JAYASURIYA
v.
SRI LANKA STATE PLANTATIONS CORPORATION

SUPREME COURT.
DR. AMERASINGHE, J.
DHEERARATNE, J.
WADUGODAPITIYA, J.
S.C. APPEAL NO. 9/89
S.C. SPE. LA NO. 215/88
C.A. NO. 449/83
L.T. NO. 10/4032/32
MAY 06, 1991.

Industrial Disputes – Rules of the Supreme Court, Rule 35 – Failure to comply with Rule 35 – Industrial Disputes Act No. 43 of 1950 S. 31D – Question of Law – Meaning of "perverse" – Circumstances when compensation rather than reinstatement will be awarded for wrongful termination – Calculation of compensation – Determining the multiplier.

The written submissions of the respondent required to be filed in 30 days by Rule 35 of the Rules of the Supreme Court were delayed and the excuse given was that the Counsel concerned generally practised in the outstations and had periodically fallen ill. The petitioner (Jayasuriya) was a planter and employed by the Respondent (Sri Lanka State Plantations Corporation) as Superintendent of Blackwater State Plantation, Ginigathena. Ten charges were framed against him and he was found guilty of charges 1, 2, 3, 4, 5, 6, 7 and 10 and dismissed with effect from 03 February 1981. On 10 April 1981 petitioner applied to the Labour Tribunal for re-instatement with back wages and/or compensation for wrongful dismissal. The respondent took up the position that petitioner's services were terminated for gross misconduct and mismanagement and that in any event the respondent had lost confidence in him. Before the Tribunal six of the 10 charges were given up from time to time and only four charges were relied on by the respondent: viz double payments, employment of excess labour, replacement of tyres, and questionable conduct (interference with the estate administration) of his wife. The President of the Labour Tribunal held that these four charges had been established and that the dismissal was justified as the acts established involved moral turpitude/(gross misconduct) and mismanagement. In appeal the Court of Appeal held that the charge in respect of the misuse of labour had not been proved but declined to go further and dismissed the appeal and affirmed the decision of the Tribunal. On appeal to the Supreme Court.

Held:

1. Respondent's excuse for delay to file the written submissions in compliance with Rule 35 of the Rules of the Supreme Court was inexcusable and he could not be heard.

2. In the context of the principle that the Court of Appeal will not interfere with a decision of a Labour Tribunal unless it is "perverse" it means no more that the court may intervene if it is of the view that, having regard to the weight of evidence in relation to the matters in issue, the Tribunal has turned away arbitrarily or capriciously from what is true and right and fair in dealing even-handedly with the rights and interests of the workman, employer and, in certain circumstances, the public. The Tribunal must make an order in equity and good conscience, acting judicially, based on legal evidence rather than on beliefs that are fanciful or irrationally imagined notions or whims. Due account must be taken of the evidence in relation to the issues in the matter before the Tribunal. Otherwise, the order of the Tribunal must be set aside as being perverse.

3. The Industrial Disputes Act No. 43 of 1950 S. 31D states that the order of a Labour Tribunal shall be final and shall not be called in question in any court except on a question of law. While appellate courts will not intervene with pure findings of fact, they will review the findings treating them as a question of law: if it appears that the Tribunal has made a finding wholly unsupported by evidence, or which is inconsistent with the evidence and contradictory of it; or where the Tribunal has failed to consider material and relevant evidence; or where it has failed to decide a material question or misconstrued the question at issue and had directed its attention to the wrong matters; or where there was an erroneous misconception amounting to a misdirection; or where it failed to consider material documents or misconstrued them or where the Tribunal has failed to consider the version of one party or his evidence; or erroneously supposed there was no evidence.

The Supreme Court, in terms of the Constitution, has wide appellate powers with regard to what is meant by a question of law.

Where the Court of Appeal fails to evaluate the recorded evidence but merely endorses the findings of the Tribunal, the Supreme Court will set aside the decision not because the Court of Appeal has been unwilling to substitute its own view of the facts for that of the Tribunal but because it has failed to evaluate the evidence so as to decide whether the Order of the Tribunal was, in the established circumstances of the case, just and equitable.

4(a). When the double payments had been made mistakenly and not fraudulently a finding that there was moral turpitude (gross mismanagement) is not justified. Transgressing Circular instructions was explained by the petitioner. Payments had been made only after computation by the Assistant Clerk and verified by the

Chief Clerk who had assured the petitioner that the Circular instructions had been complied with. The loss caused to the Corporation was fully recovered. The Court of Appeal and the President were in error both with regard to the question at issue, namely whether the Petitioner had caused a loss and the relation of the evidence to that charge.

(b) In regard to the purchase of 11 tyres the charge was not that the purchases had caused a loss to the respondent but that petitioner was guilty of making unjustifiable purchases from improper sources and failure to enter or cause to be entered the fact of the purchases in the stock book of the Plantation. There was no evidence to justify the conclusion that the petitioner had caused a loss to the respondent by his negligence. The reasons for the excessive wastage which necessitated the purchases had been established and clearly showed an absence of any culpability on his part.

(c). The evidence did not support the inference that the petitioner's wife interfered with the management of the plantation. Nor was there satisfactory evidence to link the petitioner with the alleged acts of interference. The alleged acts related to the petitioner's household and not to the plantation – an important distinction that was overlooked.

The order of the President of the Labour Tribunal was perverse and not just and equitable. The Court of Appeal failed to evaluate the evidence on record.

5. Even where the dismissal is unlawful, reinstatement will not invariably be ordered where it is not expedient or where there are unusual features. In such event an award of compensation instead of reinstatement will meet the ends of justice. Considering the petitioner's uneasy relationship with the Trade Unions and the likelihood of industrial strife if he is reinstated and the fact that the employer had alleged a lack of confidence in the petitioner, compensation rather than reinstatement would be the appropriate remedy.

6. 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.

While the expressed loss, in global terms of years of salary may in certain cases coincide with losses reckoned and counted and settled by reference to the relevant heads and principles of determining compensation, it is preferable to have a computation which is expressly shown to relate to specific heads and items of loss. It is not satisfactory to simply say that a certain amount is just and

equitable. There must be a stated basis for the computation taking the award beyond the realm of mere assurance of fairness.

For a just and equitable verdict the reasons must be set out in order to enable the parties to appreciate how just and equitable the verdict is. Where no basis for the compensation awarded is given, the order is liable to be set aside. The matters to be considered should be:

1. There should be at least an approximate computation of immediate loss i.e. loss of wages and benefits from the date of dismissal up to the date of final Order or Judgment.

2. Prospective future loss. This is not continuing damages.

3. Loss of retirement benefits based as far as possible on a foundation of solid facts given to the Tribunal by the facts.

The essential question is the actual financial loss caused by the unfair dismissal because compensation is an indemnity for the loss. What should be considered is financial loss and not sentimental harm.

The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss.

Once the incurred losses have been computed any wages or benefits paid by the employer after the termination as well as remuneration from fresh employment must be deducted. If the employee had obtained equally beneficial or financially better alternative employment, he should receive no compensation at all for he suffers no loss.

When the petitioner after his dismissal remains unemployed the manner of his dismissal is a relevant consideration in considering the petitioner's loss. This is simply because the manner of dismissal may be tied to pecuniary loss. It is not a punishment of the respondent for what he did.

Once the employee's past earnings and benefits have been ascertained they must be multiplied by the period from the date of the final Order or Judgment – the multiplier being fixed by answering the question for how many days, weeks, months, or years from the date of the Order or Judgment, as the case may be, could the Tribunal or Court reasonably expect the loss to continue. The usual date of retirement or extended date of retirement where it is probable could be adopted. The possibility of the balance period being reduced by death, closure of business, retrenchment, resignation to seek other employment could be taken into account only on express findings.

