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

In the matter of an Application for Leave to Appeal to the Supreme Court from an Order of the Provincial High Court under and in terms of section 31DD of the Industrial Disputes Act (as amended)

SC Appeal No: 138/2017
HC ALT No. 373/2013
LT Case No: 21/2570/2009

Prasanna Peiris,
No. 114/14,
Sri Wickrema Rajasinghe Road,
3rd Kurana, Negombo.

APPLICANT

-VS-

Toroid International (Pvt) Ltd.,
P.O. Box 15,
Phase II F.T.Z.,
Katunayake.

RESPONDENT

AND BETWEEN

Toroid International (Pvt) Ltd.,
P.O. Box 15,
Phase II F.T.Z.,
Katunayake.

RESPONDENT-APPELLANT

-VS-

Prasanna Peiris,
No. 114/14,
Sri Wickrema Rajasinghe Road,
3rd Kurana, Negombo.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Noratel International (Pvt.) Ltd. (formerly known as Toroid International (Pvt) Ltd.),
P.O. Box 15,
Phase II, Export Processing Zone,
Katunayake.
RESPONDENT-APPELLANT-PETITIONER

-VS-

Prasanna Peiris,
No. 114/14,
Sri Wickrema Rajasinghe Road,
3rd Kurana, Negombo.
APPLICANT-RESPONDENT-RESPONDENT

BEFORE : **BUWANEKA ALUWIHARE, PC, J.**
L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Ms. Manoli Jinadasa with Ms. Shehara Karunatne instructed by C. Suriyaarachchi for the Respondent – Appellant- Appellant.

Applicant – Respondent – Respondent is absent and unrepresented

ARGUED ON : 14th January 2020.

WRITTEN SUBMISSIONS : Respondent-Appellant – Appellant on the 25th of August 2017

DECIDED ON : 13th February 2020.

S. THURAIRAJA, PC, J.

The Employer, Noratel International (Pvt.) Ltd. formerly known as Toroid International (Pvt.) Ltd. is the Employer - Respondent – Appellant – Appellant (Hereinafter sometimes referred to as the Employer – Appellant.) The Employee, Mr. Prasanna Peiris is the Employee - Applicant – Respondent – Respondent. (Hereinafter sometimes referred to as the Employee – Respondent.)

It was revealed at the Labour Tribunal that the Employee – Respondent was a technical supervisor in the production maintenance division of the said Company. He was seen on the 15th of January 2001 at 0610 Hrs, pouring petrol from a white can into his motorcycle. A security officer Chrishantha Nallapperuma, who on seeing the incident questioned and confronted the Employee – Respondent. Being dissatisfied with the answers he received, he produced the Employee – Respondent to the senior security officer Bandusena, who after speaking to the applicant in private, had let him go. This entire incident was also witnessed by W. Karunawathie, a female security officer who then confronted the senior security officer and informed relevant authorities of the incident.

After a domestic inquiry the Employee – Respondent was found guilty of pilfering petrol belonging to the Employer – Appellant to his motorcycle and for committing the offence of theft of company petrol and his services were terminated. The Employee – Respondent then filed an application before the Labour Tribunal and the matter was inquired by the President of the Labour Tribunal, who found that the termination was unreasonable and awarded compensation as an alternative to reinstatement. Further, the Labour Tribunal had ordered compensation from the date

of termination up to the date of deciding this case as well as other additional payments (total amount to be paid being Rs. 732,424/-). Being aggrieved with the Order of the Labour Tribunal, the Employer – Appellant appealed to the Provincial High Court holden at Negombo. After hearing the appeal the High Court concluded that the decision of the Labour Tribunal was just and equitable. Hence the order was affirmed and the appeal was dismissed.

