

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

In the matter of an appeal under Article 128(1)
of the Constitution of the Democratic Socialist
Republic of Sri Lanka.

SC Appeal No: 223/2016

SC (Spl) LA No: 94/2016

HCA LT No: 117/2012

LT Application No: 13/59/2006

M.S.P. Nanayakkara,
No. 13, M.J.C. Fernando Mawatha,
Idama, Moratuwa.

APPLICANT

vs.

The Associated Newspapers of Ceylon Limited,
'Lake House,'
No. 35, D.R. Wijewardena Mawatha, Colombo 10.

RESPONDENT

And between

The Associated Newspapers of Ceylon Limited,
'Lake House,'
No. 35, D.R. Wijewardena Mawatha, Colombo 10.

RESPONDENT – APPELLANT

vs.

M.S.P. Nanayakkara,
No. 13, M.J.C. Fernando Mawatha,
Idama, Moratuwa.

APPLICANT – RESPONDENT

And now between

The Associated Newspapers of Ceylon Limited,
'Lake House,'
No. 35, D.R. Wijewardena Mawatha, Colombo 10.

RESPONDENT – APPELLANT – APPELLANT

vs.

M.S.P. Nanayakkara,
No. 13, M.J.C. Fernando Mawatha,
Idama, Moratuwa.

APPLICANT – RESPONDENT – RESPONDENT

Before: P. Padman Surasena, J
E.A.G.R. Amarasekara, J
Arjuna Obeyesekere, J

Counsel: Anura Ranawaka with Kalana Batagoda for the Respondent – Appellant –
Appellant

Srinath Perera for the Applicant – Respondent – Respondent

Argued on: 28th January 2022

Written Submissions: Tendered on behalf of the Respondent – Appellant – Appellant on 16th
December 2016

Tendered on behalf of the Applicant – Respondent – Respondent on 23rd
February 2017

Decided on: 6th December 2022

Obeyesekere, J

In this appeal, the Respondent – Appellant – Appellant [*the Appellant*] is challenging the judgment of the Provincial High Court of the Western Province holden in Colombo by which the High Court affirmed the Order of the Labour Tribunal, reinstating the Applicant – Respondent – Respondent [*the Respondent*] in service with back wages at the rate of half-months' salary from the date of termination until reinstatement.

Appointment and interdiction

The Respondent had joined the Appellant as an Assistant Store Keeper on 3rd November 1986, and had been appointed as a Purchasing Officer in 1988. With the retirement of the Store Keeper in 2002, the newly appointed Store Keeper had brought to the attention of the Appellant that there was a large stock of motor vehicle spare parts in the stores that had not been inventorised. Investigations had thereafter been carried out by the Internal Audit Division of the Appellant and the Auditor General's Department. Based on their findings that the Respondent had been involved in certain irregularities that had taken place when purchasing motor vehicle spare parts during the period of 2001 – 2003, the Respondent had been placed under interdiction on 26th February 2003.

Charge sheet issued to the Respondent

The Respondent had thereafter been issued with a charge sheet on 9th August 2005. He had however refused to answer the charge sheet on the basis that his response would be used against him in a parallel investigation that was being conducted by law enforcement authorities in respect of the said irregularities. Although the Appellant had thereafter issued the Respondent with an amended charge sheet dated 26th September 2005, the Respondent had not been afforded an opportunity of responding to the said amended charge sheet.

The amended charge sheet contained the following charges:

