

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

In the matter of an application for Special
Leave to Appeal in terms of Article 128
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

Visaka Kulasekera
No. 383, Meemana,
Pokunuwita.

SC/APPEAL/29/2019

Applicant

SC/SPL/LA/176/2017

HC Appeal No. HCALT 19/2016

Vs.

LT Application No. 31/72/2005

Elphis Lanka Private Ltd.
No. 144/9, Minuwangoda Road,
Ekala, Ja-ela.

Respondent

AND NOW

Elphis Lanka Private Ltd.
No. 144/9, Minuwangoda Road,
Ekala, Ja-ela.

Respondent-Appellant

Vs.

Visaka Kulasekera
No. 383, Meemana,
Pokunuwita.

Applicant- Respondent

AND NOW BETWEEN

Elphis Lanka Private Ltd.

No. 144/9, Minuwangoda Road,

Ekala, Ja-ela.

Respondent- Appellant- Appellant

Vs.

Visaka Kulasekera

No. 383, Meemana,

Pokunuwita.

Applicant-Respondent-Respondent

Before : Mahinda Samayawardhena, J.
Menaka Wijesundera, J.
K.M.G.H. Kulatunga, J.

Counsel : Sagara Kariyawasam instructed by Ms. Kethakee for the
Respondent-Appellant-Appellant.
Boopathy Kahathuduwa with Sachintha Perera instructed
by Wasantha Kahathuduwa for the Applicant-
Respondent-Respondent.

Written
Submissions : Latest written submissions on behalf of the Applicant-
Respondent-Respondent filed on 4th May, 2026.
Latest written submissions on behalf of the Applicant-
Respondent-Respondent filed on 20th July, 2019.
Written submissions on behalf of the Respondent-

Appellant-Appellant filed on 11th March, 2019.

Argued on : 11.03.2026

Decided on : 02.07.2026

MENAKA WIJESUNDERA J.

The instant Appeal has been lodged to set aside the judgment dated 05.07.2017 of the High Court of the Western Province.

The said judgment of the High Court has been pronounced on the judgment of the Labour Tribunal delivered on 30.03.2016.

The Applicant-Respondent-Respondent (hereinafter referred to as the “Respondent”) had preferred an application to the Wattala Labour Tribunal against the Respondent-Appellant-Appellant (hereinafter referred to as the “Appellant Company”), in the instant matter, alleging constructive termination. The Labour Tribunal had held with the Appellant and delivered the order on 16th March 2016. The Respondent, being aggrieved with the said judgment, had appealed to the High Court.

The High Court, without going into the merits of the case, had sent the matter back to the Labor Tribunal, ordering to deliver a fresh order, and the above-mentioned order dated 30th of March, 2016, had been delivered pursuant to the said direction of the High Court.

The learned High Court Judge, in delivering the impugned judgment in the instant matter, had commented that he failed to understand the merits of the said direction of the High Court, with which I also agree.

The Respondent had joined the Appellant Company in the capacity of a Management-Trainee on the 7th of March 1994 and thereafter had risen to the post of Senior Manager (Personnel) in the same company.

The Respondent averred that, due to the exigencies of service, the Appellant Company had assigned the responsibility of overseeing the company's stores on 29th October 2004. The Appellant Company, however, maintained that those responsibilities were subsequently taken away from her.

Consequently, she had given notice of constructive termination to the Appellant Company on 30.12.2004 and sought compensation at the inquiry at the Labour Tribunal.

The position taken up by the Appellant Company is that there was no harassment at all and that, in fact, the Respondent was asked to oversee the stores due to exigencies of service.

Hence, the main issue to be decided is whether the transfer of the Respondent from the post of Senior Manager-Personnel to the post of Manager-Stores amounted to a demotion, and, if so, whether such demotion amounted to constructive termination.

When this matter was supported for leave on 29.01.2019, leave was granted on the following two questions of law,

- 1) Has the Honourable Judge of the High Court of the Western Province erred in law in not considering the entirety of the evidence against the Respondent; and
- 2) Is the Order of the Honourable Judge of Provincial High Court of the Western Province totally against the evidence led at the inquiry and is there no evidence to support the determination of the Honourable High Court Judge.

The Respondent pleaded that her transfer to the position of Manager-Stores from the position of Senior Manager-Personnel amounted to a demotion. Moreover, she alleged that her end-of-month remuneration had also been reduced, as the salary attached to the post of Manager-Stores was lower than that of Senior Manager-Personnel.