List of Cases Referred to:

1. *Samarawickreme v. Attorney-General* [1983] 1 Sri Kantha's Law Reports 47.
2. *Mylvaganam v. Reckitt & Colman* SC 154/87 – SC Minutes of 08.07.1987.
3. *Mendis v. Rajapakse* SC 49/88 – SC Minutes of 03.11.1981.
4. *Kiriwanthe and Wimalawathie v. Navaratne* SC Appeal No. 16/90 – SC Minutes of 16.10.1990.
5. *Coomasaru v. Leechman & Co.* SC 27/73 – SC Minutes of 26.05.1976.
6. *Caledonan (Ceylon) Tea and Rubber Estates Ltd. V. Hillman* (1977) 79(i) NLR 421, 436, 437, 438.
7. *Somawathie v. Baksons Textile Industries Ltd.* (1973) 79(1) NLR 204.
8. *Thevarayan v. Balakrishnan* [1984] 1 Sri LR 189.
9. *Nadarajah v. Thilagaratnam* (1986) 3 CALR 303.
10. *Ceylon Transport Board v. Gunasinghe* (1970) 72 NLR 76.
11. *Colombo Apothecaries Co. Ltd. v. Ceylon Press Workers Union* (1972) 75 NLR 182.
12. *Ceylon Oil Workers' Union v. Ceylon Petroleum Corporation* [1978-9] 2 Sri LR 72.
13. *Reckitt & Colman of Ceylon Ltd. v. Peiris* [1978-79] 2 Sri LR 229.
14. *United Industrial Local Government & General Workers' Union v. Independent Newspapers Ltd.* (1973) 75 NLR 529.
15. *Hayleys Ltd. v. De Silva* (1963) 64 NLR 130.
16. *Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya* (1964) 65 NLR 566.
17. *Virakesari Ltd. V. Fernando* (1965) 66 NLR 145.
18. *Carolis Appuhamy v. Punchirala* (1963) 64 NLR 44.
19. *Ceylon Workers' Congress v. Superintendent, Kallebokke Estate* (1962) 63 NLR 536.
20. *Ceylon Steel Corporation v. National Employees' Union* (1969) 76 CLW 64.
21. *Albert v. Veeraiatipillai* [1981] 1 Sri LR 110.
22. *Collettes Ltd. v. Bank of Ceylon* [1982] 2 Sri LR 514.
23. *Sithamparanathan v. People's Bank* [1986] 1 Sri LR 411 (CA) set aside in [1989] 1 Sri LR 124 (SC).
24. *Walker Sons & Co. Ltd. v. Fry* (1966) 68 NLR 73, 99.
25. *Municipal Council of Colombo v. Munasinghe* (1969) 71 NLR 223, 225.
26. *Brooke Bond (Ceylon) Ltd. v. Tea, Rubber, Coconut & General Produce Workers' Union* (1975) 77 NLR 6, 11.

27. *Urban Council Panadura v. Cooray* (1971) 75 NLR 236, 238.
28. *Ceylon Transport Board v. Thungadasa* (1971) 73 NLR 211.
29. *United Industrial Local Government & General Workers Union v. Independent Newspapers Ltd.* (1972) 75 NLR 529, 531.
30. *Ceylon Ceramics Corporation v. Weerasinghe* SC 24/76 – SC Minutes of 15 July 1978.
31. *Ceylon Workers' Congress v. Poonagala Group* SC 120/71 – SC Minutes of 28 November 1972.
32. *Glaxo Allenburys' (Ceylon) Ltd. v. Fernando* SC 250/71 – SC Minutes of 22 October 1974.
33. *Ceylon Transport Board v. Wijeratne* (1975) 77 NLR 481; 498-9.
34. *Belgama v. Co-operative Wholesale Establishment* SC 64 and 73/71 – SC Minutes of 13 December 1974.
35. *Central Transport Board v. Loku Banda* (1986) 2 Colombo Appellate Law Reports 339.
36. *The Governing Body of Educational Institutions founded by the Church Missionary Society in Ceylon, Ladies College v. Panuthevan Thuraimugam* – SC 222/73; SC Minutes of 22 January 1976.
37. *Cyril Anthony v. Ceylon Fisheries Corporation* SC 57/8; SC Minutes of 6 March 1986.
38. *Abeysundera v. Samel et al* SC 113 – 123/67; SC Minutes of 6 December 1968.
39. *Brooke Bond (Ceylon) Ltd. v. Tea, Rubber, Coconut and General Produce Workers' Union* (1975) 77 NLR 6.
40. *Adam's Peak Tea Estates Ltd. v. Duraisamy* SC 11/69 – SC Minutes of 26 October 1969.
41. *Woolcombers of India Ltd. v. Woolcombers Workers' Union* 1973 Labour & Industrial Cases of India p. 1613.
42. *Nanayakkara v. Hettiarachchi* (1971) 74 NLR 185.
43. *Henderson & Co. v. Wijetunga* SC 33/73; SC Minutes of 21 March 1975.
44. *Liyanage v. Weeraman* SC 235/72; SC Minutes of 31 January 1974.
45. *Nidahas Karmika Saha Velanda Vurthiya Samithiya v. The Continental Motors Ltd.* cited in Abeysekera's Industrial Law Vols 3 and 4 p. 1543.
46. *Raymond v. Ponnusamy* SC 57/69; SC Minutes of 10 December 1969.
47. *Silva v. Kuruppu* SC 182/69; SC Minutes of 14 October 1971.
48. *Associated Newspapers of Ceylon Ltd. v. Jayasinghe* [1982] 2 Sri LR 595, 600.
49. *Pathinayake v. Karmika Ha Samanya Kamkaru Samithiya* (1971) 74 NLR 237.
50. *Sri Lanka Asbestos Products Ltd. v. Tampoe* SC 142/73; S.C. Minutes of 5 November 1974.

51. *Associated Newspapers of Ceylon Ltd. v. Mervyn Perera* CA 391 and 393/79; Court of Appeal Minutes of 25 September 1981.
52. *Adda International Ltd. v. Curcia* [1976] 3 All ER 620, 624.
53. *The Manager, Nakiadeniya Group v. Lanka Estate Workers' Union* (1969) 77 CLW 52.
54. *Ceylon Tea Plantation Co. Ltd. v. Ceylon Estates Staffs' Union* SC 211/72; SC Minutes of 15 May 1974.

APPEAL from judgment of the Court of Appeal.

H. L. de Silva PC with *P. M. Ramawatte* and *Janaka Silva* for the Petitioner.

A. S. Nicholas with *K. K. Suresh Chandra* and *Miss M. Aluwihare* for the Respondent

Cur. adv. vult.

30 May, 1991.

DR. AMERASINGHE, J.

Before he commenced his submissions on the merits of the appeal to this Court, learned President's Counsel for the Appellant pointed out that, since the Respondent's written submissions were lodged on 14 June 1989, although special leave to appeal had been granted on 9 February 1989, they were not lodged within the thirty days specified by Rule 35 of the Rules of the Supreme Court. The Respondent was therefore, in terms of Rule 35(b) "not entitled" to be heard.

In *Samarawickreme v. Attorney-General* [1] and in *Mylvaganam v. Reckitt & Colman* [2] the appeals were dismissed for failure to comply with Rule 35.

While in *Samarawickreme's case,* the Court was of the view that the provisions of Rule 35 were "imperative", in *Mylvaganam's case* the Court dismissed the appeal after considering the fact that there was no excuse made for the delay. In *Mendis v. Rajapakse* [3], where the question related not to the failure to lodge submissions in time, but to the failure to give appropriate notice of the lodging of written submissions, the Court considered both these decisions and concluded that "The Rule contemplates that this Court will proceed to

hear the appeal; all that the Rule does is to disentitle the party in default from claiming a **right** to be heard, but preserves the undoubted **discretion** of this Court to give such a party such hearing as it thinks appropriate."

In *Kiriwanthe and Wimalawathie v. Navaratne* [4], which was concerned with the failure to comply with Rule 46, Fernando, J. considered the decisions in *Samarawickreme, Mylvaganam,* and *Mendis.* His Lordship also considered the decision in *Coomasaru v. Leechman & Co.*[5], where the matter for consideration was the interpretation of Rule 26 of the Appeal Procedure Rules of 1972 which stated that only such authorities and legislation (except those that came into existence afterwards) cited in the submissions could be relied upon at the hearing of the appeal. It was held by the majority, (Tennekoon, C.J., Vythialingam, Sharvananda and Colin Thome, JJ., Rajaratnam, J. dissenting), that where an appellant had failed to comply with the Rule without excuse, the appeal should be dismissed. It should be dismissed because, the Court, having shut out the appellant for non-compliance with the Rule, would then be left to "carry out a study of the appellant's case unaided by adversary argument by counsel at grave risk of misleading itself in regard to authorities and legislation which the parties had no opportunity of discussing before the Court."

The line of reasoning in the *Coomasaru* case, Fernando, J. said, did not appeal to him. His Lordship explained that

> "Rule 26 would deprive the Court of the benefit of Counsel's assistance in regard to authorities not cited in the Appellant's written submissions, but the Court would nevertheless have to study that aspect of the Appellant's case to which the omitted authorities relate, despite the same risk of misdirecting itself in regard to those authorities; Rule 26 would not permit a dismissal of the appeal for non-compliance. It is also difficult to see how this principle could be applied to cases where it was the respondent who failed to file submissions, and thus deprived the Court of the benefit of the assistance in regard to authorities in support of his case. In any event, Tennekoon, C.J., does not

indicate what the position would have been had an excuse been submitted; would relief have been granted despite Rule 26. That decision is distinguishable for two reasons: Rule 26 finds no counterpart in the present Rules, and it dealt with a case of continuing non-compliance for over two years without excuse or explanation."

