

**CEYLON PLANTERS' SOCIETY
(ON BEHALF OF WEERASINGHE)**

v

BOGAWANTHALAWA PLANTATIONS LIMITED

SUPREME COURT
FERNANDO, J.
ISMAIL, J. AND
WEERASURIYA, J.
SC APPEAL NO 82/2002
HCA LT 88/96
16 OCTOBER, 2003

Industrial Dispute – Termination of services – Unjustified termination – Guidelines for determining quantum of compensation.

The workman was the Superintendent of an estate. He was interdicted on 23.10.92. After a domestic inquiry his services were terminated with effect from 23.10.92.

The appellant, a trade union of which the workman was a member, complained to the Labour Tribunal. While the application was pending the workman reached the age of 55 (the optional date of retirement) on 09.02.94. On 08.08.96 the tribunal held that the termination of services was both *mala fide* and unjustified and awarded compensation for 50 months from 23.10.92 to 31.12.96, loss of earnings, viz. up to the date of the order of the tribunal and

for a reasonable period thereafter (which was nearly 5 months) to enable him to obtain other employment. The workman had an unblemished record of 31 years of service in the plantation sector.

Held:

Compensation awarded, though generous, cannot be regarded as excessive.

Per Fernando, J

"To compensate the Superintendent means to put him in the position in which he would have been but for the wrongful termination. Had the respondent refrained from dismissing him and allowed him to retire on 09.02.94 he could well have applied..... for other employment, and could well have commenced such fresh employment soon after retirement. The wrongful termination denied him that opportunity, and for that he must be compensated."

Case referred to:

1. *Jayasuriya v Sri Lanka State Plantations Corporation* (1995) 2 Sri LR 379.

APPEAL from the judgment of the High Court.

Indra Ladduwahetty for appellant.

L.C.Seneviratne. P.C.with *Ranil Prematilake* for respondent.

Cur.adv.vult

October 31, 2003

FERNANDO, J.

The question of law in this appeal is whether, in computing compensation for a *mala fide* and unjustified termination of service, a Labour Tribunal is entitled to take into account the workman's loss of earnings only during the period between termination and his due date of retirement, or even for a subsequent period. 1

The Superintendent of an estate was employed by the respondent-appellant- respondent ("the respondent") under a contract which gave the respondent the right to retire him on reaching the age of 55 years ("the optional date of retirement") and the discretion to grant him annual extensions thereafter. He was interdicted on 23.10.92. After a domestic inquiry at which he was found guilty of certain charges, his services were terminated on 14.06.93 with effect from 23.10.92. A Labour Tribunal application was filed on his behalf by the applicant-respondent-appellant 10

("the appellant"), a trade union of which he was a member. While that application was pending he reached the age of 55 years on 09.02.94. On 08.08.96 the Tribunal held that the termination of his services was both *mala fide* and unjustified; that he had been employed in the plantation sector for 31 years, and had a very satisfactory and, indeed, unblemished record of service; that if his services had not been prematurely terminated, his record of service would probably have enabled him to obtain extensions of service after the age of 55 years; and that the manner of termination of his services was such as to prevent him from obtaining alternative employment in the plantation sector until termination was set aside by the Tribunal. The Tribunal assessed the value of his employment benefits, including salary, allowances and perquisites, at Rs 44,402/- per month, and awarded him compensation for 50 months (for the period 23.10.92 to 31.12.1996), amounting to Rs 2,220,100/-.

Against that order the respondent appealed to the High Court, which by its order dated 31.07.2002 affirmed the findings of the Tribunal as to the termination and the value of employment benefits, but held that it was "prudent to assume that considering the conduct of the [Superintendent] in all matters and circumstances relating to this case the [respondent] will decide not to extend his contract beyond the age of retirement", and that "the learned President erred in law in granting compensation beyond the employee's age of retirement". The order of the Tribunal was accordingly varied by restricting compensation to the period 23.10.92 to 9.2.94.

In coming to the conclusion that the Superintendent would, but for his premature termination, probably have obtained extensions of service, the learned President relied on a most unusual circumstance. There was clear evidence that in May 1995, during the pendency of the proceedings, the Chief Executive Officer of the respondent informed a Presidential Commission of Inquiry (into Grievances of Employees of Peoples Ventures) that a fresh inquiry would be held, and if the Superintendent was exonerated the respondent would try to give him employment if there was a possible vacancy and that if no suitable employment was available, it would consider granting him some relief. The Superintendent

agreed. The parties agreed that the inquiry should be held by an independent retired judicial officer, and they agreed on Mr Shelton Perera. The learned President regarded this undertaking as evidence that if the Superintendent was exonerated the respondent was willing, despite the lapse of more than one year after the date of his optional retirement, to give him employment - in effect, that the respondent would have been willing to grant him extensions of service even after his optional age of retirement. According to the appellant, Mr Perera's report had been submitted to the respondent *before* the Labour Tribunal order, but had not been produced by the respondent. According to the respondent, that report had been submitted only after that order. Be that as it may, it was produced in the course of the High Court proceedings, and in view of the agreement of parties it would not be equitable to exclude it from consideration in determining the relief due.