1. ඔබ වර්ෂ 2001 සිට 2003 පෙබරවාරි මාසය දක්වා කාලය තුළ ලංකාවේ සීමාසහිත එක්සත් ප්‍රවෘත්ති පත්‍ර සමාගමේ මිලදී ගැනීමේ නිලධාරියෙකු වශයෙන් සේවයේ යෙදී සිටියදී ආයතනයට අවශ්‍ය වාහන අමතර කොටස් සඳහා ලියාපදිංචි සැපයුම්කරුවන්ගෙන් ලබාගත් බැව් සඳහන් ව්‍යාප ඉන්වොයිස් පත්‍රිකා හා ව්‍යාප ලිපි ලේඛන ඉදිරිපත් කොට මූල්‍යමය වංචාවක් සිදුකොට ඇත.
2. වාහන වල අමතර කොටස් මිලදී ගැනීමට යෙදූ ගන්නා ඉල්ලුම්පත් වල (Purchasing Requisitions) අයුතු හා ව්‍යාප අන්දමට වෙනස් කොට වැඩිපුර අමතර කොටස් ඇතුළත් කොට ඒවා ලබාගැනීමට කටයුතු කිරීම. මෙහිදී:
 - (a) අමතර කොටස් මිලදී ගැනීමේ නියෝග පොත ඔබගේ අභිමතය පරිදි අයුතු ලෙස පාවිච්චි කිරීම.
 - (b) ආයතනය මගින් ගෙවීම් කරනු ලබන වෙක්පත් වලට අමතරව ඔබ විසින් පෞද්ගලිකව ගෙවීම් කටයුතු සිදු කිරීමෙන් මූල්‍යමය වංචාව සිදු කිරීමට උපයෝගී කොට ගැනීම.
 - (c) අදාළ ක්‍රෙඩිට් නෝට්ස් (Credit Notes) සහ රිෆන්ඩ් නෝට්ස් (Refund Notes) ආයතනයට ඉදිරිපත් නොකිරීම.
3. ඉහත අංක 01 දරණ චෝදනාවෙහි සඳහන් ක්‍රියාකලාපය තුළදී ඔබගේ භාර්යාවගේ නමින් කොළඹ 10 බාලි පාර අංක 413 යන ව්‍යාප ලිපිනයේ “එක්සලන්ට් ට්‍රේඩර්ස්” නමැති සැපයුම්කරු වෙතින් භාණ්ඩ මිලදී ගැනීම සහ ඒ බවට ව්‍යාප ඉන්වොයිස් ඉදිරිපත් කරමින් ආයතනය නොමග යවමින් ආයතනය ඔබ කෙරෙහි තබා තිබූ විශ්වාසය කඩ කිරීම.
4. ඉහත අංක 1 සහ 2 දරණ චෝදනාවන්හි සඳහන් ක්‍රියාකලාපයන් තුළදී ඔබ ව්‍යාප ඉන්වොයිස් හා ලේඛණ මගින් ආයතනයට රුපියල් මිලියන 01 ක පමණ මූල්‍යමය වංචාවක් සිදුකොට ඇත .
5. ඉහත අංක 1 සිට 4 දක්වා චෝදනා වල සඳහන් ක්‍රියාකලාපයේදී ආයතනය සතු මුදල් වංචනික සහ අයුතු සහගත ලෙස ලබා ගනිමින් හා පරිහරණය කිරීමෙන් බලවත් විශමාවාරයක් සිදුකොට ඇත .
6. ඉහත අංක 1 සිට 5 දක්වා චෝදනා වල සඳහන් ක්‍රියාවන් එකක් හා/හෝ කිහිපයක් හා/හෝ සියල්ලම හා/හෝ සිදු කිරීමෙන් ආයතනය ඔබ කෙරෙහි තැබූ විශ්වාසය කඩවන අයුරින් ක්‍රියාකොට ඇත .

Even though the Respondent had been requested to be present for a domestic inquiry on 4th November 2005, he had declined to participate and the inquiry had proceeded in his absence. Pursuant to the findings of the domestic inquiry, the Appellant, by its letter

dated 13th July 2006, had terminated the services of the Respondent with effect from 26th February 2003.

Order of the Labour Tribunal

Aggrieved by the said decision, the Respondent had made an application to the Labour Tribunal in terms of Section 31B of the Industrial Disputes Act [*the Act*], seeking reinstatement with back wages. After a lengthy inquiry where the Respondent too had given evidence, the Labour Tribunal, by its Order dated 6th September 2012, had determined as follows:

- (a) The Appellant has failed to establish Charge Nos. 1, 2, 4, 5 and 6;
- (b) The termination of the services of the Respondent is unjustified;
- (c) The Respondent must be reinstated with effect from 1st November 2012, with back wages for the period commencing from the date of termination and until reinstatement;
- (d) However, the fact that the Respondent failed to disclose that his wife was a partner of 'Excellent Traders' from whom spare parts had been purchased for the Appellant, which arises from Charge No. 3, had been established;
- (e) Taking into consideration the aforementioned failure on the part of the Respondent to disclose the said relationship between his wife and 'Excellent Traders,' the Respondent would only be entitled to back wages calculated at the rate of half-month's salary.

While **the Respondent did not challenge that part of the order referred to in (d) and (e) above**, the Appellant, acting in terms of Section 31D of the Act lodged an appeal in the High Court against the order for reinstatement. By its judgment dated 28th April 2016, the High Court affirmed the findings of the Labour Tribunal and dismissed the said appeal.

Questions of law

Dissatisfied with the judgment of the High Court, the Appellant sought and obtained leave to appeal from this Court on 31st October 2016 on the following questions of law:

1. Have the Labour Tribunal and the High Court erred in law and in fact by granting relief to the Respondent after coming to the finding that the Respondent had purchased spare parts from a business called Excellent Traders where the Respondent's wife was a partner, without disclosing that fact to the Appellant?
2. Has the Respondent acted in breach of the trust and confidence reposed on him by the Petitioner, by his aforesaid action?

Although leave has been granted only in respect of the above two questions of law which relate to Charge No. 3, and therefore, on the face of it, the scope of this appeal is limited to an examination of the facts and circumstances relating to that charge, it is difficult to consider the said questions of law in a vacuum. Hence, I would at the outset very briefly consider the evidence relating to the several allegations that were made against the Appellant in order to place the issues raised in the above questions of law in their proper perspective.

Procurement procedure followed by the Appellant

The starting point would be the evidence of R.S. Siriwardena, an officer attached to the Internal Audit Division of the Appellant who carried out the initial investigation, and who explained the procedure that was followed by the Appellant when purchasing spare parts.

In his evidence, he stated that when spare parts are required, the Transport Manager would initiate a request by the submission of the 'Purchase Requisition Form,' which consists of five sections, namely Sections 'A' – 'E'. Section 'A' is completed by the Transport Manager who shall specify on the said Form, the items that are required and the quantities of each such item. This Form is thereafter forwarded to the Chief Store Keeper who shall confirm in Section 'B' if the said items are available in the Stores. If the

said items are not available, the requisition shall be forwarded to a Committee consisting of *inter alia* the Accountant and the General Manager of the Appellant for their approval to proceed with the purchase of the said items. The approval of the Committee is recorded in Section 'C'.

