PREMADASA RODRIGO,
V
CEYLON PETROLEUM CORPORATION.

SUPREME COURT.
BANDARANAYAKE, J., FERNANDO, J., AND AMERASINGHE, J.
S. C. APPEAL NO. 29/88.
S. C. SPECIAL LA NO. 50/88.
C. A. NO. 305/83
LT. NO. 1/ADD/2643/80.

SEPTEMBER 10th, 1991.

Industrial Law – Termination of employment – Tests of misconduct and disobedience justifying dismissal – Compensation.

In the sale of used household and other equipment to the employer the appellant who was the Assistant Manager (Stores) purchased a large amount of the goods on sale defying some of the instructions and procedure set out in circulars issued by the management and circumventing others by false entries.

Held:

1. Loss of confidence must be based on established grounds of misconduct which the law regards as sufficient. An employer's response to the misconduct in question must be reasonable. It must not be flagrantly unjust. In applying these principles a tribunal or court is not seeking to impose its own views on what an employer ought to have done.

Per Amerasinghe, J:

"There is a band of reasonableness within which, in the circumstances, employers in that very type of business may well have acted differently. Within that band, there can be no single correct or incorrect decision."

2. The test is not that a dismissal would be unfair only if no reasonable employer would have dismissed the employee.

3. The concerns of a tribunal or court in considering an allegation of unfair dismissal should be —

(a) Were the alleged grounds of misconduct sufficiently established by evidence? What was the quality and nature of the misconduct?

(b) Are there proved reasons, or legitimate inferences from the evidence available with regard to how and why the business of the employer was, or might be reasonably expected to be adversely affected directly or indirectly by the act or omission in question?

(c) Was the misconduct taken by itself, sufficient?

(d) Are there, established by evidence, aggravating circumstances or exonerating or extenuating facts that change the quality and nature of the act or omission?

In the light of the answers to these questions, is it reasonable to conclude that the employee's misconduct was repudiatory in nature?

4. **Per Amerasinghe J:**

"Ever since Adam ate the forbidden fruit, disobedience has been viewed askance as something to be regarded as contemptible, something deserving punishment. The law relating to industrial relations reflects these values. It permits punishment, for inexcusable, wilful neglect or refusal to submit to or comply with or the transgression or violation of a command, order or direction of an employer, or that of a person lawfully and properly acting for and on behalf of an employer".

5. Not every act of disobedience would merit dismissal. The act must be qualitatively appropriate for the purpose. For instance, unless the person issuing the relevant order had the authority to do so, there can be no disobedience of the employer's order. Moreover, the order must be clear, positive and unambiguous; it must have been communicated to the employee and within his knowledge. It must not be impossible, unreasonable or unlawful to obey the order.

6. It was his inordinate and overpowering greed, rather than zeal or any sense of duty that motivated the appellant to act in defiance of the orders of the employer. There were no extenuating factors.

7. Where his misbehaviour encourages subordinates to act in dereliction of their duties, a supervisory employee is guilty of misconduct, the recurrence of which the management is entitled to prevent by strong action.

The appellant not merely failed to exercise his supervisory functions, he actively assisted his subordinate in the violation of superior orders, to be able to carry out his own improper designs and his culpability is therefore that much more serious.

8. If the de *minimis* principle is applicable a warning or admonition might be appropriate. Here the goods were deliberately sold at a concessionary price. They were hard to get and valuable. The scramble for the items demonstrates this. The appellant could not be said to have taken the trouble he took and risk so much for trifles. He cannot take refuge in the *de minimis* principle.

9. In failing in his duty as a supervisor, and in failing to maintain his authority as a supervisor, the appellant acted in breach of implied, but essential conditions of his employment. No business organization could ever be successful unless employers could depend on supervisors to do what is expected of them. The successful running of a business is committed to its supervisors.

10. Apart from his obligations in general as a supervisor and senior hand, the appellant was entrusted with the custody and safety of the employer's property. As Assistant Stores Manager, he was in a special position of confidence with regard to the goods entrusted to him. As the person in charge of the implementation of the scheme of sale, he was in a sensitive or strategic position. It was a high risk to keep the appellant in such a position after he had misused or abused his position and once suspicion had started.

11. Although in certain circumstances, compensation may be payable where reinstatement is not feasible, if the employee's conduct had induced the termination, he cannot in justice and equity have a just claim for compensation.

Cases referred to:

1. *Laws v. London Chronicle* [1959] 2 ALL ER 285.
2. *Michael v. Johnson Pumps* AIR 1975 SC 661.
3. *The Lever Brothers Dispute* ID 66 11549 of 19.10.1985.
4. *Lanka Estate Workers Union v. Superintendent of Vellai Oya Estate, Hatton* ID 8, CGG 11095 of 22.03.1937.
5. *Democratic Workers Congress v. Superintendent of Kahagalla Estate, Haputale* ID 11, CGG 11068 of 15.12.1957.
6. *Trust Houses Forte Leisure Ltd. v. Aquilar* [1976] I-RLR 251.
7. *British Leyland (UK) Ltd. v. Swift* [1981] 1-RLR 91.
8. *Vickers Ltd. v. Smith* [1977] I-RLR 11.