60

It is necessary to refer to the charges against the Superintendent, because learned President's Counsel for the respondent had strenuously submitted to the High Court that he was responsible for discipline on the estate, and was holding a position of trust and confidence; that he was guilty of falsifying entries in the running chart of his official vehicle; that he had betrayed the trust reposed in him; and that the respondent could no longer have any confidence in him. He urged that even though the respondent had not challenged the concurrent findings of the Labour Tribunal and the High Court that the termination was unjustified, the findings in respect of those charges were relevant to the likely refusal of extensions, and therefore to the assessment of compensation.

70

80

The substance of the two charges against the Superintendent was that he had mis-stated the extent of his official travel for August 1992, and failed to submit to the internal auditor on 16.10.92 the running charts for the months of July and September 1992. There was evidence that it was the driver's responsibility to maintain the running charts; that the Superintendent was required to counter-sign in confirmation of their accuracy; that the driver had fallen ill and left in October; that the mileage for a particular official trip in August had been overstated by 49 kms; that even if that excess reflected private travel incorrectly recorded as official, and was

90

added to the Superintendent's private travel for that month, his permitted allowance for private travel would not have been exceeded; and that in any event any loss caused by excess private travel could have been recovered from him.

The learned High Court Judge summarised the position in his judgment: that the learned President's finding in no way amounts to a finding of falsification; that making an incorrect entry and falsification are altogether different; that there was no finding of any deliberate act of making false entries; that there was no falsification of entries in the running chart; and that although the Superintendent had the responsibility of satisfying himself that the entries were correct, yet the circumstances were not so serious as to warrant termination. 100

In his report Mr Shelton Perera exonerated the Superintendent. Not only did he hold that the Superintendent was not guilty of any of the charges, but he also observed that the charges "seem to have been dug out to get rid of him by hook or by crook".

The principal question is whether compensation should be restricted to the period prior to the optional date of retirement. 110

In *Jayasuriya v Sri Lanka State Plantations Corporation*,⁽¹⁾ Amerasinghe, J. stated:

"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.... It is a good starting point. However, as Vythialingam, J, pointed out in *Ceylon Transport Board v Wijeratne*, [1975] 77 NLR 481, the usual date of retirement ought not to be 'mechanically' adopted because of the risks and vicissitudes of an employee's life.... 'He may die. His services may be terminated for misconduct or on account of retrenchment. The business may cease to exist or close down'.... 120

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." [emphasis added] 130

In this case the learned President was entitled to treat the agreement reached before the Presidential Commission as sufficient evidence that extensions of service were probable. The award of compensation up to 31.12.96 pre-supposes extensions of service up to the age of 57 years and 10 months, which is by no means unreasonable.

However, there is another circumstance which supports the Tribunal's assessment of compensation, which did not arise for consideration in Jayasuriya's case: whether in exceptional circumstances the "outside limit" could be a date even *after* the mandatory date of retirement. The Tribunal held that the manner of termination was such that the Superintendent could not have obtained other employment in the plantation sector until his name was cleared. The difficulty which a workman faces in mitigating his loss, particularly in the plantation sector, was discussed by Amerasinghe, J. (at page 412). 140

Even after his mandatory age of retirement, when no further extensions are permissible, an employee is nevertheless entitled to obtain employment under another employer. It is by no means uncommon for an employee to commence a fresh employment after retirement, and to continue in that employment for another five or even ten years. If, however, his services are terminated *mala fide*, he would generally be unable to obtain suitable employment elsewhere until his name is cleared. The consequent loss of earnings would also be attributable to the wrongful termination, and would be recoverable. If not, serious anomalies and injustices would result. Thus if a workman is dismissed one month before his mandatory date of retirement, upon false charges involving moral turpitude, it would be inequitable to restrict compensation to one month's salary, i.e. up to the date of retirement. His loss is much greater. But for that wrongful termination, he could have commenced a new employment after retirement. The resultant loss of earnings is the direct and foreseeable consequence of the wrong- 150 160

ful termination, regardless of his date of mandatory retirement. In this case, too, the Superintendent was entitled to compensation for the loss of earnings up to the date of the Labour Tribunal order exonerating him, and for a reasonable period thereafter to enable him to apply for and obtain other employment. To compensate the Superintendent means to put him in the position in which he would have been but for the wrongful termination. Had the respondent refrained from dismissing him, and allowed him to retire on 9.2.94, he could well have applied (even before his due date of retirement) for other employment, and could have commenced such fresh employment soon after retirement. The wrongful termination denied him that opportunity, and for that he must be compensated. 170

The learned President allowed compensation not only up to the date of his order, but also for a period of nearly five months thereafter. That would cover the period needed for applications, interviews, and selection, and though generous, cannot be regarded as excessively so. 180

I allow the appeal, set aside the order of the High Court, and affirm the order of the Labour Tribunal. The appellant will be entitled to costs in a sum of Rs 25,000/-.

ISMAIL, J. - I agree.

WEERASURIYA, J. - I agree.

Appeal allowed.