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

SC/Appeal 132/2016

SC/SPL/LA 178/2015
HC/ALT 06/2012
LT Case No. 18/KT/349/2010

Suriyarachchige Raju of No. 4, Suriyagama, Haburugala

Applicant

Vs.

Barberyn Reef Hotel Ltd., Beruwala

Respondent

And

Barberyn Reef Hotel Ltd., Beruwala

Respondent-Appellant

Vs.

Suriyarachchige Raju of No. 4, Suriyagama, Haburugala

Applicant-Respondent

And Now

Suriyarachchige Raju of No. 4, Suriyagama, Haburugala

Applicant-Respondent-Petitioner

Vs.

Barberyn Reef Hotel Ltd., Beruwala

Respondent-Appellant-Respondent

Before:	Buwaneka Aluwihare, PC. J. V. K. Malalgoda, PC. J. E. A. G. R. Amarasekara J.
Counsel:	Athula Perera with Poorni Rupasinghe for Applicant-Respondent-Appellant. Murshid Maharoof with S. Ahmed and Dasuni Ruhunage for Respondent-Appellant-Respondent.
Argued on:	29. 11. 2019
Decided on:	06. 08. 2021

Judgement

Aluwihare PC. J.,

This is an appeal against an order of the High Court setting aside an award made by the Labour Tribunal of Kalutara.

Background to the Case

The Applicant-Respondent-Petitioner [hereinafter the Applicant] had been employed with the Respondent-Appellant-Respondent Hotel [hereinafter the Respondent], as a Chef from 1992 to 2010. On 21st April 2010, whilst on duty, the Applicant had been found sleeping. The reason attributed by the Applicant for the conduct alleged, was the aggravation of his diabetic condition. When he reported to work on the following day [22nd April], he had been served with a letter, suspending him from service with effect from the said date. Thereafter, the Applicant's services had been terminated with effect from 10th June 2010. On 16th August 2010, the Applicant made an application to the Labour Tribunal in terms

of Section 31b of the Industrial Disputes Act, pleading that the termination of his services was unjust and unreasonable.

The Labour Tribunal Decision

In its answer to the Labour Tribunal, the Respondent did not dispute the Applicant's period of employment at the Hotel or the salary he drew at the time his services were terminated. The Respondent also admitted that the Applicant's services were terminated due to disciplinary reasons.

The Respondent's position was that the Applicant frequently reported to work late and that he had been warned on several occasions in writing (letters dated 30th October 2006 alleging that the Applicant had reported to work late on 10 days in September, letter dated 20th November 2006 alleging the Applicant had reported to work late on 14 days in October, and letter dated 15th February 2007 where the Applicant had reported to work late on 7 days in the months of November and December). In spite of the warnings so given, the Applicant had continued to report to work late, in the months of February and March 2007 as well and as a disciplinary measure, the Applicant had been sent on no-pay leave from around mid- May 2007 to mid-June 2007 [letter dated 7th May 2007]. The letters marked as 'R2' to 'R6' were submitted to substantiate the above position. The Respondent asserted further, that on 21st April 2010, the Applicant, whilst on duty, had been found sleeping in the rest room (provided for the workers' benefit).

Under these circumstances, the Applicant had been suspended from service with effect from 22nd April 2010. Thereafter, by letter dated 10th May 2010 ('R8') charges had been framed against the Applicant and he had been requested to show cause within 7 days, as to why disciplinary action should not be taken against him. The Applicant, however, had failed to show cause during the 7-day period granted. After a lapse of about a month, the Respondent had taken steps to inform the Applicant that his services were no longer required, by the letter dated 10th June 2010 ('R9').

At the inquiry before the Labour Tribunal, two witnesses had given evidence on behalf of the Respondent. The Respondent also relied on the documents marked 'R1' to 'R10'. On behalf of the Applicant, the Applicant himself and another witness gave evidence and the documents marked 'A1' to 'A10' were submitted. Delivering its order, the Labour Tribunal ordered the reinstatement of the Applicant without a discontinuation of his services, however, the reinstatement was ordered without back wages. Although the Labour Tribunal reached the conclusion that the employer [Respondent] had placed acceptable evidence to establish the 1st charge leveled against the Applicant, the basis on which the Labour Tribunal made the direction for reinstatement appears to be, that the Respondent had not afforded an opportunity to the Applicant to offer his explanation as to the allegations. The learned President had gone on to hold that the Employer had acted in violation of the rules of natural justice.