9. *Hind Construction & Engineering Co., Ltd. v. Their Workmen* 1965 2 SCR 85, 88.
10. *All Ceylon Oil Companies Workers' Union v. Standard Vacuum Co.* ID 237 CGG 12034 of 08.01.1960.
11. *Ceylon Transport Board v. Samastha Lanka Motor Sewaka Samithiya* (1962) 65 NLR 566.
12. *Ceylon Workers' Congress v. Janatha Estates Development Board [1987]* 2 Sri LR 73, 77.
13. *Adam v. Maison de Luxe Ltd.* 1924 35 Comm. LR 143, 151-152.
14. *Youngash v. Sasketchewan Engine* Co. 1911 4 Sask. LR 63 16 WLR 268.
15. *Power v. Rengsami* (1891) 9 S.C.C 149, 152.
16. *Winthrop v. Madasamy,* (1913) 16 NLR 467.
17. *Handyside v. Wirappu & Others* (1858) 3 Lorensz 114.
18. *Hattingh v. Sutterheim Div. Council* 1910 SALR E.D.L.D. 342.
19. *United Elec. Rad. and Mach. Workers v. Canada Wire and Cable Co.* 1950 Can. Lab. Arb. Cas. 492, 493.
20. *Mckellar v. Macfarlane* (1852) 15D. 246, 248, 2 Stuart 123 25 Jur. 156.
21. *Cawnpore Sugar Works Ltd. v. Rashtriya Chini Mill Mazdoor Sangh, (Uttar Pradesh Gazette, of* 05.03.1960 Pt 1 - B (ii),P. 508, 512 (Lab. ct.)
22. *Rv. Milne* 1950 4SALR 604, 607.
23. *Murray v. Velaiden* (1899) Tambyah 32.
24. *Mysore Premier Metal Factory v. Workmen,* (Fort St. George Gazette, 29.05.1963 Pt. 11, Section 1(supp.)p.2 Mad. Lab. ct.)
25. *United Packinghouse Workers v. Robin Hood Flour Mills Ltd.* (1961) 12 Can. Lab. Arb. Cas. 69.
26. *Sarangpur Cotton Manufacturing Co. v. Idu Ismail,* (1955) Bombay Ind. Ct. Ref. 262.
27. *United Auto Air & Agric. Imp. Co. v. Massey-Harris Co.* 1949 1 Cam. Lab. Arb. Cas. 311, 316.
28. *Champdany Jute Mills v. Ali* (Jan. 1952 Lab. App. Cas. 583)
29. *Moradabed Water Supply Co. v. Abdul H. Khan* 1951 2 Lab. L. J. 296
30. *Ford Motor Co. v. Dhomdu S. Mayekar* 1953 Bomb. Ind. ct. Refs. 418.
31. *National Rayon Corp. v. Gajaman D. Bankeer* 1954 Bomb. Ind. Ct. Rep. 161.
32. *Khulma N. Employees Union v. Khulna Newsprint Mills Ltd.* (1963) Pakistan Lab. L. Cas. 874, 875.
33. *Baidya V. Das v. Angus Co.* (Calcutta Gazette Feb. 9 1961 Pt. 1 P. 445, 446.
34. *United Elec. Rad & Mach, Workers v. Canadian Gen. Elec. Co.* 1949 1 Can. Lab. Arb. Cas. 320
35. *H. G. Jayasekera v. Ceylon Transport Board* ID/LT/8/69, CGG 14359 of 26.03.1965.

36. *Ceylon Cold Stores Ltd. v. Industrial & General Workmens Union* 1982 1 Sriskantha's Law Reports 7.
37. *The International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAWC 10) Local 199, in Re Mckinnon Industries Ltd.*(1951) 2 Can. Lab. Arb. Cas. 644.
38. *Berec (Ceylon) Ltd. v. Walpola & Others SC 96/75 SC Minutes of* 14.08.1978.
39. *Ceylon Oil & Petroleum Workers Union v. Ceylon Petroleum Corporation* (1978 - 79) 2 SLR 72, 78.
40. *Saverimuttu v. Board of Directors, CWE,* CGG 15000 of 03.03.1972.
41. *Glaxo Allenbury's (Ceylon) Ltd, v. Fernando* SC 250/71, SC Minutes of 22.10.1974.
42. *Jayasuriya v. SLPC, SC Minute of* 30.05.1991.
43. *Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. Hillman* (1977) 79 (1) NLR 421.
44. *Piliyandala Polgasowita Multi Purpose Co-op Soc. v. Liyanage* (1971) 74 NLR 138.
45. *Wataraka Multi Purpose Co-op Soc. Ltd. v. Wickramachandra* (1968) 70 NLR 239.
46. *The Group Superintendent Dalma Group v. Ceylon Estate Staffs Union* (1971) 73 NLR 574.
47. *Rumblan v. Ceylon Press Workers Union* (1973) 75 NLR 575.
48. *Karthigesu v. Sri Lanka Sugar Corporation 111 Sriskantha* LR 42.
49. *Somawathie v. Baksons Textile Industries Ltd,* (1973) 79 (1) NLR 202.
50. *Binny Ltd. v. Their Workmen,* AIR 1973 SC 1403, 1404.

Appeal from a Judgment of the Court of Appeal.

R. K. W. Goonesekera with S. M. Senaratne for appellant.

S. B. L. de Silva for respondent.

Cur. adv. vult.

December 16, 1991.

AMERASINGHE, J:

This an appeal from the decision of the Court of Appeal affirming the Order of a Labour Tribunal that the termination of the appellant's employment was justified. The question for determination is whether, in the circumstances of the case, the termination was warranted.

