BANK OF AMERICA
V.
ABEYGUNASEKERA

COURT OF APPEAL,
A. DE Z. GUNAWARDENA, J.
C.A. 179/81 & C.A. 188/87
L.T. 8/1101/86
JUNE 27 AND JULY 10. 1991

Industrial dispute - Industrial Disputes Act - Termination of services - Loss of confidence - Onus of proof - Compensation in lieu of reinstatement - Just and fair compensation.

The services of the Applicant - Appellant who was employed as an Executive at the Bank of America, were terminated, on the ground that the Bank has lost confidence in the Applicant - Appellant. The Bank alleged five "failures" on the part of the Applicant - Appellant and also made an allegation of insubordination to justify the dismissal of the Applicant Appellant.

Held:

(1) That the "failures" relied on by the Bank to justify the termination were not considered serious by the Bank at the time they occured, and it is unreasonable for the Bank to rely on them subsequently to justify the dismissal.

(2) That an inference of insubordination is not warranted on the facts and circumstances proved in the case.

(3) That it is necessary for the employer to lead evidence of facts and circumstances from which loss of confidence can be proved, directly or inferentially.

Per Gunawardana J.; "it must be pointed out that the mere assertion by an employer is not sufficient to justify the termination of a workman on the ground of loss of confidence. When such an assertion is made it is incumbent on the Labour Tribunal to consider whether the allegation is well founded."

(4) The amount that should be awarded as compensation should not be mechanically calculated on the basis of the salary a workman should have earned till he reached the age of retirement. The relevant factors that should be taken into consideration in arriving at what is just and fair compensation are:-

(i) the immediate monetary loss to the workman, (ii) the prospective and future losses, and (iii) the retirement benefits.

Cases referred to:

1. *The Calendonian (Ceylon) Tea and Rubber Estates Ltd.* v. *J.S. Hillman* 79(1) NLR 421, 435

2. *Ceylon Transport Board* v. *Wijeratne* 77 NLR 481

3. *Belgama* v. *Co-operative Wholesale Establishment* S.C. 64 and 73/71 - S.C. Minutes of 13.12.1971.

4. *Browns Groups Industries Ltd.* v. *C.M.U.* - C.A. 371/84 - C.A. Minutes of 31.3.1988.

5. *M.A. Jayasuriya* v. *Sri Lanka State Plantations Corporation* S.C. Appeal No. 9/89 - S.C. Minutes of 30.5.1991

APPEAL from judgment of the Labour Tribunal.

H.L. de Silva, P.C. with *Motilal Nehuru P.C.* and *P.M. Ratnawardane* for applicant - appellant

S.L. Gunasekera for respondent -respondent..

Cur. adv. vult

10 September, 1991

A. DE Z. GUNAWARDANA, J.

There are two appeals in this case, against the order made by the Labour Tribunal on 2.4.1987. One appeal is by the Workman-Applicant, Vevil R. Abeygunasekera (hereinafter referred to as the Applicant) bearing C.A. No. 179/87 and the other C.A. No. 188/87, by the Employer-Respondent, the Bank of America (hereinafter referred to as Respondent). The Applicant, by his appeal, is seeking to get the compensation awarded to him by the said Order, enhanced. The Respondent is moving by way of appeal to have the said Order set aside and the application of the Applicant to the Labour Tribunal, dismissed. Both these appeals were argued together.,

The Applicant was employed by the Respondent Bank with effect from November 16, 1981 as an Executive. At the beginning, the Bank was pleased with his work performance and his probationary period of 6 months was shortened to 1 month and 3 weeks, and was confirmed from January 11, 1982. According to the Respondent, the work performance of the Applicant had thereafter declined and

the Applicant was relieved of several of his duties. However, he has received a number of salary increases, though not of the same scale as some of the other employees.

