**ANDERSON**

**v.**

**HUSNY**

SUPREME COURT
FERNANDO, J.
DHEERARATNE, J. AND
GUNASEKERA, J.
SC APPEAL NO. 24/2000
HC CASE NO. HCRA 1387/99
LT CASE NO. 13/1937/97
1ST DECEMBER, 2000

*Industrial dispute - Employment on annual contract - Termination of service without extention - Imposition of probation after some time - Employer's claim that the employment was probationary at termination - Failure of the workman to admit or deny probationary employment - Burden to begin adducing evidence to establish unjustifiable termination.*

The applicant workman (the applicant) was employed by the appellant - employer (the employer) from 1993 to 1997 on annual contracts renewable entirely at the discretion of the employer. In 1997 the employer informed the applicant in writing that he was placed on probation for a period of 3 months for evaluation of his performance of the specific duties assigned to him, scheduled to end on 30.9.1997. That period was extended until 31.10.1997 as the applicant was alleged to have delayed in completing the work assigned to him. By letter dated 6.10.1997 the employer terminated the applicant's services on the ground that he had failed to show progress in his performance.

Before the Labour Tribunal, the employer filed answer *inter alia*, stating that the applicant had failed to comply with instructions given while he was on probation and since no improvement was shown his services were terminated.

The applicant in his replication neither admitted nor denied the employer's averments that he had been placed on probation, which he had accepted, nor did he dispute the receipt, authenticity or contents of the supporting documents produced.

**Held :**

1. Upon proof that termination took place during probation, the burden is on the employee to establish unjustifiable termination, and the employee must establish at least a *prima facie* case of *mala fide* before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified.

2. The question before the Labour Tribunal at the commencement of proceedings was not whether the employer could impose probation after four successive annual contracts but a limited question, viz., who should begin on the available material, subject to a decision at the end of the case, whether or not the imposition of probation was justified. The applicant would have failed if neither party adduced evidence. Therefore, the burden was on the applicant to begin.

*Per* Fernando, J.

> "While it is true that the Tribunal is not bound by the Evidence Ordinance, that enactment contains certain basic principles of justice and fairness relevant to adjudication by any tribunal. One common principle is found in section 102, that the burden of proof lies on that person who would fail if no evidence at all were given on either side. There is no good reason for departing from that principle."

**Case refered to :**

1. *State Distilleries Corporation v. Rupasinghe* (1994)2 SRI LR 395

**APPEAL** from the judgement of the High Court

*G.T. Alagaratnam* with *M. Adamally* and *R. Anthony* for the employer - appellant

*S.N. Vijithsingh* for the applicant-respondent.

*Cur. adv. vult.*

February 12, 2001
**FERNANDO, J.**

The question of law which I have to decide in this appeal is whether in the Labour Tribunal the burden lies on an applicant

to begin and lead evidence where he has failed to deny the employer's plea (in the answer) that he was dismissed while on probation.

The Applicant-Respondent-Respondent "(the Applicant)" applied to the Labour Tribunal on 22.10.97, averring that he had been employed by the Employer-Petitioner-Appellant "(the Employer)" as a "Grants Programme Accounts Specialist" from 1.7.93. and that his services had been wrongfully terminated by letter dated 6.10.97.

By his answer dated 21.11.97 the Employer pleaded that the Applicant had been employed on successive yearly contracts. Seven documents were annexed to the answer.

(a) The first was a detailed contract dated 26.6.93 signed by both parties, effective 1.7.93, which stated:

> "The post will be on a yearly renewable contract basis and such renewal will solely depend on the satisfactory performance of the duties entrusted to you."

(b) This was followed by another (undated) detailed contract, also signed by parties, which provided:

> "your appointment is for a period of one year from 1.7.94 and shall automatically terminate on 30.6.95 unless sooner determined . . . or renewed for a further period . . . Such renewal is entirely at the discretion of the (Employer) and unless so renewed . . . your employment . . . will terminate on 30.6.95."

(c) After that the Employer issued two renewal letters dated 1.7.95 and 1.7.96. each extending the contract for a further period of one year, "all other terms and conditions mentioned in the said contract (remaining) unchanged."