The Form is thereafter sent to the Purchasing Department where the Respondent was attached to, for the purpose of calling for quotations from registered suppliers of the Appellant. Upon receipt of the quotations, Section 'D' of the said Form is completed by inserting the prices that have been quoted in respect of each of the items that were requested by the Transport Manager. The Form is thereafter sent back to the Transport Manager who would recommend from which supplier the purchase must be made. The recommendation of the Transport Manager shall be recorded by completing Section 'E' of the Form.

The Purchase Order addressed to the supplier recommended by the Transport Manager is prepared only thereafter, and is issued to the Purchasing Officer (i.e., the Respondent) who would call over at the office of the supplier mentioned therein and collect the goods. The Respondent would thereafter hand over the goods to the Store Keeper. Payment in favour of the supplier is processed only thereafter, with the 'Purchase Requisition Form' being compared with the 'Goods Received Note' prior to the preparation of a cheque drawn in favour of the supplier.

Thus, according to the above evidence of Siriwardena, even though the Respondent '*may have been privy*' to the calling of quotations by the Purchasing Department, the involvement of the Respondent in the above process was limited to collecting the goods from the suppliers who had been selected by the Transport Manager and handing over the said goods to the Store Keeper. I must state that this evidence does not seem credible for two reasons. The first is, if this was the only function of the Respondent, it is a function which can be performed by an Office Assistant and does not require the services of an officer in the executive grade. The second is the Report of the Auditor General.

Findings of the Auditor General

The outcome of the investigation carried out by the Auditor General's Department was damning. Its report had revealed that among the suppliers from whom purchases had been made was a partnership by the name of 'Excellent Traders' where the wife of the Respondent was a partner during the period of 2001 – 2003. The total value of purchases made from this supplier during the year of 2002 was Rs. 1,802,353.34.

It was the position of the Audit Superintendent, as borne out by his report dated 17th March 2003, that:

- (a) The Requisition Forms had been altered by the insertion of additional items in Section 'A' of the Form;
- (b) The invoices submitted by suppliers had been altered and/or false or forged invoices said to have been issued by suppliers had been submitted to support purchases that had already been made;
- (c) The Respondent had been involved in the calling of quotations, recording same, preparing the 'Goods Received Notes' and handing over of the goods collected, without any form of supervision;
- (d) Purchases had been made only from four suppliers including 'Excellent Traders', although 37 suppliers had been pre-registered;
- (e) Although purchases had been made from 'Excellent Traders', there was no such business enterprise at the given address.

Thus, although Siriwardena explained the text book manner in which orders should be placed and purchases made, the report of the Auditor General portrayed a completely different picture of a procurement process plagued with irregularities.

Explanation of the Respondent

The Respondent took up the position that his involvement in the entire procurement process to which I have adverted, was limited to collecting the Purchase Order from the Transport Manager, collecting the goods that had been listed therein from the relevant supplier and thereafter handing over the said goods to the Store Keeper with the relevant invoice. While submitting that there was no allegation that he did not duly hand over the goods, the Respondent stated in his evidence that:

- (a) The initial request for the goods must be made by the Transport Manager and that he, as Purchasing Officer, has no involvement in that decision;
- (b) Quotations are called by the Purchasing Department;
- (c) The decision as to which quotation should be accepted is taken by the Transport Manager;
- (d) The Transport Manager must approve the quotations, thereby preventing items which had not been requested for in Section 'A' of the 'Purchase Requisition Form' at the outset, from being added subsequently;
- (e) Payment is made by an account payee cheque drawn in the name of the supplier, after having verified that the goods requested in the Purchase Requisition Form have in fact been handed over to the Stores as reflected in the Goods Received Note.

I have carefully considered the evidence led before the Labour Tribunal and observe that even though the several irregularities that are referred to in the Audit Report have been substantiated by documents, there is no evidence that the alterations were done by the Respondent. However, it is clear that one or more of the personnel involved in the procurement process had been involved in the irregularities mentioned in the said Audit report, a fact which has been admitted by the witnesses called by the Appellant, and observed by the Labour Tribunal in its Order. The alterations effected on the 'Purchase Requisition Form', as observed earlier, could not have gone undetected by the Transport Manager, as he is required to certify prior to approving payment that the goods ordered

correspond with the goods reflected in the 'Goods Received Note', unless he too was involved.

Findings of the Labour Tribunal on Charge Nos. 1 and 2

The Labour Tribunal has held that the Respondent was not guilty of any wrongdoing relating to the matters alleged in Charge Nos. 1 and 2, and that the termination of his services was unjustified, for the following reasons:

- (a) There is no proof that the alterations to the Purchase Requisition Forms had been done by the Respondent as the alterations were not in his handwriting;
- (b) The goods that have been ordered by way of the Purchase Requisition Forms have been received by the Store Keeper, as reflected by the Goods Received Notes;
- (c) Payment has been made based on the said Goods Received Notes and the Purchase Requisition Forms;
- (d) The selection of the supplier was done by the Transport Manager and the Respondent was not involved in that process.

