant into 1 year. On the other hand, for a just and equitable Order, it is not sufficient to say that 'considering the age of the Respondent and his future prospects…' to reduce the amount ordered by the learned

President without analyzing the material with regard to the computation of the compensation ordered by the learned President is erroneous or excessive.

Even though it is declared that the learned High Court Judge had failed to give reasons in reducing the compensation ordered by the Labour Tribunal, when considering the matters that has been already discussed in this judgement, payment of one year's salary as compensation to an employee whose services had been unlawfully terminated appears to be just and equitable.

I therefore answer both questions of law raised before this court in negative and dismiss the instant appeal without cost.

This Appeal is Dismissed. No cost.

Judge of the Supreme Court

Justice A. L. S. Gooneratne,

I agree,

Judge of the Supreme Court

Justice M. A. Samayawardhena,

I agree,

Judge of the Supreme Court