The circumstances of the case are as follows: After the vacation of homes occupied by expatriate staff upon the completion of their assignments with the Ceylon Petroleum Corporation, the Corporation, hereinafter referred to as 'the employer'. announced by a Circular dated 27 June 1978 (P1), that it proposed to sell to its employees the household equipment used by the former expatriate staff. Employees were requested to make their applications for the items in a prescribed manner. If there was competition for items, the goods were to be allocated by lottery. Goods not purchased within two weeks, the Circular said, would be sold to others.

The Manager, (Stores and Supplies) informed the Chairman by a memorandum (P2) that 2506 applications were received in response to the advertisement, and because the demand greatly exceeded the available items, he said he would, with the help of a computer, try to ascertain particulars of the items applied for, it was stated in the memorandum that the Tender Board had decided that (a) items of cutlery were to be limited to six per person; (b) where applicants were married, the husband and wife would, nevertheless, be each entitled to his or her quota as an individual employee; (c) where the same item was repeated by an applicant in several applications, the item should be struck out; (d) the deadline for applications should be extended to August 4; and (e) the Chairman should decide on the applications of temporary employees.

On 6th September, 1978, the Manager (Stores and Supplies), by letter, informed the Assistant Manager (Stores), the appellant, that some of the items would be required for the future use of other "foreign personnel due to arrive in the Island shortly in connection with Corporation activities". The kinds and the number of items required were specified. The appellant was directed to "set aside" these items from the best available and to "segregate" them in a "separate location" from the others.

On 11th October 1978 the Manager (Stores and Supplies) issued a Circular to all the Heads of Departments (P5) announcing that, further to the Circular of 27 June 1978 (P1), there would be a lottery conducted with the assistance of a computer, for the household items applied for by employees on 17th October 1978, in the employees' recreation hall. The Chairman, Working Director and Director in-charge of personnel, it was said, were expected to be present. The Circular (P5) also stated that (1) three items from the list originally advertised, viz., items 40, 41 and 47 were withdrawn from the sale; and (2) that, while the results of the lottery, it was hoped, would be announced on or before 20th October 1978, the goods should be paid for and removed between 23rd October and 10th November 1978; and (3) that goods not disposed of on or before the closing date, would be sold to those employees mentioned in an additional reserve list.

On 24th October 1978 the Manager (Stores and Supplies) by a Circular to all Heads of Departments (P7): (1) sent the results of the lottery; and (2) directed that the winners should, between 27th October and 10th November 1978, pay the amounts due for the purchase of the items they were entitled to, after establishing their personal identities in the manner specified.

On 2 December 1978 the appellant, who was in charge of the disposal of the items on sale, wrote to the Manager (Stores and Supplies) as follows (P8):

> "SALE OF HOUSEHOLD AND OTHER EQUIPMENT TO EMPLOYEES.
>
> After the lottery and sale of goods to the respective employees which ended on the 17th of November 1978, the following goods are left with us. A list of such items is attached hereto. Though there were some employees who appled to take their goods after the 17th of November 1978, we rejected the offers, as it was decided, that some persons had been selected at that lottery qual-

ifying them to purchase the goods which might be left unsold. However, we have to face difficulties in selling these leftover items as some times the number of items are more or less than the number of specified qualified persons.

If the lottery system is adopted to solve this problem, it would take approximately one month, and this would seriously hamper our day-to-day official functions."

The Manager (Stores and Supplies) on 12th December 1978 responded that, since it had been earlier resolved that if the first winner did not exercise his right of purchase, the second and third "etc" (sic) in line should be called upon to purchase the items, the Tender Board had decided that the second and third should be called upon " to pay and remove the leftover goods". The Manager added that "If the 2nd and 3rd parties also failed to pay and remove the goods, the Tender Board decided that we should throw open to any officer of the Corporation the opportunity to purchase such leftover items on a first-come first-served basis"

The Appellant was asked to "take action accordingly"

Although he had not become entitled to do so in terms of the luck of the draw at the lottery, the appellant, according to the Stores Invoice Order of 20 December, 1978 (P14), purchased for himself 12 saucepans, 12 table spoons, 12 forks, an LP Gas Cooker and 2 foam rubber mattresses.

On 22nd December, 1978, the appellant issued a Circular to all Heads of Departments (P9) stating as follows:—

"SALE OF USED HOUSEHOLD AND OTHER EQUIPMENT TO THE EMPLOYEES.

This letter is further to my Circular dated 24.10.1978 and the letters dated 26.10.1978 and 09.11.1978 issued by the Assistant Manager (Stores).

After the lottery, a list of workers was prepared, having regard to the number of items to be sold. Other names were also picked at the same lottery to deal with the eventuality of some goods being left unpurchased by the winners. The names of workers, selected for the sale of unsold goods, are stated against the particular items they are eligible to purchase in a list.

These workers should, between 26th December 1978 and 5th January 1979, pay the amounts due for the purchase of the items to which they are entitled, establishing their personnel identities in the manner specified. Goods are to be sold in the condition in which they are found.

Please inform your respective departments of this letter and advise those whose names appear on the list to pay and collect the goods before the deadline mentioned above.

Assistant Manager (Stores)"

No reference was made by the appellant to the way in which the goods not purchased by the winners at the lottery were to be sold.

In terms of invoice 192284, dated 24 January 1979, (P14), the appellant purchased a breadknife, ten tea spoons and a bread-board. The sale of these items had been approved on 4th January, 1979, which in terms of the Circular issued by the appellant (P9) was the day immediately preceding the last date for purchase by those qualified to purchase in terms of the lottery.