These findings of the Labour Tribunal have been affirmed by the High Court and were not canvassed before us.

Findings of the Labour Tribunal on Charge No. 3

This brings me to Charge No. 3, which forms the basis for the aforementioned questions of law – i.e., non-disclosure by the Respondent of the fact that he had a personal interest in one of the suppliers, and the Appellant's resultant loss of confidence in the Respondent.

In his evidence, the Respondent has stated that 'Excellent Traders' was registered for the first time as a supplier of the Appellant in late 2001. He has admitted that he was aware of the involvement of his wife in the said business, and that although he himself has

collected goods from 'Excellent Traders,' he never informed the Appellant of this fact. Contrary to how a reasonable prudent man would have acted in similar circumstances, the Respondent does not appear to have seen anything wrong in failing to disclose the said fact, with his explanation being that the decision to purchase spare parts from 'Excellent Traders' was not a decision that was taken by him.

The Labour Tribunal, while holding that the Respondent failed to disclose the involvement of his wife in 'Excellent Traders,' and that the Appellant may have suffered a financial loss as a result of the said non-disclosure, has also held that there was no evidence that the Respondent influenced the selection of 'Excellent Traders' for the supply of spare parts, or that the Respondent benefitted from the said transactions.

The stark reality however, which has also been raised in the report of the Auditor General, is that quotations have been called by the Purchasing Department, to which the Respondent had been attached for over 13 years, and hence the involvement of the Respondent could not have been limited to the extent claimed by him, especially when one considers (a) that the value of the orders placed in favour of Excellent Traders during the first year of it being registered as a supplier amounted to almost Rs. 2 million; and (b) the acknowledgement by the witnesses of the Appellant that others in the procurement process may have been involved in the irregularities identified in the report of the Auditor General's Department. While the Labour Tribunal must proceed only on the evidence placed before it, the Respondent's involvement in the commission of the irregularities identified by the Auditor General is an inescapable conclusion when everything is looked at in context.

Back wages limited to half months' salary

Having concluded that the Respondent is guilty of not disclosing the relationship between 'Excellent Traders' and his wife, the Labour Tribunal instead of considering the second element of Charge No. 3 – i.e., the consequential loss of confidence – went onto hold that the Respondent must be reinstated in service in the same or a comparable post. It is clear from the Order of the Labour Tribunal that the decision to reinstate was influenced by

the fact that the Appellant did not take any disciplinary action against others who were involved in the irregularities identified in the report of the Auditor General.

However, the Labour Tribunal held that the Respondent should only be paid half months' salary for the period he was not in service, for the following reason:

“අසාධාරණ අත්දැමින් ඉල්ලුම්කරුවා සේවයෙන් පහ කිරීම මත ඔහු සේවය අහිමිව සිටි කාල සීමාව වෙනුවෙන් සම්පූර්ණ හිඟ වැටුප් සමග නැවත සේවය ලබා ගැනීමට ඉල්ලුම්කරුට හිමිකම තිබුණද එමගින් වගඋත්තරකරුට අත් විඳීමට සිදු විය හැකි මූල්‍යමය තත්ත්වයද ඉල්ලුම්කරුගේ භාර්යාව එක්සලන්ට් ට්‍රේඩර්ස් නමැති ආයතනයේ හවුල් කරුවකු බවට වගඋත්තරකාර ආයතනයට ආයතනයේ සැපයුම් කරුවකු ලෙස ලියා පදිංචි වීමට පෙර දැන්වා සිටි බවට කරුණු හෙළි කිරීමට ඉල්ලුම්කරු අසමත් වී තිබීමද යන කරුණු දෙක සැලකිල්ලට ගනිමින් දෙපාර්ශවයටම සාධාරණ වන පරිදි හිඟ වැටුපෙන් අඩක් ගෙවන ලෙසට වගඋත්තරකරුට නියෝග කිරීමට තීරණය කරමි.”

It is clear from the above that the Labour Tribunal has considered as critical the non-disclosure by the Respondent of the relationship his wife had with ‘Excellent Traders’. This is the reason that led the Labour Tribunal to declare that the Respondent is only entitled to one half of his monthly salary. In my view, the said non-disclosure is critical when one considers that the post of Purchasing Officer is a position of responsibility and requires the holder of that post to act with utmost honesty and integrity. If the Respondent’s wife was keen to engage in a business that supplied goods to her husband’s employer, the Respondent owed a duty at the very least to report that fact to the Appellant prior to any business transaction taking place between the Appellant and the wife of the Respondent. Failure to do so can give rise to a potential conflict of interest, which must be avoided at all times.

This position is clearly reflected in Section 1:5 of Chapter XLVII of the Establishments Code in the following manner:

“An officer shall not do anything which will bring his private interests into conflict with the public duty or which compromises his office. He should so conduct himself at all times as to avoid giving rise to any appearance of such conflict or of being so compromised ...”