The Appellant Company denied the said allegation and had stated that transfers from one branch to another formed part of the conditions of employment and were not carried out on personal agendas. According to the Appellant, this had been communicated to the Respondent by documents marked A6 and A7.

The Respondent further alleged that her transport facility granted by the Appellant Company had been withdrawn from her benefits, that her year-end bonus had been reduced by fifty percent, and that funds in her account at the Commercial Bank had been withheld, as evidenced by documents marked as A23 and A24. All these allegations were supported by documentary and oral evidence.

I find these acts to have been deliberate and arbitrary on the part of the Appellant, and in my opinion, the explanation offered by the Appellant Company is wholly inadequate.

In the case of **Gardner Ltd vs Beresford (1978)** IRLR 63, it had been held that:

“The Employee received no increase in salary for two years, although some other employees received three increases during this period. The Employee left the services claiming constructive termination. The tribunal had held that normally an implied term can be read in to the contract that the Employer will not treat his employees arbitrarily, capriciously or inequitably on questions of remuneration and that a deliberate discrimination on this account would be a repudiation of contract by the Employer. The mere unreasonable conduct would not amount to constructive termination, and the rationale of the case is that any victimization or arbitrary discrimination could constitute such a repudiation sufficient to entitle the Employee to terminate.”

In the instant case, the Respondent has pleaded constructive termination. The circumstances relied upon by the Respondent include:

1. The Respondent being transferred to the post of Store-Manager from the post of Senior Manager-Personnel,
2. reduction in the salary and the bonus, and
3. depriving the Respondent of the transport facility,

The above-stated facts, in my opinion, when considered collectively, amount to constructive termination.

The term “*constructive termination*” has not been defined in the Industrial Disputes Act; hence, the President of the Labour Tribunal is required to determine the issue on the merits and circumstances of each individual case.

In the instant matter, the behavior of the Appellant Company towards the Respondent had changed, and the Appellant Company failed to provide a valid reason for the change in attitude towards the Respondent.

The learned High Court Judge considered each of the allegations made by the Respondent against the Appellant Company and concluded that, although the Appellant Company had advanced various explanations for the withdrawal of the benefits previously enjoyed by the Respondent, those explanations were neither satisfactory nor convincing.

The learned Judge further examined the order of the Labour Tribunal and observed that the withdrawal of the benefits afforded to the Respondent had not been denied by the Appellant. Similarly, the transfer of the Respondent to a different position had also not been disputed. The learned Judge nevertheless noted that the explanations advanced by the Appellant Company had failed to satisfy the Labour Tribunal, which had the benefit of hearing the evidence firsthand.

Hence, in my opinion, the learned High Court Judge had correctly held that the findings of the Tribunal should not be varied except for a very good reason. Accordingly, the learned Judge affirmed the order of the Labour Tribunal, but varied the compensation awarded on the basis that, when granting compensation, the Court must be mindful of the monetary loss suffered and not sentimental loss.

Therefore, I am of the view that the impugned judgment of the High Court is well within the reason and in accordance with the law, and I am compelled to affirm the same. I observe that the learned High Court Judge varied the compensation awarded by the Labour Tribunal on the basis that the financial loss should be calculated and not the sentimental loss.

In our legal precedence, when computing compensation, certain factors have been taken into account, namely:

1. The age of the employee;
2. How many years of service have been lost;
3. The opportunities available for him or her to be re-employed; and
4. Whether the employee had already been employed.

In the case of **Jayasuriya vs Sri Lanka State Plantations Corporation** (1995) 2 SLR 379, it has been held that:

“In determining compensation, what is expected is that after weighing together of the evidence and the probabilities in the case, the tribunal must form an opinion of the nature and the extent of the loss, arriving in the end at an amount that a sensible person would not regard as means extravagant but would rather consider to be just and equitable in the circumstances of the case. There must eventually be a balance, of which scales of justice are meant to remind us”.

This case sets out the legal principle that must be considered when awarding compensation in labour disputes. In the instant case, the High Court varied the compensation awarded by the Labour Tribunal on the basis that compensation

should reflect the actual financial loss suffered by the Respondent rather than sentimental considerations. The cited case supports this approach by emphasizing that compensation must be fair, reasonable, and proportionate to the loss proved by the evidence, after considering factors such as the employee's age, loss of service, and future employment prospects.

Hence, while answering the above-mentioned questions of law in the negative, I see no reason to interfere with the findings of the learned High Court Judge dated 05.07.2017.

