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 31 DD(1) the Industrial Disputes (as amended)

SC. Appeal No:54/2010

SC.HC.LA No.13/2010

HCALT No: 141/2007

L.T. Case No: 08/1075/2001

Kotagala Plantations Limited
Elakanda, Horana

(Also at 53 1/1/, Sir Baron Jayatilleke Mawatha, Colombo 01)

RESPONDENT-RESPONDENT-PETITIONER

Vs.

M.R. Ranasinghe
No.14, Uyana Road,
Moratuwa.

APPLICANT-APPELLANT-RESPONDENT

BEFORE : **TILAKAWARDANE J,**
MARSOOF J, &
SURESH CHANDRA J.

COUNSEL : Gomin Dayasiri with Ms. Manoli Jinadasa for Appellant
J. Joseph with Nimal Ranamuthuarachchi for Applicant-Respondent-Respondent

ARGUED ON : 21/06/2011

DECIDED ON : 03.02.2012

Shiranee Tilakawardane J.

The Applicant-Appellant-Respondent (hereinafter referred to as the Respondent) was originally an employee of the Sri Lanka State Plantations Corporation from October 1975 .Consequent to the privatization of the plantations from 22nd June 1992 the Respondent's contract of employment was vested with the Respondent -Respondent-Petitioner (hereinafter referred to as the Petitioner). As specified in the terms and conditions of the gazette notification, bearing No. 720/2 and dated 22nd of June 1992 the Respondent continued to be in the service of the petitioner without a break in service. His past service under the Sri Lanka State Plantation Corporation was counted for his service period under the Petitioner.

On or about 9th January 1995, the petitioner served a charge sheet on the Respondent which consisted of 16 charges, all relating to serious acts of misconduct. Thereupon, after a domestic inquiry and upon being found guilty of charges 5, 8(c), 8(d), 9, 10(a), 10(b), 14 and 15 of the charge sheet the Respondent's services were terminated with effect from 21st January 1994 by letter dated 16th May

1996. Shortly afterwards, the Respondent filed an application in the Labour Tribunal seeking reinstatement , with all salary and benefits enjoyed by him prior to his termination.

In the result, the President of the Labour Tribunal in his order held the following:-

a) The Respondent was irresponsible, failed to comply with the instructions specified to him and grossly negligent therefore he was guilty of Charges 5, 8(c), 9, 10 (a), (b) , 14 and 15.
b) Due to Respondent's failure to perform his duties adequately the Petitioner had incurred losses.
c) The Respondent had carried out irregular cutting and disposing of trees in the Petitioner's estate.
d) It was further revealed and admitted by the Respondent that he had signed blank vouchers although such wrongdoing was not included in the charge sheet.
e) Therefore, the Respondent's application was dismissed on the basis that his termination was just and equitable.

The Respondent aggrieved by the decision of the President of the Labour Tribunal appealed to the Provincial High Court of the Western Province. The learned High Court Judge finding the Respondent had committed serious misconduct affirmed the order of the Tribunal but nevertheless under the principles of Saleem v Hatton National Bank [1994] 3 S.L.R 409, awarded the Respondent two years salary as compensation.

The Petitioner has sought Leave to Appeal from the decision of the Provincial High Court of the Western Province dated 11th February 2010 whereby the High Court upheld the Judgment of the Labour Tribunal yet nevertheless awarded two years salary as Compensation to then Respondent. This Court granted Leave to Appeal on the following three questions of law.

1) Did the learned Judge of the High Court err in law by awarding compensation to the Respondent?
2) Did the learned Judge of the High Court err in law by applying the principles of the case of Saleem v Hatton National Bank?
3) Did the learned Judge of the High Court have jurisdiction to allow the relief awarded when the questions of law raised by the Respondent in the appeal was rejected?

In light of the aforementioned questions of law, this Court granted permission for the parties to tender written submissions and oral submissions. Having received and reassessed such submissions, this Court has examined and analyzed the above questions of law.