It is perhaps appropriate to observe at this stage that in 2019, the Commission to investigate allegations of Bribery and Corruption issued a publication dealing with conflict of interest. In its introduction, the Commission has stated that, “**One of the root causes of corruption is the absence of an effective conflict of interest framework. The recognition of conflict of interest is synonymous to nipping the bud of a plant, which would be harder to cut down, once it grows in to a fully-fledged tree. This endeavor aims at introducing guidelines to permeate a society sans conflict of interest. This is a mechanism to weed out the seeds of corruption by mitigating the potential risks.**” [emphasis added]

Even though no evidence had been led that the Appellant had in place procedures that required any potential conflict of interest to be declared or that the Establishments Code applied to the Respondent, I agree with the finding of the Labour Tribunal that the Respondent owed a duty to disclose the aforementioned relationship which gives more than an appearance of a conflict of interest, and which the Respondent by his own admission had failed to do.

The Labour Tribunal, and the High Court which affirmed the findings of the Labour Tribunal, have not considered the following:

- (a) Whether the said non-disclosure has resulted in the Appellant losing confidence in the Respondent, as claimed by the Appellant, and which in fact was an integral part of Charge No. 3;
- (b) If there is loss of confidence, whether the termination of the services of the Respondent was justified.

The failure to consider these matters forms the basis of the two questions of law which need to be decided in this appeal.

It is in the above factual circumstances that I must consider whether the aforementioned non-disclosure can lead to the Appellant losing confidence in the Respondent in a manner that justifies the termination of the services of the Respondent, and if so, whether the

Labour Tribunal erred when it ordered reinstatement of the Respondent with back wages, albeit limited to 50% of his salary.

Loss of confidence and its consequences

The critical importance of the confidence that an employer must have in its employees has been highlighted in the following passage from **Democratic Workers' Congress v De Mel and Wanigasekera** [CGG 12432 of 19th May 1961 at para 24], which has been cited with approval by this Court *inter alia* in **Peiris v Celltel Lanka Limited** [SC Appeal No. 30/2009; SC Minutes of 11th March 2011 at pages 8-9] and **People's Bank v Lanka Banku Sevaka Sangamaya** [SC Appeal No. 209/2012; SC Minutes of 16th November 2015 at pages 18-19]:

*“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 fulfil 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.”*

Loss of confidence therefore arises in a situation where, due to certain circumstances, an employer loses confidence in an employee in a way that the employer no longer considers it appropriate to continue to employ such person within the organisation.

S. R. De Silva in his book, **The Legal Framework of Industrial Relations in Ceylon** [(1973) at page 553] has stated as follows:

“Loss of confidence may justify a termination or, in a case where a termination is held to be unjustified, may be an argument against the award of reinstatement. Though theoretically there is no restriction as to the class of employee in respect of

whom termination of employment may be effected on the ground of loss of confidence, it usually applies in respect of employees who hold positions of trust and confidence such as accountants, cashiers and watchers or who perform a certain degree of responsible work. The type of conduct that can reasonably be said to lead to loss of confidence by an employer in an employee is generally that which involves bribery and corruption, collection of unauthorized commissions, revealing confidential information, having an interest in a rival business, dissuading clients and customers, transferring business orders to competitors, conniving actively or passively at thefts, defalcations and fraud, sabotage and undermining discipline or loyalty...” [emphasis added]

In **'The Law of Dismissal'** [(2018) at page 123], S.R. de Silva has stated further that:

“Loss of confidence is not confined to conduct involving dishonesty. Thus, for instance, loss of confidence in an employee for making disparaging remarks concerning a senior planter to junior planters has been held to be justified [The Ceylon Mercantile Union v. Geo Steuart & Co. Ltd. CGG 14773 of 3 November, 1967]. In another case, the Court of Appeal, in concluding that the termination was justified, held that there was reasonable suspicion of the employee’s complicity in the theft and that, although insufficient to bring home a charge of theft, it was sufficient to establish negligence having regard to his position as a security guard [Ceylon Cold Stores Ltd. v. Gunapala – CA/398/1980 – CAM 06.08.1982].”

Loss of confidence in the banking sphere

The issue of loss of confidence has been considered by this Court in the past, mostly in cases involving bank employees.

In **National Savings Bank v Ceylon Bank Employees’ Union** [(1982) 2 Sri LR 629], the bank had dismissed a clerk in its service for an alleged misconduct at an examination conducted by the Bankers’ Training Institute, which had later been admitted by the workman. Soza, J held at page 632 that:

*“... The public have a right to expect a high standard of honesty in persons employed in a bank and bank authorities have a right to insist that their employees should observe a high standard of honesty. **This is an implied condition of service in a bank.** Conduct on the part of a bankman which tends to undermine public confidence amounts to misconduct. Whether the misconduct relates to the discharge of his duties in the bank or not, if it reflects on the bankman’s honesty, it renders him unfit to serve in a bank and justifies dismissal ...*

*... The learned President found that Amarasuriya has innocently taken the examination notes into the hall but in the same breath he declared that an offence has been committed, and a serious offence at that. He went on to hold that Amarasuriya was guilty of misconduct at an examination but not of misconduct at his workplace and ordered reinstatement. **The learned President has failed to appreciate the fact that he was considering the case of an employee of a bank which is under a special duty to ensure that the honesty of its servants is not open to question.** The dismissal of Amarasuriya is therefore justified. The order of the learned President cannot be allowed to stand ...” [emphasis added].*

A similar conclusion was reached in **Bank of Ceylon v Manivasagasivam** [(1995) 2 Sri LR 79] where at the instance of the employee, the bank had certified the signature of two persons who had subsequently used such certification to fraudulently transfer a large sum of money from Sri Lanka to accounts which had been opened in a Swiss bank. In reversing the decision of the High Court which had ordered reinstatement of the employee, Chief Justice G.P.S. De Silva held as follows at page 83:

“It seems to be that by reason of the part played by the applicant in two transactions which, to say the least, were questionable, he has clearly forfeited the confidence reposed in him as an employee of the Bank. In these circumstances, the Bank should not and cannot continue to employ him.”

