

HATTON NATIONAL BANK
V.
PERERA

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
RAMANATHAN, J. AND
WIJETUNGA, J.
S. C. APPEAL NO. 70/95
H. C. L. T. 914/93 & 917/93
L.T. 1 ADD 1/8348/90
2ND AND 3RD SEPTEMBER, 1996.

Industrial Disputes Act - section 33 - Termination of Services - Compensation as alternative to reinstatement - Quantum of compensation - Discretion.

The applicant was employed as an executive under the Appellant - Bank from 1974 to 1987. His services were terminated on a charge of falsely absenting himself from work from 20th to 27th July 1987 on the ground of alleged illness, forwarding a telegram and two medical certificates dated 22.7.87 and 27.7.87. The telegram was received on the evening of the 20th. The Labour Tribunal ordered that the applicant be reinstated with one year's salary for the period of non-employment. The tribunal also found that the

applicant had in failing to notify his illness by telephone in the morning of the 20th had acted in an irresponsible manner causing inconvenience to the management and others. The evidence also showed that cordial relations between the applicant and the Bank had ceased to exist for quite sometime. The High Court ordered reinstatement with full back wages for 67 months.

Held:

(1) In order to set aside the determination of facts by the tribunal that the termination was unjustified the appellant must satisfy that there was no legal evidence to support the conclusions of fact or that the finding is irrational or perverse. This is a heavy burden.

(2) Where termination is unjustified the workman cannot as of right demand reinstatement. The tribunal is required to make a just and equitable order. The order must therefore be just and equitable to both parties. Consequently, the tribunal has the discretion to order payment of compensation as an alternative to reinstatement.

(3) The amount of compensation should not mechanically be calculated on the basis of his salary till he reached superannuation.

(4) On the facts and circumstances of the case an order to pay the applicant 5 years salary as compensation in lieu of reinstatement is just and equitable.

Cases referred to:

1. *The Caledonian (Ceylon) Tea and Rubber Estates Ltd., v. Hillman* -791 NLR 421
2. *United Industrial Local Government and General Workers' Union v. Independent Newspapers Ltd.,* 75 NLR 529, 531.
3. *Ceylon Transport Board v. Wijeratne* 77 NLR 481.

APPEAL from the Judgment of the High Court.

S.Sivarasa, P.C., with Shammil Perera and Sampath Welgampola for Employer-Appellant.

S. L. Gunasekera for Applicant-Respondent.

Cur. adv. vult.

11th October, 1996.

G. P. S. DE SILVA, C.J.

The Applicant-Respondent was employed at the Hatton National Bank in the capacity of an executive in grade I. He made an application to the Labour Tribunal alleging, inter alia, that his services were wrongfully, unjustifiably and maliciously terminated by the Bank (Appellant). He sought reinstatement with full backwages or in the alternative adequate compensation for loss of career. His employment commenced on 14.9.74 and his services were terminated on 14.12.87. The Bank filed answer and took up the position that the Applicant was dismissed from service for misconduct after he was found guilty at a domestic inquiry. After inquiry, the Labour Tribunal made order reinstating the applicant in service with effect from 20.8.93 and directed the Bank to pay him a sum of Rs. 61,200/- as one year's salary for the period of non-employment. Both the Applicant and the Bank appealed against the order of the Labour Tribunal to the High Court. The appeal of the Bank was dismissed. The appeal of the Applicant was allowed and the Bank was directed to pay the Applicant back wages for a period of 67 months (full back wages). The Bank has now preferred an appeal to this court.

R43 is the charge sheet served on the Applicant. The main charge upon which the Applicant's services were terminated was charge No. 1 which reads as follows: "You did absent yourself from work from 20th July 1987 to 27th July 1987 falsely on the ground of alleged illness, forwarding a telegram and two medical certificates dated 22.7.87 and 27.7.1987". The week commencing 20th July 1987 was the week during which the Applicant was required to handle the safe keys. This was an important duty entrusted to the Applicant. During that week he was required to report for work at 7.40 a.m. and send the cheques for "clearing" by 8 a.m. If the cheques were not sent in time for "clearing", the Bank would be shut out from "clearing" for that day. Admittedly, the applicant did not come for work the whole of that week. He sent a telegram which reached the Bank only at 5.30 p.m. on 20.7.87. Thereafter he submitted two medical certificates (marked R 35 and R 36) dated 22.7.87 and 27.7.87 respectively.

