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

In the matter of an Application for Special Leave to Appeal to the Supreme Court in Terms of Article 128(2) of the Constitution of Sri Lanka.

S.C. Appeal 30/2009
S.C. Spl. LA No: 285/2008
H.C.A.L.T.: 39/2007
L.T. Colombo: 2Addl/2615/2004

D.L.K. Peiris,
344/12, Wattalpola Road,

Walana,
Panadura.

Applicant-Appellant-Petitioner

Vs.

Celltell Lanka Limited,
3rd Floor,
Mukthar Plaza,
No.78, Grandpass Road,
Colombo – 14.

Respondent-Respondent-Respondent

BEFORE : **S. TILAKAWARDANE, J.**
RATNAYAKE, J. &
EKANAYAKE, J.

COUNSEL : Uditha Egalahewa with Gihan Galabadage for the Applicant-Appellant-Petitioner.

S.L. Gunasekara with Manoj de Silva instructed by F.J & G De Seramfor Respondent-Respondent-Respondent.

ARGUED ON : 24/11/2010

DECIDED ON : 11/03/2011

Ms. Tilakawardane, J.

Special leave to appeal was granted on the application by the Applicant-Appellant-Petitioner (hereinafter referred to as the Appellant) for Special Leave to Appeal dated 24th October 2008 on the following questions of law:

1. Did the learned President of the Labour Tribunal and the learned High Court Judge err in law in failing to consider the evidence of the Appellant in light of the fact that certain documents produced by the Respondent were essentially based on recordings containing several discrepancies?

2. Did the learned President of the Labour Tribunal and the learned High Court Judge err in law by failing to consider that the Respondent, in seeking to establish the charges against the Appellant, had based its case on presumptions and not on actual evidence?

3. Learned Counsel for the Respondent suggested two further questions of law which read as follows:

    A. Was the finding of the learned President of the Labour Tribunal supported by the evidence?
    B. If so, is the Appellant entitled to any relief?

The Appellant had preferred an application dated 1st April 2004 to the Labour Tribunal in terms of sections 31 B(1)(a) of the Industrial Disputes Act, as amended, averring, *inter alia*, that (i) he was employed by the Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) from 4th October 1993 to 18th December 2003, (ii) his services were unreasonably, unjustifiably and unlawfully terminated with effect from the 18th of December 2003, and (iii) up until the termination of his services, he had held the post of Assistant Manager - Credit Collections for the Respondent. In light of this averred injustice, the Appellant had accordingly sought to be reinstated with back-wages or, in the alternative, be paid reasonable compensation for loss of his career.

The Respondent filed Answer stating that the Appellant's services were terminated lawfully, justly and equitably after holding a domestic inquiry at which he was found guilty of attempting to defraud the Respondent by presenting an invalid bill of Rs.1419/- to seek reimbursement of expenses for (and also provide evidence of) his purported overnight stay in Kandy in the course of official duty and that, as a result of such misconduct, the Respondent had justifiably lost confidence in the Appellant's ability to carry out his professional obligations with integrity and propriety.

More specifically, the position taken by the Respondent was that the Appellant had been ordered to proceed to Matale on official duty on 7th August 2003 and was to stay in Kandy overnight as was required to properly fulfill his duties there, only returning to Colombo on 8th August 2003. The Appellant had presented a hotel bill to the Respondent for reimbursement, however, upon further investigation, Base Station records kept in respect of telephone calls made by him from his official cellular phone number revealed that he had, in fact, not stayed in Kandy that night. The Respondent, while not challenging the validity of the bill presented by the Appellant, based its position entirely on the documents obtained from computer in respect of the use of the cellular phone of the Appellant, documents that directly contradicted his initial position that he had spent that night in Kandy.

To substantiate its position that the Appellant did not stay in Kandy on the night of 7th August 2003, the Respondent led the evidence of three witnesses and produced as documentary evidence several computer print-outs of call records showing particulars of all calls made from the Appellant's cellular phone on the night he was alleged to have spent in Kandy. The call records listed the Base Stations through which all calls taken from the said cellular phone had been routed, revealed the geographic locations of calls made from the official cellular phone to be in the proximity of Kegalle, Gampaha, Kiribathgoda and then ultimately Moratuwa between 7:13pm and 10:39pm on 7th August 2003 – an impossibility, given the operational infrastructure of cellular technology, if the Appellant had actually stayed in Kandy that night and, thereby serving as *prima facie* evidence that the bill presented by Appellant for re-imbursement , and his version of the events were false.