Being aggrieved with the High Court Order the Employer – Appellant preferred an appeal to this Court. Initially the notice was issued on the Employee – Respondent on the 01/03/2016 and it was fixed for support on the 14/06/2016. On that day the Employee – Respondent was absent and unrepresented. Notice was re-issued. On the 26/09/2016 the wife of the Employee – Respondent was present and informed the court that the Employee – Respondent was out of the island and also that they had retained an Attorney-at-Law to represent them. However the said Attorney – at - Law did not appear before Court. On the 06/12/2016 the matter was mentioned and the Employee – Respondent was absent and unrepresented. Once again notice was issued on the Employee – Respondent and on the 23/02/2017 a Counsel represented the Employee – Respondent and the matter was re-fixed for support on the 26/05/2017 as the Employee – Respondent was overseas and time was required to obtain a power of attorney and once again on that date the Employee – Respondent was absent and unrepresented. Notice was issued on the Respondent and matter was fixed for support on 07/07/2017. On said day he was absent and unrepresented. Since sufficient notices were given to the Employer – Respondent, the Counsel for the Appellant were allowed to support the application. The Court being satisfied, granted leave under paragraph 16 (c) of the petition. Subsequently this case was fixed for argument on the 02/03/2018, 29/10/2018, 08/07/2019 and finally on 14/01/2020. On all these days the Employee – Respondent was absent and unrepresented. Since notices were sent on several occasions, this court took up the appeal for argument and allowed Counsel to make her submissions.

I considered all the material before the Labour Tribunal, High Court and this Court. The question of law on which leave was granted is reproduced below for the purpose of easy reference;

> *16 (c) – Whether the orders of Provincial High Court and the Labour Tribunal are consistent with the principles of industrial law pertaining to the award of compensation and/or the calculation of compensation? In any event is the relief awarded to the applicant by the Provincial High Court and the Labour Tribunal just and equitable and/or consistent with the principles of law, considering the facts and circumstances of this case?*
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> *Counsel for the Employer – Appellant submitted to court that she wished to address the standard of proof required to establish misconduct which was also allowed.*

It is well established that the Labour Tribunal has equity jurisdiction and the standard of proof necessary is on a balance of probabilities.

In ***Associated Battery Manufacturers (Ceylon) LTD vs. United Engineering Workers Union (77 NLR 541)*** it was held

> *Where in an inquiry before a Labour Tribunal it was alleged that the reason for the termination of employment was that the workman was guilty of a criminal act involving moral turpitude, the allegation* ***need not be established by proof beyond reasonable doubt as in a criminal case. Such an allegation has to be decided on a balance of probability,*** *the very elements of the gravity of the charge becoming a part of the whole range of circumstances which are weighed in the balance, as in every other civil proceeding.*
>
> *(Emphasis added)*

In the present case, the learned President of the Labour Tribunal had the privilege of hearing the evidence and observing the demeanor and deportment of all the witnesses.

It is on record that the Employee – Respondent had given evidence and had admitted that he had lied under oath. Specifically, he had submitted to the Tribunal that he was unemployed after the termination from the Appellant Company. However evidence was submitted before the Labour Tribunal that he was employed in another establishment on a higher pay than what he was receiving at the Appellant Company.

ප්‍රශ්නය : දැන් තමුන් මේ වනවිට රැකියාවක නිරත වෙනවාද?

උත්තරය: රැකියාවක් නෑ.

ප්‍රශ්නය : තමුන්ට මම ඉදිරිපත් කළා තමා පිළිගත්තා ආර්. 43 කියන ලෙඛනයෙන් අද දින ඉදිරිපත් කරපු ලෙඛනයෙන් වෙන්නපුවෙ පිහිටි මැක්සිස් පුද්ගලික සමාගමේ 2009.11.16 වෙනි දින සිට සූපරීක්ෂක තනතුරේ රැකියාව කළා කියා?

උත්තරය: එහෙමයි.

ප්‍රශ්නය : එතකොට ආර් 44 කියන ලෙඛනයෙන් එම තනතුරේ තමාව ස්ථිර කළා කියා තමා පිළිගත්තා?

උත්තරය: එහෙමයි ස්වාමීනි.

ප්‍රශ්නය : තමා තවමත් ඒ ආයතනයෙද සේවය කරන්නේ?

උත්තරය: එහෙමයි.