"The weight of authority that favours the view that while all these Rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse in explanation therefor, in the context of the object of the particular Rule."

In the case before us, on 7 June 1989, while filing the written submissions of the Respondent, his Attorney-at-Law explained that the delay in lodging them was because the learned Counsel to whom a draft of those submissions were tendered "generally practices in the outstations and has periodically fallen ill in the last few months." This is not good enough. I am of the view that the Respondent's failure to comply with Rule 35 is inexcusable. In the circumstances, I refuse to hear him. I do so with regret. On the one hand I cannot ignore the existence of Rule 35 and agree to hear counsel for the respondent when the failure to comply with the Rule cannot be excused. On the other hand, the prescribed penalty for default deprives a party of his most elementary right, namely, the right to be heard. It also deprives the court of the very assistance which written submissions were meant to give. Where no authorities or some authorities are not cited, the Court may, albeit cautiously, nevertheless take due account of them. But when it shuts out the benefit of counsel's assistance, it takes on a heavy burden merely because Rule 35 imposes it on the Court.

I now proceed to consider the appeal. The Petitioner was employed by the Respondent as the Superintendent of Blackwater State Plantation, Ginigathhena. The following complaints made

against him by the Ceylon Estates Staffs' Union and the Ceylon Worker's Congress, on the basis of a "disciplinary inquiry", were said by the Respondent in a letter dated 9 January 1981, to have been "established" :

1. Attempting to bring about rift and disharmony among the employees of Blackwater, S. P. leading to a breach of peace, during the latter part of 1980.

2. Misusing or appropriating to yourself Corporation funds amounting to about Rs. 6,293/83 by utilizing labour in excess of your entitlement of 4 labourers.

3. Violating instructions of Circular No. 126 of 3rd January, 1980, by paying or causing to be paid a sum of Rs. 1686/26 by way of Budgetory Relief Allowances in excess of Rs. 55/- allowed to each individual, worker and thereby causing a loss to the corporation.

4. Purchasing 11 new tyres purported to be for the official vehicle allocated to you between August and October, 1980, within a period of 3 months, from outside sources without justification and failing to enter or causing them to be entered in the Stock Book of the Plantation.

5. Making exaggerated and untruthful representations to the Regional Corporation Office on 1st November, 1980, with regard to the alleged damage to the quarters of Jayasinghe and field terraces.

6. Allowing your wife to interfere in the administration of the Plantation and to provoke members of the staff by insult that led to strike on the Plantation in November, 1980.

7. Acting maliciously against the employees of the Plantation and mismanaging the affairs of the Plantation."

In view of this, the Petitioner was asked to show cause why he should not be dismissed. In his letter dated 20 January 1981 (R10), the

Petitioner stated that there was in fact no proper disciplinary inquiry against him, since he had not been charged with any misconduct, the Trade Unions could not frame charges against him, he was given no opportunity of meeting the charges, and because the inquirer was prejudiced. The Petitioner, in his closely spaced letter of seven pages, (R10), suggested reasons for the allegations made against him and explained each of the alleged acts of misconduct referred to by the Respondent.

On 3rd February 1981, the Respondent informed the Petitioner that "with reference to the preliminary inquiry" held against him and the "explanations" contained in his letter of 20 January, he was "interdicted with immediate effect" without remuneration. A "charge sheet" dated 2 February 1981 was annexed to the letter of interdiction on the ground that the Petitioner's explanations were "not satisfactory". The seven charges set out above were repeated in this "charge sheet". Three additional charges were added during the course of the inquiry.

On 29 December 1981 the Respondent informed the Petitioner that he had been found guilty of charges 1, 2, 3, 4, 5, 6, 7, and 10 and that he was dismissed "with effect from the date of interdiction, i.e. 3rd February 1981."

When the Planters Society, to which the Petitioner belonged, requested a copy of the inquiring officer's report, it was informed that the document was "privileged"; and since the Respondent's defence in the event the Petitioner filed an action in the Labour Tribunal would be based on that report, the request was refused.

The Petitioner on 19 April 1982 applied to the Labour Tribunal for relief by way of reinstatement with back wages and/or compensation for wrongful dismissal. In its answer, the Respondent took up the position that the Petitioner's services were terminated for "gross misconduct and mismanagement" and that "in any event the Respondent has lost confidence" in him.

Six of the ten charges had been given up by the Respondent, from time to time, as and when it realized that there was nothing the Corporation possessed either by way of a reasonable ground for belief in the guilt of the Petitioner or of anything which it saw tended to prove those six charges.

In the proceedings before the Tribunal, the Respondent Corporation relied upon four grounds, namely, those contained in charges 2, 3, 4 and 6 above. On 20 May, 1983. The President of the Tribunal of Hatton delivered his Order. He found that "double payments" were made on account of the "misconduct" of the Petitioner and that, therefore, the charge (No. 3 above), had been established. He also found that charges 2, 4 and 6 relating respectively to the matter of the employment of excess labour, the replacement of tyres and the questionable conduct of his wife, had also been established. The President of the Labour Tribunal concluded that "in examining all the facts, and taking into consideration the position and responsibilities held by the "Petitioner", his experience, the acts involving moral turpitude/(gross misconduct) and mismanagement, I have to hold that his dismissal from service is not too severe and therefore dismiss the application."

The Petitioner's appeal to the Court of Appeal was argued on 22 June and 18 July 1988 and decided on 7 November 1988. On the basis that there was no evidence to support such a finding, the Court of Appeal held that the charge with regard to the alleged misuse of labour had not been proved. The Court of Appeal however, declined to go further. It dismissed the appeal and affirmed the decision of the Tribunal. The Court said:

> "This being an appeal from an order made by a Labour Tribunal, an appeal lies to this Court only on a question of law, and an applicant who seeks to have a determination of fact, by a Labour Tribunal set aside must satisfy this Court that there was no legal evidence to support the conclusion of facts reached by the Labour Tribunal or that the finding was not rationally possible and is perverse even with regard to the evidence on record, (Vide *Caledonan (Ceylon) Tea and Rubber Estates Ltd. v. Hillman* [6].
>
> In the instant case, I am unable to contribute to the view that the findings of the learned President are capricious or unreasonable in respect of the allegations (2), (3), and (4). The legislature designed the Labour Tribunal as the proper Tribunal to determine the facts, and this Court cannot seek to substitute its own view of the facts for that of the Tribunal even though it may on a review of the evidence be inclined to accept counsel's criticism of the findings.

> The learned President has in this case, held that having regard to the totality of the evidence adduced, the termination of the appellant's service by the Respondent was justified, I am unable to state that there was no legal evidence in this case to support this conclusion reached by the learned President or that his finding was not rationally possible, and is perverse with regard to the evidence on record. I would accordingly dismiss the appeal without costs."

The Industrial Disputes Act No. 43 of 1950 states in section 31D that the order of a Labour Tribunal shall be final and shall not be called in question in any Court except on a question of law. While appellate courts will not intervene with pure findings of fact e.g. see *Somawathie v. Baksons Textile Industries Ltd.* [7]; *Caledonan (Ceylon) Tea and Rubber Estates Ltd. v. Hillman* [6]; *Thevarayan v. Balakrishnan* [8]; *Nadarajah v. Thilagaratnam* [9]; yet if it appears that the Tribunal has made a finding wholly unsupported by evidence *Ceylon Transport Board v. Gunasinghe* [10]; *Colombo Apothecaries Co. Ltd. v. Ceylon Press Workers' Union* [11]; *Ceylon Oil Workers' Union v. Ceylon Petroleum Corporation* [12], or which is inconsistent with the evidence and contradictory of it *Reckitt & Colman of Ceylon Ltd. v. Peiris* [13], or where the Tribunal has failed to consider material and relevant evidence *United Industrial Local Government & General Workers' Union v. Independent Newspapers Ltd.* [14], or where it has failed to decide a material question *Hayleys Ltd. v. De Silva* [15] or misconstrued the question at issue and has directed its attention to the wrong matters *Colombo Apothecaries Co. Ltd. v. Ceylon Press Workers' Union* (*supra*), or where there was an erroneous misconception amounting to a misdirection *Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya* [16], or where it failed to consider material documents or misconstrued them (*Virakesari Ltd. v. Fernando* [17]) or where the Tribunal has failed to consider the version of one party or his evidence *Carolis Appuhamy v. Punchirala* [18]; *Ceylon Workers' Congress v. Superintendent, Kallebokke Estate* [19] or erroneously supposed there was no evidence *Ceylon Steel Corporation v. National Employees' Union* [20] the finding of the Tribunal is subject to review by the Court of Appeal. In any event, on further appeal to the Supreme Court, this court, in terms of the Constitution, has wide appellate powers with regard to what is meant by a question of law See *Albert v. Veeraiatipillai* [21]; *Collettes Ltd. v. Bank of Ceylon* [22]. And where the Court of Appeal fails to evaluate

the recorded evidence but merely endorses the findings of the Tribunal, as it has done in this case, the Supreme Court would, as it has done before e.g. *Sithamparanathan v. People's Bank* [23] set aside the decision of the Court of Appeal. The decision will be set aside not because the Court of Appeal has been unwilling "to substitute its own view of the facts for that of the Tribunal", but because it has failed to evaluate the evidence so as to decide whether the Order of the Tribunal was, in the established circumstances of the case, just and equitable.