After determination of this fraud, the Respondent directed the Appellant to give his explanation in respect of the charges against him by two letters dated 27th August 2003, one entitled "Letter of Suspension – Charge Sheet" and marked R3 (vide page 371-2) and the other entitled "Domestic Inquiry" and marked A3 (vide page 300). In a single response to both of these letters, the Appellant issued a letter dated 2nd September 2003, marked R4/A20 (vide page 373-4) in which he denied any wrongdoing but provided no substantiating explanation whatsoever.

Nevertheless, at the trial the Appellant strongly assailed the veracity of the telephonic evidence led by the Respondent to establish the Appellant's absence in Kandy on the night he alleged to have been there, asserting that when the records were compared with the Appellant's phone bill, certain discrepancies suggested that the telephonic evidence was crafted to effect a false reason for the Appellant's termination. Accordingly, the entire inquiry before the Labour Tribunal was directed towards the establishment of the fact that the cellular phone used by the Appellant had been used in and around Colombo on the relevant date the Appellant claimed to have been in Kandy.

Significantly, despite this intense cross-examination of the validity and veracity of these computer records, the Appellant had, during the latter part of the domestic inquiry, taken up a different position that after arriving in Matale and carrying out his official duties, he had given his son his cellular phone in order to get some fruits to be sent home having met him at a bus stand in Kandy and had forgotten to retrieve the phone before his son's departure to Panadura later that day. The Appellant filed this alternative and belated explanation in a statement marked R6/A19 (vide pages 377 – 89).

At the very outset it must be noted that whilst this Court undoubtedly has jurisdiction to evaluate the evidence put before the learned President of the Labour Tribunal aforesaid, this Court is equally conscious of the unequivocal recognition of the trial court as the most able, to determine questions of original facts and, therefore, of the need to accord its finding due deference. In *Sri Cooperative Industries Federation Ltd. v. Ajith Devapriya Kotalawela* (S.C.

Appeal No. 02/2005), this Court took the opportunity to note that "...an appellate court would not lightly interfere with the decision of the trial judge who had the advantage of seeing and hearing the testimony of witnesses who are called to give evidence," and further quoted with approval an extract in *Munasinghe vs. Vidanage* 69 NLR 97, wherein Viscount Simon's decision in the House of Lords case of Watt vs. Thomas [1947] 1 All E.R. 582 at pages 583 was quoted and which observed that :

> *"... an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if the conclusion* **has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration**. *Like other tribunals he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal evidence, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given."* (emphasis added)

Nowhere is the need to accord due deference to trial court findings of fact as important as in cases of potential misconduct like the behavior at hand, simply for the fact that such potential transgressions must be determined not only with a holistic look at the evidence presented but, indeed, an almost visceral analysis of the issues – a position only possible where direct presentation of evidence and cross-examination can occur. This accords and is consistent with prior holdings of this Court in Labour cases, as in *Caledonian (Ceylon) Tea and Rubber Estates, Ltd.*

V J S Hillman SC 250/27 where it was stated by Sharvananda, J. that "Under Section 31D (2) of the Industrial Disputes Act, an appeal to the Supreme Court lies from an order of a Labour Tribunal only on a question of law. Parties are bound by the Tribunals findings of fact, unless it could be said that the said findings are perverse and not supported by any evidence," and who went further to quote from *Inland Revenue V Fraser* (1942), wherein Lord Normand expounded that Appellate review is only appropriate when "...the Tribunal has made a finding for which there is no evidence, or which is inconsistent with the evidence and contradictory of it."

This Court has looked at the findings of fact made by the President of the Labour Tribunal and concludes that such findings should remain as no reason exists to suggest an error in law caused by a failure to consider available evidence or a failure in findings on the evidence. Nevertheless, out of an abundance of caution this Court reconsiders the evidence in view of the Appellant's assertions and, in doing so, point out fatal weaknesses that undoubtedly led the Labour Tribunal and High Court to the findings they made.