The Decision of the High Court

The Respondent appealed to the High Court of the Province, where the order of the Labour Tribunal was set aside. The Learned High Court judge was of the opinion that, as the Applicant failed to show cause as to why he should not be dealt with and steps should not be taken against him, the Learned President of the Labour Tribunal could not have ordered the reinstatement of the Applicant. Accordingly, the High Court set aside the order of the Labour Tribunal and held that the Respondent was justified in terminating the services of the Applicant.

Questions of Law

On appeal by the Applicant, this Court granted Leave to Appeal on the following questions;

a) *In the circumstances pleaded, is the judgment of the High Court which had dismissed the application of the applicant just and equitable in terms of law?*

b) *Could the High Court set aside the order of the Labour Tribunal considering only the fact that, the supplicant (sic) had not answered the charges levelled against him on 10. 05. 2010?*
c) *In the circumstances pleaded, is the judgement of the High Court according to the law and according to the evidence adduced in the case?*

The Allegations against the Applicant

The charges preferred against the Applicant, as per the charge sheet ['R8'] were;

1. Neglecting mandatory services and leaving the kitchen without permission on 21st April 2010.
2. Neglecting mandatory services for a period exceeding 3 hours on 21st April 2010 by going to the hostel without permission during work hours.
3. Acting in breach of discipline or attempting to act in breach of discipline by the actions in 1 and 2 above.

As reflected in the above charge sheet, the Applicant's services were terminated specifically for **being absent from his workstation on 21st April 2010**.

The Evidence

The Administration Manager of the Hotel, Indika Upulnath De Silva, witness for the Respondent, maintains that the charge sheet was sent by registered post to the Applicant. A postal receipt for registered post bearing the date 10th May 2010 was submitted marked 'R8A' along with the charge sheet 'R8'. Although the Applicant initially took up the position that he did not receive the charge sheet (page 193 of 'x'), under cross examination, he has stated (at pages 214 and 215) that he received 'R8' but not 'R9' [Letter of termination]. Later however, (at page 227) he has stated that he received the letter informing that his services were terminated ('R9'), but not 'R8'. Thus, his testimony appears to be infirm.

The Applicant admitted that he failed to show cause as required by 'R8' but did not submit any reasons for such failure except the initial denial of the receipt of 'R8'. In the written submissions, the Applicant maintained that he led sufficient

evidence before the Labour Tribunal to indicate that he was not guilty of the charges levelled against him. The Applicant submitted blood reports marked 'A7' to 'A9' and 'A11' obtained in 2005, 2008, 2009 and 2010 respectively indicating Fasting Plasma Glucose levels as high as 197.80 and 216.8, in order to establish that he was suffering from diabetes for a period of about 7-8 years. The Applicant submitted a medical report marked 'A3' issued by Dr. Namal Jayatilaka of the Government Hospital of Bentota on the same date as the incident i. e. 21st April 2010 as an explanation for being absent from work for 3 hours.

The Applicant had been treated by Dr. Namal Jayatilaka and according to the medical report 'A3', his condition is stated as "*uncontrolled Diabetes Mellitus with Fasting Blood Sugar 365mg/dl.*" The evidence of the Applicant and Dr. Jayathilaka, however, indicate that the test referred to in 'A3' was in fact not a 'fasting' blood sugar test. From the summation of the evidence relating to this issue, it is evident that the medical report 'A3' does not accurately indicate the Applicant's blood sugar level. Therefore, 'A3' cannot be relied upon to reach the conclusion that the Applicant had in fact experienced a soaring blood sugar level on the day in question.