Admittedly a Labour Tribunal, in being required by section 31C of the Industrial Disputes Act to make "such order as may appear to the tribunal to be just and equitable", has a very wide power. It may be that the Tribunal is not required to give a verdict with regard to the charges made by an employer, Per Rajaratnam, J. in *Somawathie v. Baksons Textile Industries Ltd.* [7]. Yet Labour Tribunals do not possess an unfettered power. As H. N. G. Fernando, J. (as he then was) observed in *Walker Sons & Co. Ltd. v. Fry* [24], a Labour Tribunal does not have the "freedom of the wild ass". (Cf. *Municipal Council of Colombo v. Munasinghe* [25] "freedom of a wild horse" per H. N. G. Fernando, J. in relation to an arbitrator). Considerations of justice and equity must necessarily control and limit the powers of Labour Tribunals. (*Brooke Bond (Ceylon) Ltd. v. Tea, Rubber, Coconut & General Produce Workers' Union* [26]). The Order of a Tribunal must not, as the Court of Appeal says, be perverse. "Perverse" is an unfortunate term, for one may suppose obstinacy in what is wrong, and one thinks of Milton and how Satan in the Serpent had corrupted Eve, and of diversions to improper use, and even of subversion and ruinously turning things upside down, and, generally, of wickedness. Yet, in my view, in the context of the principle that the Court of Appeal will not interfere with a decision of a Labour Tribunal unless it is "perverse", it means no more than that the court may intervene if it is of the view that, having regard to the weight of evidence in relation to the matters in issue. the tribunal has turned away arbitrarily or capriciously from what is true and right and fair in dealing even-handedly with the rights and interests of the workman, employer and, in certain circumstances, the public. The Tribunal must make an order in equity and good conscience, acting judicially, based on legal evidence rather than on beliefs that are fanciful or irrationally imagined notions or whims. Due account must be taken of the evidence in relation to the issues in the matter before the Tribunal. Otherwise, the order of the Tribunal must be set aside as being perverse.

Notwithstanding the Judgment of the Court of Appeal to the contrary, the Petitioner, it seems much to the annoyance of some, insisted that the Order of the Tribunal was perverse and on 9 February 1989 he was granted special leave to appeal to this Court. I do not think the Petitioner was guilty of pertinacity: I think, rather, that his obstinacy and stubbornness, was righteous.

The residual part of the Respondent's case has three charges. There is the charge that the Petitioner, had acted in violation of Circular instructions in authorizing the payment of Budgetary Relief Allowances and thereby caused a loss to the Corporation. This, the President of the Tribunal erroneously surmised, was an allegation that the Petitioner had acted **"fraudulently."** He misconstrued the question at issue. It was never the Respondent's case, and there was not a word of evidence to even hint at the suggestion, that the Petitioner was guilty of any form of deception or deceit or that he acted in violation of the Circular instructions to obtain any unjust advantage or to injure the Respondent by causing loss. The President of the Tribunal, found that any sums of money paid to the workers, had, according to his understanding of the evidence, been paid **mistakenly** and not **fraudulently.** He says: "It is proved from the evidence that the double payments had been made as a result of the applicant's mistakes." But having found that the charge of acting in violation of the Circular had been established, the President of the Tribunal concludes that there were "acts involving moral turpitude/(gross mismanagement) and mismanagement" for which dismissal was "not too severe" a punishment. The Petitioner may have transgressed Circular instructions and, therefore, in that sense have been **mistaken.** But that is quite obviously different from finding that the Petitioner was guilty of fraud and misconduct involving "moral turpitude" for which he deserved to be dismissed. And as for what the Court of Appeal described as a "lapse", it might be observed that in his letter to the Respondent dated 20 January 1981, (R10) the Petitioner explains that he certified the payments only after the payments computed by the Assistant Clerk had been verified by the Chief Clerk who had also assured the Petitioner that the Circular instructions had been complied with.

The President, it seems to me, completely misunderstood the nature of the charge. He misconstrued the question at issue and misdirected himself and then went on to arrive at conclusions with regard to his wrongly assumed charge which had no relation whatever to the evidence before him. This is a matter of law in which this Court might, and ought, to intervene. Cf. *Colombo Apothecaries Co. Ltd. v. Ceylon Press Workers Union* (*Supra*), *Urban Council Panadura v. Cooray* [27].

The gravamen of the Respondent's charge was that **loss** had been caused to the Corporation by the Petitioner's failure to comply with the instructions, given in the circular. The Petitioner in his letter dated 20 January 1981 to the Respondent (R10) explained that a sum of Rs. 1223.65 out of the total excessive payment of Rs. 1686.26 had already been recovered and that he would "recover the balance shortly." The whole sum paid as a result of the Petitioner's alleged glide into error, greased by the activities of his subordinates, had been recovered from the workers. And so, there was no loss. The President in his Order states as follows:

> "Further the evidence indicates that these overpayments had been recovered from the workers and refunded to the Corporation. However, I have to hold that double payments were made due to the applicant's misconduct."

The Court of Appeal was of the view that, because the overpayments were caused as a result of the introduction by the Petitioner of a Cash Works Register in addition to the Checkroll, and because the Petitioner had certified the payments, it was unable "in this state of the evidence" to hold that the President was in error when he held that this charge had been proved. "The fact that the overpayments have been recovered does not", the Court of Appeal held, "mitigate the lapse" on the part of the Petitioner.

With great respect, I am of the view, for the reasons stated, that the Court of Appeal as well as the President of the Tribunal were in error

both with regard to the question at issue, namely whether the Petitioner had caused a loss, and the relation of the evidence to that charge.

In connection with the question of loss, it might also be pointed out that in his letter R10, the Petitioner said he had reduced the losses of the plantation by 50%. (In his evidence he said that at the time he took charge of the Plantation there was a loss of Rs. 832,000 which in a year he had reduced to Rs. 449,000). Edirimanasingham, the Internal Auditor of the Respondent, admitted in his evidence before the Tribunal that the Petitioner had reduced the losses of the Plantation by Rs. 350,000. Among the steps he had taken in this connection was curtailing Overtime payments by about 75%, a measure that could hardly have made him popular with the workers, yet one, which the Respondent Corporation, which was complaining of a loss of Rs. 1686.26, might have taken into account in deciding whether the Petitioner was the sort of person who acted in reckless disregard of the interests of the Respondent and deserved to be dismissed. The Petitioner, understandably, concludes his letter to the Respondent by expressing the hope that "far from being found fault with", he should be "highly commended." I am inclined to agree with him.

What the Court of Appeal describes as "the more serious allegation" against the Petitioner was that he had during the period August 1980 to October 1980 purchased eleven tyres "purported to be for the official vehicle allocated", "from outside sources, without justification" and failed "to enter or cause them to be entered in the Stock Book of the Plantation." Although the charge, by referring to the purchase of tyres for the "purported" use of the Petitioner's official vehicle suggests that they were not in fact so used, the President found that "the 11 tyres which were purchased had been fitted to the vehicle and used." Neither the Tribunal in its Order nor the Court of Appeal in its Judgment says a word about the allegation of purchases from "outside sources without justification." Nor does the Tribunal say anything about an additional ingredient it mistakenly supposed the charge to have contained, namely, that quotations had

not been called for the purchases. And it is only as almost an afterthought that the Tribunal in its Order mentions the failure to make entries in the stock book. The Petitioner had explained that the purchases were made by monthly vouchers and that the Respondent was aware of the purchases and that the failure to make entries in the stock book was due to the fact that the tyres were purchased from time to time for immediate use. The President noted that the Corporation had taken up the position that it had not been informed of the purchases but does not state whether the Petitioner had failed to comply with an obligation and what the effect should be. The Court of Appeal does not mention at all the failure to enter the purchases in the stock book.

