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THE LABOUR TRIBUNALS
AND
THE RELIEFS THAT CAN BE GRANTED

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The Labour Tribunal was not part of the Industrial Disputes Act when it was enacted in 1950. The remedies provided to a workman in the Industrial Disputes Act were limited to Conciliation, Arbitration and Collective bargaining. The remedies under Conciliation and Voluntary Arbitration largely depended on the co-operation of the employer. An aggrieved workman did not have an effective remedy for an industrial dispute, especially, when the employer does not cooperate with a Voluntarily Arbitration process, the only effective remedy available was reference to Compulsory Arbitration which too was available at the discretion of the Minister. If the minister decides not to refer a dispute for Compulsory Arbitration, there was no remedy available to the aggrieved workman.

Further, for a dispute emanating from unfair termination of employment, there was no direct remedy available except under the Common Law of Sri Lanka (*i.e.* Roman Dutch Law) where a workman could resort to a civil action against the employer in the District Court. In the District Court too the Common Law did not permit for an order of reinstatement as the Roman Dutch Law does not recognize specific performance of a contract of personal service[2]. Therefore, the only remedy available was to claim damages for wrongful termination.

In the backdrop of the aforesaid lacunas found in the Industrial Disputes Act, by an amendment to the Industrial Disputes Act in 1957, Labour Tribunals were

[1] LL.M. (Col), LL.M. (Malta)

[2] Weeramantry CG ; The Law of Contracts Volume 2 Page 968

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introduced. The Labour Tribunals were established under Part IVA of the Industrial Disputes Act.

An application to a Labour Tribunal maybe made by a workman or a trade union on behalf of a workman who is a member of that union in respect of the following matters:

(a) The termination of the services by the employer;

(b) The question whether any gratuity or any other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and the extent of any such benefits, where such workman has been employed in any industry employing less than 15 workmen or any date during the period of 12 months preceding the termination of services of the workmen who makes an application in respect of whom the application is made to the Tribunal;

(c) The question whether the forfeiture of a gratuity in terms of the Payment of Gratuity Act No.12 of 1983 has been correctly made in terms of that Act; and

(d) Such other matters relating to the terms of employment or the conditions of labour, of a workman as maybe prescribed. (Not prescribed to-date)

It is important to note that the Labour Tribunal, in terms of Section 31B (4), may grant redress to a workman upon an application notwithstanding anything to the contrary in the contract of service between him and his employer. Labour Tribunal may on any such application made under Section 31B (1), order the employer to pay to the workman any sum as wages in respect of any period during which that workman was employed by such person or as compensation as an alternative to the reinstatement of that workman or as to any gratuity payable to that workman by such employer.

Therefore, a Labour Tribunal may make an order, on account of termination of services by the employer, reinstatement with or without back-wages or any part of back-wages or in the alternative an order for compensation. The rest of the powers of

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the Labour Tribunal relates to Gratuity. Upon an application made under Section 31B (1) (b) the Tribunal may decide what quantum of Gratuity to be paid and on an application in terms of Section 31B (1) (c) whether the calculation and or the forfeiture of Gratuity was lawful.

It is important to note that applications under Section 31B (1) (a) and (b), shall be made within a period of six months from the date of the termination of that workman whereas for an application in terms of Section 31 B (1) (c) there is no time limit.

Reinstatement of Service

Reinstatement of service of a workman, in the case of an unfair termination, appears to be the most significant remedy a Labour Tribunal could grant to a workman. However, the law recognizes certain limitations with regard to the remedy of reinstatement.

The Labour Tribunal, in terms of Section 31B (6), shall have the power to award compensation in lieu of reinstatement where the reinstatement of services of a workman would not be desirable in the interest and welfare of the workman or conducive to the maintenance of industrial peace. Generally, employees such as confidential secretaries, personal chauffeurs and bank employees whose employment is based on trust and confidence reposed on them by their employers are not reinstated although termination is held to be unjustifiable.

In the case of *United Industrial Local Government and General Workers Union V Independent Newspapers Limited*[3] ;

> *"In an application made under section 31 B (1) of the Industrial Disputes Act on behalf of a workman who had been dismissed from service by his employer, the President of the Labour Tribunal found on the evidence that the termination of the workman's*

[3] 75 NLR 529

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employment was unjustified. He ordered the employer to reinstate the workman and to pay him a sum of Rs.1,600 as back wages. On an appeal preferred by the employer the Supreme Court stated that the continuance in service of the workman under the employer might not be in the interest of industrial peace or of the work man himself and, therefore, varied the order of the Labour Tribunal by permitting the employer, at his option, to pay the workman, as an alternative to reinstatement, an additional sum of Rs. 1,000 as compensation. The ground on which the Supreme Court varied the order of the Labour Tribunal was the latter's failure to consider the practically on contradicted evidence in regard to the several previous acts of misconduct on the part of the workman…"

The Court of Appeal (The highest court at that time) held that the Supreme Court did not act in excess of its jurisdiction by caring the order made by the Labour Tribunal.