On January 21, 1986 around noon the Assistant Vice President (operations) of the Respondent Bank, Mr. Mc Coy has called up the Applicant to Trevor Perera's table, another Executive of the Bank, and in the presence of another lady officer, had asked the Applicant whether he signed certain Bank Return Forms. When the Applicant said "Yes", Mr. Mc Coy had then angrily asked him whether those forms do not indicate, where provision is made for the signature is for the Manager to sign. The Applicant had explained that he had signed "for the Manager" and not "as the Manager". He had added that he had been signing those returns during the past two years, as required by the previous management, and continued that practice upto then. Mr. Mc Coy had then come upto the Applicant and said, "you fucker, you should not have signed it" and dashed the papers on Trevor Perera's table and had walked away to his office. Mr. Mc Coy has in his affidavit filed in this case has admitted having used the said words in "utter exasperation as this latest instance of the Applicant having acted in utter disregard of both my (his) instructions as well as written Bank Policy procedures and written instructions,..."

After this incident although the Applicant had tried to discuss this matter with Mr. Mc Coy and with Mr. Tengg, the Vice President and Manager, he had not been given an opportunity by both of them. The following day the Applicant was relieved of all his normal duties. He was required to make a thorough review of the Standard Procedure Manual consisting of 9 volumes containing the Bank. Procedures and compare each requirement with what is being done. The next afternoon Mr. Mc Coy had called the Applicant to his room and suggested that the Applicant should resign as he would not be able to get another job if he is "fired". This suggestion the Applicant had rejected. Thereafter by letter dated January 30, 1986 (marked A6) the Applicant was suspended from his duties with immediate effect, on full pay. The Applicant has replied the said letter by his letter dated January 31, 1986 (marked R28). In that letter he had explained the incident that took place on January 21, 1986, the subsequent steps taken against him and had taken up the position that his suspension from work, is totally unjustified. In reply, the Vice

President Mr. Tengg by his letter dated February 20, 1986, (marked R29) has stated that the suspension of the Applicant from work is justified, and that the Bank has lost confidence in the Applicant to perform his duties, satisfactorily. Therefore his services were terminated with immediate effect by that letter.

On 2nd March 1986 the Applicant made an Application to the Labour Tribunal against the said dismissal asking for re-instatement with back wages or in the alternative for compensation in lieu of re-instatement. The Respondent in its answer admitted termination and sought to justify it on the basis that it has lost trust and confidence in the Applicant due to extremely unsatisfactory work performance and conduct of the Applicant. In paras, 3.1 to 3.4 of the said answer the circumstances under which the Applicant's services were terminated have been set out.

At the inquiry in the Labour Tribunal the Applicant did not give evidence but has produced documents marked A1 to A5. Mr. Mc Coy had filed an affidavit on behalf of the Respondent and was subject to cross-examination by the Applicant's Counsel. Miss Amal Perera, an employee of the Bank also gave evidence, and produced certain documents. The documents marked R1 to R35 and the affidavit of Mr. Mc Coy marked "X" were produced on behalf of the Respondent. The Labour Tribunal by its Order dated April 2, 1987 has held that the termination of the services of the Applicant was unjustified, but awarded only one year's salary as compensation to the Applicant, calculated at Rs. 93,864/-. This appeal is from the said Order.

The learned Counsel for the Applicant submitted that,

> "the N.P.L. forms which were sent both quarterly and at the end of the year, to the Bank's headquarters, had for the previous two years been signed by the Applicant himself for the Manager "as required by the Management without any question being raised as to its propriety and therefore did not warrant this outburst from Mc Coy."

The learned Counsel for the Applicant pointed out that, Mr.Tengg, the Manager, does not deny even in his letter dated February 20, 1986 (marked R29) that the Applicant had previously signed the said Forms, "for the Manager". "There is also no evidence to show

that such signing was queried earlier. The learned Counsel raised the question as to why Mr. Tengg had never called for these Forms for his signature, if they were so important, and had to be signed personally by the Manager. The Applicant appears to have signed these Forms at least on eight previous occasions but no query seems to have been raised either by Mr. Tengg or the Headquarters in San Francisco. Hence, the learned Counsel for the Applicant submitted that this was spotted as a result of the "nit picking" approach of Mr. Mc Coy and there was "absolutely no ground for Mr. Mc Coy to rave and rant in this unseemly manner."