Complaints were made to the management by employees about the appellant helping himself to the items referred to above (a) none of which he was qualified by lottery to purchase; (b) some of which no one could have purchased in such *quantities* and (c) others which could not have been purchased by anyone at all, because they had been withdrawn from the sale. A domestic inquiry was held into the appellant's conduct,

and his services were terminated with effect from 25th May, 1979. His appeal to the Labour Tribunal was without success, save and except to the extent that the Tribunal on 6th April, 1983 ordered the payment of a gratuity of Rs. 12,792/50 for the services rendered by the appellant. In the Court of Appeal, on 11th March, 1988, Mr. Justice Palakidnar affirmed the decision of the President of the Labour Tribunal.

On 21st July, 1988 this Court (Atukorale, Actg. C.J., G.P.S. de Silva, J. (as he then was) and Jameel, J.), observing that the "only point urged by the learned Counsel for the petitioner" was "whether in the circumstances of this case the punishment meted out to the petitioner is warranted", granted "special leave to appeal to this Court from the judgment of the Court of Appeal dated 11th March, 1988."

The matter was argued before us on 10th September, 1991. At the request of the Court, learned Counsel filed additional written submissions: The appellant did so on 16th September and the respondent on 7th October 1991.

Mr. Goonesekere, learned Counsel for the appellant, submitted that, although an employer ought to have the right to decide on what punishment is appropriate in the event of misconduct, it is not every mistake or act of disobedience that would make dismissal a just and equitable way of dealing with the matter. Where the employer has acted *mala fide,* or where the punishment is disproportionate to the offence, a Labour Tribunal should, he said, intervene to give relief. A Tribunal, learned counsel for the appellant submitted during his address, should regard a dismissal as unfair if *no reasonable employer would have dismissed him.* No reasonable employer, learned counsel submitted, would have dismissed the appellant. However, in his written submissions later on 26th September, 1991. Mr. Goonesekere submitted that a tribunal or court should be guided by the test, *Would a reasonable employer have decided that the employee's conduct was sufficiently serious to warrant the penalty of dismissal?* Mr. Goonesekere cited S. R. de Silva,

Legal Framework of Industrial Relations, 592–595; Malhotra, *Dismissal, Discharge, Termination of Service and Punishment*, 7 Ed., 274-275 and Steven D. Anderman, *The Law of Unfair Dismissal*, 1985, pp. 149 - 172, in support of his submissions. Mr. Goonesekera drew our attention to the fact that Anderman (op.cit.) quoted Lord Evershed, MR in *Laws v. London Chronicle* (1) as stating that "an act of" disobedience can justify dismissal only if it is of a nature which goes to show in effect that the servant is repudiating the contract or one of its essential conditions." Mr. Goonesekere submitted that the appellant's conduct "cannot even remotely be considered gross misconduct" and that, therefore, the termination could not be justified.

It was never suggested at any time that the employer in this case acted *mala fide*. Therefore, that matter does not need to engage our attention.

Whether the termination of the appellant's services was justifiable or not, whether it was, as Mr. Goonesekere claims "disproportionate", depends on what he did or omitted to do and whether what he did or omitted to do, as a matter of law, and not as a mere whim or fancy of the employer, warranted dismissal. (Cf. *Michael v. Johnson Pumps* (2) at p. 666 para. 22, per Krishna Iyer, J.). I agree with learned counsel for the appellant that an employer cannot claim to have a right to dismiss an employee merely because he says he has lost confidence in an employee. As Justice Krishna Iyer pointed out, with great respect, albeit somewhat quaintly, in *Michael v. Johnson Pumps,* (supra) at p.666 para. 19, loss of confidence is "no new armour for the management : otherwise security of tenure, ensured by the new industrial jurisprudence and authenticated by a catena of cases of the Supreme Court, can be subverted by this neo-formula."

Loss of confidence must be based on established grounds of misconduct which the law regards as sufficient. An employer's response to the misconduct in question must be reasonable. It must not be flagrantly unjust. (Cf. *The Lever Brothers*

Dispute (3), see also ID/LT/4/30 CGG 13441 of December 21, 1962). It must be emphasized, however, that, in applying these principles, a tribunal or court is not seeking to impose its own views on what an employer *ought* to have done. In general, tribunals and courts must recognize the fact that the employer is in the best position to judge what punishment is appropriate for his employee's misconduct. (E.g. see *Lanka Estate Workers Union v. Superintendent of Vellai Oya Estate, Hatton)* (4) *Democratic Workers Congress v. Superintendent of Kahagalla Estate, Haputale* (5) see also ID 66 CGG 11549 of October 10, 1958). The question for a tribunal or court is not what such tribunal or court would have done if it had been the employer. [See *Trust Houses Forte Leisure Ltd. v. Aquilar,* (6)].

Nor is a tribunal or court concerned with what a reasonable employer might have done. There is a band of reasonableness within which, in the circumstances, employers in that very type of business may well have acted differently. Within that band, there can be no single, correct or incorrect decision. One reasonable employer might have retained his services. Another, equally reasonable, employer might have dismissed him.