As such, the instant appeal is dismissed, and the judgment of the High Court is hereby affirmed.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE SUPREME COURT

K. M. G. H. KULATUNGA, J.

I have had the privilege of reading in draft the judgment of Her Ladyship Justice Menaka Wijesundera. I agree and concur with the finding and conclusion that the Applicant was constructively terminated. However, I am respectfully unable to agree with the affirmation of the quantum of compensation as awarded by the learned Provincial High Court Judge, in a sum of Rs. 808,250.00.

In the first instance, the President of the Labour Tribunal awarded a total of Rs. 1,272,000.00 as compensation. The basis of computation was 48 months' salary, of Rs. 26,500.00. This was on the basis that her period of service was approximately 10 years and the Order was pronounced almost 12 years after the determination of her employment. Further, the learned President of the Labour Tribunal also considered the age of retirement as being 55 years, and the Applicant thus having approximately 15 years of prospective service. The learned High Court Judge varied the same on the basis that the Applicant had obtained alternate employment on 17.07.2007 at the Open University. Accordingly, the period of unemployment or 'loss of career' as said by the High Court Judge, was '30 and ½ months'. Then, based on the last drawn salary of Rs. 26,500.00, a sum of Rs. 808,250.00 was awarded as compensation.

The Labour Tribunal, by virtue of section 31C(1) of the Industrial Disputes Act, is vested with the power to make all such inquiries, to hear evidence and to make such Order that may appear to be appropriate. The said Section reads thus:

***“31C. (1)** 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.”*

Correspondingly, section 33(1)(d) empowers the making of a decision as to compensation that shall be paid. Section 33(1)(d) reads thus:

***“33. (1)** Without prejudice to the generality of the matters that may be specified and any award under this Act or in any order of a labour tribunal, such award or such order may contain decisions*

***(d)** 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;”

Whilst section 33(1)(d) empowers the ordering of compensation simpliciter, section 33(6) empowers the Labour Tribunal to order payment of compensation in lieu of reinstatement if the Labour Tribunal thinks it fit to do so. The said provision reads thus:

“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.”

Whilst the statutory provisions so provide and empower the Labour Tribunal to award and order compensation, there is no stipulation as to the mode and manner of computing or quantifying the compensation to be so awarded. Superior Courts have time and again laid down and prescribed certain guidelines and criteria which may be followed in quantifying compensation by the Labour Tribunal.

In **Jayasuriya v. Sri Lanka State Plantations Corporation** [1995] 2 Sri L.R. 379, the matters to be considered in determining compensation was laid down as follows:

“In determining compensation what is expected is that after a weighing together of the evidence and probabilities in the case, the Tribunal must form an opinion of the nature and extent of the loss, arriving in the end at an amount that a sensible person would not regard as mean or extravagant but would rather consider to be just and equitable in all the circumstances of the case. There must eventually be an even balance of which the scales of justice are meant to remind us.”

Similarly, in **Ceylon Transport Board v. Wijeratne** 77 NLR 481, Vythialingam, J., observed that in determining and quantifying compensation, the following factors should be considered:

“Account should be taken of such circumstances as the nature of the employer's business and his capacity to pay, the employee's age, the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal including the nature of the charge levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights and any other relevant considerations. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place.”

It is also settled law that in making a just and equitable order, it is not only the interest of the employee that should be considered but also that of the employer and that a just and equitable order is required to be fair by all parties and should not consider the interests of the workmen alone [**Manager, Nakiadeniya Group v. Lanka Estate Workers' Union** (1969) 77 CLW 52 and **Ceylon Tea Plantations Co. Ltd. v. Ceylon Estates Staffs' Union** (SC 211/72, SC Minutes 15.05.1974)].

In **Ceylon Transport Board v. Wijeratne** (supra), it was also held that,

“The amount however should not mechanically be calculated on the basis of the salary he would have earned till he reached the age of superannuation and should seldom if not never exceed a maximum of three years' salary.”

The sum total of the judgments aforesaid makes it clear that there is no fixed formula, but the following, inter alia, may be considered as guidelines, based on the circumstances of each case:

- a) the nature of the employer's business and his capacity to pay;

- b) employee's age;
- c) nature of employment;
- d) length of service and seniority;
- e) present or the last salary drawn;
- f) future prospects and opportunities of obtaining similar or alternate employment;
- g) the past conduct and circumstances under which the termination took place;
- h) nature of the charge, if any, and extent to which the employee's action was blameworthy;
- i) future pension or prospects of terminal benefits;
- j) actual loss of earnings due to the termination and dismissal;
- k) should not be mechanically computed based on the last drawn salary or the age of retirement; and
- l) should seldom exceed 3 years.