Both the Tribunal and the Court of Appeal were primarily concerned with the purchase of so many tyres within such a short period, to cover a small mileage. This, the Court of Appeal held, was conduct on the part of the Petitioner that "undoubtedly caused loss to the Corporation." Causing loss is a neutral event upon which the Petitioner's dismissal could not have been justly based: Whether there is a **culpable** loss for which the Petitioner was to blame is another matter. The Tribunal found that the loss was caused **negligently.** Both the Tribunal and the Court of Appeal misunderstood the nature of the charge. A charge of causing loss, negligently or otherwise, by the purchase of tyres was one that was never made against the Petitioner by the Respondent. The charge was not that the purchase of the eleven tyres had caused a **loss** to the Respondent but that the Petitioner was guilty of two procedural irregularities, namely, **(1) making unjustifiable purchases from improper sources and (2) the failure to enter or cause to be entered the fact of the purchases in the stock book of the plantation.** Since both the Tribunal and the Court of Appeal were driven to a point of distraction by the loss caused by the use of as many as eleven front wheel tyres to run a mere 4003 miles in three months, and especially since the Tribunal attributed the loss to the Petitioner's negligence, an examination of the evidence deserves to be made.

The Respondent gave the Petitioner one car and then another when the first was found to be unsatisfactory. The second car too was unsatisfactory and, in the same year, a third car, an old Volkswagen after a major engine repair, was given for his official use on 15 August 1980. The Reports from the Volkswagen Agents make it quite clear that this car too was yet in need of further attention. Among other things, it had serious defects in the front axle and steering and suspension on account of which there was "heavy tyre wear" in the front. This appears in the report of the Volkswagen Agents dated 19 February 1981. This was not a new discovery of which the Petitioner and Respondent were ignorant. Edirimanasingham, the Respondent's Internal Auditor, admitted in his evidence before the Tribunal that the Petitioner had given information with regard to the excessive wastage of tyres. On 18 August 1980, when the Volkswagen Agents had reported (A3) "excessive play" in the front axle and steering and they had advised the dismantling and checking of the assembly, the Petitioner had communicated this to the Respondent by his letter dated 19 August 1980 (A1). The Petitioner was, by the Respondent's letter dated 26 August 1980 (A2), castigated for taking the car to the Agents, when the Petitioner had been advised to test the car himself and then take it to Kotiyagalle State Plantation where a "comprehensive job" on the vehicle was said to have been done. Now that he was aware of the defects, the Petitioner was advised to communicate with the Superintendent of Kotiyagalle State Plantations "by prior appointment ascertaining whether he is in a position to undertake the rest of the repairs enumerated by "the Petitioner". On 30 August 1980 the Petitioner wrote to the Respondent explaining why he had taken the car to the Agents in Kandy (R3). He also informed the Respondent that he had the car examined by the Colombo agents when he was on leave in Colombo on 27 August 1980, "as the tyre wastage (front) was very severe" and that they had in their Defect Report (A10) confirmed the findings of the Kandy branch. He enclosed copies of the Defect Reports obtained from the Kandy and Colombo branches of the Agents. When the Petitioner communicated with the Kotiyagalle Superintendent by his letter dated 30 August 1980, the Petitioner was informed that he was unable to undertake the repairs. With his letter

dated 6 September 1980 (R11) the Petitioner sent the Respondent a copy of the Kotiyagalle Superintendent's letter and pointed out the need to effect the repairs to prevent even more major repairs and referred to the high tyre wastage and the cost of replacing the front tyres. In his evidence, the Petitioner explained that he had been asked by the Assistant Manager, the Resident Director and the Visiting Agent of the Respondent to postpone repairs until financial provision for doing so was made in the following year. Since he was precluded from taking the car to the Agents for repairs, as the Petitioner explains in his letter dated 20 January 1981 (R10) to the Respondent, he had "no choice but to continue to use" the vehicle, replacing the tyres when it became necessary to do so.

In his Order, the President of the Tribunal refers to the Petitioner's explanation that the wastage was due to a mechanical defect. He also refers to the fact that the Reports from the Agents, A3 and A10, had been communicated to the Respondent, but finds that the reports did not attribute the wastage to the defects in the steering and axle. The Court of Appeal agreed with the President of the Tribunal that the Defects Reports, A3 and A10, "did not refer to the question of tyre wastage at all". With great respect, the Court of Appeal failed to note that the President ignored the vital evidence of Ranasinghe, the Service Manager of the Volkswagen Agents, who had issued, A3. Ranasinghe had said in his evidence that the wastage in the tyres was due to the mechanical defects specified in the report he issued. The Court of Appeal also failed to note that the President did not take account of the fact that Petitioner in his letters to the Respondent had explained the relationship between the mechanical defects referred to in A3 and A10 and the tyre wastage. The Petitioner in his evidence called attention to the fact that "time and again both orally and in writing" he had complained of these defects to the Respondent. This was also overlooked by the Court of Appeal. By failing to take account of the evidence of Ranasinghe and the Petitioner and the explanations given by the Petitioner in his letters to the Respondent, the President misconstrued A3 and A10 which were documents of vital significance to the matter in issue.

The President then goes on to discuss the separate question of whether the Respondent had been informed of the purchase of the tyres and then refers to the evidence of Ranasinghe, the Service Manager of the Volkswagen Agents, that a tyre on the Ginigathhena road should "if fitted to a Volkswagen in good condition, driven by a good driver should run 7000 miles. The President then draws the inference that, since the Petitioner had used eleven tyres to run 4003 miles, there appears to be a disparity". He then quotes Ranasinghe as saying that he advised the Petitioner that unless the defect was rectified, it would get worse and that he had said that the front axle and steering had to be dismantled for repairs. The President then says: "It would be seen from this evidence that in spite of being advised by this witness the applicant had negligently used the tyres, as a result of which a loss was caused to the Corporation. Furthermore, the applicant has admitted that he has not brought these tyres into the stock book."

I am of the opinion that there was no evidence to justify his conclusion that the Petitioner had caused a loss to the Respondent by his **negligence**. The evidence in the case points in the opposite direction which, however, the President of the Tribunal failed to notice because he did not consider the relevant evidence given by Service Manager Ranasinghe and the Petitioner orally and through the correspondence between him and the Respondent and because he misconstrued the Defects Reports (A3 and A10).

The President of the Tribunal and the Court of Appeal were aware that the normally expected mileage was subject to the condition that the vehicle was in a **good condition,** but lost sight of the fact that there was abundant evidence of the fact that the vehicle assigned to the Petitioner was in a bad condition and that the excessive wastage of tyres was attributable to its defective state.

After stating that Ranasinghe had observed that a "tyre should do an average mileage of around 7000 miles provided the vehicle was in good condition," the Court of Appeal notes that the President had

reached the conclusion that the Respondent had not been notified of the inordinate frequency with regard to the replacement of the tyres. Edirimanasingham, the Internal Auditor of the Respondent, in his evidence, while admitting that the Respondent had been informed by the Petitioner of the excessive wastage, and that the cause of the wastage, namely mechanical defects in the vehicle, had been personally explained to him by the Petitioner, in his re-examination stated that in the letters in which excessive wastage was complained of by the Petitioner, no mention had been made that "tyres had been obtained within a short period."

The Court of Appeal states that "having regard to the evidence of witness Edirimanasingham and the version given by the appellant, the Tribunal has held that this conduct on the part of the appellant has undoubtedly caused loss to the Corporation." The President uses Edirimanasingham's evidence only to establish the fact that the Petitioner's car had been fitted with eleven tyres to run 4003 miles from 15 August to the end of October. As for the Petitioner's evidence, had it been examined, it would have been seen to adequately explain the reasons for the wastage and clearly show an absence of any culpability on his part.

There remains the Respondent's charge that the Petitioner allowed his wife "to interfere in the administration of the Plantation and to provoke members of the staff by insult that led to a strike on the Plantation in November 1980." The gravamen of the charge of which the Petitioner was found guilty and dismissed by the Respondent was that the permitted misconduct of the Petitioner's wife was of such a serious nature as to cause a strike. The President of the Tribunal did not find that there was a strike related to the Petitioner's wife's misconduct. Having accepted the evidence of three employees of the Plantation that in four documents, R6, R7, R8, and R9, the Petitioner's wife had "called for explanations from them in regard to official work," the President of the Tribunal found that the Petitioner had "allowed his wife to interfere into the management of the estate." "I have therefore arrived at the conclusion that this amounts to mismanagement", states the President of the Tribunal. The Court of

Appeal notes that the President had concluded that the Petitioner had permitted his wife to interfere in the work of the Plantation, that the Petitioner's wife had failed to give evidence and that the evidence of Pandian, one of three employees who gave evidence on this matter, with regard to the authenticity of R6, R7, R8 and R9 had gone "completely unchallenged."

