

MILLERS LIMITED
v.
CEYLON MERCANTILE INDUSTRIAL
AND GENERAL WORKERS UNION (CMU)

SUPREME COURT.

BANDARANAYAKE, J., DHEERARATNE, J. AND

WIJETUNGA, J.

SC APPEAL NO. 38/92.

HCA LT/LA SC 2/92.

HCA/LT 46/91.

LT CASE NO. 1/14/89.

FEBRUARY 16, 1993.

Industrial Law – Unjust termination of workman's services – Misconduct – Deprivation of back wages – Just and equitable order – Necessity to take into account the interests of both parties.

Where the workman's conduct was deserving of censure but dismissal was considered too severe a punishment and reinstatement without back wages was ordered –

the fact that the workman concerned was a labourer and could well have been gainfully employed as a manual labourer during the time he was out of work with the appellant but placed no evidence that he remained unemployed despite efforts to find work must be taken into account in considering suitability of awarding back wages. The deprivation of back wages would be justified if he placed no evidence in this regard. It was also relevant to this question that the workman had falsely and deliberately denied misbehaviour on his part which resulted in disciplinary proceedings being taken against him.

Per Bandaranayake, J. :

" The Order must be fair by all parties in the interests of discipline ".

' When the Provincial High Court stresses ' the spirit of the order '..... the Court introduces a dimension of vagueness and uncertainty into the proceedings. The Tribunal's decision included both reinstatement and an order not to award any back wages. It would appear that the High Court is laying too much stress on the fact of reinstatement and therefore the interests only of the workman, whilst not appreciating the reasons for the denial of back wages.

An award is just and equitable only if it takes into consideration the interests of all the parties ".

Cases considered as per Judge's annex :

1. *SLTB v. Ceylon Transport Labour Union* 1986 1 CALR 309.
2. *Malik Dairy Farms v. Its Workers Union* 1968 (2) LLJ 523 (Bombay).
3. 1978 SC Labour Law Journal : vol. 2, 474, 477.
4. 1985 Labour Law Journal : vol. 2, 457.
5. CA 404/83 – CA Minute of 19.5.83.
6. *United Engineering Workers' Union V. Devanayagam* (1967) 72 CLW 35.
7. *Ceylon Tea Plantations Co. Ltd. v. Ceylon Estates Staff Union* (S.C. 211/72 ; S.C.M. 15/5/74).
8. *Ceylon Transport Board v. Ceylon Transport Board Workers' Union* (1969) 71 NLR 42.
9. *Uplands Tea Estates Ltd. v. Ceylon Workers' Congress* (1970) 72 NLR 68.
10. *Associated Newspapers of Ceylon Ltd. v. Jayasinghe* [1982] 2 SLR 595.

APPEAL from order of the High Court in appeal.

M. A. Bastiansz with Nigel Hatch for respondent-appellant.

Shirley M. Fernando with Ms. H. Fernando for the applicant-respondent.

Cur. adv. vult.

May 13, 1993.

BANDARANAYAKE, J.

Leave to appeal to the Supreme Court has been granted by the High Court of the Western Province in terms of Act No. 19 of 1990.

The applicant-union on behalf of the workman sought relief from the Labour Tribunal alleging that the workman's services had been unjustly terminated with effect from 10.9.88 and prayed for reinstatement with back wages. The respondent-employer resisted the application stating dismissal had been on disciplinary grounds after a domestic enquiry and was justified.

The facts were that the workman who was a labourer and been in employment for 2 years with the appellant had sought to remove a large thick sheet of hardboard belonging to the respondent-company without permission by placing the article in a company vehicle which was about to take employees who had worked overtime unloading containers back to their houses that night. On being cautioned by the driver of the vehicle that he should obtain prior permission to remove Company property, the workman had gone inside the office

and sought permission from the Manager to remove the hardboard but permission was refused. The workman had then in a fit of temper kicked the hardboard and broken it into two and thrown it out of the vehicle and banged the door of the vehicle so hard that the lock was damaged ; this was in the presence of several other workmen. This was the misconduct complained of by the employer. The workman had at first sought to deny that the hardboard belonged to the employer Company ; later whilst admitting that he sought permission to remove the hardboard, denied damaging the door lock and also said that he kept the hardboard outside the vehicle. The Tribunal has chosen not to believe the workman and has accepted the employer's witnesses narration of events. This rejection of the workman's version is important for the reason that the workman by his evidence had sought to deny any misconduct which necessitated disciplinary measures being taken against him. The tribunal accepted the evidence led on behalf of the employer and held the workman guilty of the behaviour alleged. The Tribunal however without dismissing the application ordered reinstatement without break in service but without back wages. Appellant's Counsel submitted that here was a case of an outburst of extreme resentment against a decision of the employer in the presence of several other workmen which if not censured could lead to chaos in the work place. Being perhaps a borderline case, a case where the conduct of the workman may have been regarded as reprehensible and intolerable warranting dismissal, the Tribunal had taken a more lenient view and considering the circumstances where previous bad behavior had not been satisfactorily proved though alleged, decided that termination was too harsh a punishment for his behaviour and in this sense unjustified and instead ordered reinstatement with effect from 5.3.91 without a break in service but without back wages. This order had been complied with.

