JOHN KEELLS LTD.
VS
CEYLON MERCANTILE, INDUSTRIAL AND GENERAL WORKERS UNION AND OTHERS

COURT OF APPEAL,
SRIPAVAN, J. AND
SRISKANDARAJAH, J.
CA 1531/2003
SEPTEMBER 9 AND OCTOBER 8, 2004

Writ of certiorari - Industrial Disputes Act, section 3 (1) (d)-Arbitration-Just and equitable concept in Labour Law-Arbitrator not relying on evidence led at domestic Inquiry-Is it lawful?–Alternative relief-Loss of confidence-Circumstances-Evidence Ordinance-Applicability.

The services of the workman, who was employed as an office minor staff was terminated for misconduct after a domestic inquiry. The dispute was referred for arbitration and the Arbitrator after inquiry, re-instated the employee with back wages. The employer petitioner sought to quash the said order on the basis that (a) it is ultra vires, illegal and null and void, and (b) the Arbitrator had not considered the evidence of the eye witness and had refused to accept as evidence in the arbitration proceedings, the evidence given by the virtual complainant at the domestic inquiry.

Held:

(i) The evidence given before the domestic inquiry was not under oath, and therefore the truthfulness of the evidence is not established.

Per Sriskandarajah, J.

"A charge against a person has to be proved by direct evidence. Hence reliance cannot be placed in her evidence unless it is before the Arbitrator. Even though the Evidence Ordinance is not strictly applicable to inquiries held under the Industrial Disputes Act, the principle behind the admissibility of evidence should be borne in mind in accepting such evidence. The purpose of leading direct evidence is to test the credibility of a witness and to test the truthfulness of the facts given by the witness when giving evidence.

In the circumstances pleaded, the Arbitrator has correctly come to the conclusion that the evidence of the virtual complainant given at the domestic inquiry should not be relied upon in considering the award".

(ii) There are circumstances, where alternative relief in lieu of re-instatement is granted even if the workman is not found guilty to the charge. Instances include where the allegation against the workman is such that it would not promote harmonious relations between parties or by this allegation the employer lost confidence in the workman. The evidence led does not show that the reinstatement will affect the harmonious relationship between the parties and further, the workman is only an office minor staff-the question of loss of confidence would not arise. Further the allegation of misconduct is not related to his office functions.

APPLICATION for a writ of certiorari.

Gomin Dayasiri with *Manoji Jinadasa* for petitioner.

Pradeep de Silva for 1st respondent

Uresha de Silva, State Counsel for 2nd respondent.

Cur.adv.vult

October, 20, 2004

SRISKANDARAJAH, J

The petitioner is a limited liability company in which the workman W. A. S. Jayaweera was employed as an office minor staff. This workman's service was terminated for misconduct after a domestic inquiry. The 2nd respondent made an order under Section 3(1)(d) of the Industrial Disputes Act referring this dispute to the 3rd respondent who was appointed as the arbitrator. The workman was represented by his trade union the 1st respondent in the arbitration proceedings.

The dispute referred for arbitration was as follows : "whether the termination of employment of W. A. S. Jayaweera by John Keells Limited is justified ; if not to what relief the said workman is entitled to". After an inquiry the 3rd respondent made an award on 03.06.2003 wherein he held that the dismissal of the workman was unjustified and awarded reinstatement on or before 1st July 2003 with back wages from 01.09.1997 calculated at Rs. 6,174 per month. This award is marked as X9.

The petitioner submitted that the said award is ultra vires and/or illegal and/or null and void and/or no force and effect in law and/or excess or without jurisdiction and therefore it should be quashed for reasons set out

in Paragraph 15 of the Petition. The counsel for the petitioner submitted that the arbitrator when coming to the conclusion has not considered the evidence of an eye witness, namely, Omar who saw Ms. Kotalawala the female employee of the petitioner with a purple patch on her skirt and the workman W. A. S. Jayaweera apologizing to her. The counsel further submitted that this was a major lapse in the consideration of evidence by the learned arbitrator to determine the justifiability of the termination of services. The counsel urged that the arbitrator had relied heavily on the fact that Ms. Kotalawala did not give evidence before him and submitted that he has erroneously refused to accept as evidence in the arbitration proceedings, the evidence given by this witness at the domestic inquiry. Therefore the contention of the counsel was that non consideration of this material evidence was a complete violation of the "just and equitable concept" in labour law and constitutes an error on the face of the record.

The arbitrator in his award has given his reasons for not relying on the evidence of Ms. Kotalawala (virtual complainant) led at the domestic inquiry. According to him a domestic inquiry cannot be considered as a judicial inquiry and the evidence in a domestic inquiry is not led after administering oath. Hence reliance cannot be placed in her evidence unless it is led before the arbitrator. A charge against a person has to be proved by direct evidence . But the rules of evidence provided in the Evidence Ordinance permit evidence led in a former judicial proceedings to be led in a subsequent judicial proceeding in exceptional circumstances where the witness cannot be found or cannot be brought without unreasonable delay or expenses or the witness is prevented from giving evidence. Even though the Evidence Ordinance is not strictly applicable to inquiries held under the Industrial Disputes Act, the principle behind the admissibility of evidence should be borne in mind in accepting such evidence. The purpose of leading direct evidence is to test the credibility of a witness and to test the truthfulness of the facts given by the witness when giving evidence. If this opportunity is denied to a tribunal then only on exceptional circumstances, it can accept evidence subject to the aforesaid test.