I am unable to accept the other test suggested by learned counsel for the appellant, namely, that a dismissal is unfair only if *no* reasonable employer would have dismissed the employee. I know that this seems to have been the standard suggested in *British Leyland (UK) Ltd. v. Swift* (7) Cf. also *Vickers Ltd. v. Smith* (8) Perhaps it was the same criterion the Indian Supreme Court had in mind in *Hind Construction & Engineering Co. Ltd. v. Their Workmen,* (9), at p.88 when Justice Hidayatullah, (Gajendragadar, C.J., and Wanchoo, J. agreeing), said: "In respect of punishment it has been ruled that the award of punishment for misconduct under the Standing Orders, if any, is a matter for the management to decide, and

if there is any justification for the punishment imposed, the tribunal should not interfere. The tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe. But where the punishment is shockingly disproportionate, regard being made to the particular conduct and the past record, or is such, as no reasonable employer would ever impose in like circumstances, the tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice."

The decisions in *British Leyland* (supra) and *Hind Construction & Engineering Co.*, in my view, impose unacceptable fetters on Labour Tribunals in making their decisions in terms of the Industrial Disputes Act, including decisions under section 33 (6) of that Act. The application of the *no reasonable employer* test would drive tribunals, and eventually employers, to seek the lowest standards of conduct. Concerned as we are with the pursuit of excellence, better performance and greater productivity in our places of work, I have no hesitation in rejecting the "no reasonable employer" standard proposed by Mr. Goonesekera. Employers should not be compelled to scrounge in the lowest depths of the relevant standards of performance and behaviour to justify their actions.

A reading of the decisions leads me to the view that the concerns of a tribunal or court in considering an allegation of unfair dismissal are these: Were the alleged grounds of misconduct sufficiently established by evidence? What was the *quality* and *nature* of the misconduct? Are there *proved reasons*, or *legitimate inferences* from the evidence available, with regard to how and why the business of the employer was, or might be reasonably expected to be adversely affected, directly or indirectly, by the act or omission in question? (Cf. *All Ceylon Oil Companies Workers' Union v. Standard Vacuum Co.*, (10). Was the misconduct, taken by itself, sufficient? Are there, established by evidence, aggravating circumstances or exoner-

ating or extenuating facts that change the quality and nature of the act or omission? in the light of the answers to these questions, is it reasonable to conclude that the employee's misconduct was repudiatory in nature?

What did the appellant do or omit to do in this case?

The appellant was disobedient. Not once, but over and over again. Although on 6th September, 1978 he had been directed by the Manager (Stores and Supplies) to set apart and, subsequently on 11th October, 1978 the Manager (Stores and Supplies), in Circular (P5) announced that those items (40, 41 and 47) had been withdrawn from the scheme of sale to the employees, the appellant, nevertheless, made personal purchases of two of those items, namely teaspoons (item 40) and stainless steel spoons (item 41).

The appellant was also disobedient, when he purchased items of household equipment for himself, because in terms of the scheme set out in the employer's several Circulars, including one issued by the appellant himself for and on behalf of the employer (P9), he was not qualified at all to make such purchases.

The appellant was disobedient once again when he purchased 12 table spoons, 12 forks and ten tea spoons, since the *maximum* number of such items of cutlery as were permitted to be sold was limited to six per person.

The appellant was disobedient again when he failed to inform employees in his Circualr (P9) of the manner in which goods remaining after 5th January, 1979 would be sold. He incorporated in his Circular only *some* of the instructions he had been ordered to communicate.

What is the nature and quality of an act of disobedience? Ever since Adam ate the forbidden fruit, disobedience has been viewed askance as something to be regarded as contemptible, something deserving punishment. The law relating to

industrial relations reflects these values. It permits punishment, for inexcusable, wilful neglect or refusal to submit to or comply with or the transgression or violation of a command, order or direction of an employer, or that of a person lawfully and properly acting for and on behalf of an employer. (Cf. *Ceylon Transport Board v. Samastha Lanka Motor Sewaka Samithiya* (11) *Ceylon Workers' Congress v. Janatha Estates* Development Board (12) at p.77 per Atukorale, J. See also the Australian case of *Adam v. Maison de Luxe Ltd* (13) at pp. 151-152 per Isaacs ACJ; and the Canadian case of *Youngash v. Sasketchewan Engine Co.* (14).

Alfred Avins, *Employees' Misconduct*, 1968 Ed., pp. 125-126 explains why obedience to orders is essential to a business, why it is an essential condition of every contract of employment and why disobedience must be regarded as misconduct, in the following way:

> "Disobedience to lawful commands is a most noxious offence, and the most dangerous in nature, for it goes at once to the utter annihilation of all authority.
>
> The authority and desires of superiors, be they employers or supervisors, are expressed through orders. Without a willingness by an employee to accept the authority of superiors, no business organization of any kind, or indeed any other kind of organization, could function. Every employee would do just what he chose, and no central plan could be put in operation or successfully carried out. The objects and aims of the employer would never be accomplished, the very purpose of the contract of employment."

I agree with Mr. Goonesekere's submission that not every act of disobedience merits dismissal. The act must be qualitatively appropriate for the purpose. For instance, unless the person issuing the relevant order had the authority to do so, there can be no disobedience of the *employer's* order. This is an

old, well-established principle in our law, going back a hundred years at least. (E.g. see *Power v. Rengsami,* (15) see also *Winthrop v. Madasamy* (16) Moreover, the order must be clear and positive and unambiguous; it must have been communicated to the employee and within his knowledge; Otherwise, how could he be disobedient? Moreover, it must not be impossible, unreasonable or unlawful to obey the order.