The learned Counsel for Respondent conceded that,

> "... it is no doubt correct that the Applicant had not been previously found fault with for signing reports without authority."

However, he argued that Applicant's conduct in this instance should be related to the repeated instances of the Applicant's disobedience of instructions, previously. He added that, therefore, the gravity of the offence and the penalty therefor should be enhanced due to his past record. He further pointed out that specific instructions have been given by, documents containing instructions, marked R17 and R17A, requiring every employee signing any document to be absolutely sure that he is authorised to do so. He submitted that it was in this background that Mc Coy acted in the way he did and,

> ".. not with malice aforethought to humiliate or insult but through sheer exasperation at the unbelievable obtuseness of the Applicant who had displayed a kind of incurable allergy to following instructions."

Thus it is seen that Applicant had signed "for Manager" in the said Forms at least on eight occasions, prior to Mr. Mc Coy detecting the flagrant violations of the Bank's procedures. It is difficult to imagine how such a serious violation of a rigid requirement had been permitted, for such a long time, especially in view of the evidence of Mc Coy that following of Bank procedures have been closely monitored by him. In fact in his evidence he asserted that because of his effective supervision, the branch audit rating for Sept. 1985, was one of the highest in Bank of America, in Sri Lanka. (Vide page 71 of the brief.) In this context it is pertinent to note that at page 44 of the brief when Mc Coy was asked whether,

"According to R17 have you given any specific instructions that the Applicant was not entitled to sign "For Manager".

The answer given by Mc Coy was that, "There is no specific reference to these forms". This clearly shows that documents R17 and R18 gave general instructions and had not made any reference to the matter in issue directly, namely as to whether Applicant could have signed the said Forms "for the Manager".

It is strange that Mr. Tengg, the Manager, also had missed checking on this matter, as it was solely the function of the Manager, according to what Mr. Mc Coy had stated in his affidavit. Mr. Mc Coy has insisted in his evidence that even he could not have signed the said reports "either on his own behalf or for or on behalf of the Manager". (Vide page 178 of the brief.)

In spite of the seriousness of the violation of the procedure, as alleged by Mr. Mc Coy, it is significant that Headquarters of the Bank to which the said forms were sent, had not raised any query about it. This position is confirmed by the following evidence of Mr. Mc Coy,

"Q. Have you got a letter from San Francisco Head Office that Mr. Abeygunasekera should not have been allowed to sign these reports?

A. No." (Vide page 74 of the brief).

When one views the act of the Applicant of signing the said Forms, in the light of these circumstances, the gravity and seriousness that Mr. Mc Coy tries to attach to the said act of Applicant, is much lessened. However the learned Counsel for the Respondent has invited this Court to consider the said act of the Applicant in the background of his previous conduct, as it would then enhance the gravity of the offence. On the other hand the learned Counsel for the Applicant submitted that once Mr. Mc Coy realised that the charge of signing said Forms, "was a tenuous ground on which to dismiss the Applicant, he was obliged to delve into past history in order to make out a case that the Bank had lost confidence in the Applicant". In view of the said contentions by the learned Counsel, it would be incumbent on this Court to look at the past record of the Applicant in order to assess the merits of the said arguments.

In this context it is significant to note that the letter informing the Applicant of his suspension from work (marked A6) dated January 30, 1986, which is 9 days after the said incident with Mr. Mc Coy, does not state any ground as to why the services of the Applicant had been suspended with immediate effect. If the signing of the said Forms was such a glaring and grave error it would have been most appropriate to have mentioned it in the first intimation to the Applicant.