In regard to the first question of law, the Petitioner asserts that the learned Judge of the High Court made an error in law by awarding compensation to the Respondent. Section 31B (1) of the Industrial Dispute Act sets out when an employee can seek compensation, and states the following;

> *'A workman..., may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters:-*
>
> *(a) The termination of his service by his employer;*
> *(b) The question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits;*
> *(c) Such other matters relating to the terms of employment, or the conditions of Labour, of a workman as may be prescribed.'*

It is clear from the language of Section 31 B (1) of the Industrial Dispute Act that an employee is entitled to seek remedies for unfair dismissal and redundancy, in other words when an employer has acted unjustly, but what happens when the employee has directly contributed to his own dismissal? The provisions of the Industrial

Dispute Act have not spelt out a guideline for the Labour Tribunal and the Courts to follow in the event such situations arise.

As equity must operate with regard to both parties in a contract of employment, it is important to note that contribution to one's own dismissal in the form of misconduct could justify the termination of his services by the employer. This however does not detract from the fact that a constructive dismissal did take place.

Therefore, this Court would like to consider English law, merely to acquire an understanding of the grounds a Tribunal must take in to consideration when adjusting compensatory awards. Section 123 (6) of the Employment Rights Act 1996 states the following;

> *'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding'*.

In the English case W.Devis & Sons Ltd v Atkins [1977] AC 931 it was established that:

> '*a tribunal can make a finding of 100% contributory fault of the employee and if it does there is no compensatory award'.*

Furthermore, the Northern Ireland Court of Appeal held in the case of Morrison v Amalgamated TGWU [1989] IRLR 361:

> *'The tribunal should take a broad commonsense view of the situation; that view should not be confined to the moment of dismissal; the employee's conduct must have contributed to the dismissal and it must*

have been culpable blameworthy or unreasonable.'

It is clear from the mentioned English Law that the concept followed in these cases was that an employee who has brought the dismissal upon himself might be precluded of any right to compensation.

In dismissal cases such as the present case, the Labour Tribunal must ensure to carry out the correct approach to determine as to whether the employer's decision to dismiss fell within a 'band of reasonableness' as held by the Court of Appeal of England and Wales in HSBC Bank Plc v Maden [2000] ICR 1283.The burden is on the employer to show the reasons of dismissal and the Labour Tribunal must be astute in ascertaining that the reason is genuine and just and equitable.

The Petitioner has provided sufficient evidence such as the Respondent's charge sheet, other documentary evidence and witnesses to the Labour Tribunal and the Provincial High Court to establish the Respondent's failure to carry out his duties in a satisfactory manner as reflected in the several findings of the Labour Tribunal referred to above. The facts clearly disclose a reasonable deduction that the Respondent was irresponsible and grossly negligent. As a result, the Labour Tribunal logically concluded that the Petitioner had suffered numerous losses.

The Respondent functioned as the Superintendent of the estate and was required to comply with the orders of the management to ensure smooth and efficient management of an organization which he had grossly neglected to do. It was further brought to light from the Petitioner's evidence that the Respondent, after the termination of his services continued to use the bungalow and the car causing further loss and harm to the employer depriving his successor of a bungalow and a supervisory vehicle and compelling such a successor to manage an estate whilst living outside it. Prior to the dismissal, the Petitioner had issued the Respondent

with 13 letters of ‘warnings’ and ‘last warnings’

This Court is of the opinion that the Petitioner as the employer has provided the Respondent with sufficient warnings prior to the dismissal and has established genuine reasons for the Respondent’s dismissal. As held by his Lordship H. N.G Fernando in the case of Municipal Council of Colombo V. Munasinghe 71 NLR at page 225;

> ‘*When the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is ‘just and equitable’, the Legislature did not intend to confer on an Arbitrator the freedom of a wild ass. An award must be ‘just and equitable’ as between the parties to a dispute; and the fact that one party might have encountered ‘hard times’ because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other party to make undue concessions…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. An Arbitrator holds no license from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double headed coin*.’