Furthermore, it was contended that the failure to show cause was not a bar to hold a domestic inquiry against the Applicant. The Respondent, however, had not proceeded to hold one. It was contended on behalf of the Applicant that these facts were not appreciated by the High Court and had the totality of the evidence adduced by the Applicant been considered in the correct perspective, the High Court would not have held that the termination of the Applicant's services was just and equitable.

The Operations/Security Manager of the Hotel, Wilson Wickramaratne giving evidence on behalf of the Respondent maintained that on 22nd April, an inquiry was conducted by him, and a statement from the Applicant (marked 'R10') was recorded. However, the evidence led at the Labour Tribunal indicates that the alleged inquiry into the matter by the Operations Manager, Wickramaratne had not been a comprehensive one. No other employee in the kitchen had been questioned regarding the absence of the Applicant from his workstation.

Furthermore, no statements other than the statement of the Applicant had been recorded (at page 118 of 'X').

The Respondent points out that, in the said statement ('R10') the Applicant had neither mentioned that he was suffering from uncontrollable diabetes nor that he had been recommended 3 days of rest by the doctor, whom he had consulted the previous day. In the Applicant's statement, there was no mention of consulting a doctor on the previous day either. Furthermore, the medical certificate purported to have been issued by the doctor when he was consulted on the previous day, had not been produced by the Applicant, at the time of making the statement. While the Applicant maintains that it was handed over to the Security Officer of the Hotel, the Respondent denies receiving such a medical certificate. According to the Applicant, the original of the medical certificate ['A3'] had been handed over to the Security Officer at about 3 pm on 22nd April 2010 as the Applicant had not been allowed to enter the Hotel premises. The Respondent maintains that if a document was given to the security officer, it would have been handed over to an officer at the Hotel's Reception desk. The position taken up by the Respondent was that the Applicant has belatedly obtained a backdated medical certificate in an attempt to state that he was ill on the day in question.

In the written submissions tendered, the Respondent pointed out that, by 'R10', the Applicant had admitted that he did not inform the Sectional Head nor his immediate superior in writing or verbally that he was not well. In addition, the Respondent had also pointed out that when there was a resident Doctor in the Hotel, the Applicant had not made use of the facility; that he admitted guilt; and gave an undertaking that he would not repeat such conduct in the future.

The Issues

The Applicant claims that no domestic inquiry was conducted before the decision to terminate his services was reached. Holding a domestic inquiry, however, is not mandatory in terms of the Sri Lankan law. In **St. Andrew's Hotel Ltd. v Ceylon Mercantile Union**, Case No. 138/85 decided on 01. 09. 1993 and in **Director CWE v. C. Ranatunge** CA 272/89 [CA minutes 18.10.93], it was held that there is no

duty to hold a domestic inquiry unless there was a special provision to do so in terms of the contract of employment or the collective agreement. It is accepted that a domestic inquiry will, however, be useful in establishing the bona fides of the employer.

On behalf of the Respondent, it was argued that the principles of natural justice apply only to administrative tribunals and not to the employer-employee relationship. This submission has no merit as it is generally accepted that judicial decision-making in any case, regardless of its nature, should be governed by the principles of natural justice, in order to guarantee a just decision-making process, by ensuring the right to a fair trial and avoid prejudice.

In the Indian case **D. K. Yadav v. JMA Industries Ltd.** 1993 SCR (3) 930, 1993 SCC (3) 259, K. Ramaswamy J. holding that the termination of an employee without following principles of natural justice is violative of Article 21 of Constitution of India (i.e. "*No person shall be deprived of his life or personal liberty except according to procedure established by law*") stated; "*The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words, application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority to act arbitrarily effecting the rights of the concerned person.*" Therefore, the norm that the person facing the allegation should be given a reasonable opportunity of presenting his case in line with the principles of natural justice is not excluded from labour matters and operates to ensure that the decision making authority acts fairly and justly.