The letter of termination alleges that Applicant is guilty of "gross insubordination" because Applicant refused to sign the counselling memorandum on January 23, 1986. It is also stated in the said letter that "the purpose of obtaining your signature on the original was only an indication that the discussion was held. "However, it appears that a different, if not a second interpretation, had been given to the same act of the Applicant not signing the said memo when in the latter part of the same letter it is stated that, "By your refusal to sign the counselling memorandum you have also rejected the management's warning to correct the failures detailed therein. " Thus this allegation seems to contradict the Respondent's own assertion that signing of the Counselling Memorandum was only intended for the purpose of showing that a discussion was held. If that be the position of the Respondent it could be construed as an additional ground for the Applicant, not to have signed the said memo.

In explaining why the said memo was not signed by the Applicant, learned Counsel for the Applicant submitted that if obtaining the signature on the said memo was only for the purpose of showing that a counselling session was held in the presence of the Applicant and not for authenticating the contents of the said memo, all that was necessary was for Mr. Mc Coy to call in Mr. Tengg or Mr. Trevor Perera to be a witness to that fact. He argued that the said counselling session was something more than a corrective interview although the said memo in its column "Type of Interview", indicated it to be a corrective interview. He added that it was indeed an "Exit Interview". He pointed out that when the Applicant declined to sign the said memo and offered to send in his own comments later, what Mr. Mc Coy should have done was to have noted that in the sheet and got the Applicant to countersign that minute. He further pointed out that the said memo contained a false statement, in that it stated, "As discussed with you on 21st January '86 you have failed to meet

one of your basic job objectives, of accurate compliance with bank policies." There was according to the learned Counsel no discussion on January 21, 1986, except the words of filthy abuse. This is borne out by the letter of the Applicant dated January 31, 1986, marked R28. Therefore, the learned Counsel for the Applicant submitted that charge of insubordination is not maintainable.

The learned Counsel for Respondent submitted that Applicant was required to sign the said memo "purely for the purpose of 'indicating that the discussion was held'." He went on to add that, his signature "does not connote his agreement with comments set out therein" and would not amount to a confession.

However considering the different interpretation given to his not signing, which I have referred to earlier, the alternatives that were available to Mr. Mc Coy to record the refusal to sign the said memo, the false statement that is alleged to be contained there in and the nature and circumstances under which the said interview was held, may have given reasonable apprehension to the Applicant that his possible defences may be affected, if he signed it. Therefore, in the circumstances, the Applicant appears to have acted with a view of self protection, than in defiance of authority. Hence his conduct would not warrant an inference of insubordination.

The said letter of termination also referred to five failures on the part of the Applicant, in order to bring his past record into focus and thereby justify his dismissal. The fifth failure is the failure of the Applicant to have obtained prior review and approval of the Manager, before he signed the said year end reports. As I have already dealt with that matter I now propose to deal with the other four 'failures'.

The first referred to therein is the failure of the Applicant to, "adhere to your clearly defined expense delegation of authority and lapses subsequent to being warned." These discrepancies are evidenced by the documents produced marked R5A to R5E, (vide brief pages 310 to 320) which are for months January '85 to May '85 and (at page 200 of the brief) document marked R5, for June '85. The learned Counsel for the Applicant submitted that if these discrepancies are so serious, how come, that further delegation of authority to expend had been given on August 12, 1985 by document marked R4 (videbrief page 194). The learned Counsel for the Respondent has

countered this argument by showing that after Mr. Mc Coy prepared R5 and R5A to R5E, and thereby discovered the discrepancies in the expenditure, the authority given on 12.8.1985 had been withdrawn completely, on 2.9.1985, which is within such a short period as three weeks.

However what is important in the context is the attitude adopted by the Bank towards this lapse. It is seen from the comment made by Mr. Mc Coy himself in the Performance Evaluation Report (marked R19, vide brief page 244) that "The exceptions appear to have been unintentional". In the light of this comment, the learned Counsel for the Applicant submitted that, the Bank took into account the fact that such excesses were unintentional when it gave the Applicant a general rating of having fully met all the job requirements. He further raised the query as to how the Bank could, "now convert omissions which were not considered serious then, into serious irregularities in February 1986."