This Court accepts the reasoning of the President of the Labour Tribunal and the learned Judge of the High Court and holds that the Respondent’s dismissal was just and equitable as the Respondent has none other than himself to blame for his dismissal. The employee has contributed by acting unreasonable, by committing intentional and deliberate wrongdoings.

The learned High Court Judge awarded the Respondent two years salary as compensation on the principle established in the Saleem v Hatton National Bank, such principle states;

'Compensation will be ordered if there are special circumstances which would make it just and equitable to order such relief even whether the termination of service is justified'.

The question that must also be determined in this present case is whether there are 'special circumstances' to order relief to the Respondent? The Respondent has committed misconduct, has blatantly neglected and abandoned his duties and disregarded warnings of the Petitioner, and has brought about grave losses to the Petitioner and had put the Petitioner's reputation in great jeopardy. For that reason, the Respondent's circumstances will not fall in to the category of 'special circumstances' and the principle held in the Saleem v Hatton National Bank case has no relevance to the present case. If such an employee as the Respondent is granted compensation, what would be the use of our legal system if it encourages the wrongdoer with monetary rewards while punishing the innocent party? The following cases established contrary views to the Learned High Court Judge's award;

In Caledonian (Ceylon) Tea and Rubber Estates Limited V. Hillman 79 (1) NLR 421 Justice Sharvananda held;

'If the employee's conduct had induced the termination, he cannot in justice and equity have a just claim to compensation for loss of career as he has only himself to blame for the predicament in which he finds himself'.

His Lordship Justice J A N de Silva in Kotagala Plantations Limited V. Ceylon Planters Society S C Appl. No: 144/2009 decided on 15.12.2010 established;

'An allegation involving misconduct or moral turpitude is a determining factor in the proceedings before a Labour Tribunal in order to decide whether the workman is a fit and proper person to be continued in employment in an establishment. If the conduct of the workman has

induced the termination, he cannot in justice and equity claim compensation for loss of career. On the other hand, if the termination was not within the control of a workman but solely by the act and will of an employer, a Tribunal exercising just and equitable jurisdiction is well entitled to grant relief in the nature of compensation to a discharged workman. The jurisdiction of a Labour Tribunal is intended to produce in a reasonable measure a sense of security in a workman so long as he performs his duties, efficiently, faithfully and for the betterment of his establishment and not otherwise. No workman should be permitted to suffer for no fault of his, but unwanted, dishonest, troublesome workman maybe discharged without compensation for loss of his employment. The workman in those circumstances has to blame himself for the unpleasant and embarrassing situation in which he finds himself.'

Accordingly, this Court is unable to understand the learned High Court Judge's reasoning for awarding compensation to the Respondent; the High Court did not find the Respondent's termination of service unjustified, rather the High Court accepted the Respondent's dismissal as just and equitable. Where a dismissal is justified it is incumbent upon the court to seek special reasons for the granting of compensation, such as that the employer had not acted in a rational way, or that the employer had not communicated the manner in which a task had to be carried out or did not give the necessary utilities for the task, or that the employer had acted *mala fides* etc. As stated the burden of proving this is upon the employee, especially where he had contributed one hundred percent to the dismissal and caused loss to the employer.

The High Court is in a position to award compensation in the interest of justice, in the event the Court finds after careful analysis and after taking in to due consideration aspects of discipline and work ethics relating to both the employer and employee that the dismissal was not reasonable. But this case is not such a case. The Respondent's actions have caused 100% contribution to his dismissal as his own misconduct has contributed to his termination.

The losses incurred by the Petitioner are neither negligible nor minimal. This court has considered the period of 17 years that was served by the employee but does not award any compensation on the basis that for at least a considererable part of that time loss was caused to the Petitioner by the several acts committed over a long period by the Respondent.

For these reasons the appeal of Petitioner is allowed, the judgment of the High Court is set aside and the order of the Labour Tribunal dated 15th October 2007, is affirmed. No costs.

JUDGE OF THE SUPREME COURT

MARSOOF J.

I agree.

JUDGE OF THE SUPREME COURT

SURESH CHANDRA J.

I agree.

JUDGE OF THE SUPREME COURT