No questions were raised in the case before us of lack of authority, or clarity, or misinterpretation or impossibility or illegality and similar extenuating or exonerating circumstances. Had these questions been raised, I would have considered them in deciding whether these circumstances made the appellant's conduct qualitatively less serious than disobedience of orders might usually be.

However, it was in evidence that the appellant did think that the scheme, from the point of view of implementation, was somewhat problematical. It was not a case where the order was so unreasonable as to make the disobedience excusable. (Cf. *Handyside v. Wirappu & Others* (17)-a case of a prosecution for the disobedience of an employer's orders under Ordinance 5 of 1845). This is not a case where performance was impossible or dangerous or illegal. The implementation of the scheme ordered by the employer was, in the appellant's view, disruptive of his other work, inconvenient, perhaps, and something of a nuisance. But no more than that. He expressed his views in his letter to the Manager (Stores and Supplies) on 2nd December 1978 (P7). Due consideration, no doubt, was given to the disruptive effects alleged; but the appellant was informed in the clearest of terms, by the Manager (Stores and Supplies) on 12th December 1978, that his views were not acceptable, and he was told what he should do. Whatever his private views were, and however desirable his personal motives might have been, the appellant should have complied with the order of the Manager (Stores and Supplies) dated 12th December

1978 given, as it was said, in consultation with the Tender Board. Avins (op. cit. p. 289), referring to numerous authorities in support of his views, says this:

> "While excessive zeal or other good motives may lessen the punishment to be imposed on an employee who disobeys orders, unless the superior is mistaken as to the facts in which they are to operate, good motives do not constitute a defence. A subordinate has no right to substitute his own opinion for that of a superior, and any disobedience in so doing will be considered wilful and not merely due to forgetfulness or carelessness. An employee cannot refuse to obey an order because he believes the work called for is unnecessary or the order is unwise... Disobedience of a positive order to do something in one way is not excused because the employee believes he has a better method of accomplishing the same result. Likewise, it is no excuse for disobeying orders that obedience might endanger the employer's property, when this has been explained to the employer and he has said that he would take the risk."

According to the evidence, it seems to me that it was his inordinate and overpowering greed, rather than zeal or any sense of duty that motivated the appellant in this case to act in defiance of the orders of the employer. There were no extenuating factors.

How did the appellant disobey the orders of his employer? He did so by committing several additional acts of misconduct which aggravated his disobedience.

For one thing, he falsified entries in the relevant documentation to enable him to purchase the twelve saucepans. There is abundant authority for the proposition that an employee who makes false records, a *fortiori* to benefit himself, is guilty of serious misconduct, warranting dismissal. (E.g. see Avins, op. cit. at p. 483 et seq. p. 489 et seq., p. 511 et seq.). Indeed,

generally, any abuse of authority to gain a personal advantage would, *prima facie* amount to misconduct. Thus in the South African case of *Hattingh v. Sutterheim Div. Council*, (18) it was held that a supervisor who, without authority, altered the hours of work of the gang under him, so that he could get to a dance on time, was guilty of misconduct, although they worked the same number of hours as usual.

A superior officer is expected to set a good example to his subordinates. His misconduct serves to demoralize his entire department. (See *United Elec. Rad. and Mach. Workers v. Canada Wire and Cable Co.*, (19). The appellant violated the employer's orders in circumstances of great aggravation, since he made a subordinate officer accessory to open and determined breach of such orders. He thereby destroyed respect for himself and his authority as Acting Assistant Stores Manager and lowered himself in the eyes of other employees by showing himself to be so completely the slave of his cupidity. (Cf *Mckellar v. Macfarlane)* (20). In the words of a decision in an old Sheriff's Court case in Scotland, "this was a fault of the highest kind."

Where his misbehaviour encourages subordinates to act in dereliction of their duties, a supervisory employee is guilty of misconduct, the recurrence of which the management is entitled to prevent by strong action. In *Cawnpore Sugar Works Ltd. v. Rashtriya Chini Mill Mazdoor Sangh*, (14) at the end of the last shift before a two day holiday, there was some work yet to be completed. The Chief Engineer told the shift engineer to remain until the work was completed, but the latter refused on the ground that he had arranged to go home by the 2.30 a.m. train, leaving a half hour after the end of the shift, and that he had sent his family to the railway station to wait for him. He also protested that he had not received prior notification of this work. Ultimately, he did not stay, and, for

this act of disobedience, he was dismissed. The Uttar Pradesh Labour Court upheld the dismissal. After finding that there was an emergency, it said:

> "The shift engineer, being next to the chief engineer, ... was... second in command. When such a person was to behave in the manner Sri Daya Ram did, it gave encouragement to other subordinates and this is why.... the ..... chief engineer was put in trouble and had to ask Sri Daya Ram and others to make haste and bring the workmen who were leaving the shift and were going out of the gate. It one visualises the situation which prevailed at the moment, he would no doubt think that it was like one second-in-command letting down the commander and the whole army was running away helter-skelter. I am afraid when such a chaotic condition is led by the action of a responsible employee, no management would like to tolerate it... [and must] take strong action so as to put an end to recurrence of it... Further.... there was no harm if Sri Daya Ram had stayed for a few hours and could have gone by the second train which was leaving at 7 a.m. The distance to Gorakhpur which he was to cover was a little over 40 miles. To the family which he alleged to have sent to the station in advance he could have sent a message through a peon or any other workman of his department to await for the next train. By taking employment and the responsibility of shift engineer, he subordinated his personal interests to that of the concern. He should have kept before him the motto 'Service before Self'. When Daya Ram could put up an excuse for not overstaying in his own shift, it was not proper for him to suggest before this Court that the chief engineer could have sent for shift engineers of the previous shifts, one of which was over sixteen hours back and the other eight hours back."