The learned Counsel for the Respondent submitted that the Applicant had exceeded his authority 98 times, in 6 months. The expenditure so incurred by the Applicant is Rs. 294,933/-. However it is pertinent to note that another employee of the Bank one Kumar Weerasooriya has incurred a much larger amount totalling to Rs. 526,951/- above the limit, authorised for him. However, there is no evidence that any action was taken against any employee for such a lapse, least of all against the said Weerasooriya. Furthermore when one actually examines the items on which the said expenditure had been incurred by the Applicant, it appears that they were for the daily needs of the Bank, and in some instances for the requirements of the Manager Mr. Tengg himself, like the payment of his visa tax, and for the payment for flowers sent by him. (vide brief page 314).

In the light of the above circumstances and the attitude adopted by the Bank, in the first instance, towards the said lapse it is my view that it is unreasonable for the Bank to now make it a ground to justify the dismissal.

The second "failure" urged in the said letter of termination is, "failure to seek proper approval for the overtime worked by your (his) staff". The document marked R7 dated February 7, 1985 indicates that overtime can be permitted only with the prior approval of Mr. Mc Coy.

By letter dated May 1985 which was produced marked R9, Mr. Mc Coy has requested the Applicant to explain why he had authorised overtime in the case of a clerical employee named Priyadarshi. The Applicant has in his reply (marked R10) explained why it was necessary for that employee to have worked overtime to complete the work in hand, and that it had just slipped his mind, to get prior approval. Mr. Mc Coy had apparently accepted the explanation and replied by letter R11, stating that, "This is no big deal, but a reminder about overtime ..." Again by letter R12 dated September 2, 1985 Mr. Mc Coy had called for explanation from the Applicant as to why he authorised overtime in respect of two employees. The Applicant has given a detailed explanation of the circumstances in his reply (R12 A) dated September 3, 1985 and pointed out that Mr. Mc Coy was aware of the situation. Mr. Mc Coy had not replied this letter. The learned Counsel for the Applicant submitted that this shows that Mr. Mc Coy had accepted the explanation. However, the learned Counsel for the Respondent has pointed out that although Mr. Mc Coy did not reply the said letter, he has in his affidavit at paragraph 4.3 stated that he did not accept the explanation, and this was not challenged in cross-examination. If Mr. Mc Coy did not accept the said explanation, reasonable conduct would have been to reply the said letter of the Applicant, at that time, indicating his disapproval. In addition the learned Counsel for the Applicant has submitted that this "failure" was not considered such a serious matter as it had not even been referred to in the Performance Evaluation Report (marked R19) and that the Bank is, "virtually 'scraping the barrel' in order to find material on which it could justify the termination." Thus it appears that present position of the Bank, that the said lapse is a serious failure, is not borne out when one considers the above circumstances.

The third "failure" referred to in the said letter of termination is, "failure to review branch mail handling procedures despite complaints by other staff." In this regard it is to be noted that The Performance Evaluation Report made in September 1985, merely states that the Applicant "had not fully taken charge of resolving departmental problems e.g. mail procedures." It is significant that it is so stated in the said report under the heading "suggested improvements". Such "failure" has not prevented the Applicant getting an overall performance rating of fully met. Mr. Mc Coy has in his affidavit filed in the Labour Tribunal referred to the delays in decoding telexes at

paras 5.1 and 5.2. He also refers to letters R13 dated March 25, 1988 and R14 dated May 14, 1985. The Applicant has by R14A explained in detail the circumstances under which the delays have occured. Mr. Mc Coy does not join issue on this. There had been no complaints after that. Thus it appears that the Bank has not then, attributed the same seriousness to this matter as it is seeking to do now, to justify the termination.

The fourth "failure" referred to in the said letter of termination is that, "nine objectives of the Performance Plan personally prepared by you (him) have not been achieved." The learned Counsel for the Applicant argued that if they were such serious failures the Applicant would not have been given the job rating "fully met". Therefore he submitted that the inference to be drawn from giving such a job rating is that, the non achievement of the said objectives, was not considered blameworthy or culpable to warrant any adverse rating. He further submitted that if they were not considered serious failures in September 1985, how could the Respondent Bank fall back on them to substantiate a charge of incompetence in February 1986.