The authenticity of the documents was earlier disputed by the Petitioner. In this connection it must be observed that section 36(4) of the Industrial Disputes Act provides that in the conduct of proceedings under that Act, a Labour Tribunal shall not be bound by any of the provisions of the Evidence Ordinance. Tribunals are not fettered by the Evidence Ordinance, although they ought not to make orders ignoring the rules of evidence in the guise of making just and equitable orders. (See per Alles, J. in *Ceylon Transport Board v. Thungadasa* [28]. Pandian's evidence was that he received R7 from the Petitioner's wife. Pandian had nothing to do with R6, R8 and R9. With regard to R6, Dorairaja, said that it was the only letter he had, received from the Petitioner's wife and did not answer the question how he recognized her handwriting. With regard to R8 and R9, Ramanathan said in his evidence that he received them from the Petitioner's wife. The President examined the documents and was satisfied that the handwriting was similar and because the Petitioner's wife was not called as a witness, he accepts the evidence of Dorairaja, Pandian and Ramanathan.

Learned President's Counsel did not find it necessary to deal with the question of authenticity. He submitted that the documents, if they were written by the Petitioner's wife, did not warrant a charge of interference in the management of the affairs of the plantation. In any event, there was no evidence to show that the interference complained of was permitted by the Petitioner. With this submission, I agree.

The first document (R6) was a note addressed to Dorairaja. It reads as follows:

"Dorairaj, please explain as to why you did not send the paper and the letter? Are you the new Superintendent? Send the paper and the letters immediately, without trying to be funny."

D. Jayasuriya

The Petitioner had explained to the Respondent in his letter of 20th January (R10) that his wife was expecting an item of clothing by post which she required to wear on a special occasion. When she had sent a servant to the plantation's office (where mail was received) for the collection of the item, Assistant Clerk Dorairaja had said that it had not been received. When the Petitioner's wife was informed by the Post Office that the item had, in fact been delivered, she sent this note to Dorairaja. Whatever one may think of her manner of expressing herself and the fact that it may have used Dorairaja to put up his hackles, the inference by the President of the Tribunal that there was an interference with the management of the plantation was altogether unwarranted. In any event, even if it is assumed that this amounted to an interference with the management of the plantation, there is no evidence at all to indicate that the **Petitioner allowed,** as the President of the Tribunal found, such an interference. He overlooks the fact that the Petitioner had explained to the Respondent in his letter (R10) that when the letter R6 was sent, he was away at the Respondent's Board Office; and that, according to the evidence of Dorairaja, when the Petitioner came to know of this letter, he had been summoned to the Petitioner's bungalow and told by the Petitioner that his wife could not write such letters. The Tribunal and the Court of Appeal overlooked all this vital evidence which stood in the way of a finding that the alleged interference was allowed by the Petitioner.

The second document, R7, is as follows:

5kg Flour	26.00
$1^1/_2$ kg Sugar	19.80
5 kg Flour	26.00
1 kg Dhall	12.50
16 Pkts Tea	32.00
1 kg Sugar	13.20
5 kg Flour	26.00
5 Pkts L'Spray	42.50
1 kg Sugar	13.20
	211.20

S.K

Please explain as to how you entered 3 kg of sugar in your book, and you sent me only 1 1/2 kgs. which I wanted, through Siripala, Hereafter maintain your book properly and make it a point not to enter others bills onto my account as I too have a book on my own, you are not efficient enough to hold that post, as this is the second time you did this sort of thing, so please be careful and cautious (sic.)

D. Jayasuriya

"P.S. Please show this to the Manager when he comes.

D. Jayasuriya

The man to whom this note, R7, was addressed was Pandian, the Storekeeper of the plantation. In his brief stay in the witness box, Pandian said that during his six-year stint at the plantation he had never before been called upon to give an explanation to the wife of a Superintendent, and that this lady had no reason to state that he was inefficient in his work. In cross-examination Pandian said that he was the brother of Dorairaja, and that although two inquiries had been conducted against the Petitioner, he had no part in them and that R7 was now produced for the first time. He said he went on strike, but never said that it had any thing to do with R7 or with the Petitioner or his wife. There was not a word out of him to support an allegation of interference with the management of the plantation. How does R7 in any way whatsoever support the President's inference? It does not.

Perhaps the Petitioner's efforts at economy and being watchful over expenditure had touched his wife also, in relation to the domestic scene. But that is all R7 shows. In any event, there is nothing to show that the Petitioner ever knew of the existence of R7 until it was produced at the Tribunal.

In R8, the Petitioner's wife said:

> K.P.
> I hope you are **not** marking name to Gandhi from the 6th. He has kept away from work in the bungalow and you are not to offer him work in the field as he was brought from Galle only as an allowance, Periasamy came to work yesterday and you may continue giving him name. Doraisamy have been working from 8th and you may continue, Yesu has not being coming for work from the 7th up to now. Do not mark name till I send a chit. Give name to Mary Soma from the 6th in lieu of Gandhi.
>
> *D. Jayasuriya*

Gandhi was an "allowance" – plantation jargon for a household servant. He was therefore not to be given ordinary **plantation** work, such as work in the field. The Petitioner's wife was keeping the domestic scene quite distinct from the plantation. K. P. was the Head Kanaka Pulle, Ramanathan. In his evidence he stated that the Petitioner fell out with him in June 1980 because he had refused to continue collecting money from workers for the milk supplied by the Petitioner's wife's private herd of cattle. She had sent him the note R8. The Petitioner's wife was legitimately concerned about people assigned to work in the Petitioner's residence. Who would have known better about Ghandhi not turning up for work in the bungalow? This was not concerned with workers employed in the field or in the factory and, therefore, the inference that there was an interference with the management of the plantation was unwarranted. In any event, there is not a single word in the evidence to link the Petitioner with the communication in question. How then did he allow his wife to interfere?

And in R9 the Petitioner's wife says:

> K.P.
>
> Please do not give the name to the boy who came yesterday, as he too didn't follow instructions and I was compelled to send him away. He is supposed to be one Ramaiya. From today send the name of our cook Ramaiya. Our usual bungalow watcher's brother has to give me Rs. 2.50 for the milk he bought from the 7th-10th. After several reminders he still has failed to pay. So please. get him to pay immediately.
>
> *D. Jayasuriya*

R9 was produced by the Kanaka Pulle in support of his claim that the Petitioner's wife was giving him instructions with regard to work on the plantation. As in the case of R8, the instructions related to domestic staff assigned to work in the Petitioner's *household* and not in the plantation, on the field or in the factory, an important distinction which the Tribunal overlooked. In any event there was nothing to link the Petitioner with this document.

For the reasons explained in my judgment I am of the opinion that the order of the President of the Labour Tribunal was perverse and not just and equitable. With great respect, the learned Judge of the Court of Appeal, in my opinion, came to a different conclusion because his Lordship failed to evaluate the evidence on record. I therefore set aside the judgment of the Court of Appeal and the Order of the Labour Tribunal and hold that the termination of the employment of the Appellant by the Respondent was wrongful.

Although the Petitioner's dismissal was wrongful and it may be ordered that he be reinstated., as Sharvananda, J. (as he then was) observed in *Caledonan Estates v. Hillman* (*Supra*) at p. 435, see also per Siva Supramaniam, J. in *United Industrial Local Government & General Workers' Union v. Independent Newspapers Ltd.* [29] that remedy is "not absolute or of universal application. There can be

cases where it might not be expedient, because of the presence of unusual features, to direct reinstatement, and a Tribunal may think the grant of compensation instead may meet the ends of justice." Considering the Petitioner's uneasy relationship with the Trade Unions and the likelihood of industrial strife if he is reinstated cf. *Ceylon Ceramics Corporation v. Weerasinghe* [30]; cf. also *Ceylon Workers' Congress v. Poonagala Group* [31] and the fact that the employer had alleged a lack of confidence in the Petitioner cf. *Glaxo Allenbury's (Ceylon) Ltd. v. Fernando* [32], I am of the view that compensation, rather than reinstatement is the appropriate remedy in this case.