To my mind, constructive termination of employment is different and distinct from direct termination by the employer. In the former, due to the circumstances created by the employer, the work environment is made intolerable, and the employee finds it unbearable or not possible to continue in employment, as the work environment is no longer conducive. This may be either denial of material or financial benefits or denial of the status or causing physical inconvenience or mental distress that prevents or precludes the employee from peacefully engaging in his normal employment with dignity. There should be proven repudiatory conduct of the employer. The employee thus jettisons his employment. If the circumstances in fact sufficiently justify the repudiation by the employee and it is attributable to the conduct of the employer, then it is termination of a constructive nature. If the circumstances alleged in fact does not justify the repudiation, then it would amount to vacation of post or resignation and not wrongful termination.

In **Western Excavating (ECC) Ltd v. Sharp** [1978] ICR 221, the UK Court of Appeal established that “constructive dismissal” (or constructive termination) arises only where the employer has committed a fundamental or repudiatory breach of the employment contract, entitling the employee to treat the contract as terminated. Rejecting a broader test, named the “Unreasonableness Test”, based merely on the employer's unreasonable conduct, Lord Denning M.R. applied the “Contract Test” and held that the statutory phrase requiring circumstances in which the employee is entitled to terminate the contract without notice invokes established principles of contract law, as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

Accordingly, it was held that constructive dismissal occurs where the employer's conduct either goes to the root of the contract or demonstrates an intention no longer to be bound by its essential terms, and the employee resigns in response to that breach. Applying these principles, the Court held that Mr. Sharp had not been constructively dismissed because his employer had committed no contractual breach; rather, he resigned due to his personal financial difficulties after being refused a loan and an advance on holiday pay. Thus, his resignation could not be attributed to any repudiatory conduct by the employer.

Constructive termination may be brought about by the employer by one or more of the following acts:

- a) transfer or change of designation which would be lower in the hierarchy in the structure of employment of that organisation;
- b) the reduction of the salary or emoluments;
- c) change of the environment of employment;
- d) change of the conditions of employment; and
- e) acts of intentional harassment, physical or mental, to make continued employment unpleasant and unbearable.

The above are just a few examples and not exhaustive. A multiplicity of factors may give rise to and suffice to establish constructive termination, and it is for the Labour Tribunal president to consider and evaluate such circumstances and determine if the conditions created the intolerable work environment that compelled the employee to repudiate and determine his employment. If the Labour Tribunal president is so satisfied, constructive termination may be upheld; then compensation should be separately evaluated and quantified.

As to the quantification in the present application, there was admittedly no reduction of the salary or emoluments. The only allegation is that there was a reduction in the bonus payment at the end of the year. The evidence clearly establishes that during that era (in 2004), due to the withdrawal of the quota system, the garment industry had to face certain financial difficulties, and this affected the profitability of the industry. It is for this reason that there have been reductions of bonuses paid across the board to all employees, and some in the senior management have even foregone their entitlement to a bonus. In these circumstances, the reduction of the bonus payment would not constitute the reduction of salary or emoluments. In any event, the bonus is paid at the discretion of the employer, and 'bonus' connotes an incentive payment for past satisfactory performance of the employee in generating profits for the employer. Apart from this, the Employee-Applicant, during cross-examination, has clearly

admitted that there was no reduction of the salary, the employees who served under her were increased after the transfer, her conditions of service and infrastructure were better, and in fact, she received all the benefits and more than what she had before. She also admitted that her transport facility continued as it was. If at all, she only asserted that by virtue of the transfer her position had been downgraded from Senior Manager-Personal to Manager-Stores. It is solely on this basis that the High Court found that her services were constructively terminated. The relevant portion of the Applicant's evidence is as follows:

“ප්‍ර: ඒ-08 ලේඛනය ඉල්ලුම්කාරියට පෙන්වා සිටී. තමුන් ඒ-07 ලිපියට ආයතනයෙන් දැනුම් දීල තිබෙනවා. තමුන් කියන වොදනා පලිගන්නේ නෑ. දිගටම වැඩ කරගෙන යන්න කියල තමුන්ට 2004.12.07 වැනිද ලිපියක් එව්ව නේද?”

උ: ඔව්.

ප්‍ර: ඒ ලිපියෙන් කියල තිබෙනවා නේද ගබඩා කළමනාකරුවෙකුට ගෙවන පඩිය රු.19,500/- යක් කියල.

උ: ඔව්.