The learned Counsel for the Respondent submitted that,

> "... the rating 'fully met' does not carry with it the connotation of its ordinary grammatical meaning, but that the person receiving that rating was a 'borderline case' who was barely surviving in his employment."

He further pointed out that "fully met" was the 4th of 5 possible gradings and that if the overall rating of the Applicant was the 5th rating i.e. "did not meet", the bank's policy was to terminate employment.

However, it is significant to note that in the said Performance Evaluation Report (marked R19) in the column overall rating, in regard to the remark "fully met" the following note had been made,

> "While several important objectives were not achieved, many of the objectives were met and most basic job requirements were achieved resulting in the overall rating."

This amplification on the comment "fully met" clearly shows what the said comment meant to the Bank. It is also implicit in that explanation that the Applicant had met most of the basic job requirements. Furtheremore, it is seen from the said report that at least one of the said objectives could not be achieved "due to uncontrollable circumstances". In the light of these circumstances it is reasonable to infer that the Applicant has satisfactorily met the job requirements, as stipulated by the bank.

In the said letter of termination the Bank has also taken up the position that it had lost confidence in the Applicant, as a result of the aforesaid "failures". It must be pointed out that the mere assertion by an employer is not sufficient to justify the termination of a workman on the ground of loss of confidence. When such an assertion is made it is incumbent on the Labour Tribunal to consider whether the allegation is well founded. Therefore it would become necessary for the employer to lead evidence of facts from which such an assertion could be proved directly or inferentially.

In this case I have already carefully considered the five grounds or "failures" upon which the employer is seeking to draw such an inference and shown why such alleged "failures" individually or collectively would not justify the dismissal of the Applicant. In the circumstances, in my view, it would not be possible for the Respondent to rely on the same failures, to justify its allegation that it has lost confidence in the Applicant.

In regard to the allegation of loss of confidence it would be relevant to consider the submission of the learned Counsel for the Applicant that according to document R35, (vide brief page 304C) during the period November 1981 to August 1984, which is the period before Mr. Mc Coy came to the Bank, the Applicant had been consistently assessed at level 3, which means "Requirements fully met and at times exceeded". During the same period he earned increments ranging from 14% to 30% of his salary. However, after Mr. Mc Coy came to the Bank the increments had plummeted to 8% to 5% and in the single evaluation he did, the Applicant was rated at Level 4. This the learned Counsel submitted was due to hostile attitude adopted by Mr. Mc Coy and is not a bona fide assessment and therefore not evidence of a fall in standards.

On the other hand learned Counsel for the Respondent pointed out that the grading at Level 3 was the 3rd of 5 possible gradings. He added that upon a comparison of the salary particulars of the Applicant with the other 6 Sri Lankan Executives show, that even upto the arrival of Mr. Mc Coy on 1.10.1984, the rate of salary increase received by the Applicant was one but the lowest. However it must be pointed out that after the arrival of Mr. Mc Coy's the rate of increase in salary and the grading of work level of the Applicant, had both gone down.

It has also being alleged that a number of functions were withdrawn from the list of duties of the Applicant (marked R1) due to his incompetence. It is strange that a written communication of such an allegation had not been sent to the Applicant by the Bank. There is no evidence that any counselling session was held, in this regard. Only indication to this effect is an undated, and unsigned minute by Mr. Mc Coy on document R1. It is significant to note that the document through which this change in the duties is indicated to the Applicant (marked R6) is titled "... Realingment of Duties" and not withdrawal of duties. There is no indication in that document to show that it had been done due to inefficiency or incompetence of the Applicant. Therefore the learned Counsel for the Applicant submitted that it was at best a scheme of reorganisation of functions whereby the Applicant is entrusted with the functions of supervisor Reporting and General Services. However, the learned Counsel for the Respondent argued that,

> "The measure of an employer's confidence in an employee can be gauged largely by the degree of responsibility vested in him. The more confidence he has in the employee the more responsibility he will be vested with, vice versa."