A supervisor is ultimately responsible for the operations within the section or unit under his charge. It is his duty to devise ways and means by which the overall plans and objects of his employer are carried out. (See *R. v. Milne* (22). It is the duty of a person in a supervisory position to see that the plans and directions of the employer are executed. *(Murray v. Velaiden* (23) *Mysore Premier Metal Factory v. Workmen* (24). A superior officer is obliged to ensure that subordinates comply with the legitimate orders of the employer. He must prevent a dereliction of duty by subordinates. Where he culpably fails to do these things, he is guilty of misconduct.

In permitting his subordinate, Jayasekera, to violate the instructions given by the employer, the appellant was guilty of misconduct in that he failed to exercise his supervisory duties.

In this case, the appellant not merely failed to exercise his supervisory functions, he actively assisted his subordinate in the violation of superior orders, to be able to carry out his own improper designs and his culpablity is therefore that much more serious. *(United Packinghouse Workers v. Robin Hood Flour Mills Ltd.* (25) *Saiangpur Cotton Manufacturing Co. v. Arb idu Ismail* (26)) Jayasekera, his subordinate, "authorized" the appellant's irregular purchase on 20th December; and the appellant returned the favour by approving Jayasekera's unauthorised purchases on 27th December, 1978. (Vide p.16).

The authority to deviate from the scheme could have been given only by the employer. In authorizing Jayasekere's purchase, the appellant, therefore, was guilty of a further act of misconduct, namely usurping functions he did not possess. (See *United Auto Air & Agric. Imp. Co. v. Massey-Harris Co.* (27)

Counsel for the appellant argued that the penalty of dismissal was unfair, having regard to the value of the property involved. I agree that where the *de minimis* principle might be applicable in the circumstances of a case, a warning or admonition might be more appropriate than dismissal. However,

dismissal is justified where the nature of the misconduct is serious. Quantitative considerations must be taken into account but only in relation to the nature and quality of the act in question. For instance where an employee is guilty of theft the value of the thing stolen is not necessarily conclusive of the matter, although dismissal would be usually considered reasonable. [E.g. see *Champdany Jute Mills v. Ali* (28) *Moradabed Water Supply Co. v. Abdul H. Khan* (29) *Ford Motor Co. v. Dhomdu S. Mayekar* (30) *National Rayon Corp v. Gajaman D. Bankeer* (31) *Khulma N. Employees Union v. Khulna Newsprint Mills Ltd.* (32) *Baidya V. Das v. Angus Co.*, (33).

In *United Elec. Rad & Mach. W. v. Canadian Gen. Elec. Co.* (34) an employee who was ordered to sell to other employees items at the canteen at the price he got them for, was dismissed for charging one cent extra per item. The amount involved did not render the misconduct trivial.

The case of *H.G. Jayasekera v. Ceylon Transport Board* (35) also supports the view that the amount is not conclusive. The amount involved was Rs. 1/40, but the employer who attempted to defraud the employer of this amount earned just dismissal.

In *Ceylon Cold Stores Ltd. v. Industrial & General Workmens Union* (36) the Court of Appeal reversed the order of the Labour Tribunal and held that the dismissal of an employee who was "caught with a few sundry items of small value at the gate of the" employer's premises was justified because the employee had been working in a "responsible position". He had disobeyed an order prohibiting employees from bringing things from outside into the premises without notice to the security officers.

In the case before me, the price fixed was no indication of the value of the articles. The goods were deliberately sold at a concessionary price. Moreover, they were hard to get and they were therefore valuable. The scramble for the items amply demonstrates this. The appellant himself complained that due to the large numbers flocking to his stores in search of the goods, his other work was disrupted. Did the Chairman and important officials waste their time in attending a lottery of items of little use or value? Were the elaborate steps taken to sell the items consistent with the sale of discarded trash? Did the appellant abuse his position of trust and manipulate the records and, not only fail to exercise his supervisory duties but, also support disobedience on the part of his subordinate, Jayasekera, thereby demeaning himself and undermining his authority, in order to acquire goods that were of little value? Did he take all the trouble he did, and risk so much, for trifles? He can scarcely take refuge in the *de minimis* principle.

What did the disobedience on the appellant's part (and that of his subordinate he helped to defy the employer's orders) relate to? They concerned a scheme devised by the employer to promote good employer-employee relations. It is the law that any wilful and inexcusable disruption by an employee of a relationship, which an employer has a legitimate interest in preserving, is misconduct. (See Avins op. cit. 604 et seq.). This may relate to suppliers, customers or others, such as government officials, with whom the employer has dealings. Perhaps, the most precious of all connections an employer has, the most important to the success of his business, is that he has with his employees. It is the very basis of production. Obviously, anything done to create disaffection amongst employees, would be a serious matter. Equally, anything done to frustrate or thwart or jeopardise a scheme of an employer to strengthen his valued connections, would be serious misconduct. In the case before us, not only had the employer generously offered to give its employees much-sought after goods at a concessionary price, it had also taken the most elaborate steps to ensure that

employees would be satisfied by the equitable treatment meted out to them. The appellant's conduct put the scheme of the employer in jeopardy and drew understandable protests from the employees. His misconduct in this regard was properly, in my opinion, regarded as serious enough to warrant his dismissal.