What would be a just and equitable amount by way of compensation? Vythialingam, J. pointed out in *Ceylon Transport Board v. Wijeratne* [33] that "Although the Industrial Disputes Act provides for the payment of compensation in lieu of reinstatement it does not lay down the basis on which it is to be computed." Vythialingam, J. said that "the amount not be mechanically calculated on the basis of the salary he should have earned till he reached the age of super-annuation. "These observations were quoted with approval by Sharvananda, J. (as he then was) in the *Caledonan (Ceylon) Tea and Rubber Estates Ltd. v Hillman* (*Supra*). With these observations, I respectfully agree. Sharvananda, J. added that:

> "The Legislature has wisely given untrammelled discretion to the Tribunal to decide what is just and equitable in the circumstances of each case. Of course, this discretion has to be exercised judicially. It will not conduce to the proper exercise of that discretion if this Court were to lay down hard and fast rules which will fetter the exercise of the discretion, especially when the Legislature has not chosen to prescribe or delimit the area of its operation, Flexibility is essential. Circumstances may vary in each case and the weight to be attached to any factor depends on the context of each case."

While I respectfully agree that the amount of compensation should not be "mechanically" calculated and that Labour Tribunals have a wide discretion, there is, it seems to me, no power conferred by the Legislature on Labour Tribunals to act without unhampered restraint. Their power has been, with soundness of judgment, curtailed by the legislature. They have no "untrammelled" power, in the ordinary sense of the word. The legs of those who feign to enjoy the freedom of the quadruped H.N.G. Fernando, J. referred to, have been fastened together. Indeed, as Sharvananda, J. himself pointed out in the *Caledonan Estates Case* at p. 436, Labour Tribunals have an obligation to act judicially.

"Compensation" is derived from the Latin root *compensate*, and 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. The Tribunal must endeavour to give each man that which is his right: *Sum clique tribuere*", as the Roman Law, to which our legal systems owe so much, felicitously phrased that concept.

Our Tribunals and Courts have often used a given number of years' salary as *global* compensation. For example, in *Belgama v. Co-operative Wholesale Establishment* [34], and in *Central Transport Board v Loku Banda* [35], one years' salary was considered just and equitable. Five years salary was deemed to be just and equitable in *The Governing Body of Educational Institutions founded by the Church Missionary Society in Ceylon, Ladies' College v. Panuthevan Thuraimugam* [36]. Seven years' salary was awarded in *Cyril Anthony v. Ceylon Fisheries Corporation* [37], the Supreme Court being of the view that one years' salary awarded by the Tribunal was grossly inadequate. Sharvananda, J. in the *Caledonan Case* (*supra*) at

p. 438 thought that seven years' salary was a just and equitable award and reduced the award of ten years' salary awarded by the Tribunal.

With great respect, while, in the circumstances of those decisions, the expressed loss, in global terms of years of salary, may in fact have coincided with losses reckoned and counted and settled by reference to the relevant heads and principles of determining compensation, it is preferable, in my view, to have a computation which is expressly shown to relate to specific heads and items of loss. It is not satisfactory in my view to simply say that a certain amount is just and equitable. There ought, I think, to be a stated basis for the computation, taking the award beyond the realm of mere assurance of fairness. This would enable the parties and anyone reading the Order to see that it is, all in all, just and equitable. In *Abeysundera v. Samel* [38]; cf. also *Brooke Bond (Ceylon) Ltd. v. Tea, Rubber, Coconut and General Produce Workers' Union* [39] the Court said: "For an order to be just and equitable it is not sufficient for such order merely to contain a just and equitable verdict. The reasons for such verdict should be set out to enable the parties to appreciate how just and equitable the order is. In the absence of reasons, it would not be a just and equitable order." Indeed, as De Kretser, J. pointed out in *Adam's Peak Tea Estates Ltd. v. Duraisamy* [40] the failure to give reasons might lead a party to conclude that the order was arbitrary. Giving reasons would also lead the Tribunal to address its mind to the relevant considerations leading to its award. As the Supreme Court of India observed in *Woolcombers of India Ltd. v. Woolcombers Workers' Union* [41], the very search for reasons will lead the tribunal to give reasons which will be regarded as fair and to disregard others. Wade (Administrative Law, 5th Ed. at p. 486) observes that "the giving of reasons is required by the ordinary man's sense of justice and is also a healthy discipline for all who exercise power over others. "Where no basis for the compensation awarded is given, the Order of the Tribunal is liable to be set aside. (See *Nanayakkara v. Hettiarachchi* [42]).

In any event, it would not be satisfactory to impose arbitrary ceilings on the compensation to be awarded, whether by reference to years of salary or otherwise. In *Ceylon Transport Board v. Wijeratne*[33], Vythialingam, J. placed a limit of three years salary on the total amount of compensation to be awarded. There was no basis for selecting a three year period and, it came without surprise, that Vythialingam, J. was compelled to review his three year limit. In *Henderson & Co. v. Wijetunge*[43], Vythialingam, J. awarded five years salary as compensation. In the *Caledonan Estates Case,* Sharvanada, J. said (at p 436) that His Lordship was unable to subscribe to Justice Vythialingam's proposition that the amount "should seldom, if not never, exceed a maximum of three years' salary". Sharvananda, J. said that "flexibility is essential" and pointed out that "circumstances may vary in each case and the weight to be attached to any particular factor depends on the context of each case."

I respectfully agree with those observations. However, there are certain parameters. There is data which is necessary to determine the orbit of every Tribunal, so as to prevent it from straying off its course. What are the matters to be considered? There ought to be at least an approximate computation of immediate loss, i.e loss of wages and benefits from the date of dismissal up to the date of the final Order or Judgment, and another with regard to prospective, future loss, and a third with regard the loss of retirement benefits, based as far as possible on a foundation of solid facts given to the Tribunal by the parties.

While it is not possible to enumerate all the circumstances that may be relevant in every case, it may be stated that the essential question, in the determination of compensation for unfair dismissal, is this: What is the actual financial loss caused by the unfair dismissal?, for compensation is an "indemnity for the loss". (Per Soza, J. in *Associated Newspapers of Ceylon Ltd. v. Jayasinghe* [48]). Now, losses can be of various kinds; but the matter for consideration in this kind of case is the **financial loss,** and not sentimental harm caused by the employer. In his petition to this Court, dated 25, September

1990, the Petitioner refers to the fact that he was "undergoing hardships, both financially and mentally."

I am of the view that privations caused by injured feelings, anguish, unpleasantness, loss of face or inconvenience, do not, in the absence of evidence that they could be translated into calculable financial loss, enter into the computation of compensation in this case. They are, in the realm of industrial law, remote. Emotional suffering by itself is not compensatable. There is no suggestion in this case of mental hardship that could be translated into calculable financial loss. Therefore, I do not take the Petitioner's alleged mental hardship into account in deciding what compensation ought to be awarded.

With regard to financial loss, there is, first, the loss of earnings from the date of dismissal to the determination of the matter before the Court, that is, the date of the Order of the Tribunal, or, if there is an appeal, to the date of the final determination of the appellate court. The phrase "loss of earnings" for this purpose would be the dismissed employee's pay (net of tax), allowances, bonuses, the value of the use of a car for private purposes, the value of a residence and domestic servants and all other perquisites and benefits having a monetary value to which he was entitled. The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss he had incurred. For instance, if an employee claims that he would have earned more than his basic salary, he must adduce supporting evidence such as the fact that there was a general wage increase from which he would have benefited, and/or that he was on a regular ladder of promotion along which he would have progressed, and/or that he had special qualifications or opportunities which would have led to an improvement in his conditions of service during the relevant time. Otherwise, it must be assumed that he would continue to earn at the same rate as at the time of the termination of his services.

The Petitioner in his evidence stated that he was earning Rs. 1295 without allowances. There is no evidence before us of how much he

was entitled to by way of allowances, bonuses and other payments. It was in evidence that he was given the use of a car, a residence and domestic help. However, there is no evidence with regard to the value of these benefits. Did he have to pay something, albeit a token amount, for these benefits? If so, how much? Was he entitled to unlimited private travel, if not, what was he entitled to? What was the reasonably estimated value of this facility in monetary terms? In the absence of evidence with regard to losses other than those relating to his basic salary, I am unable to compute the Petitioner's losses under this head, except those with regard to basic wages. Since the Petitioner has failed to adduce evidence in support of a claim for other benefits, he shall be confined under this head of assessment to the losses of which he has given evidence, viz., his basic wages. The Petitioner was dismissed on 3 February 1981. The maximum sum he is entitled to under this head is Rs. 160,580, i.e. his monthly salary multiplied by the number of months from the date of his termination to the date of this Order, that is 124 months.