(d) Thereafter the Employer informed the Applicant by letter dated 17.7.97:

". . . you will be placed on a probation period of 3 months effective 1.7.97 - 30. 9.97 to enable the Management to evaluate the improvement in the performance of the specific duties assigned to you in your capacity as Grants Programme Accounts Specialist.

Depending on your performance during the probation period, it would be decided whether your employment contract should be extended for a further period of one year.

This, it was averred, was "due to poor performance and refusal to perform duties assigned" to him.

(e) Finally, on 30.9.97 the Employer wrote:

"Your probation period is scheduled to end on 30.9.97. However, I must extend your probation period one more month until 31.10.97. The reason for this extension is that you have not yet completed the reconciliation of the grant disbursement data. Part of the delay is due to illness and your computer breakdown. However, we must have the grant disbursement data reconciled and completely reviewed before we can review your probationary status. One more month should be sufficient for this."

Less than a week later, by letter dated 6.10.97 the Employer terminated the Applicant's services, with one month's salary in lieu of notice, giving as the reason that:

". . . you have failed to show progress in your performance during the probation period and have also refused to adhere to instructions and requests made by the Management pertaining to your work performance."

On 11.2.98 the Employer filed a further answer, averring that:

"Since the Applicant's performance and attitude to work was unsatisfactory, he was issued another contact but was offered work on probationary basis on 1.7.97 which he

accepted, and his initial period of three months probation was extended by a further month as his performance during probation had not improved and because he had failed on numerous occasions to carry out instructions given to him."

While the Applicant was on probation, and since no improvement was seen in his performance and/or conduct, his services at the project were terminated by letter dated 6.10.97"

The Applicant filed a replication dated 12.2.98. He referred to one matter extraneous to the present dispute, but failed *either* to deny the Employer's averments that he had been placed on probation (and the reasons therefor) which he had accepted, and that he had been terminated during probation, or to dispute the receipt, the authenticity *or* the contents of any of the documents produced. No application was made to amend that replication.

When the application was taken up for inquiry the Tribunal had to decide which party should begin. The President observed that the Employer's plea that the Applicant was a probationer "goes to the root of jurisdiction of the Labour Tribunal" and "challenges the jurisdiction of the Labour Tribunal;" that "this question of probation (was) a mixed question of fact and law;" that the factual position could be determined only after the witnesses gave evidence; and that therefore he was not inclined to accept the position of either party as to the status of the Applicant. Having regard to section 31C(1) of the Industrial Disputes Act - which provides that "it shall be the duty of the Tribunal to make all such inquiries into (an) application and hear all such evidence as the Tribunal may consider necessary" he held that the Employer must begin and lead evidence.

The Employer filed an appeal as well as an application in revision in the High Court of the Western Province. The parties agreed that the order made in the revision application would apply to both proceedings.

The High Court held that what was averred by the Employer "are facts that should be considered after an inquiry on whatsoever the material that is placed before the Tribunal. The real question that arises. . . is as to who should begin." That was a matter of procedure, and was therefore governed by section 31C(2), which empowered a Labour Tribunal to lay down the procedure to be observed by it in the conduct of an inquiry. Citing section 31C(1) too, the High Court affirmed the order of the Labour Tribunal.

In the course of the proceedings in the High Court, the Applicant produced certain documents which could have been, but were not, produced in the Labour Tribunal. I have not taken those into consideration in deciding this appeal because the correctness of the Labour Tribunal order must be determined in the light of the material which was available to it.

This Court granted special leave to appeal on the question "whether the learned judge of the High Court was in error in over looking the fact that the (Applicant) was a probationer in deciding whether the procedure adopted by the President of the Labour Tribunal was appropriate in the circumstances."

Although in the past the view has sometimes been expressed that an employer had an unfettered right to dismiss a probationer, almost at will, the better view is that even a probationer can challenge his dismissal, albeit on limited grounds. Many of the previous decisions were reviewed by me in *State Distilleries Corporation v. Rupasinghe*,[1] where I observed:

> "What then is the principal difference between confirmed and probationary employment? In the former, the burden lies on the employer to justify termination; and he must do so by reference to objective standards. In the latter, upon proof that termination took place during probation, the burden is on the employee to establish unjustifiable termination, and the employee must establish at least a

*prima facie* case of *mala fide* before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified."