ප්‍රශ්නය : එසේ රැකියාවක් කරමින් ඉන්න තමා තමයි 2012.02.21 දින 7 වෙනි පිටුවේ කියා සිටින්නේ මෙම අධිකරණයේ දිවුරලා රැකියාවක් නැහැ කියා

උත්තරය: එහෙමයි ස්වාමීනි.

ප්‍රශ්නය : තමා එතකොට පිළිගන්නවද මෙම අධිකරණයේ තමා දිවුරලා බොරු කිව්වා කියා?

උත්තරය: එහෙමයි ස්වාමීනි.

ප්‍රශ්නය : තමා කියන ආකාරයට වගඋත්තරකාර ආයතනය තමාව සේවයෙන් පහ කරපු පලියට මේ අධිකරණයට ඇවිල්ලා ශුද්ධ වූ බයිබලයේ අත තියා බොරු කිව්වා කියා?

උත්තරය: එහෙමයි

When a President of a Labour Tribunal is exercising equity jurisdiction he should be mindful of a person who states falsehood under oath. In the present case, the Labour Tribunal has ignored all the deficiencies and presumed otherwise. When there was evidence to say that he was employed and the same was admitted by the Employee – Respondent the President of the Labour Tribunal assumed that he was unemployed.

The Labour Tribunal should hold the scale equal for both parties. They are not expected to run as a Philanthropic organization, which is required to show kindness when there is sufficient evidence to show otherwise. In the present case, I find that the President of the Labour Tribunal had acted unreasonably when evidence shows the contrary.

The awarding of compensation is governed under Section 33 of the Industrial Disputes Act No. 43 of 1950 (as amended) which is reproduced below for easy reference;

Section 33 (1) (d)

Without prejudice to the generality of the matters that may be specified in any award under this Act or in any order of a labour tribunal, such award or such order may contain decisions- as to the payment by any employer of compensation to any workman, the amount of such compensation or the method of computing such amount, and the time within which such compensation shall be paid;

Section 33 (5)

Where the arbitrator, industrial court or labour tribunal considers that a decision should be made, under paragraph (b) of subsection (1), for the reinstatement in service of any workman, then, if the workman so requests, the arbitrator, industrial court or labour tribunal may, in lieu of making that decision, make a decision, under paragraph (d) of that subsection, for the payment of compensation to that workman ; and in any such case, the provisions of subsection (2) shall apply as though the decision were for the payment of compensation as an alternative to reinstatement.

Section 33 (6)

The provisions of subsections (3) and (5) shall not be construed to limit the power of the industrial court or a labour tribunal or an arbitrator, under paragraph (d) of subsection (1), to include in an award or order a decision as to the payment of compensation as an alternative to reinstatement, in any case where the court, tribunal or arbitrator thinks fit so to do

However none of the provisions define the manner in which the quantum of compensation should be determined. The only parameter provided for in the Act concerning such granting of compensation is the just and equitable concept provided or in Section 31 C (1) which states;

'Where an application under section 31B is made to a labour tribunal, it shall be the duty of the tribunal in to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary and thereafter make, not later than six months from the date of such application, such order as may appear to the tribunal to be just and equitable'

In the case of ***Richard Peiris and Co. Ltd. v D.J. Wijesiriwardena*** *(62 NLR 233)* T.S. Fernando J stated;

" in regard to the power of the Tribunal to make such order as may appear to it to be just and equitable there is point in Counsel's submission that justice and

equity can themselves be measured not according to the urgings of a kind heart, but only within the framework of the law."

S.R. De Silva, a renowned writer on industrial law in **'The Legal Framework of Industrial relations in Ceylon'** (H.W Cave 1973) (at page 390) wrote that *the quantum of compensation is generally within the discretion of the court, and no definite rules can be laid down in regard to the assessment of compensation. The reason for the termination, the nature of the workman's employment, his length of service and the employer's capacity to pay would all be relevant to the quantum of compensation.*

In ***Moosajees Limited v Eksath Engineru Saha Samanya Kamkaru Samithiya*** *(79(1) NLR 285) the court took into consideration the very serious nature of the charge of which the firm had wrongfully found them guilty, the length of service, good conduct during service, the wages each workman last drew, the fact that four of them have failed to obtain employment for as long as fifteen months, the ability of the employer to pay and the need of the employee.* ***I have also borne in mind the fact that one of them has succeeded in getting employment elsewhere.*** [S.R. De Silva, *The Legal Framework of Industrial Relations in Ceylon,* (H.W. Cave 1973*)* at page 390]