Once the incurred, i.e., the ascertainable past, losses have been computed, a Tribunal should deduct any wages or benefits paid by the employer after termination, as well as remuneration from fresh employment. (See *Liyanage v. Weeraman* [44]; *Ceylon Transport Board v. Wijeratne* (*Supra*)). If the employee had obtained equally beneficial or financially better alternative employment, he should receive no compensation at all, for he suffers no loss. (e.g. see *Nidahas Karmika Saha Velanda Vurthiya Samithiya v. The Continental Motors Ltd.* [45] cited in Abeysekera's **Industrial Law** Vol. III & IV at p. 1543). And compensation should be reduced by the amount earned from other, less remunerative employment. The principle is this: He is entitled to indemnity and not profit.

According to his Petition to this Court dated 25 September 1990, the Petitioner remained unemployed up to that date. At the hearing before us learned President's Counsel stated that the position remained unchanged. The question then is whether the Petitioner failed to mitigate his loss because of his own fault. A dismissed

employee must mitigate his loss by taking any offer of employment that is reasonably offered to him, acting as if he had no hope of seeking compensation from his previous employer. I hold that the failure to mitigate the loss was not due to the Petitioner's fault. It is a fact recognized by this Court that persons like the Petitioner, who are engaged in the business of running plantations, find it difficult to obtain alternative employment. (e.g. see *Caledonan Estates Ltd. v. Hillman (supra) at p. 437; Raymond v. Ponnusamy* [46]. The fact that he was dismissed for certain acts of serious mismanagement and misconduct and causing disaffection and strife among the workers in the plantation might well have exacerbated the problem. I am of the view that the manner of dismissal in this case, blackened the Petitioner's name in the plantation sector and rendered him unfit for immediate re-employment and that the loss caused by unemployment is entirely attributable to the Respondent. The manner of dismissal is a relevant consideration in considering the Petitioner's loss. In *Silva v. Kuruppu* [47] the fact that the employer had made a false allegation of theft against the employee, thus preventing her from obtaining other work of a suitable nature, was taken into account in awarding compensation. This is simply because the manner of dismissal may be tied to pecuniary loss. It is not a punishment of the Respondent for what he did. (Cf. *Associated Newspapers of Ceylon Ltd. v. Jayasinghe* [48]. There is no element of exemplary or punitive damages contained within an order of compensation for unfair dismissal made by a Labour Tribunal.

Since there was no evidence that the Petitioner received any money or monetary benefits from the Respondent after his dismissal, and since he remains unemployed through no fault of his own, no deduction is made from his immediate losses.

The Petitioner is also entitled to be compensated for the loss of **future** earnings and benefits. This is not "continuing damages" of the sort which Sirimane, J., with great respect, correctly refused to sanction in *Pathinayake v. Karmika Ha Samanya Kamkaru Samithiya* [49]. Once the employee's past earnings and benefits have

been ascertained, they must be multiplied by the period from the date of the final Order or Judgment. The Tribunal has to fix a "multiplier": This is fixed by answering the question for how many days, weeks, months or years, from the date of the Order or Judgment, as the case may be, could the Tribunal or Court reasonably expect the loss to continue?

This is a very troublesome question, for it involves uncertain, conjectural and, in a sense, imponderable factors. As a result, there is, lamentably, yet inevitably, a degree of speculation and a lack of desirable precision. Nevertheless, in my view, the question must be answered with stated reasons. I have already explained the need for this.

The usual date of retirement, and if there be evidence to show that it was probable that his date of retirement would be extended, then that extended date of retirement would, I think, represent the outside limit. The date of retirement has been taken in some, decisions to be the relevant date up to which the computation of future losses have been made. (e.g. see *Raymond v. Ponnusamy* (*Supra*); *Sri Lanka Asbestos Products Ltd. v. Tampoe* [50]; *Associated Newspapers of Ceylon Ltd. v. Mervyn Perera* [51]). It is a good starting point. However, as Vythialingam, J. pointed in *Ceylon Transport Board v. Wijeratne* (Supra) the usual date of retirement ought not to be "mechanically" adopted. Vythialingam, J. was, it seems, unwilling to automatically, in every case, use a period terminating with the age of expected retirement because of the risks and vicissitudes of an employee's life. His Lordship said "He may die. His services may be terminated for misconduct or on account of retrenchment. The business may cease to exist or close down."

While I respectfully agree that consideration should be given to the possibility that the balance period may be reduced by death, closure of business, retrenchment, resignation to seek other employment and so on, these matters ought not to be merely mentioned and left, as it were, in the air. It is not sufficient to recite a sort of litany of factors to which Presidents of Labour Tribunals who are making computations are supposed to respond. The matters to which they must respond, in

the circumstances relevant to the case before them, ought, for the reasons I have given, be considered and decided upon and expressed.

To assume for certainty all the disadvantageous possibilities and to take no account of the advantageous, seems hardly fair. Unless there are stated reasons supported by evidence to arrive at such conclusions, I am of the view that they run the risk of being described as arbitrary, and, therefore, being set aside.

With regard to premature death, for example, why should the normal expectation of life, officially announced from time to time by the Government's statistical department, be ignored, in the absence of evidence to the contrary in a specific case? There is no evidence in this case that the Petitioner is in such a state of poor health that he is not likely to live up to the date of normal retirement of 55 years, which is well below the national expectation of life. I therefore assume that he would live up to the age of retirement, but I do not take any period beyond that age into account, for there is no evidence with regard to probable extensions of service.

What were the chances of retrenchment or the business of the Respondent closing down before the Petitioner reached his age of retirement? If these things were likely to happen, when were they likely to happen? And if it would be reasonable to assume that they would happen by a certain date, would the Petitioner have been entitled then to certain monetary benefits? If so to what amount, for the figure computed for future loss must take that into account. There is no evidence to show that the Respondent's business was likely to close down or that the Petitioner would be retrenched before retirement: I, therefore, hold that retrenchment and closure should not in this case be used to discount the period for which future earnings should be computed.

Was it likely that the Petitioner would have resigned to seek other employment? This is essentially a question of marketability. I have no evidence of his academic or professional attainments. However, there

is evidence of his experience. This is in a limited area of activity. He worked in the Private sector for twelve years and for the State Plantations Corporation for seven years, managing plantations. He has then remained unemployed. Having regard to local conditions, including the labour market, it is unlikely that he will be able to obtain employment of a similar nature in his particular job market. His name has now been cleared. But it took ten years, through no fault of his own, to do so. He is now 45 years old and, in my view it is unlikely that he will find alternative employment, even outside the plantation sector, having failed to do so when he was younger.

In the circumstances of this case, I hold that the expected age of retirement. 55 years, should be regarded as indicating the date up to which prospective loss ought to be calculated. There is evidence that the Petitioner is 45 years old, but there is no evidence of his exact date of birth. The multiplier for the purpose of computing prospective loss is, therefore, taken to be 120 months. Under this head, therefore, the Petitioner is entitled to receive Rs. 1295 multiplied by 120, i.e., Rs. 155,900.

There is no evidence with regard to the loss of retirement benefits, and therefore, no compensation is awarded under that head. As the Employment Appeal Tribunal observed in *Adda International Ltd. v. Curcia* [52], "The tribunal must have some thing to bite on and if an applicant produces nothing for it to bite on, he will have only himself, to blame if he gets no compensation".

This Court has considered it appropriate for Tribunals to take into account the capacity of the employer to pay compensation, (e.g. see *Belgama v. Co-operative Wholesale Establishments* (*Supra*); *Ceylon Transport Board v. Wijeratne* (*supra*). This is in keeping with the general obligation that the Tribunal must be fair by all parties, including the employer. (Cf. *The Manager Nakiadeniya Group v. Lanka Estate Workers' Union* [53]; *Ceylon Tea Plantations Co. Ltd. v. Ceylon Estates Staffs' Union* [54]; *Somawathie v. Baksons Textile Industries Ltd.* (*Supra*). There is no evidence in this case that the

Respondent has any difficulty in paying compensation, and I, therefore, do not need to take that matter into account.

The future income of the Petitioner has been accelerated and ordinarily I should award only the present value of that income. However in the absence of evidence with regard to the appropriate rate of interest I should take into account in ascertaining the present value of the future income due to the Petitioner, I make no adjustment.

For the reasons stated in my Judgment, the Order of the Labour Tribunal and the Judgment of the Court of Appeal are set aside. The Respondent shall on or before 30 June 1991 pay the Petitioner a sum of Rs. 315,980 by way of compensation and Rs. 10,000 as costs.

DHEERARATNE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal allowed.