In the previous month too, he was required to carry the safe keys. That was for the week commencing from 19.6.87; the whole of that week he kept away from work and submitted two medical certificates. The case for the Bank was that the Applicant feigned illness, submitted

false medical certificates and absented himself from work when it was his turn of duty to carry the safe keys. It was the evidence of the Assistant Manager, Wijesekera, that on 26.4.87 he informed the applicant that he (i.e. the applicant) along with two other executives would be "rostered" on a weekly basis to carry the safe keys. The applicant did not agree to perform this duty and according to Wijesekera "he protested vehemently and he told me that despite his protest we are forcibly handing over the safe keys to him and as such he will come either late or for some illness in the family (sic), so that he would get out from the clearing. He said that it will open our eyes to exempt him from (sic) the carrying of the safe keys."

It was an important part of the case for the Bank that it was in pursuance of the protest and threat uttered by the applicant in April 1987 in the presence of Wijesekera, that the applicant deliberately absented himself from work on the pretext of illness. It was an equally important part of the case for the Bank that the medical certificates R35 and R36 (which sought to cover the period 20th to 27th July 1987) were false. The belief or disbelief of the testimony of Wijesekera was one of the crucial issues that arose for consideration by the Labour Tribunal. Mr. S. L. Gunasekera for the applicant contended that the first time Wijesekera reported to the Head Office, the threat alleged to have been made by the applicant on 26.4.87 was only on 27.7.87 by letter R 32. On the other hand, Mr. Sivarasa for the Bank submitted that Wijesekera in his evidence gave cogent reasons for the delay. Mr. Wijesekera stated that he and the applicant were good friends and furthermore he did not take the threat seriously. It was only in July that he realised that the pattern of absence from duty had a significance in relation to the threat uttered by the applicant.

As for the medical certificates R35 and R36, the Bank led the evidence of witnesses Rowel, Emmanuel and Fernando in an effort to establish their falsity. While the medical certificates stated that the applicant was suffering from "acute viral fever", the evidence led on behalf of the Bank established that he had taken his wife to a dentist and he had gone to the Negombo branch of the Bank to deposit some cheques. It was also in evidence that witness Emmanuel had in 1992 visited the same medical practitioner who had issued R35 and R36 and obtained a "medical certificate" which purported to state that

Emmanuel was suffering from viral fever when in fact Emmanuel was in good health. On the other hand, Mr. S. L. Gunasekera submitted that the best and obvious method of ascertaining whether the applicant was in fact sick was to have taken steps to have the Applicant examined by a doctor selected by the Bank. Witness Obeysekera called by the Bank admitted that this course of action could have been taken.

It is unnecessary for me to consider in greater detail the factual aspects of the case on which counsel addressed us at length. The concurrent findings of both the Labour Tribunal and the High Court are against the Bank. It is to be noted that an appeal from an order of a Labour Tribunal is only on a question of law.

On a consideration of the findings of the Labour Tribunal (and affirmed by the High Court), I find that the submissions of Mr. Sivarasa are not without attraction. However, it cannot be said that the findings are unsupported by the evidence; nor are the findings inconsistent with and contradictory of the evidence. As observed by Sharvananda, J., (as he then was) in the case of *The Caledonian (Ceylon) Tea and Rubber Estates Ltd., v. Hillman*,⁽¹⁾. . . the question of assessment of evidence is within the province of the Tribunal, and, if there is evidence on record to support its findings, this court cannot review those findings **even though on its own perception of the evidence this court may be inclined to come to a different conclusion . . .** Thus in order to set aside a determination of facts by the Tribunal, limited as this court is only to setting aside a determination which is erroneous in law, the appellant must satisfy this court that there was no legal evidence to support the conclusions of fact reached by the Tribunal, or that the finding is not rationally possible and is perverse having regard to the evidence on record. Hence, a heavy burden rested on the appellant when he invited this court to reverse the conclusions of fact arrived at by the Tribunal. . . The legislature has designated the Labour Tribunal as the proper tribunal to determine the facts, and this court should not seek to substitute its own view of the facts for that of the Tribunal.