The Appellant's principal assertion was his suggestion that the records upon which the Respondent based its entire case contained discrepancies that, if the Labour Tribunal and High Court had appropriately weighed in their respective analyses, would not have resulted in the findings arrived at by these respective courts. While it is noted that discrepancies between the telephone records and the Appellant's phone bill did remain unchallenged, the mere existence of these discrepancies cannot be said to completely invalidate the call records. The principle reason for this conclusion is that the discrepancies between the two relate to the absence of a mere minority of calls, an absence which does not materially affect the corroboration being sought. Even if we are to assume that the missing calls should be stricken from the call records, the remaining calls are, in our opinion, sufficient to establish the general "geolocation" of the cellular phone the Respondent has sought to make clear. In short, the movement of the cellular from Matale to the Colombo area on 7th August 2003 is clearly apparent.

This Court, however, need not engage in the unnecessary undertaking of assailing this finding of fact, for the contradiction to the Appellant's assertion that the Respondent fabricated and/or manipulated telephone records to justify its termination of his services was made by the

Appellant himself. That the Appellant first attempted to challenge the call records (vide pp. 277-298 of the brief) on the basis that the such records were prepared in furtherance of a plan to terminate the Appellant from his employment and then later, presumably at the point the Appellant surmised that his attempt to assail the telephonic evidence would not work , attempt to reconcile his account of the sequence of events with these supposedly fabricated records, cannot be seen as anything other than an unsuccessful attempt to justify himself. If the day's sequence of events played out as alleged by the Appellant, this Court cannot understand why the Appellant would fail to provide such an explanation promptly, in his initial response to the Charge Sheet and Domestic Inquiry, much less meaninglessly attempt to impugn the credibility of the telephone call records.

The Appellant's failure to inadequately substantiate his factual allegations and lack of cohesion in presenting the overall version of his defense in a credible manner and consistent with the integrity, honour and reliability expected from an officer of his position of trust, is clear.

For the foregoing reasons, this Court holds that the learned President of the Labour Tribunal was not remiss in her duty to properly exercise her powers under section 36(1) of the Industrial Disputes Act, which, *inter alia*, reposes the power in the Labour Tribunal to hear all such evidence, as the tribunal may consider necessary. The aforesaid powers reposed in the Labour Tribunal are discretionary powers and, from a review of the evidence, it was not erroneous in law for the learned President of the Labour Tribunal to arrive at a conclusion that the Appellant had engaged in misconduct, and, as importantly, that the Respondent was reasonable in ceasing to repose trust in the Appellant, a basic trust that was necessary for the performance of the duties required of him.

We are also of the opinion that the Labour Tribunal and High Court were conscious of the importance in arriving at their findings. Dismissal on the basis of misconduct is, after all, the foremost punishment in labour law. In *All Ceylon Oil Companies Workers Union v. Standard Vacuum Oil* Cl.ID 237 CGG 12034 8.1.60 the court defined misconduct as *"...an act which is inconsistent with the fulfillment of express or implied conditions of service or which has a material bearing on the smooth and efficient working of the concern..."* The Court Of Appeal in *Engineering*

Employees Union v. State Engineering Corporation CA 862/85 CAM 2.8.91 stated that for any act or omission by an employee to be reprehensible and subversive of discipline, it must (i) be inconsistent with the fulfillment or an express or an implied condition of service, (ii) be directly linked with the general relationship of employee and employer, (iii) have a direct connection with the contentment and comfort of the men and work; and (iv) have a material bearing on the smooth and efficient working of the concern.

The Appellant was an Assistant Manger , Credit Collections (outstation), a position of responsibility which demands integrity, competency, reliability and independence. Given the nature of the Appellant's services which was to independently handle the Respondent's work in the outstation districts, there was without a doubt an expectation by the Respondent that the Appellant was to act with the utmost integrity and honesty, arguably even more so than that required of an employee without such autonomy.

Once the Appellant fell short of this expectation it is perfectly reasonable, by any reasonable standard, that the Respondent would cease to continue to repose any confidence in the Appellant. Loss of confidence arises when the employer suspects the honesty and loyalty of the employee. It is often a subjective feeling or individual reaction to an objective set of facts and motivation. It should not be a disguise to cover up the employer's inability to establish charges in a disciplinary inquiry but must be actually based on a bona fide suspicion against the employee making it impossible or risky to the organization to continue to keep him in service. The employer-employee relationship is based on trust and confidence both in the integrity of the employee as well as his ability or capacity. Loss of confidence however, is not fully subjective and must be based on established grounds of misconduct which the law regards as sufficient. The concept of loss of confidence has been well expressed in the following terms :

> *"The contractual relationship as between employer and employee so far as it concerns a position of responsibility is founded essentially on the confidence one has in the other and in the event of any incident which adversely affects that confidence the very foundation on which that contractual relationship is built should necessarily collapse….*