As observed by the arbitrator, the evidence given before a domestic inquiry is not under oath and therefore the truthfulness of the evidence is not established. In this domestic inquiry the workman against whom the inquiry was held was not permitted to retain counsel. It appears from the proceedings that the workman himself was given an opportunity to cross

examine this witness. This may be to comply with the rules of natural justice. In this instant case the petitioner has sent two letters to Ms. Kotalawala and thereafter did not make any attempt to summon this witness and to lead her evidence. The submission of the petitioner is that all endeavors to summon this witness were made who is no longer working in the petitioner's company. The Human Resources Manager, Mithraka Fernando in his evidence before the arbitrator on 07.11.2001 admitted that even though letters were sent to Ms. Kotalawala there was no response from her. He also admitted that he had not taken personal interest in contacting her over the telephone but he came to know through others that the witness was threatened and was told not to give evidence. The petitioner did not call any witness to substantiate this fact.

There is no evidence to prove that this witness was threatened or prevented from giving evidence. According to the Human Resource, Manager this witness is working in Colombo. In the absence of sufficient proof that the witness cannot be brought to give evidence it is dangerous to admit the evidence given by that witness in an earlier proceedings which was not given under oath or subjected to proper cross examination. Under these circumstances the arbitrator has correctly come to the conclusion that the evidence given by Ms. Kotalawala at the domestic inquiry should not be relied upon in considering the award.

The petitioner further submitted that the arbitrator has failed and neglected to consider the evidence of the eye witness Omar. The arbitrator in his award has stated that he has carefully and diligently considered all the evidence led in the case and was of the considered view that the company has failed to prove the guilt of the accused workman of the offense he was charged with.

It appears that the arbitrator has not dealt with the evidence of Omar in the award but he may have considered this evidence in arriving at his conclusion. The evidence of Omar in relation to the charge of misconduct is in pages 6 and 7 of the proceedings before the arbitrator dated 12.01.2000 marked X5. Witness Omar has stated that his attention was drawn towards Anusha Kotalawala when she was talking to Jayaweera. This witness also said that he saw an ink stain in the skirt of Anusha. When he was questioned whether he saw the incident, he said he saw them only after the incident. This witness also said that he saw Jayaweera following Anusha and saying "I am sorry Miss Anusha". This witness also said that he did not see anything in the hand of Jayaweera. This is the evidence of Omar in

relation to the incident. From this evidence it appears that he is not an eyewitness to the incident but a person who has seen a conversation between Jayaweera and Anusha. The fact that Jayaweera apologized to Anusha cannot be construed as a confession. This witness who claims to have seen Jayaweera and Anusha immediately after the incident had said that he has not seen anything in the hand of Jayaweera. This evidence is not sufficient to establish a charge of misconduct. Therefore the failure to deal with this evidence in the arbitrator's award will not make any difference in the outcome of the award.

When considering the totality of the arbitration inquiry the only witness who can speak of the incident is the virtual complainant Anusha Kotalawala. But she did not give evidence before the arbitrator ; the other witness is Omar who claims that he did not see the incident but he only saw the conversation between Anusha the complainant and Jayaweera the workman charged for misconduct. According to this witness he has seen the complainant in a disturbed stage and there is ink stain on her skirt but he said he saw Jayaweera closer to her but he did not have anything in his hand. Other than these witnesses there is no witness to speak to the incident. In these circumstances the arbitrator had come to the correct conclusion that the company has failed to prove the guilt of the accused workman of the offense he is charged with.

The counsel for the petitioner submitted that even though the arbitrator had come to the conclusion that the termination is unjustified, yet there is a major error in the award of the learned arbitrator, namely he has failed to consider two primary principles of industrial law. Firstly, to evaluate the evidence placed before the learned arbitrator ; and secondly the need to act judicially at the inquiry between the employer and employee. In this regard the counsel submitted that the learned arbitrator has not given his mind to the question of relief and has automatically awarded reinstatement with back wages to the workman without considering the evidence and analyzing whether or not the relief is suitable in the given circumstances of the case. He has a duty imposed by law to consider what is the proper relief and he has failed to consider other alternative relief available which is essential for a just an equitable award. The counsel further contended that there could be cases where such a consideration of the relief is not essential. But the evidence led in this case warrants a consideration on the question of relief for the reason that there was a trade union action in the place of work and there were certain employees who did not take part in the

picketing and they were harassed and abused. The accused workman was a union member and the female employee he allegedly harassed was a member who has resigned from the union and did not take part in the trade union action of picketing. Therefore the arbitrator could have considered alternative relief.

There are circumstances where alternative relief in lieu of reinstatement is granted even if the workman is not found guilty to the charge. Instances include, where the allegation against the workman is such that it would not promote harmonious relation between parties or by this allegation the employer lost confidence in the workman. In this instant case there is no evidence whatsoever against the workman in relation to the charge framed against him and also there is no evidence that he harassed or abused other employees or created industrial unrest. On the other hand according to the evidence led, the workman has nothing to do with this incident and there is evidence to the contrary to state that the workman has gone out of the premises during the relevant time. This is borne out by the log entry made at the gate in the vehicle movement chart. According to this entry the workman left the premises at 3.07 p.m. This entry was made by the security officer at the gate. According to the charge the incident has taken place at 3.20 p.m. The female employee who is supposed to have been humiliated is not working in the petitioner's company now. There is no allegation of misconduct against this employee in relation to the employer or other employees ; therefore the reinstatement of this employee will not affect the harmonious relationship between the employer and the employee.

In considering the question of loss of confidence the workman is only an office minor staff ; he will not fall within the category of officers such as accountants, cashiers, watchers and bank employees who occupy positions of confidence. In addition the allegation of misconduct is not related to his official function. Therefore there cannot be a loss of confidence in the workman. Under these circumstances the arbitrator has no alternative but to reinstate the workman with back wages. For the reasons stated above I dismiss this application without cost.

SRIPAVAN, J. - *I agree.*

Application dismissed.