People’s Bank v Lanka Banku Sevaka Sangamaya [supra] and **Ceylon Bank Employees’ Union v Hatton National Bank** [SC Appeal No. 75/2012; SC Minutes of 14th October 2021] are two cases where bank employees had issued several cheques to third parties without

sufficient funds being available in their accounts. In the latter case, my brother Surasena, J, having carried out a detailed survey of the cases involving loss of confidence, held as follows at page 15:

“The facts and the circumstances of the instant case, clearly justify the decision of the Employer to discontinue the service of the Employee. The said circumstances are sufficient for the Employer to have lost confidence in the Employee. As has been discussed in the cases cited above, the banks would not be able to function with Employees in its staff who are not prepared to strictly adhere to the rules put in place by the banks to safeguard the trust reposed in them by their customers. When customers lose confidence in the bank, the bank would no longer attract business. When the bank does not attract business, it would not survive any further. Thus, in the instant case, the Employer bank is justified in terminating the service of the Employee.”

Loss of confidence in a non-banking environment

The issue of loss of confidence in a non-banking environment was considered by this Court in **Peiris v Celltel Lanka Limited** [supra]. The appellant was an Assistant Manager (Credit Collection), a position which this Court described as being *“of responsibility which demands integrity, competency, reliability and independence.”* Referring to the nature of the appellant’s services which was to independently handle the respondent’s work in the outstation districts, it was held by Tilakawardane, J as follows at page 8:

“... 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"* [emphasis added].

At pages 9-10, Tilakawardane, J summarised the position in the following manner:

*"... 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 behaviour for which termination of services can be justified."* [emphasis added]

Thus, in **Peiris**, this Court drew a nexus between the high level of responsibility and autonomy that the employee had been entrusted with, and the loss of confidence resulting from a breach thereof, in order to justify termination of the services of the employee.

A broader approach

A much broader approach going beyond the test of the employee occupying a position of responsibility and based on the trust that an employer is entitled to have in its employees was adopted by this Court in **Kosgolle Gedara Greeta Shirani Wanigasinghe v Hector Kobbekaduwa Agrarian Research and Training Institute** [SC Appeal No. 73/2014; SC Minutes of 2nd September 2015], where Wanasundera, J held as follows at pages 10-11:

*"The Appellant argued **that she did not hold a fiduciary position** in the Respondent Institution and therefore the final charge in the charge sheet regarding "loss of confidence" does not apply to her. I see this concept in a different way. All the*

*workers in any institution work for the employer. The employer has employed each and every person having allocated some part of the work of the employer. Let it be the Chief Executive Officer, let it be a clerk or a peon or even a sanitation labourer, they are employed under the employer. **The employer trusts that they will do their part of the work properly.** The employer thus has trust on them. The CEO is a very highly trusted person. The officers are also trusted with may be a little lesser degree than the CEO. The minor employee also is trusted, may be even to a lesser degree than the officer. No employee is distrusted. **Without trust, an employer cannot and will not employ any person.** The employee knows that he is trusted not to be negligent in his work, not to be indisciplined, not to be fraudulent, not to work without due care for co-workers etc. **They are tied to the employer with the bond of trust.** I am of the view that each and every employee is holding a fiduciary position in relation to the employer. **The employee cannot break his trust and work at his or her free will and leisure**" [emphasis added].*

While I am in agreement with Wanasundera, J that trust is one of the core features of an employer – employee relationship, there are two matters that I must advert to at this stage.

The first is that the trust and confidence that an employer must have in an employee is encapsulated in the duty of fidelity that an employee owes his employer. As observed in **Finlay Rentokil (Ceylon) Ltd v A. Vivekananthan** [(1995) 2 Sri LR 346], an employee owes a duty of fidelity to his employer during the period of his contract of employment. This duty is one of good faith and loyalty, and will require the employee to serve his/her employer faithfully and to avoid situations of conflict or any appearance of any conflict between their own interests and that of their employer.

The second is with regard to the view expressed "*that each and every employee is holding a fiduciary position in relation to his employer.*" While it is certainly possible for fiduciary duties to arise in employment relationships, it is not the norm. In **Gower's Principles of Modern Company Law** [10th edition (2016): §16–11], for instance, it has been observed that although subject to a number of qualifications, in principle, the employment

relationship is not a fiduciary relationship, so that it would be inappropriate to apply the full range of fiduciary duties even to senior employees.