The Colombo Apothecaries Co. Ltd v. Ceylon Press Workers Union (1972) 75 NLR 182 case dealt with the question of absence without prior permission over a period of time. The employee in question was absent without leave on numerous occasions from the printing press where he was employed. On several occasions he was informed that he had vacated his post but was reinstated after he gave his

explanations. Finally, the services of the employee were terminated, particularly on the ground of absence without prior permission over a period of time despite warnings by the employer. The question was whether the employee was entitled to absent himself without notice regardless of repeated warnings. Weeramantry J. held that the employee's services were liable to be terminated observing that "*While an employee is no doubt entitled to his quota of leave, he must not, as far as is avoidable, draw on this leave without prior notice to the management; nor must he repeatedly draw on such leave in such a manner as would throw out of gear the work of the establishment he serves.*" (at page 186). In coming to this conclusion, the court took into account the nature of the work carried out by the errant employee as a compositor whose work had to be completed in order for the process of printing to go on as previously planned and on schedule, commenting that absence without notice meant that the employer could not in advance entrust the respondent-employee's work to another employee in his place. It was emphasized that the consideration should not be whether the total number of days on which the employee was absent was within or in excess of his leave entitlement, but rather the impact on the smooth working of the establishment.

In the said case the services of the employee were terminated "*on the ground of misconduct and particularly of absence without prior permission over a period of time although warned by the employer*". In the present case, however, the charge sheet had been drawn up only with respect to the Applicant's conduct of sleeping while on duty on the 21st of April.

In the **Colombo Apothecaries** case (*supra*), Justice Weeramantry (at page 186), went on to state that, "*The fact that an earlier default had been pardoned or excused does not, in my view, wipe it off the slate so completely as to render that default totally irrelevant. That default assumes relevance and importance in the context of a complaint by the employer of successive and repeated defaults of the same nature.* ***When one is considering how reasonable or unreasonable has been the conduct of each party, it would be wrong to view the final act in the series in isolation as though it existed all by itself.*** *Here as elsewhere in the field of labour law, a proper assessment of a dispute can only be made against the background of the conduct and relationship between the parties.*" [emphasis added].

This view ought to be applied in the case at hand as well. While the fact that the Applicant's affliction prevented him from reporting to work on some days could be looked upon with sympathy, the failure to inform his employer cannot be considered lightly. The Applicant had been excused and issued warning letters on 3 occasions. When he failed to mend his ways, he had been sent on compulsory leave, with the incident on 21st April finally leading to his termination. It would not be fair by the employer to consider the final incident which led to the termination, in isolation.

From the evidence led before the Labour Tribunal it was revealed that the work of the Applicant was necessary for putting together, on time, the meals served for the guests staying at the hotel. This was a job where the work simply had to be completed by a given deadline if the residents of the Hotel were to be satisfactorily served their meals in keeping with the standards of the Respondent Hotel as a Ayurvedic resort, catering predominantly to foreign tourists. The Applicant has maintained that on the day he was found sleeping, he had finished the work for the day. This submission is not acceptable as it is a matter for the employer, and not the employee, to decide whether the work for the day was completed or not. Once an employee reports to work the common norm is that the employee would remain in his or her workstation until the end of the duty hours. Furthermore, regarding the days on which the Applicant was absent without prior notice, it has to be stated that it would have led to disruption in the working of the kitchen as another person would have to be assigned the usual tasks of the Applicant at short notice. This would have no doubt affected the ability to provide the meals on time, or in the least made the process of serving the meals on time challenging. The unreasonable conduct of one party in the employer-employee relationship, should not burden the other party.

This court observes that the Respondent was engaged in the hospitality trade where success largely depends on the customer satisfaction or the satisfaction of the guest to be precise. Thus, in the highly competitive present-day business world the sustenance of a business of this nature hinges on the customer reviews. Hence the employees are not only expected but are under a duty to rise up to industry demands and to act reasonably and with a sense of responsibility. As Justice

Weeramantry observed in the case of **Colombo Apothecaries** (*supra*) the absence of the Applicant from the place of work cannot be considered in isolation. As referred to earlier, Justice Weeramantry emphasized that it is the impact on the smooth working of the establishment that should be given paramountcy, rather than whether the employee was within or in excess of his leave entitlement.