But the question is, if in fact the said duties were withdrawn from the Applicant due to his inefficiency or incompetence, why did the Bank fail to communicate it to him? In addition the learned Counsel for the Applicant has raised the query whether the withdrawal of functions was due to inefficiency, and if that is so, is it conceivable that R19, the Performance Evaluation Report would not have mentioned it? or would the Applicant be given a general rating of "Fully met"? Thus upon a careful analysis of the Respondent's documents and conduct, it is apparent that the allegation of loss of confidence cannot be substantiated.

Therefore upon a consideration of all the facts and circumstances of this case I am of the view that termination of employment of the Applicant by the Respondent Bank cannot be justified.

The ordinary consequence of my holding that the termination of employment of the Applicant is unjustified, would be to order the reinstatement of the Applicant. In fact the Applicant in his application to the Labour Tribunal has pleaded so. Sharvananda J. (as he then was) has pointed in the case of, *The Caledonian (Ceylon) Tea and Rubber Estates Ltd.* vs. J.S. *Hillman* (1) that,

> "Once it is found that a workman has been wrongfully or illegally discharged or dismissed, he is normally entitled to claim re-instatement. But this 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 re-instatement, and a Tribunal may think the grant of compensation instead may meet the ends of justice."

In this case too there is a special feature which prevents this Court from making an order for re-instatemtent, viz., the fact that the Respondent Bank has wound up its business in Sri Lanka. Therefore the only remedy left in this case is to grant compensation.

Then the question arises for consideration; what is the just and fair amount that should be granted as compensation? Although the Industrial Disputes Act states that compensation can be paid in lieu of reinstatement, it does not set out the basis on which it has to be computed. Vythialingam J has stated in *Ceylon Transport Board* vs. *Wijeratne* (2) that, "the amount should not be mechanically calculated on the basis of the salary he should have earned till he reached the age of super-annuation."

According to the evidence of Miss Amal Perera the Applicant was 29 years of age at the time he applied to join the Respondent Bank in 1981. Therefore at the time of dismissal he would be 34 years of age. The normal retiring age being 55, the Applicant would have served for 21 years more. However, in my view it is unreasonable to calculate as compensation the amount he would have earned as salary for the prospective service period of 21 years. In fact in the instant case having regard to the circumstances of this case, the

learned Counsel for the Applicant has claimed compensation for only ten years.

The Courts and Tribunals have adopted a given number of years' salary, ranging from 1 year to 10 years, as the criterion for calculation of compensation. For example in *Belgama* vs. *Co-operative Wholesale Establishment* (3) one year's salary, in *Caledonian Estates Case* 7 years salary and in *Browns Group Industries Ltd.* vs. *C.M.U* (4) 10 years salary, were considered to be just and fair compensation. However, the amount of the compensation would depend on the facts and circumstances of each case.

In the case of *M.A. Jayasuriya* vs. *Sri Lanka State Plantations Corporation* (5), Amarasinghe J. in discussing as to what matters should be taken into consideration in ascertaining fair and just compensation in a given case has stated that,

> "There ought to be at least an approximate computation of immediate loss, i.e. loss of wages and benefits from the date of dismissal upto 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."

When one considers the first head stated therein viz. the immediate loss to the Applicant, it appears that he has not found any employment upto now. However, the learned Counsel for the Respondent strongly urged that there is no evidence adduced by the Applicant as to whether he is unemployed or his efforts to seek employment were unsuccessful. It is significant to note that, in the said case *M.A. Jayasuriya* vs. *Sri Lanka State Plantation Corporation* Amarasinghe J. had taken note of the matters stated in the petition to that Court and the submission made by Counsel in that regard when he stated,

> "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."