Whether a fiduciary relationship arises in an employer – employee relationship was considered by the Singapore High Court in the recent case of **Sumifru Singapore Pte Ltd v Felix Santos Ishizuka** [2022 SGHC 14], where it was held that, “*the duties that the employee owes his employer is primarily a matter of contract, and the imposition of additional fiduciary obligations on the employee is the exception rather than the norm.*” This echoes the view taken by the Court of Appeal of England and Wales in **Ranson v Customer Systems Plc** [2012 EWCA Civ 814], which relied on the pronouncements from **Hospital Products Ltd v United States Surgical Corporation** [1984 156 CLR 41 at page 97], of the High Court of Australia (which has later been cited with approval by the Privy Council in **Kelly v Cooper** [1993 AC 205 at page 214]), and **University of Nottingham v Fishel** [2000 ICR 1462 at page 1491].

Taking into consideration the above judicial pronouncements, I am of the view that an employee is expected at all times to serve his employer:

- (a) with honesty and integrity;
- (b) in a manner that does not breach the trust that has been placed in him/her;
- (c) in a manner that fosters the confidence that the employer has in him/her.

While the above would undoubtedly include a requirement that all matters that may give rise to a conflict of interest or any matter that may give rise to the employer losing confidence in the employee be reported to the employer forthwith, failure to act as set out above may result in the employer losing confidence in the employee.

I must however, add a word of caution. An employer cannot, merely to justify the termination of the services of an employee, claim that he has lost confidence in an employee. As pointed out by this Court in **Bank of America v Abeygunasekara** [(1991) 1 Sri LR 317 at page 328], “*the mere assertion by an employer is not sufficient to justify the*

termination of a workman on the ground of loss of confidence. When such an assertion is made it is incumbent on the Labour Tribunal to consider whether the allegation is well founded. Therefore it would become necessary for the employer to lead evidence of facts from which such an assertion could be proved directly or inferentially."

Furthermore, such a claim must always be considered in the context of the breach of discipline that is said to have been committed by an employee. As Amerasinghe, J stated in **Premadasa Rodrigo v Ceylon Petroleum Corporation** [(1991) 2 Sri LR 382 at pages 392-393]:

*"Whether the termination of the appellant's services was justifiable or not, whether it was, as Mr. Goonesekere claims "disproportionate," depends on what he did or omitted to do and whether what he did or omitted to do, as a matter of law, and not as a mere whim or fancy of the employer, warranted dismissal (Cf. Michael v. Johnson Pumps AIR 1975 SC 661 at p. 666 para. 22, per Krishna Iyer, J.). **I agree with learned counsel for the appellant that an employer cannot claim to have a right to dismiss an employee merely because he says he has lost confidence in an employee.** As Justice Krishna Iyer pointed out, with great respect, albeit somewhat quaintly, in Michael v. Johnson Pumps, (supra) at p. 666 para. 19, loss of confidence is "no new armour for the management: otherwise security of tenure, ensured by the new industrial jurisprudence and authenticated by a catena of cases of the Supreme Court, can be subverted by this neo-formula" [emphasis added].*

In the above circumstances, I am of the view that whether an employer has lost confidence in an employee is a matter that must be determined on the facts and circumstances of each case, with factors such as the incident or breach of discipline that gave rise to the loss of confidence, and the position held by the employee being relevant factors in arriving at such determination.

Loss of confidence in the Respondent

Having laid down the legal context in which the argument of the Appellant that it has lost confidence in the Respondent must be considered, I shall now re-visit the factual circumstances of this case.

I have already held that the post of Purchasing Officer is a position of responsibility and requires the holder of that post to act with utmost honesty and integrity. This requirement would extend to all those involved in procurement in any establishment, thus ensuring that such persons are beyond suspicion. I would even go to the extent of stating that honesty and integrity that is expected from those involved in procurement in any work place is similar to those employed by banks. All persons involved in procurement must not make a business out of their employment by selecting friends and family for the supply of goods and services to the employer in a manner that benefits such friends and family over the interests of their employer. Therefore, the ideal situation would be that the Respondent's immediate family members should not have had any business dealings with the Appellant, as long as the Respondent was in the employment of the Appellant, as it can give rise to a conflict of interest or at the very least, an appearance of a conflict of interest.

Even if that cannot be practically achieved, at a bare minimum, the Respondent, having been the Purchasing Officer of the Appellant since 1988 and knowing fully well that as a member of the Purchasing Department, he is privy to price sensitive information as well as its decisions especially in the absence of any evidence that the Appellant had in place *Chinese Walls*, owed a duty to have declared to the Appellant the fact that his wife was a partner of 'Excellent Traders' the moment the said entity was pre-registered as a supplier.

As an additional measure, the Respondent should have thereafter, having discussed the matter openly with the management, sought a transfer from the Purchasing Department, thus ensuring absolute transparency. This is the manner in which any reasonable, prudent and right thinking employee who has no financial benefit to derive from such a transaction would have acted. A disclosure of this fact by the Respondent would in all probability have led the Appellant to transfer the Respondent to a different division,

where he would not have been privy to any of the information or decisions relating to the selection of the successful supplier for the supply of goods and services to the Appellant. If that was not possible, and as a last resort, the Appellant could have even disqualified 'Excellent Traders' from the bidding process, in order to safeguard its own interests.

An employer should have the confidence to entrust duties and responsibilities to its employees in the expectation that the said duties and responsibilities shall be discharged honestly and faithfully. Although an employer will have in place supervisory structures to ensure due performance, an employer cannot be expected to keep a constant watch on all its employees. It is for this reason that honesty, integrity, loyalty and trust forms the bedrock of an employer-employee relationship. The situation inside a Purchasing Department is akin to a trading room in a stock brokers office or a directors' office of a listed company where price sensitive information is always floating in the air but with the expectation that confidentiality shall be maintained at all times with regard to such information and that such information shall not be used to one's personal benefit.

