

**JANATHA ESTATES DEVELOPMENT BOARD  
AND OTHERS**

**v.**

**KURUKULADITTA**

COURT OF APPEAL.

D.P.S. GUNASEKERA, J.

C. A. No. 232/84 – L.T. CASE No. 9/12635/83,

JANUARY 16, 1990.

*Industrial Disputes. – Unjustified termination – Refusal to comply with punitive transfer order.*

Although an employer has an inherent right to transfer an employee it must be made *bona fide*. The respondents had found the applicant guilty of a serious act of misconduct without affording him an opportunity of being heard. They had acted unilaterally in transferring him. The order of punitive transfer was arbitrary and the applicant was not bound to comply. Hence the termination was unjustified.

**Cases referred to :**

- (1) *Ceylon Estate Staff Union v. Superintendant, Madekumbura Estate, Wattagoda* 73 N.L.R. 278,
- (2) *Estates Staff Union v. The Superintendant and Others (1986)* 1 C.A.L.R. 102.

*APPEAL from order of President, Labour Tribunal.*

*Chula de Silva, P.C. with N. Chasie Chetty, R. Deviligoda and C. Liyanapatebendi for employer-appellant.*

*H. L. de Silva, P.C. with Harsha Soza and P. N. Ratnawadana for applicant-respondent.*

*Cur. adv. vult.*

September 12, 1990

**D. P. S. GUNASEKERA, J.**

The Applicant-Respondent had made an application to the Labour Tribunal dated 5th May, 1983 stating that his services as Assistant Superintendant, Dunsinnane Estate, Pundaluoya were terminated without any valid reasons by the Employer-Appellants on 6th April, 1983 and prayed for (a) reinstatement with backwages and or compensation for loss of career, (b) for gratuity, (c) for Statutory and other dues.

The Respondent-Appellants filed answer admitting the termination of the services of the Applicant-Respondent and pleaded that the Applicant-Respondent was transferred to Miyanwatte Estate, Daraniyagala with effect from 1st March, 1983 by letter dated 8th February, 1983 and that the Applicant-Respondent refused to comply with the said transfer order despite repeated requests and therefore the termination of the services of the Applicant-Respondent was lawful and justified.

At the inquiry before the Tribunal C. S. Gunathilake, the Superintendant and J. G. Perera, the Assistant Superintendant of the Dunsinnane Estate gave evidence on behalf of the Employer-Appellants and marked and produced documents R 1 – R 16. The Applicant-Respondent did not give evidence but called Tangawelu, the chief Kanagapulle, Dunsinnane Estate as his witness.

After the inquiry the learned President by his order dated 17th of April, 1984 held that the services of the Applicant-Respondent has been terminated without valid reasons and ordered that he be reinstated with backwages for 6 months amounting to Rs. 6,054. It is against this order that the Employer-Respondents have appealed.

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The facts relating to this case briefly are as follows :

On the morning of 16.12.82 a conference had been arranged in the Estate factory by the Superintendent Gunathilake at which the Applicant and other Assistant Superintendants Ranathunge Premadasa, Perera and Madiwela had been present. The purpose of this conference had been to discuss the programme of work relating to weeding in the various divisions of the Estate for the month of December. A few days earlier the Agricultural Advisor Anil de Silva had done an inspection of the estate ; the weeding programme on each division was to be discussed and firstly the discussion had centred around the division in which the factory was located and then the discussion in regard to the middle division which was in charge of the Applicant-Respondent had commenced. This had been the division in which weeding had been very badly neglected and when this situation was pointed out the Applicant is alleged to have lost his temper and made disparaging remarks about the Agricultural Advisor and said that since the Agricultural Advisor has only one eye that he could not see properly and turned abusive towards the Superintendent. All attempts to control the Applicant had failed whereupon the Superintendent has requested the Applicant-Assistant Superintendent to leave the factory which he had refused to do. The Superintendent had then informed the other Assistants that they could not continue with the discussion and left the factory.

The Applicant is alleged to have continued to abuse the Superintendent in obscene language and followed him to the car ; after this incident the Superintendent had gone to his office when the other Assistants had come into his office and reported that the Applicant had continued to abuse him in obscene language and made disparaging remarks about him.

The Superintendent had thereafter reported this incident to the Director, Group Three of the Janatha Estates Development Board No. 2, Nuwaraeliya by document R1 and suggested that an inquiry be held in regard to the conduct of the Applicant-Respondent.

The Director of Janatha Estates Development Board had contemplated disciplinary action against the Applicant-Respondent and approval had been sought from the General Manager through the Chairman in Colombo. This contemplated action is evidenced by R2 and

a detailed report had been called for from the Superintendent by R3 to which the Superintendent had responded by sending his report R4. Thereafter by letter dated 8th February, 1983 marked R5 the Applicant-Respondent had been transferred to Miyanwatte Estate, Daraniyagala with effect from 1st March, 83. In R5 the letter of transfer *inter alia* it is stated as follows : "although such misconduct on your part warrants severe disciplinary action not excluding the termination of your services, we are not in this instance proceeding to take this extreme step but transferring you out of Dunsinnane Estate as a punitive measure with the warning that if there is any complaint in the future in regard to your work or conduct your services are liable to be summarily dismissed."

