M/s. MOOSAJEES LIMITED

v.

RASIAH

COURT OF APPEAL.
MOONEMALLE, J. AND BANDARANAYAKE, J.
C.A. 131/82.
L.T. No. 2/13167/80.
NOVEMBER 20, 1985.

Industrial Disputes Act – S. 31B(1) – Termination of services of probationer within the probationary period.

A probationer has no right to be confirmed in his post and the employer is not bound to give any reason as to why he does not confirm the probationer. The employer is the sole judge to decide whether the services of a probationer are satisfactory or not. The employer is not bound to show good cause where he terminates the services of a probationer at the end of the term of probation or even before the expiry of that period. The tribunal cannot sit in judgment over the decision of the employer. It can examine the grounds of termination only for the purpose of finding out whether the employer had acted mala fide in doing so.

Cases referred to:

(1) *Richard Peiris & Co., Ltd. v. Jayatunga – C. A. 404/80, C. A. Minutes of 9.9.1982.*
(2) *Venkatacharya v. Mysore Sugar Co., Ltd. – High Court Mysore Decisions (1956).*
(3) *Caltex India Ltd. v. Second Industrial Tribunal – High Court, Calutta (1963) L.L.J. 156.*
(4) *Upper Ganges Valley Electricity Co., Ltd. V. Their Workmen – Cited in W. E. M. Abeysekera: Industrial Law and Adjudication, Vol. 2, p. 686.*

APPEAL from judgment of the Labour Tribunal.

D. R. P. Goonetilleke with *G. D. D. Piyasiri* for respondent-appellant.

Motilal Nehru for applicant-respondent.

Cur. adv. vult.

January 17, 1986.

MOONEMALLE, J.

The applicant was appointed Assistant Manager, Exports in the employer respondent's company on 1st November 1979 on six months probation. The letter of appointment is marked R1. He

assumed duties on 16th November 1979. The employer respondent terminated his services after four months probation with effect from 13th March 1979, as his service with the Company was totally unsatisfactory and far below the standard required, and his standard of correspondence in English was unsatisfactory.

The applicant made an application to the Labour Tribunal praying for inter alia reinstatement with back wages and compensation for loss of career resulting from unjust termination.

The learned President by his order dated 3rd February 1982 held that the services of the applicant had been terminated without good cause and ordered the respondent to deposit the sum of Rs. 15,000 (one year's salary at Rs. 1,250 per month) with the Assistant Commissioner of Labour, Colombo South in favour of the applicant. This appeal is from that order.

Learned counsel for the respondent-appellant submitted that a Labour Tribunal could give a probationer relief on the ground of unjust termination only if he establishes that his services were terminated mala fide. He submitted that the employer need not show good cause for the probationer's termination. He cited in support the judgment of Abdul Cader, J. in the unreported case of *Richard Peiris and Co., Ltd. v. Jayatunga* (1). He submitted that the finding of the learned President that the services of the applicant-respondent could not be terminated before the expiry of his probationary period without assigning justifiable reasons is wrong in law.

Learned counsel for the applicant respondent submitted that as termination has been admitted in this case, the burden was on the respondent-appellant to establish that the termination was just and lawful. He submitted that the judgment of Abdul Cader, J. in *Richard Peiris & Co., Ltd. v. Jayatunga (supra)* is not applicable to this case. He submitted that it is the duty of the Tribunal when an application is made under section 31 (B) (1) of the Industrial Disputes Act to make all inquiries and hear evidence and then make a just and equitable order. He further submitted that the learned President was correct in arriving at the finding that the termination of the services of the applicant-respondent was for no good cause and that his findings were based on pure questions of fact.

In the case of *Richard Peiris and Co., Ltd. v. Jayatunga (supra)* the applicant was employed on a period of probation for one year and his services were terminated 15 days before the expiration of the stipulated period of one year. He applied to the Labour Tribunal for relief on the ground that the termination was not justified as the termination of the services had been done without due cause, reason or excuse. The learned President held that the termination of the services of the applicant before the entire probationary period was completed was not justified and ordered the respondent to pay the applicant one year's salary as compensation.

The question that arose for decision in that case was whether the employer could have terminated the services of the applicant before the expiration of the full period of probation, and if the employer did so, whether the employer should show sufficient cause for that course of action. Abdul Cader, J. did not express an opinion as regards the Indian authorities cited as it was conceded that the determination should be for relevant reasons and not on arbitrary grounds, and if the reasons given are irrelevant then mala fides can be inferred, in which event the workman may be entitled to compensation.

However, Abdul Cader, J. held in that case that any employer should have the right to discontinue a probationer if he does not come up to the expectations of the employer. He further held that in the circumstances of that case as there was no mala fides on the part of the employer and as the applicant had not come up to expectations of the employer, the employer did no wrong in discontinuing the services of the applicant.

In the case of *Venkatacharya v. Mysore Sugar Co., Ltd.* (2), the question arose whether a period of probation for one year could be cut short by the exercise of the employer's option to terminate the services before the expiration of the specified period of one year Venkataramaya, J. stated:

> "If as urged for the plaintiff the expression 'on probation for one year' entitles him to be employed for one year, irrespective of the wishes of the defendant, the words 'on probation' will be supefluous and meaningless. Such a construction will perhaps place him even in a better position than a person appointed without that condition though ordinarily the absence of the condition implies that the appointment is permanent in the sense of not being liable to be brought to an end by the will of the employer "

"Obviously a probationer is not in the same position as others in service. He is in a state of suspense with the uncertainty of an inchoate arrangement. Prima facie his rights and claims against the employer are less than those of others. Probation cannot be taken to bind the parties to be employer and employee till it is over and confer on the employee rights not available to others. That would be contrary to the accepted notions of service as 'probation' is understood to be a stage preparatory and prior to confirmation. It is not disputed that the services of a person on probation can be dispensed with on grounds on which a person appointed without it can be dismissed. While the two to that extent are on a par it is more reasonable to imply a disability or disadvantage for a 'probationer' than a privilege as against one who is not in probation. The period denotes the time up to which he will be on trial and not an assured duration of services. The plaintiff, it is conceded, could not have complained against the termination of services at the end of one year."