In this case, the Respondent had been the Purchasing Officer for a very long period of time and it is fair to assume that he had won the confidence of the Appellant. In such a scenario, it was the duty of the Respondent, as well as all those involved in the procurement process, to ensure that it purchases for the Appellant the best product at the most economical price. That cannot simply be achieved when an insiders' wife is a partner of a supplier. As observed earlier, one reason for the Labour Tribunal to award only half months' salary to the Respondent was the finding that a financial loss may have been caused to the Appellant.

That the confidence that the Appellant had in its employees involved in procurement including the Respondent has been breached is evident when one considers the aforementioned report of the Auditor General where he has identified the manner in which invoices had been tampered with or forged invoices had been presented and the fact that while orders were only placed with four of the thirty seven registered suppliers, orders totaling almost Rs. Two million had been placed with 'Excellent Traders' in the first year of its registration, in spite of 'Excellent Traders' not even having an office at the given

address. In fact, the investigation that led to the dismissal of the Respondent commenced when the newly appointed Store Keeper brought to the attention of the Appellant that there was a large stock of spare parts which had not been inventorised, from which an inference can possibly be drawn that spare parts which were not required by the Appellant may have been purchased.

Taking into consideration the facts and circumstances peculiar to this case, I am of the view that the failure to disclose the above relationship is a serious breach of discipline on the part of the Respondent that goes to the very root of the employer – employee relationship and is sufficient to substantiate the claim of the Appellant that it has lost trust and confidence it was entitled to have in the Respondent. I would therefore answer the second question of law - i.e., *“Has the Respondent acted in breach of the trust and confidence reposed on him by the Petitioner, by his aforesaid action?”* in the affirmative.

Consequences of a finding that an employer has lost confidence in an employee

I have already observed that confidence, trust, honesty, loyalty and integrity are at the core of an employer-employee relationship and are therefore indispensable. The result of that confidence and trust being forfeited, as in this case, is that the very foundation on which the contractual relationship between the employer and employee stands has been completely destroyed. In such a situation, the only course of action available to the Appellant was to have terminated the services of the Respondent. I am therefore of the view that:

- (a) the termination of the services of the Respondent is justified;
- (b) forcing the Appellant to employ a person such as the Respondent in whom it can no longer have confidence, even in any other capacity, is simply not just and equitable;
- (c) having found the Respondent guilty of non-disclosure of the said relationship, the Labour Tribunal and the High Court erred in law when it held that the termination of services was nonetheless unjustified and ordered the reinstatement of the Respondent with back wages.

There is one other matter that I must advert to, prior to answering the first question of law. That is whether an employee whose termination of services is justified is nevertheless entitled to the payment of compensation. This is an issue that has been answered in the negative as well as in the affirmative in the past. In **People’s Bank v Lanka Banku Sevaka Sangamaya** [supra], the Labour Tribunal, having held that the termination of services is justified had awarded compensation. In appeal, Sisira De Abrew, J set aside the order for compensation on the basis that, “*When compensation is awarded to the employees who committed the above acts of misconduct, such a decision can be construed as an encouragement to commit further acts of misconduct.*”. This conclusion has been followed by this Court in **Ceylon Bank Employees’ Union v Hatton National Bank** [supra].

In **David Michael Joachim v Aitken Spence Travels Limited** [SC Appeal No. 9/2010; SC minutes of 11th February 2021], Kodagoda, J having considered several previous judgments of this Court including **Saleem v Hatton National Bank** [(1994) 3 Sri LR 409] and **People’s Bank v Lanka Banku Sevaka Sangamaya** [supra], held that while an employee whose termination of services is lawful and justified cannot as of right claim compensation,

“The power conferred by law on the labour tribunal requires the President of the tribunal to make a just and equitable order, and he is not precluded by law from making an order for the payment of compensation to the applicant, if the circumstances justify the making of such an order ...

The ordering of compensation to the applicant should be considered favourably, if attendant circumstances justifies the making of an order for compensation, and particularly when termination of services though determined by the tribunal to have been both lawful and justifiable, was not occasioned due to any wrongdoing/misconduct committed by the applicant.(employee).

In situations where termination of services was due to misconduct by the applicant/workman and such termination is held by the tribunal to have been just and equitable, an order for compensation would be just and equitable, only if there

are special or exceptional circumstances, that warrant the making of such an order for payment of compensation.”

Thus, while it is clear that the awarding of compensation even where termination of services is justified is the exception, I am of the view that an employee who is guilty of misconduct that brings into question his integrity, loyalty, trust and honesty is not entitled to the payment of any compensation. Taking into consideration the facts and circumstances of this case and the conduct of the Respondent, I am of the view that there is no justification at all to make an order for the payment of compensation to the Respondent. To make such an order would be to reward dishonest conduct.

I would therefore answer the first question of law, as well, in the affirmative.

The Order of the Labour Tribunal and the judgment of the High Court are accordingly set aside and this appeal is allowed. I make no order for costs.

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