

TUNIS
v.
THE SRI LANKA STATE TRADING CORPORATION
(TEXTILES) SALU SALA

COURT OF APPEAL.

A. DE Z. GUNAWARDENA, J.

C.A. 816/82 - L.T.A. ADDL/ 3320/80 NARAHENPITA.

JANUARY 23 AND FEBRUARY 6, 1990.

Industrial Dispute - Can a Labour Tribunal justify the termination of employment of an employee on a ground not pleaded or supported by evidence by an employer ? - Evidence of loss of confidence must originate from the employer.

The appellant in this case was employed as an Assistant Security Officer of the respondent Corporation and was dismissed after a domestic inquiry, where the charges were :

- (i) that he raided 3 shops without authority from head office, and
- (ii) that he has thereby abused his powers.

After inquiry, the Labour Tribunal held that the said raids have been conducted with authority from head office, but went on to justify the dismissal on the ground of loss of confidence as the said employee had failed to act with responsibility in not sending a report to the head office, in regard to said raids.

Held :

- (i) That the Labour Tribunal was in error when it justified the dismissal of the employee on a ground that was not supported by evidence and not pleaded by the employer ;
- (ii) that in a case where the employer justifies the termination on the basis of loss of confidence the mere assertion by the employer is not sufficient. When such an assertion is made, it is incumbent on the Labour Tribunal to consider whether the employer's apprehension is well founded. In such a situation, the evidence of loss of confidence must originate from the employer.

Case referred to :

The Management of Panitole Tea Estates v. The Workman 1971 (1) LLJ 223, 240.

APPEAL from judgment of the Labour Tribunal of Narahenpita.

N.R.M. Daluwatte P.C. with *P. Keerthisinghe* and *T. Keenawinne* for applicant - Appellant.

Nihal K.M. Perera with *L. Abeysekera* and *A. Weerasinghe* for employer - Respondent.

Cur. adv. vult.

March 9, 1990.

A. DE Z. GUNAWARDANA, J.

The appellant in this case was employed as an assistant security officer by the respondent corporation, the Sri Lanka State Trading Corporation (Textiles), Salu Sala and was stationed at Hatton. After a domestic inquiry the appellant's services were terminated by the respondent corporation. Thereafter the appellant made an application to the Labour Tribunal alleging that the said termination was illegal an unjustified and sought reinstatement with compensation and gratuity. After inquiry, the Labour Tribunal held by its order dated 09.11.82, that the termination was justified on the ground of loss of confidence in an officer holding a position of confidence. The Labour Tribunal having considered the service of 11 years of the appellant to the respondent corporation, awarded a sum of Rs. 2,750/- as relief consequent to the termination of his services. The present appeal is from the said order of the learned President of the Labour Tribunal.

The respondent corporation took up the position in the Labour Tribunal inquiry that the appellant's services were terminated on 27.10.1980, as he was found guilty at a domestic inquiry at which the charges were that the appellant had without authority raided the shops of 3 Salu Sala dealers in Gampola on 25.06.78 and had taken charge of the identity cards of 2 of the said dealers without authority from the head office. It was also alleged that the appellant had given instructions, without the sanction of the head office, to the Salu Sala stores at Kandy, not to issue textiles to two of the said dealers. Thus he is said to have abused his powers and had acted without responsibility.

In the answer filed by the respondent corporation before the Labour Tribunal it was pleaded that in view of the fact that the appellant had been found guilty of the said charges it was not conducive to have him in the services of the corporation. It is important to note that there was no averment in the answer, to the effect that the respondent corporation has lost confidence in the appellant.

At the inquiry before the Labour Tribunal witness Nazeer who is the Proprietor of Cheap Side Stores, Gampola, gave evidence for the respondent corporation and stated that he was a registered dealer of the Salu Sala. That on 25th June, 1978 the appellant came to his shop and inquired about the prices of poplin material issued by the Salu Sala. The appellant had pointed out that the price he quoted was above the price fixed by the Salu Sala, for such material. Thereafter, he had asked for the identity card and taken charge of it. The appellant had issued a receipt for the same. The appellant had not recorded a statement from him about the incident. After the identity card was taken over by the appellant the witness could not obtain his quota of textiles from Salu Sala. He had been asked to come to Hatton the following day. Accordingly he had gone to Hatton on the following day but was not able to get back his identity card. He later learnt that Salu Sala stores at Kandy had been instructed not to issue textiles to him. Thereafter he had made representations to the head Office. The Head Office had issued a letter marked R3 to the Salu Sala Stores at Kandy to issue textiles to him.

A. Nadasapullai the owner of the shop named Nadarajah & Sons of Gampola also gave evidence on behalf of the respondent corporation. This is the other shop that was raided by the appellant on the same day. According to Nadasapullai he was in India at that time. When he came

back he had learnt that some Salu Sala official had come to his shop and made inquiries about the prices of Salu Sala textiles and thereafter had disclosed his identity and asked for the identity card from an employee who was there at that time. Although the employee had protested that he cannot give the identity card as the owner was not there, the appellant had asked for the identity card and taken it away. Nadasapullai had gone to Hatton and met the appellant, but he was not able to get back his identity card. He had reported this matter to the Head Office. Thereafter the Head Office had issued a letter to Salu Sala Stores at Kandy authorising the issue of textiles to Nadasapullai's shop. This letter was produced marked R7.

One Balasuriya Sumanasena who is the Asst. Manager (Administration), Salu Sala, has given evidence and stated that once a raid is conducted a report should be sent to the Head Office. This was in answer to a leading question asked by the Counsel for the respondent corporation. However in cross - examination, at page 28 of the brief, he has stated that he does not know whether there is any circular governing such raids and that the person who would know, is the Manager, security division. In regard to the question whether an entry had to be made in the log book when a report is submitted to the Head Office, he had stated that it is necessary to enter in the log book when such a report is sent. He had admitted that although the summons required him to produce the log book of the Hatton Office, he had failed to produce the said log book on that day. When asked whether Hatton Office should have maintained a log book he had stated that they ought to have maintained a log book. He had further stated that he did not make an effort to get the log book of the Hatton office, because he thought that it was not necessary.

The other witness called by the respondent corporation was W.S. Weeraratne, Deputy Manager (Security). He has set out the procedure that should be followed in the case of a raid. His position was, that if necessary, the identity card would be taken charge of. Thereafter a report would be forwarded to the manager (Security). He is a person who has worked in the Head Office and was not familiar with the procedure that would be followed by a Security Officer in a Regional Office. When asked by the Tribunal whether there is any circular setting out the procedure to be followed in raids, this witness's answer was that as far as he is aware, there is no circular. He went on to state that to his knowledge, there are no written instructions either. The register where letters received by Salu

Sala, Head Office for the years 77/78 were entered, was produced, marked R9 by this witness. According to the said register there is no note to indicate that report had been received by the Manager (Security) from the Gampola Office.

The appellant gave evidence on his own behalf. According to him, he conducted 3 raids at Gampola on 25.06.78, which was a Sunday. He did so on instructions received from Mr. Gamunu Wijeratne, the Manager (Security) Salu Sala. The three shops he went to on that day are, Cheap side, Nadarajah's and Varieties. He had gone to Cheap Side first because he had heard that Cheap Side was selling a yard of poplin at Rs. 12/50 when the controlled price was Rs. 7/50. He had taken labourer Chandradasa also along with him in this raid. He had made an entry in the log book that he was taking Chandradasa along with him. He had sent Chandradasa to the shop and when Chandradasa was about to pay for the material, he had walked up to the shop owner and asked him as to why he was selling poplin material at a higher price when the controlled price is Rs. 7/50. The owner had explained that this was not Salu Sala material. Thereafter he had asked for his identity card. The identity card was given to him by the owner. He gave a receipt for the same. Similarly he went to Nadarajah's and Varieties. At Nadarajah's he was able to obtain the identity card but Varieties did not give him the identity card. When asked as to why he did not record statements from the owners, he had stated that, at that stage he was afraid to record statements. Therefore he had asked the owners to come to the Hatton Office. On the following Monday morning he had informed the Head Office that he had obtained the identity cards and samples of material from the two shops. When he rang up the head office the duty officer at that time was security officer Mr. Karunapala. He was instructed by the Manager (Security) to send only the two cases in which the charges could be proved. Security Officer Mr. Karunapala had also instructed him to inform the Salu Sala Stores at Kandy to suspend the quotas of the two shops against which there is evidence. He accordingly informed Salu Sala Stores at Kandy to stop the quotas of Cheap Side and Nadarajah's against whom there was sufficient evidence. As he could not get the identity card and obtain sufficient evidence against the shop named Varieties, he did not proceed against that shop. All these details were recorded in the log book maintained at Hatton Office. At the domestic inquiry, the appellant had insisted that the said security officer Mr. Karunapala and the Manager (Security), Mr. Gamunu Wijeratne, who gave him instructions should be called. However the respondent

corporation failed to do so. In his evidence the appellant has specifically stated that he sent the report in respect of the said raid under registered cover, having noted the details in the log book. In cross examination he was confronted with the position that he had taken up in his statement to the investigating officer Salu Sala, on 22.02.79 wherein he had stated that he is not quite sure whether he sent the report by post or handed it over personally to Mr. Wijeratne, the Manager (Security). His explanation was that he cannot remember what he stated in that statement but in his evidence he was sure that the report was sent by post. He also stated that he noted the registered article number in the said log book. However the respondent corporation has failed to produce the said log book in spite of his specific request.

The learned President of the Labour Tribunal having considered the evidence led in the case has held that he accepts the position taken up by the appellant that, when he conducted the raids in Gampola, he did so on the verbal instructions of the Manager (Security) Mr. Wijeratne. While I agree with the said finding of the learned President, it has to be pointed out that the respondent corporation has also failed to seriously challenge this position. In fact, the respondent corporation did not call the Manager (Security), Mr. Wijeratne, to give evidence at the domestic inquiry or in the Labour Tribunal.

The learned President of the Labour Tribunal thereafter goes on to state as follows :-

“ However it is to be noted that there is one important aspect in the applicant's conduct where he has failed to satisfy the Tribunal that he had acted in a responsible manner. This is in regard to the follow up action subsequent to the raids. In particular, his failure to submit reports leaves him open to suspicion that he had acted with the intention of obtaining some personal gain”.

It is of interest to note here what the learned President of the Labour Tribunal had to say about the allegation of “obtaining some personal gain” earlier on in the same order.

“C. It was suggested that the applicant's action had been directed to the purpose of obtaining some personal gain although no evidence was led before the Tribunal in this regard”.

Thus it is clear that on the said observation of the learned President that there is no evidence led in the case to substantiate the position that the appellant had acted with the intention of obtaining some personal gain. Furthermore it must be noted, that the two owners of the shops raided, in their evidence before the Labour Tribunal did not at any stage take up the position or even suggest that the appellant demanded any money or any favour. If in fact, such a request was made by the appellant, it is very unlikely that they would not have brought that to the notice of the Labour Tribunal because, they had suffered by the action taken by the appellant. Therefore the opinion the learned President of the Labour Tribunal had formed, in casting a suspicion, that the appellant acted with the view of obtaining some personal gain, in my view, is not supported by evidence (as seen by his own observation) and is an unreasonable inference.

In regard to the question whether the appellant submitted a report in respect of the said raid, the learned President of the Labour Tribunal has pointed out that the appellant in his statement to the Salu Sala Investigating Officer had stated that he cannot remember whether he posted or personally handed over the said report to the Manager (Security). However before the Tribunal he was quite categorical that he reported under registered cover and made entries to that effect in the log book. This situation has prompted the learned President to hold that the appellant failed to submit a report. When one considers carefully the position taken up by the appellant in the said statement to the Salu Sala Investigating Officer and the position taken up by the appellant in the evidence at the Labour Tribunal, it cannot be said that one position contradicts the other, except that he has taken a specific stand in his evidence before the Tribunal. In any event his evidence could have been contradicted by the respondent corporation if it took the trouble to produce the log book maintained at the Hatton Regional Office, because the appellant was positive that he made an entry in the log book, not only as to the sending of the report, but also as to the number of the registered article receipt. In fact, as referred to earlier, witness Sumanasena admits having received summons to produce the said log book. As I have already pointed out according to the said witness if a report was sent regarding the said raid the procedure was to have made an entry in the log book about the sending of the report. Another way the respondent corporation could have contradicted the appellant was to have called the former Manager (Security), Mr. Wijeratne. Both or either of these methods could have been easily followed by the respondent corporation to disprove the

appellant's contention that he sent the report. However the procedure adopted to show that a report was not received at the Head Office was by producing the register where, ordinarily, the letters received at the Head Office, were noted. There is however no evidence that all the letters that came by post to Head Office had to be noted in the said register. Thus the mere production of such a register when other cogent evidence was available, in my view would not suffice to prove a fact upon which so much depends in this case. Furthermore the appellant has asserted on oath that he sent the report concerned.

It must also be pointed out that the failure to send the report *per se* cannot be held to be irresponsible conduct in itself. Since such raids were conducted on the specific instructions of a superior officer it would be as much his duty to call for a report, if a report was not forthcoming from the junior officer. There is however, no evidence in this case that a report was called for by the superior officer. In addition according to the evidence of both witnesses, who were officials of the Salu Sala, there is no circular or any written instructions requiring the submission of a report. This may be interpreted to mean that there was no imperative requirement to submit a report after a raid was conducted. However the learned President has considered the non-submission of the report as an act which amounted to irresponsible conduct, although in this case there was no cogent evidence in regard to the requirement of the submission of a report or whether in fact in this instance a report was submitted by the appellant or not.

It is important to note that the learned President had justified the dismissal on the ground of loss of confidence by the respondent Corporation in an officer who held a position of confidence. It would be appropriate to recall that the position taken up by the respondent corporation in its answer before the Labour Tribunal was that the appellant was dismissed from service after a domestic inquiry on 2 charges. The charges were :

- (i) that the appellant had raided the shops of dealers of the respondent corporation and taken charge of identity cards and stopped their supply of quotas without authority from the head office ;
- (ii) that by engaging in such acts the appellant has abused his power and acted without responsibility.

It must be pointed out that there is no mention at all of any loss of confidence in the said charges. However upon a consideration of the evidence the learned President of the Labour Tribunal has held that he accepts the position of the appellant that he conducted the said raids on the instructions of the Manager (Security). Therefore according to the said finding both charges upon which the respondent corporation sought to justify the dismissal of the appellant, fails. In spite of that, the learned President of the Labour Tribunal has brought in the principle of loss of confidence to justify the dismissal although such a contention is not supported by the evidence in the case. It is appropriate in this context to point out that the two officers of the Corporation who gave evidence at the Labour Tribunal have not stated in their evidence that the acts of the appellant resulted in loss of confidence. This aspect is important because if in fact the respondent has lost confidence, the first person who must assert that fact must be the employer corporation itself. In this case there is no such evidence. In the case of *The Management of Panitole Tea Estates v. The Workmen* as reported in Law of Dismissal by S.R. de Silva at page 45,

“ Which ever way one views the concept, loss of confidence in the integrity of an employee must be supported by cogent evidence.”

Furthermore, the question of loss of confidence is a matter specially within the knowledge of the employer. Therefore the evidence of that fact must be adduced by the employer before the Tribunal. That has not been done in this case. Thus it is seen that, although the learned Counsel for the respondent corporation earnestly urged that the dismissal was justified as the employer had lost confidence in the employee, such an assertion is not borne out by the evidence available in the case.

It must be pointed out that the mere assertion by the 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 employer's apprehension is well founded. In such a situation, in my view, the evidence of loss of confidence must originate from the employer and such evidence is lacking in this case.

For the above reasons, I am of the view that the termination of the employment of the appellant by the respondent Corporation is not

justified in law. In the circumstances, the appeal is allowed and the said order of the learned President of the Labour Tribunal dated 09.11.82, is hereby set aside. It is hereby ordered that the appellant be reinstated with immediate effect and that he be paid all arrears of salary and other benefits due to him under the law as from February 1979, as if he was in service, continuously. It is also ordered that the respondent corporation pay the appellant a sum of Rs. 525/- as costs.

Appeal allowed.