In this case too it is evident from the Petition of Appeal filed in this Court, and the submissions of the Counsel for the Applicant, at the hearing, that the Applicant is still unemployed. In the instant case the services of the Applicant were terminated on February 20, 1986, and the Applicant is unemployed upto date which in effect would be a period of nearly 5 years and 7 months. Thus it appears that the Applicant had suffered a loss of income from employment, due to the wrongful dismissal, during the said period.

The other aspect that is relevant to the computation of compensation is the prospects of future employment. In this regard the very damaging allegations contained in R29 and the manner of dismissal is very significant. It is especially so in the Banking sector, where confidence is required at maximum level, which is the chosen career-line of the Applicant. Thus the prospects of re-employment would have been naturally affected until the Applicant vindicated himself before a judicial body.

There is no evidence in regard to any fringe benefits or retirement benefits that the Applicant was entitled to, and therefore no compensation is awarded in that regard.

For the reasons above stated this Court is of the view that it is just and fair to award, a sum equivalent to seven years salary earned by the Applicant at the time of dismissal, as compensation, in lieu of reinstatement. Accordingly the said Order of the Labour Tribunal awarding one year's salary as compensation is hereby set aside.

This Court hereby makes Order that the Respondent bank should pay the Applicant seven years salary as compensation. According to the evidence the salary at the time of termination was Rs. 7822/- per month. Therefore, the total salary for seven years payable as compensation to the Applicant would be (Rs. 7822 x 12 x 7 = Rs. 657,048) Rupees Six Hundred and Fifty Seven Thousand and Forty Eight (Rs 657,048/-). Accordingly, this Court makes Order that the said sum of Rupees Six Hundred and Fifty Seven Thousand and Forty Eight (Rs. 657,048/-) be deposited with the Assistant Commissioner of Labour, Colombo Central, on or before December 10, 1991, to be paid to the Applicant as compensation.

This Appeal is allowed and the Respondent Bank will pay the Applicant costs, fixed at Rs. 5000/-.

In view of the findings in this Appeal, the Appeal No. C.A. 188/87 made by the Employer-Respondent - Appellant is dismissed without costs.

Appeal No. 179/81 allowed
Appeal No. 188/87 dismissed

PREMADASA
V.
WIJEYEWARDENA AND OTHERS

SUPREME COURT
THAMBIAH, C.J.,
G.P.S. DE SILVA, J. &
RAMANATHAN, J.
S.C. APPEAL NO. 36/91
C.A. APPLICATION NO. 736/89
17 September, 1991

Writ of certiorari - Status of tenant after decree for eviction during period of stay of writ - Right to purchase house under Ceiling on Housing Property Law, No. 1 of 1973 after passage of Ceiling on Housing Property Law (Special Provisions) Act, No. 4 of 1988 - Withdrawal of application for writ of certiorari - Locus standi

The appellant was a tenant of premises No. 3 Rockwood Place under the 2nd respondent having earlier been a tenant under his father the 1st respondent who in 1979 gifted the premises to the 2nd respondent.

When the Ceiling on Housing Property Law, No. 1 of 1973 came into operation on 13 January 1973 the 1st respondent owned 19 houses including No. 3 Rockwood Place.

On 4.5 1983, the 2nd respondent filed case No. 5639/RE in the District Court of Colombo seeking the eviction of the appellant on the ground of arrears of rent and reasonable requirement. On 4.6.1984 the case was settled. The appellant consented to judgment - writ not to issue till 31 March 1987. On 19.3.1987 the appellant made an unsuccessful attempt to have the consent judgement revised by the Court of Appeal.

On 17.5.1987 the appellant sought to challange the validity of the consent judgement in the District Court itself but did not pursue his application. The issue of writ was however stayed till 31.11.1987.

On 30 November 1987 the appellant wrote a letter to the Commissioner of National Housing, stating that the 1st respondent had made an incorrect section 8 declaration of the number of houses owned by him under the Ceiling on Housing Property Law and supported his letter with an affidavit and moved that early steps be taken to transfer the house No. 3 Rockwood Place to him (the appellant) as these premises were deemed to have vested in the Commissioner as a surplus house.