Both Counsel agreed with those observations. Learned Counsel for the Applicant conceded that if an Employee admitted that he was dismissed while on probation, then the burden would be on him to begin. Learned Counsel for the Employer conceded that if an Applicant denied probation, the Employer would have to begin. However, in this case there was no express admission or denial of probation.

It was contended for the Employer that since the Applicant had failed (in his replication) to deny probation, he must be deemed to have admitted probation. Accordingly, the burden was on him to begin and lead evidence.

That position was strenuously disputed by Counsel for the Applicant. He made two distinct submissions. Firstly, he cited two decisions (in actions filed under the Civil Procedure Code) where it was held that the failure to file a replication could not be construed as an admission of averments in the answer. Secondly, he argued that a probationary clause could not have been introduced (a) after the Applicant had worked for four years, and (b) because by permitting the Applicant to work for seventeen days after the expiration of the fourth contract, his contract had already been impliedly renewed for another year without a probationary clause.

The Industrial Disputes Regulations provide for an applicant to file a response to the Employer's answer. While I agree that, in general, the failure to file a replication in the Labour Tribunal, ought not to be treated as an admission of averments in the answer, the position would be different where a replication *was* filed without denying relevant averments. Although strict rules of pleading do not apply in Labour Tribunal proceedings, pleadings are necessary, and do serve an important purpose - to identify the matters really in issue between the parties, thus

enabling, on the one hand, each party to know with a reasonable degree of certainty the case which he has to meet, and, on the other hand, the Tribunal to inquire into the real dispute without unnecessary delay, inconvenience and expense.

As for the Applicant's second submission, it is true that the imposition of a probationary period after four successive annual contracts was most unusual. However, it is not inconceivable that the factual situation might have justified probation as an alternative to non-renewal or dismissal. While it is possible that, at the end of the case, after hearing all the evidence, the Tribunal may uphold that submission, it is not proper to rule on it at the outset.

The question which I have to decide is not whether the Applicant was indeed a probationer - because of a binding admission as to probation, or upon an interpretation of the documents produced, or for some other reason - but a much more limited one: who should begin? (And, I must add, that is a question which does not affect the jurisdiction of the Tribunal).

Undoubtedly, sections 31(C)(1) and(2) do give the Tribunal some discretion as to procedure. However, that discretion must be exercised not arbitrarily, but reasonably, with some degree of uniformity, and in a principled manner: with the overriding objective of ensuring a fair and expeditious inquiry. While it is true that the Tribunal is not bound by the Evidence Ordinance, that enactment contains certain basic principles of justice and fairness relevant to adjudication by any tribunal. One common sense principle is found in section 102: that the burden of proof lies on that person who would fail if no evidence at all were given on either side. There was no good reason for departing from that principle.

Let me add that that principle is the foundation of the *cursus curiae* in the Labour Tribunal where termination (of confirmed employment) is not admitted. In such cases the applicant must begin. Why? Because if no evidence at all were given on either

side, on the material available to the Tribunal, it is the applicant who would fail.

When the Tribunal was called upon to give its ruling in this case, it was faced with the Employer's uncontradicted averments as to dismissal during probation, as well as documents to the same effect, whose authenticity and contents had not been questioned. If neither party had then adduced evidence, the Tribunal could not have held - on the then available material - that the Applicant was not on probation when dismissed, or that *prima facie* the dismissal was *mala fide*. Accordngly, the Applicant would have failed. Therefore, the burden was on him to begin, and the Labour Tribunal and the High Court should have so ruled.

I therefore allow the appeal, and set aside the orders of the Labour Tribunal and the High Court. The Applicant will begin and lead evidence. The parties will bear their own costs.

**DHEERARATNE, J.** - I agree.

**GUNASEKERA, J.** - I agree.

*Appeal allowed.*