This letter of transfer had been acknowledged by the Applicant-Respondent by R6 and he had denied the charges levelled against him and refused to comply with the transfer order transferring him to Miyanwatte Estate as it had been a punitive transfer. By R7 dated 15th March, 1983 the General Manager of the 1st Respondent Board had confirmed the order of transfer and requested the Applicant to comply with it and intimated that severe disciplinary action would be taken in the event of the transfer order was not complied with by the 31st March, 1983. The Applicant-Respondent had again protested about his transfer stating that he was not guilty of any act of misconduct by R8 and refused to go on transfer to Miyanwatte Estate, Daraniyagala and thereafter the Applicant-Respondent's services had been terminated by R9 dated 6th April, 1983.

Having considered the evidence placed before him the learned President has taken the view that the allegations made against the Applicant-Respondent have not been established before him ; in any event the Respondent-Appellants have taken the decision to terminate the Applicant's services without affording him an opportunity of answering the charges levelled against him and imposed a double punishment by warning him and transferring him to Miyanwatte Estate. The learned President in this context holds therefore that the transfer of the Applicant-Respondent to Miyanwatte Estate has been a punitive transfer and was unreasonable.

Learned President Counsel for the Appellants submitted that the President had made several errors in his order and therefore it should be set aside. He contended that the learned President misdirected himself in regard to the powers of the Labour Tribunal and contended that a matter of a transfer of an employee is not within the jurisdiction of a

tribunal. In support of this submission learned Counsel stated that the President was bound by the decision in the *Ceylon Estates Staff Union v. Superintendent, Madekumbura Estate, Wattagoda (1)* which recognized the right of an employer to transfer an employee and which held that the refusal to comply with a reasonable transfer order entitles the employer to terminate the workman's services.

Learned Counsel submitted that the question of the transfer of an employee is an internal management function and that in the absence of provisions to the contrary it is an implied term in the contract and that the refusal to comply with a reasonable transfer order entitles the employer to terminate the employee's services.

In the *Estates Staff Union v. The Superintendent and others (2)* H. A. G. de Silva, J. having considered all the authorities has held that although an employer has an inherent right to transfer an employee that the right to transfer is subject to the following limitations :—

- (1) It should not be contrary to the contract or terms of employment.
- (2) Transfer should not be *Mala fide*.
- (3) There is no implied condition of service that an employee can be transferred to a new concern commenced by the employer and subsequent to the date of the employers recruitment.
- (4) An employee cannot be transferred from one employer to another.
- (5) A transfer must not involve a change in the condition of service of the employee transferred.

The learned Counsel for Appellant also submitted that the President has failed to address his mind to the question of the failure of the Applicant-Respondent to give evidence at the Tribunal and contended that there was no evidence by the Applicant-Respondent that his transfer to Miyanwatte Estate was made *Mala fide*.

Learned President Counsel for the Applicant-Respondents contended that the question of the Applicant-Respondent giving evidence did not arise since on the evidence of the Respondents alone it is implicit that the transfer of the Applicant was not *bona fide*. His contention was that although the Respondent-Appellants contemplated in taking disciplinary action against the Applicant consequent to the report made by the Superintendent by R1, that without calling for the explanations of the Applicant, without any charge been framed and without affording an opportunity to the Applicant to

meet the charges that the Respondents have taken an unilateral decision and found him guilty of a most reprehensible conduct if it is true and imposed a dual punishment. He submitted that the 1st intimation the Appellant received was R5 where the Respondents alleged that the Applicant was guilty of misconduct and that he was been transferred to Miyanwatte Estate on account of it.

Although an employer has an inherent right to transfer an employee it must be made *bona fide*. The question that has to be determined in this case is whether the Applicant was justified in refusing to comply with the order of transfer made by R5. Learned Counsel for the Applicant-Respondent contended that an employee is not obliged to comply with an unlawful order he submits that by R5 it is clear that the Respondents-Appellants have found the Applicant guilty of a serious act of misconduct without affording him an opportunity of being heard and therefore this transfer effected by R5 is an illegal order. On a consideration of R1 it appears that the 3rd Respondent-Appellant has complained to his superior Officers about the conduct of the Applicant-Appellant and requested that an inquiry be held. By R2 disciplinary action has been contemplated and approval had been sought from the General Manager to hold an inquiry in respect of the alleged act of misconduct and a detailed report had been called from the 3rd Respondent which had been forwarded by R4. Having contemplated disciplinary proceedings the respondents have acted unilaterally and taken steps to transfer the Applicant-Respondent having found him guilty and transferred him by R5. Although the employer's right to transfer is undisputed the conduct of the 1st and 2nd Respondents in this case indicates that they have acted arbitrarily and it is in consequence of the refusal to comply with this order of transfer his services has been terminated by R9 dated 6th April, 1983. It is upon an examination of these sequence of events that the learned President has taken the view that the termination of the services of the Applicant-Respondent in this arbitrary manner was unjustified.

On a consideration of the submissions of the learned Counsel and upon an examination of the evidence led before the Tribunal in my view, it was open to the learned President of the Labour Tribunal to have reached the conclusion that he arrived at. In these circumstances I see no reason to interfere with his findings and accordingly this appeal is dismissed with costs in a sum of Rs. 315.

*Appeal dismissed.*