> *Once this link in the chain of the contractual relationship…. snaps it would be illogical or unreasonable to bind one party to fulfill his obligations towards the other. Otherwise it would really mean an employer being compelled to employ a person in a position of responsibility even though he has no confidence in the latter." (vide Democratic Workers' Congress vs. De Mel and Wanigasekera CGG 12,432 of 19 May 61 at para 24)*

This Court has recognized that employee dishonesty can be tantamount to the level of moral turpitude justifying termination of services. In *Whittals Boustead Ltd. Vs. United Tea, Rubber and Local Produce Worker's Union* SC33/71 decided on 14/12/71 the Supreme Court held that worker who attempted to remove dishonestly some commodity kept in the stores was guilty of an act involving moral turpitude. Similarly the Appellate Court in *Ceylon Cold Stores Ltd. Vs. Sisil Beema Podu Sewa Sangamaya* (1986) CALR342 it was held that removing a parcel of sugar from the work place was an act of misconduct involving moral turpitude and justified termination of the workman's services. Again, in *Ceylon Mercantile Union V Bartleet and Co. Ltd.* the Arbitrator held that the dismissal of a workman for attempting to remove without authority six ounces of tea was justified on the basis that the workman was guilty of an act of misconduct involving moral turpitude. In an English case *Morrish V Henlys (Folkstone) Ltd.* (1973) I R L R 61, the employee was dismissed after he refused to accept book entries recording that he had drawn quantities of fuel for his vehicle which had not in fact been put into the vehicle. Griffiths Lord Justice stated that, Henlys contended that as there was evidence before the Tribunal that was a common practice to alter the records in this way to cover deficiencies, it was unreasonable for Mr. Morrish to object, and he should have accepted the manager's instructions. Accordingly his refusal to do so was an unreasonable refusal to obey an order, which justified dismissal.

I hold that in cases of employment which demand a high level of responsibility and autonomy, a lapse in integrity is the precise sort of moral turpitude that can result in a particularly devastating structural and managerial breakdown simply because of the reliance and expectation placed in

the hands of such positions, and as such is the sort of transgressive behavior for which termination of services can be justified.

As a procedural matter, it is important to note that this Court need not consider the Appellant's declaration for payment of back-wages or alternative compensation. By written submissions dated 10th July 2009 the Appellant avers that the termination of his services, by the Respondent, is unreasonable and unjustifiable. The Appellant, as such, by the said written submissions prays for an Order from this Court, granting the relief of reinstatement with back wages. However, in the prayer of the Appellant's Special Leave to Appeal to the Supreme Court, the Appellant has only set out the following relief:

a) *Grant Special Leave to appeal to your Lordships Court from the Judgment of the High Court and the Order of the Labour Tribunal;*
b) *Set aside the Judgment of the High Court and the Order of the Labour Tribunal;Make Order that the petitioner be entitled to the grant of reasonable compensation for the unjustifiable termination of his services and loss of career;*
c) *Grant cost;*
d) *Grant such other and further relief, as the Court shall seem meet.*

Noticeably, the Appellant has failed to specify the relief of reinstatement with back wages in the prayer of the application for Special Leave to Appeal to the Supreme Court. Therefore, the Appellant has failed to specify the relief of reinstatement with back wages in the prayer of the said application.

Therefore, this Court shall only consider whether it is justifiable for this Court to grant the relief prayed for in the application for Special Leave to Appeal to the Supreme Court.

It is apparent from the material facts of these cases that that the Appellant has clearly forfeited the confidence reposed in him as an employee of the Respondent by falling short of the integrity and standard of conduct expected from an employee of the Appellant's stature. The Appellant has failed in his fundamental duties towards his employer and this Court does not see any

justifiable reason for this Court to grant the relief prayed by the Appellant from this Court. Furthermore, this Court is also of the opinion that the Appellant has not discharged its burden in satisfying this Court that it is just and equitable for this Court to Order the Appellant's reinstatement with back-wages without jeopardizing the interests of the Respondent.

In light of the aforesaid reasons I affirm the finding of the learned President of the Labour Tribunal and the High Court that the Respondent was justified in terminating the Appellant's services. Appeal is dismissed. No costs.

JUDGE OF THE SUPREME COURT

RATNAYAKE, J.

I agree

JUDGE OF THE SUPREME COURT

EKANAYAKE, J.

I agree

JUDGE OF THE SUPREME COURT