ප්‍ර: ඒ අනුව තමුන්ගේ පඩිය සත්‍යයෙන් හරි අඩු කළාද?

උ: නැහැ.

ප්‍ර: තමුන් යටතේ වැඩ කළ සේවක සේවිකාවන් තිබ්ව්ව ප්‍රමාණයට වඩා වැඩි වුනා නේද?

උ: ඔව්.

ප්‍ර: කලින් ලොකු ශාලාවක සේවය කළ තමුන්ට වායුසම්පීරනය කළ කාබරයක් ලබා දුන්න නේද?

උ: ඔව්.

ප්‍ර: තමුන්ට කම්පියුටරයක් හම්බ වුනා කිව්ව නේද?

උ: ඔව්.

ප්‍ර: තමුන්ට ලැබ්ව්ව ප්‍රතිලාභ ඔක්කොම දුන්න නේද?

උ: ඔව්.

ප්‍ර: තමුන්ට ගමනා ගමන පහසුකම් සහ තමුන්ට දුන්න කිසිම ප්‍රතිලාභයක් අයින් කළේ නෑ නේද?

උ: නැහැ.

ප්‍ර: ඒ අනුව ද තමුන් කියන්නේ ගබඩා කළමනාකාරුගේ තනතුර පහත දැමීමක් කියලද?

උ: ඒ වෙලාවේ විතරක් නොවෙයි අදටත් මම විශ්වාස කරනවා.

ප්‍ර: ඒ විශ්වාසය මත ඉදගෙන තමයි තමුන් ද්වේශසහගත ලෙස සේවයෙන් අයිත් කළා කියන්නේ.

උ: ඔව්.

ප්‍ර: ඒ පදනමේ ඉඳලා තමයි තමුන් එහෙම තීරණය කළේ.

උ: ඔව්.

ප්‍ර: තමුන් කියා සිටින්නේ එම මාරුව තමුන්ට නිරිහැර කිරීමට, සුරාකෑමටත්, තත්ත්වය පහත හෙළීමටත්, තමුන්ගේ ජීවිතය තුවාල තත්ත්වයට පත් කිරීම සඳහා කරුණු ලැබූ ක්‍රියාවක් කියලා.

උ: ඔව්.

ප්‍ර: තමුන්ට කලින් දුන්න පඩිය සත්‍යයක්වත් අඩු කරල නෑ නේද?

උ: ඔව්.”

The learned High Court Judge upheld the termination on the singular basis of the reduction of status. It is common ground and admitted that the salary of Manager-Stores is approximately Rs. 19,500.00, whereas the salary of Senior Manager-Personal was approximately Rs. 26,500.00. Based on the salary scales, it was found that there was a demotion and downgrading of the Applicant's status, though, in fact the Applicant was paid Rs. 26,500. It is in evidence and is common ground that the employer continuously offered employment on the same salary scale. Even after the Labour Tribunal proceedings commenced, the employer has continued to maintain the same position and informed the Labour Tribunal on 08.06.2005 that the employer is willing to offer employment and permit her to continue with her employment. It was the Applicant who was not willing to be so employed.

It is also relevant to note that in an application to the Labour Tribunal, it appeared that she had only sought compensation and not reinstatement. This clearly indicated that the Applicant had no desire to continue with her employment, and it was her own decision that resulted in determining the employment. To my mind, even if there be constructive termination, the conduct of the employee does not justify or warrant the awarding of compensation for a period of 30 months, as determined by the learned High Court Judge. I say so for the reason that the evidence does not establish such extreme or intolerable

conditions which made it impossible or totally unpleasant for the Applicant to continue with her employment. Admittedly, there was no reduction of salary or emoluments or other benefits. The employer has consistently offered her employment.

In this backdrop, the Applicant has unilaterally determined her employment. Even if it were justified, yet for all it was the duty and obligation of the Applicant to have sought for and obtained alternate employment immediately after the determination of her employment. She should have made an effort, and if she was unable to obtain employment and mitigate the loss. The burden was on the Applicant to establish the inability to find employment on equal benefits. In the absence of this specific information and evidence, the employer cannot be blamed or held responsible for the total loss of income, especially when the employer has continuously offered her employment on the same salary scale.

Accordingly, I find that the 30-month salary awarded as compensation is not just and equitable. If at all, the Applicant is entitled to some nominal compensation, which should be 12 months' salary, amounting to Rs. 318,000.00 (Rs. 26,500.00 x 12). Accordingly, the compensation awarded is varied; subject to this variation, the appeal is dismissed.

JUDGE OF THE SUPREME COURT