We are mindful that in labour matters judicial forums are vested with a just and equitable jurisdiction. T. S. Fernando J. commenting on the parameters of the phrase 'just and equitable' in **Richard Pieris and Co. Ltd. v. Wijesiriwardena** (1961) 62 NLR 233 at 235 stated "*justice and equity can themselves be measured not according to the urgings of a kind heart but only within the framework of the law*". In **Associated Cables Ltd. v. Kalutarage** (1999) 2 SLR 314 it was held that although the Labour Tribunal was required to make a just and equitable order it must not only be just and equitable but the procedure adopted to that end must be legal and every judicial body exercising judicial powers must so arrive at an order only on legal evidence.

In **Municipal Council of Colombo v. Munasinghe** (1969) 71 NLR 223 at 225 it was observed that "*The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily an award which favours an employee."* A similar view was expressed by A. R. B. Amerasinghe J. in **Elmo Rex Lord & Theresa Margaret Lord Partners v. Eksath Kamkaru Samithiya** SC Appeal No. 37/99, decided on 07. 03. 2001; "*The law relating to employment is not a one-way street. Justice, fairness and equity must be meted out even-handedly to employees and employers alike."* In **Millers Ltd. v. Ceylon Mercantile Industries and General Workers Union** (1993) 1 SLR 179 at 183, G.R.T.D. Bandaranayake J. expressed the opinion that an award is just and equitable only if it takes into consideration the interests of all the parties.

Therefore, it is clear that equity is not sympathy and that a court is barred from reaching a just and equitable decision based solely on sympathetic considerations. A just and equitable decision in an industrial matter is one which takes into consideration the situations of both the employer and the employee and assumes a holistic approach to the issue at hand based on the existing legal framework.

Applying this definition of the law, we think it fit to answer **question (a)** affirmatively in that; the judgment of the High Court which dismissed the application of the applicant, is just and equitable in terms of law.

The Learned High Court Judge set aside the award of the Labour Tribunal, on the basis that the learned President of the Labour Tribunal had granted relief on the premise that the Respondent had not given an opportunity to the Applicant to explain the allegations against him. The material placed at the inquiry, however, is indicative of the contrary in that it was the Applicant who did not respond to the allegations within the stipulated time period. At page 4 of the learned Labour Tribunal President's award, he had clearly stated that he arrived at the conclusion that the termination of the services of the Applicant was not just and equitable as the Respondent was in breach of the rules of natural justice, by not affording the Applicant an opportunity to show cause to the charge sheet. It appears that the learned President of the Labour tribunal had misdirected himself in arriving at this conclusion. In the examination in chief, the Applicant had said that he was served with a letter of suspension on 22nd October 2010 ['A10' or 'R7'] and the same contained a single allegation, requiring him to show cause. The Applicant, however, denied that he was served with the charge sheet 'R8'. In fact, R8 had been dispatched under registered cover, and the receipt of registration has also been marked as 'R8A'. Under cross examination, however, the Applicant had admitted that he received 'R8' (the charge sheet) but he did not respond [proceedings of 06.07.2011]. Considering the above, it is evident that the learned President of the Labour Tribunal had erred in arriving at his conclusions. The High Court, having observed that the learned President had misdirected himself, had quite correctly set aside the order. In the circumstances I answer the question of law referred to in **paragraph (b)** above also in the affirmative.

The final question this court is called upon to answer is, whether the judgement of the High Court was according to the law and according to the evidence adduced in the case (**question (c)**). As stated above, the learned President of the Labour Tribunal having come to the conclusion that the Respondent has established the first charge preferred against the Applicant has misdirected himself in holding that the respondent had violated rules of natural justice by not giving an opportunity

to the Applicant to answer the allegations leveled against him. The evidence, however, reflects the contrary and in the circumstances this court cannot fault the judgement of the High Court. Accordingly, **question (c)** too is answered in the affirmative.

Accordingly, the appeal is dismissed, however, the Applicant would be entitled to his statutory dues for the period of service with the Respondent.

In the circumstances of this case, I do not order costs.

Appeal dismissed.

Judge of the Supreme Court

V. K. Malalgoda, PC. J.
I agree.

Judge of the Supreme Court

E. A. G. R. Amarasekara, J.
I agree

Judge of the Supreme Court