The applicant next took an appeal to the Provincial High Court seeking to have the order of the Tribunal varied. The only ground urged in appeal by Counsel had been that the President had erred in refusing back wages to the workman. The loss in income of the workman from 10.9.88 to 5.3.91 was in excess of Rs. 34,000 which it was urged was inequitable.

The judgment of the High Court in appeal observed as follows:..... "quote"....." The learned President has not considered whether it is reasonable and/or equitable to deprive the applicant of the entirety of the back wages particularly in the light of the amount and the period concerned. No reason has been advanced for depriving the grant of back wages. This would have been a relevant consideration in view of the finding.... that termination of service was too harsh a punishment. In keeping with the spirit of the order of the learned President it will not be in the interests of equity to deprive the workman of the entirety of the back wages." The High Court varied the Tribunal's order to the extent of awarding back wages for 18 months at a monthly wage of Rs. 1,187/50 = Rs. 21,375. Subject to this variation the appeal was dismissed without costs.

This appeal is from that judgment. It was submitted on behalf of the employer respondent-appellant that the Labour Court had indeed approached the evidence placed before it correctly and considered all relevant matters in coming to its decision. The Tribunal had upon a consideration of the evidence come to a finding in the first instance that the workman was guilty of improper behaviour when permission to remove the hardboard was refused. This finding has not been canvassed in appeal. Thereafter the Tribunal had to decide whether in the circumstances, dismissal was fair or justified. The Tribunal has applied its mind to this question and decided that it was excessive and therefore awarded reinstatement. This the Tribunal could do and the employer has not appealed against that order. Thereafter the Tribunal had obviously given its mind to the question of back wages when it decided against the award of back wages and deliberately said so. Counsel submitted that this decision was within the Tribunal's discretion in the situation where dismissal in the first instance had been taken as a disciplinary measure. There can be no doubt that the Tribunal felt that the interests of discipline required that some form of disapproval of or punishment for the workman's misconduct be shown and thus in fairness to the employer in the face of proved indiscipline decided against the award of back wages. Furthermore the workman although he gave evidence had not stated that he remained unemployed since 10.9.88. Thus it was submitted that the Tribunal had abundant reason to make the order it did. Counsel for the applicant-respondent submitted that the incident of 9.9.88 was of a trivial nature and therefore termination was unjustified and consequently the deprivation of Rs. 35,000 was unjustified and that the High Court therefore restored some wages.

The question before us is whether the Labour Tribunal President was justified in depriving the workman of back wages upon reinstatement. A Tribunal has to determine this upon the facts and circumstances of each case. In this instance upon the evidence the President could have concluded that the workman's conduct was deserving of censure although dismissal was too severe.

The workman has given his age as 22 years when he testified before the Tribunal in May 1990. Thus, he was 20 years of age when his services were terminated in September 1988. His employment had been that of a manual labourer. Thus it would appear that he could well have been gainfully employed at least as manual labourer during the time he was out of work with the appellant.

Although the workman testified he has placed no evidence that he remained unemployed despite efforts to find work. A Tribunal is entitled to take his failure to do so into account in deciding the question of back wages. There was also the conduct of the workman before the Tribunal of falsely and deliberately denying any misbehaviour on 9.9.88. We are of the opinion that there was material before the Tribunal upon which the President, in the exercise of his discretion in making an award which was just and fair to both employee and employer, could have fairly refused to award any back wages to this workman. The Order must be fair by all parties in the interests of discipline. The finding of the High Court that the order of the Tribunal was inequitable is unacceptable.

When the Provincial High Court stresses "the spirit of the order"..... the Court introduces a dimension of vagueness and uncertainty into the proceedings. The Tribunal's decision included both reinstatement and an order not to award any back wages. It would appear that the High Court is laying too much stress on the fact of reinstatement and therefore the interests only of the workman whilst not appreciating the reasons for the denial of back wages.

An award is just and equitable only if it takes into consideration the interests of all the parties.

The appeal is allowed.

The judgment of the Provincial High Court is set aside and the Order of the Labour Tribunal is restored. No costs.

DHEERARATNE, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal allowed.