The case of the *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAWCIO) Local 199 in re Mckinnon Industries Limited,* (37) is instructive. At a time when new cars were scarce, and a person without priority had to wait for many months after placing his order before he secured delivery, Mckinnon Industries of Ontario made an arrangement under which its employees could secure certain priorities when purchasing new General Motor Cars. From 1948 until July 2nd 1950, 273 employees purchased cars under this scheme. However, a few employees, in disregard of their obligations, sold the cars to others. In order to discourage future abuses, the company required its employees to sign an agreement under which they promised not to sell the vehicles obtained under the scheme for twelve months. It was agreed that failure to live up to the terms of the agreement would incur discharge or other diciplinary action which the Company may deem advisable under the circumstances.

An employee named Joseph Kormany purchased a car under the scheme on July 14th, 1950. Kormany sold the car a few months later. His position was that, since he had paid for the car, he had the right to sell it when it pleased him. In any event, he was soon returning to Budapest and had no further use for another car. Kormany was dismissed. He protested and demanded reinstatement on the ground that he had been unfairly treated. His Trade Union took up this matter. The dispute was referred to an arbitrator - Professor J.C. Cameron. Kormany, it seems, had not read the agreement and, in any event, did not realize that he was liable to be dismissed,

if he sold the car he had purchased within twelve months. The arbitrator held that if the employer had not read the agreement, he had nobody to blame but himself. He refused to remove or modify the penalty on the assumption that Kormany did not intend to do wrong. To do so, he said, "would be to encourage other employees who were disposed to breach the agreement to do so in the hope that they too would be dealt with leniently. This practice, if indulged in, would certainly mean cancellation of the priority plan." The arbitrator concluded that, "while the punishment imposed upon Kormany is severe, the circumstances of the case certainly do not warrant me in setting aside the penalty".

Reference might also be made to *Berec (Ceylon) Ltd. v. Walpola & Others* (38) In that case, six employees defrauded a medical scheme set up for the benefit of employees by the employer. Collin Thome, J (Malcolm Perera, J agreeing) held that the six employees had been justifiably dismissed for "defrauding their fellow workers who had a stake in the scheme."

In deciding the nature of and evaluating the quality of an act of misconduct, regard must be had to the position of the employee. I have already dealt with the duties and responsibilities of the appellant as a supervisor and his several failures as a supervisor. It is hardly necessary to add that, in failing in his duty as a supervisor, and in failing to maintain his authority as a supervisor, he acted in breach of implied, but essential, conditions of his employment as a supervisor. No business organization could ever be successful unless employers could depend on supervisors to do what is expected of them. The successful running of a business is committed to its supervisors. The appellant failed in more ways than one to discharge his duties as a supervisor.

There are other aspects to the question relating to the specific position of the appellant in the organization and the act of misconduct in question, apart from his obligations in

general as a supervisor and senior hand. The appellant was entrusted with the custody and safety of the employer's property. As Assistant Stores Manager, he was in a special position of confidence with regard to the goods entrusted to him. As the person in-charge of the implementation of the scheme of sale, he was, what Justice Krishna Iyer in *Michael v. Johnson Pumps Ltd.*, (2) called a person in a "sensitive or strategic" position. It was, as Krishna Iyer, J said in that case (at p.666), a "high risk" to keep the appellant in such a position after he had misused or abused his position and once suspicion had started. (See also *Ceylon Oil & Petroleum Workers Union v. Ceylon Petroleum Corporation* (39) per Tambiah, J.). In *Saverimuttu v. Board of Directors, CWE* (40), a senior accountant's dismissal was upheld for acting contrary to orders prohibiting the authorization of the encashment of personal cheques. Where loss of confidence is based on proven misconduct which warrants dismissal, an employer should not be compelled to employ the workman, (Cf. *Glaxo Allenbury's (Ceylon) Ltd. v. Fernando* (41)).

Learned counsel for the appellant submitted that if reinstatement was not possible, then the court should award the appellant compensation on the basis of the principles set out in *Jayasuriya v. SLPC.* (42) .

Although, in certain circumstances, compensation may be payable where reinstatement is not feasible, yet, as Sharvananda, J. (as he then was) observed in *Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. Hillman* (43) "If the employee's conduct had induced the termination, he cannot in justice and equity have a just claim to compensation for loss of career as he has only himself to blame for the predicament in which he finds himself." (See also *Piliyandala Polgasowita Muti Purpose Co-op Soc. v. Liyanage* (44) *Wataraka Multi Purpose Co-op. Soc. Ltd. v. Wickramachandra* (45). *The*

Group Superintendant Dalma Group v. Ceylon Estate Staffs Union (46) *Rumblan v. Ceylon Press Workers-Union* (47) *Karthigesu v. Sri Lanka Sugar Corp* (48) also *Somawathie v. Baksons Textile Industries Ltd.* (49).

The appellant is, in my view, solely to blame for the predicament in which he finds himself. He had acted in a manner on account of which the employer could possibly have no confidence in him for the future and, therefore, I do not think he has any claim to be compensated. (Cf. per Grover, J. in *Binny Ltd. v. Their Workmen.* (50)).

For the reasons stated, I hold that the dismissal of the appellant was justified. The decision of the Court of Appeal is affirmed. The appeal is dismissed. Each party will bear his own costs.

Bandaranayake, J. — I agree.

Fernando, J. — I agree.

Appeal dismissed.