In *Caltex India Ltd. v. Second Industrial Tribunal* (3) the order of the Tribunal that the employer had not acted in good faith and had not shown real or genuine cause for termination of services of the workman, was set aside. It was stated in the judgment of the High Court:

"Whether a probationer had put in satisfactory service or not rests with the satisfaction of the petitioner company. That satisfaction cannot be objectively tested and an employer is not bound to give any reason if he does not confirm a probationer on the expiry of the period of probationship."

A probationer has no right to be confirmed in the post and an employer is not liable to give any reason as to why he does not confirm the probationer.

The test to be applied in a case where claim is made for reinstatement of a probationer appears in the case of *Upper Ganges Valley Electricity Co., Ltd. v. Their Workmen* (4) as referred to in Industrial Law and Adjudication, Vol. 2, page 686 by Abeysekera which states as follows:

"We think that apart from the cases of victimisation, the Management is the sole judge to decide whether the services of a probationer are satisfactory or not. The tribunal in our opinion

cannot sit in judgment over the decision of the Management in the matter of confirmation, where the Management in not confirming him is not actuated by motives of victimisation or other ulterior motives."

Having considered these decisions, I am of the view that a probationer has no right to be confirmed in his post and the employer is not bound to give any reason as to why he does not confirm the probationer. The period of probation is a period of trial, during which, the probationer's capacity, conduct or character is tested before he is admitted to regular employment. For the purpose of confirmation, the petitioner must perform his services to the satisfaction of his employer. The employer, therefore, is the sole judge to decide whether the services of a probationer are satisfactory or not. Thus, the employer is not bound to show good cause where he terminates the services of a probationer at the end of the term of probation or even before the expiry of that period. If the employer could terminate the services of a probationer at the expiry of the term without showing good cause, I do not see why good cause should be shown where he terminates the services of the probationer during the period of probation. The tribunal cannot sit in judgment over the decision of the employer in either instance. It can examine the grounds for termination only for the purpose of finding out whether the employer had acted mala fide in doing so.

In the instant case, the respondent appellant had terminated the services of the applicant respondent as his performance of work was unsatisfactory and fell below the standard required in the respondent appellant's Export Department. The learned President has erred in arriving at the finding that the services of the applicant respondent could not be terminated before the expiry of his period of probation without the respondent-appellant assigning justifiable reasons. The respondent appellant was not bound to give any reasons for the termination of the services of the applicant-respondent and the Tribunal could not sit in judgment over the decision of the respondent appellant. The Tribunal could have examined the grounds for termination only for the purpose of finding out whether the respondent appellant had acted mala fides in doing so. In the present case, there has been no allegation of mala fide on the part of the respondent appellant. The learned President has then not considered the fact that the respondent-appellant has acted in good faith in terminating the services of the the applicant-respondent. In the absence of mala fides

on the part of the respondent-appellant, no reinstatement or payment of compensation for loss of career would arise. In any event, the learned President's finding that the services of the applicant-respondent had been terminated without good cause is untenable. The learned President was of the view that the reasons given for the termination of the services of the applicant-respondent are far too trivial to be considered as being sufficient for the termination.

The nature of the duties entrusted to the applicant-respondent was that he had to do day to day shipping and to attend to freight matters connected with the export orders and register them in the contract book and then follow the order in consultation with the factory, and see that the order is executed during the correct period. Witness H. A. David, the shipping manager of the appellant-company stated that the applicant-respondent was not familiar with freight calculations. He pointed out that he had asked the applicant-respondent to calculate the freight in contract No. 479 and that he had made mistakes and entered the wrong freight in the contract book (R2).

Then in contracts numbers 481 and 487 the applicant-respondent had given freight miscalculations which had to be corrected. Then in contract No. 478 he had misspelt the Port Lehavre, which is a principal Port in France, as Alehavra. Witness David stated that if there is a mistake in a contract, the respondent-appellant would be charged for defrauding the contract by the buyer. Thus, these mistakes cannot be described as too trivial for termination of services of a probationer. The applicant-respondent no doubt had attended to 41 contracts but it is fortunate that these mistakes had been detected and corrected, before the contracts were finalised. Witness David also stated that he brought these mistakes to the notice of the applicant-respondent and had verbally warned him several times but there had been no marked improvement in his work. The learned President erred in his finding that a warning should be given in writing to a workman who is found wanting in his work. There is no law which requires that an employee should be forewarned in writing so that he may adjust himself to the requirements of his service. The learned president also erred in his finding that as the applicant-respondent was a graduate in commerce and witness David had only a G.C.E. qualification that he did not think that witness David was in a position to make a pronouncement on the knowledge of English of the applicant-respondent. In today's context, a G.C.E qualified person may very well be more conversant and knowledgable in English than the holder of a commerce degree.

I hold that as there has been no mala fides on the part of the respondent-appellant, and as the applicant-respondent was not putting in satisfactory service to the satisfaction of the respondent-appellant, no wrong has been done by the respondent-appellant in terminating the services of the applicant-respondent. I set aside the order of the learned President and I allow the appeal without costs.

BANDARANAYAKE, J. – I agree.

Appeal allowed.