I accordingly hold that there is no basis upon which this court could reverse the finding of the labour Tribunal (affirmed by the High Court) that the termination of the services of the applicant was "unjustified and wrongful."

However, there remains for consideration the issue whether the High Court and the Labour Tribunal erred in law in failing to consider an order for compensation in lieu of reinstatement. There is one significant finding reached by the Labour Tribunal which has a direct bearing on this issue. The relevant finding reads as follows: "The Applicant did not report for work on 20.7.87 due to illness. He had to do "chubb" safe keys duty that week commencing from 20th July. His absence would have caused considerable inconvenience to the Bank in being unable to open the vault in time, to commence business. The Applicant should have made all efforts to inform the Bank that he was not in a fit condition to report for work from 20th July due to illness, to enable the management to get the duplicate key and open the vault in time. The least the applicant could have done was to have informed the Bank management by a telephone message in the morning of the 20th July explaining his illness and that he would not be reporting for work so that the management could have made alternative arrangements . . . The applicant has not given a telephone message to the management on the 20th July. But has instead sent a telegram which has been received by the Bank at about 5.30 p.m. **By this negligence or carelessness in not giving a telephone message he had acted in an irresponsible manner and had caused inconvenience to the management and others. The applicant as a senior executive should have acted in a more responsible manner so as to cause the least amount of inconvenience**". (Emphasis added). Moreover, the evidence shows that cordial relations between the Applicant and the Bank had ceased to exist for quite sometime. The Applicant's services were terminated nearly 9 years ago. A Labour Tribunal is required to make an order which is "just and equitable". The order must therefore be fair and just by both parties.

On a consideration of the provisions of section 33 of the Industrial Disputes Act, Siva Supramaniam, J., in the case of *United Industrial Local Government and General Workers' Union v. Independent Newspapers Ltd.*,⁽²⁾ stated: - "A finding that the termination of service of a workman is unjustified will not, therefore, entitle the workman to demand as of right his reinstatement; nor will such an order be obligatory on the part of the Tribunal. The Tribunal is vested with a discretion to decide whether payment of compensation should be ordered as an alternative to reinstatement."

Having regard to the matters set out above, I am of the opinion that this is not a fit case to make an order of reinstatement. I accordingly set aside the order for reinstatement and the order for the payment of backwages made by the Labour Tribunal and the High Court.

As regards the quantum of compensation in lieu of reinstatement, it was pointed out to us by Mr. S. L. Gunasekera, that the applicant could have remained in service for 15 years more had his services not been terminated. Vythialingam, J. in *Ceylon Transport Board v. Wijeratne*,⁽³⁾:-

“The amount however should not mechanically be calculated on the basis of the salary he would have earned till he reached the age of superannuation. This observation was cited with approval by Sharvananda, J. in *Hillman's case* (*supra* at page 436). The finding of the Labour Tribunal referred to above shows that the conduct of the applicant himself (a senior executive) was not altogether free of blame. It seems to me that in the facts and circumstances of this case it would be just and equitable to order the Bank (Appellant) to pay the applicant a sum of Rs. 306000/- representing 5 years salary as compensation in lieu of reinstatement. I make order accordingly. The aforesaid payment of compensation is without prejudice to the applicant's rights, if any, to statutory claims. The Appellant Bank must deposit the aforesaid sum of Rs. 306000/- with the Assistant Commissioner of Labour, Colombo Central, Department of Labour, Colombo 5, on or before 30.12.1996. The order for reinstatement with back wages amounting to 67 months' wages made by the High Court is set aside.

In all the circumstances, I make no order for costs of appeal.

RAMANATHAN, J. – I agree

WIJETUNGA, J. – I agree.

*The order for reinstatement with back wages set aside.
Compensation in lieu of reinstatement ordered.*