(Emphasis added)

In the case of ***Saleem v Hatton National Bank*** *[(1994) SLR Vol 2 379]* Kulatunga J followed Sharvananda J's distinction of the words 'compensation' and 'damages' in ***The Caledonian (Ceylon) Tea And Rubber Estates Ltd. v J.S. Hillman*** *(79(1) NLR 421)* and stated *'Damage' always signifies recompense given to a party for the wrong that has been done to him. On the other hand 'compensation' includes recompense for pecuniary loss or damage which involves no breach of duty.*

There are general principles recognized by the Superior Courts when granting compensation. In ***Bank of America v Abeygunasekara*** *[(1991) SLR Vol 1 317]* it was

held that *the amount that should be awarded as compensation should not be mechanically calculated on the basis of the salary a workman should have earned till he reached the age of retirement. The relevant factors that should be taken into consideration in arriving at what is just and fair compensation are:-*

I. *The immediate monetary loss to the workman.*
II. *The prospective and future losses, and*
III. *The retirement benefits.*

It was also observed that the other aspect that is relevant to the computation of compensation is the prospects of future employment. In this case the Employee – Respondent had found new employment and this should have been a factor in the Labour Tribunal and High Court's decisions.

In ***Jayasuriya v Sri Lanka State Plantation Corporation*** *[(1995) SLR Vol 2 379]* it was stated;

> *Once the incurred losses have been computed, any wages or benefits paid by the employer after the termination as well as remuneration from fresh employment must be deducted.* ***If the employee had obtained equally beneficial or financially better alternative employment, he should receive no compensation at all for he suffers no loss.***
>
> *(Emphasis added)*

In ***Fentiman v Fluid Engineering Products Ltd.*** *(1991 IRLR 150)* it was held as follows;

> *if an employee obtains new employment at a higher rate of pay, then the Industrial Tribunal should calculate the compensatory award on the basis of the loss suffered from the date of dismissal up to the date when the new employment commenced.*

In ***Jayasuriya v Sri Lanka State Plantation Corporation*** *(Supra)* it was also stated that *for compensation 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.* It was further stated by Dr. Amerasinghe J that " *While it is not possible to enumerate all the circumstances that may be relevant in every case, it may be stated that the essential question, in the determination of compensation for unfair dismissal, is this: What is the actual financial loss caused by the unfair dismissal?, for compensation is an "indemnity for the loss". (Per Soza, J. in Associated Newspapers of Ceylon Ltd. v. Jayasinghe).* It was further stated that the burden is on the employee to adduce sufficient evidence to enable a Labour Tribunal to decide the loss. In this case the Employee – Respondent gave false information to the Labour Tribunal and lied under oath about his employment status this should be considered against the Employee and he should not have been granted an enhanced award of compensation.

Taking the abovementioned case law into consideration, I find that losses can be of various kinds; but the matter for deliberation in these circumstances is the financial loss, and not sentimental harm caused by the employer.

For the aforesaid reasons I answer the 1st question of law negatively. Answering the 2nd question of law I find that both parties should prove their case on a balance of probabilities.

Considering the materials and submissions, I find that the Order of the learned President of the Labour Tribunal namely the termination was unreasonable is acceptable and I affirm the same. However, the computation in awarding the compensation cannot be accepted. Under the Industrial Disputes Act and decided cases the actual financial loss during the period of unemployment will be considered for computation of compensation. Accordingly, I order compensation equivalent to

ten months' salary to be awarded to the Employee – Respondent (Rs. 26, 258 x 10 = Rs. 262,580/-). If the money had been already deposited before this appeal was filed, the aforementioned amount is to be deducted and the balance to be refunded to the Employer – Appellant together with relevant portion of interest accrued. Similarly, the Employee – Respondent should be paid Rs. 262,580/- with the relevant interest.

Appeal allowed.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT