MERRIL J. FERNANDO & CO.
V.
DEIMON SINGHO

COURT OF APPEAL
WIJETUNGA, J.
C. A. NO. 539/82
L. T. NO. 2/15388/82
NOVEMBER 20, 1987

Industrial Disputes Act — Is a casual employee entitled to reinstatement or compensation in lieu of reinstatement?

A casual employee has no right to reinstatement as there is no former position in which he can be placed again or a previous state to which he can be restored. Hence a casual employee not being entitled to reinstatement, is not entitled to compensation in lieu of reinstatement.

Cases referred to

1. *Ceylon Fisheries Corporation v. Sri Lanka Nidhahas Welanda Karmika Ayatana Sevaka Sangamaya S.C. 56/72 LTB/5264* S. C. Mins of 29. 6. 73

2. *Nanayakkara v. Hettiarachchi* 74 NLR 185

APPEAL from order of President, Labour Tribunal of Colombo

Shirley N. Fernando with *P. Panduwawela* for respondent — appellant

J. C. Boange for applicant-respondent.

February 12, 1988
WIJETUNGA, J.

This is an appeal against the order of the Labour Tribunal directing the respondent-appellant to pay a sum of Rs. 5000/-as compensation to the applicant-respondent.

The workman was a lorry driver under the appellant company, whose services were allegedly terminated by the employer on 22.1.82. In his application, the workman claims that he had served in this capacity from 24.10.77 and was paid at the rate of Rs. 19.50 per day.

The employer states in the answer that the workman was a casual driver during the period 28.11.78 to 22.01.82 and was suspected of removing some tea from tea chests loaded in his lorry, while in transit during one of the trips on 22.01.82, on being questioned by the Transport Assistant, Nimal Amerasekera, he had spoken rudely to him and having thrown the switch key of the lorry on the latter's table, had left the place of work. He had not returned to work thereafter and consequently his name was taken off from the casual pool.

In his evidence-in-chief before the Tribunal, the workman has claimed that he was in receipt of a monthly salary of Rs. 600/- but has admitted in cross-examination that he was a daily paid employee on a wage of Rs. 19.50 per day. According to him, his services were terminated because he had scolded Gunatilleke, the cleaner of the lorry, who had failed to discharge his duties properly, in that he had refused to assist him to reverse the lorry by keeping a proper look out and by giving the necessary directions. He denies any incident of theft or attempted theft.

Gunatilleke, the cleaner has given evidence for the employer and has stated that the workman had suggested taking some tea out of the tea chests, to which suggestion he did not agree, whereupon the workman had scolded him. He had then made a complaint to Transport Assistant Amerasekera.

Gunatilleke has further stated that when the workman was questioned by Amerasekera, he had dropped the key on his table and had gone away. He had not reported for work thereafter.

The only other witness for the employer was the Transport Manager, Micheal Rodrigo. According to him, the workman was in the employment of the Company from 28.11.78 as a daily paid casual worker. He denies that the services of the workman were terminated as alleged. He had not been present when the incident of 21st January took place. He states that the workman did not report for work after the 22nd of January.

Learned counsel for the appellant submits that the workman was only a casual employee and the President was in error when

he states in his order that according to Rodrigo the workman was a permanent employee from 1978. He further submits that a casual employee is not entitled to reinstatement or compensation in lieu of reinstatement. He relies on the decision in *Ceylon Fisheries Corporation v. Sri Lanka Nidhahas Welandaha Karmika Ayathana Sevaka Sangamaya.* (1) In that case, Wijayatilake, J. agreeing with the submission that "this workman being a casual workman, the payment of compensation in lieu of reinstatement would be irregular because in the context of this case he would not be entitled to reinstatement," has set aside the award of the Labour Tribunal.

In the instant case, the employer has taken up the position, in the answer, that the workman was employed as a casual driver, as and when work was available. Counsel refers to the evidence of Rodrigo, the Transport Manager who states that the workman was a daily paid casual employee. He further points out that the workman himself has in his evidence admitted that no E.P.F. payments had been made in respect of him.

He submits that under the Wages Board for the Motor Transport Trade a permanent employee is entitled to a monthly wage and a lorry driver is covered by that Trade. So, if the workman was a permanent employee, he would have been in receipt of a monthly wage. The very fact that he was on a daily wage, he submits, is clear evidence that his employment was of a casual nature.

I find from the proceedings that the learned President is clearly in error when he states that Rodrigo, the Transport Manager of the employer, had stated that the workman had been employed in a permanent capacity. On the contrary, Rodrigo had expressly stated that the workman was a daily paid casual employee.

In the light of this error and the other submissions referred to above, I am unable to say that there was material before the Tribunal to come to a finding that the workman was a permanent employee.

Although learned counsel for the workman respondent submitted that the Industrial Disputes Act does not draw a

distinction between casual and permanent employees, he was unable to cite any authorities in support of the proposition that a casual employee too is entitled to reinstatement and consequently to compensation in lieu of reinstatement.

The word 'casual' denotes such employment as is subject to, resulting from or occurring by chance and without regularity. By its very nature, such employment cannot confer upon a workman a right to reinstatement as there is no former position in which he can be placed again or a previous state to which he can be restored, as in the case of a permanent employee.

I am, therefore, in respectful agreement with the view expressed by Wijayatilake, J. in S. C. 56/72 (supra) that a casual workman is not entitled to reinstatement and consequently to compensation in lieu of such reinstatement.

Counsel for the appellant submits that the learned President was again in error when he declined to accept the evidence of witness Gunatilleke on the ground that there was no corroboration. His evidence in regard to the alleged incident itself could not have been corroborated by any other witness, as the only other person present on the occasion was the workman himself against whom Gunatilleke was testifying.

The only other corroborative evidence would have been that of Amerasekera, the Transport Assistant to whom Gunatilleke had complained. The learned President comments on the employer's failure to call him. It appears that Amerasekera was not present on the date of the inquiry due to ill-health and a Medical Certificate had subsequently been tendered to the Tribunal in proof of his illness. If the Tribunal considered him to be a necessary witness, it was open to the President to have heard his evidence before making the order, particularly as the employer had sought to call him as a witness.

As was submitted by learned counsel for the appellant there is a significant difference between the duties and powers of a Labour Tribunal under Section 31 C(1) of the Industrial Disputes Act as amended by Section 6 of Act No. 74 of 1962 and the

original provisions as contained in Act No. 62 of 1957. Whereas the original Section required the Tribunal to "hear such evidence **as may be tendered** . . . . . ", the amended Section makes it the duty of the Tribunal to "hear all such evidence **as the tribunal may consider necessary"**. The latter indeed is a very salutary provision which the Tribunal should not have lost sight of.

The learned President in ordering that a sum of Rs. 5000/- be paid to the workman as compensation has failed to state the basis of such computation. He merely mentions that he had taken into account the workman's period of service. In *Nanayakkara v. Hettiarachchi,* (2) it has been held that when a Labour Tribunal awards a sum of money as compensation to an employee whose services have been terminated, the failure of the Tribunal to consider the basis of computation of such sum amounts to a question of law. In the instant case, the Tribunal was in error in this regard too.

For the reasons aforesaid, I set aside the order of the Labour Tribunal awarding Rs. 5000/- as compensation to the respondent workman. However, I make no order as regards costs.

Appeal allowed.
Order set aside.