In *Ceylon Ceramics Corporations v. Weerasinghe*[4] the court held that except in cases falling within section 33 (3), (5) and 47 (c) of the Industrial Disputes Act, a workman wrongfully dismissed will normally be entitled to reinstatement unless there are special circumstances which justify this departure from this general rule.

In *Bank of Ceylon v. Manivasagasivam*[5]; the case for the Bank was that there was a loss of confidence in the applicant by reasons of the part he played in an attempt made by certain persons to fraudulently transfer a very large sum of money from Sri Lanka to accounts which had been opened in a Swiss Bank. Reversing the Order of the High Court, the Supreme Court held:

"i) The High Court had failed to consider the evidence as a whole and address its mind to a significant fact, namely the kind of institution in which the applicant was employed.

[4] SC 24/76, SCM 15778
[5] [1995] 2 SLLR 79

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ii) Utmost confidence is expected of any officer employed in a Bank. There is a duty both to the Bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the Bank.

iii) In the circumstances of this case, it is apparent that he has clearly forfeited the confidence reposed in him as an employee of the Bank."

G. P S. De Silva, C.J. further elaborated on the above fact stated thus;

"…In reversing the order of the Labour Tribunal, the High Court was in error in as much as the High Court had failed to consider the evidence as a whole. The High Court has failed to address its mind to a significant fact, namely, the kind of institution in which the applicant was employed.

Siva Selliah, J. in *Sithamparanathan v. Peoples Bank*[6] held that;

"It is needless to emphasize that the utmost confidence is expected of any officer employed in a Bank ... he owes a duty both to the Bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the Bank. Integrity and confidence thus are indispensable and where an officer has forfeited such confidence has been shown up as being involved in any fraudulent or questionable transaction, both public interest and the interest of the bank demand that he should be removed from such confidence...
1t seems to be that by reason of the part played by the applicant in two transactions which, to say the least, were questionable, he has clearly forfeited the confidence reposed in him as an employee of the Bank. In these circumstances, the Bank should not and cannot continue to employ him."

In the said case it was further held that,

[6] [1986] - 1 SLR at p. 414-415

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> *"failure to properly evaluate evidence or to take into account relevant considerations, in such evaluation is a question of law and is reviewable by an Appellate Court. The finding that though the appellant was not directly guilty of fraud or fraudulent transactions, Loss of confidence has two aspects in Labour Law. Loss of confidence- may justify termination by the employer. Loss of confidence may be a circumstance from which a Court may conclude that reinstatement is not the appropriate relief, despite a finding that the termination is not justified".*

Any employee whose employment is dependent on trust and confidence of the employer should not be awarded reinstatement. In *Glaxo Allenbury's (Ceylon) Ltd. vs. Fernando*[7] Rajaratnam J. observed that:

> *"An employer should not be forced to employ a workman in whom he has lost his confidence for reasons, either on the ground that he has been negligent or has not conducted himself in such a way to enjoy his confidence."*

In *De Silva v. Ceylon Estate Staffs' Union*[8] the Supreme Court held that failure to do so would render an order not "just and equitable". Rajaratnam J. itemized some of the factors to be taken into consideration in this regard:

> *"the Tribunal must be mindful of the nature of the applicant's employment, the impact a reinstatement can make on the industry and the employer/ employee relationship. It should also consider whether an order of reinstatement would disrupt and disorganize the management or administration of the business. It must also take into account that efficiency, discipline and sound business principles should never be impaired by its order. a workman cannot enjoy the security of his employment in which he lacks, or have lost the confidence of his employer………."*

<u>Payment of Compensation</u>

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[7] SC 250/71, SCM 22/10/74

[8] SC 211/72, SCM 15/5/74

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The Arbitrator, Industrial Court or Labour Tribunal in its award or order may contain a decision as to the payment by any employer for compensation to any workman, the amount of such compensation or the method of computing such amount, and the time within which such compensation shall be made[9]. Compensation may be paid by the Labour Tribunal for unjust and just termination of employment. Statutorily the Labour Tribunal is given the power to award compensation in lieu of reinstatement[10].

Where any award or order of a Labour Tribunal contains a decision as to the reinstatement in service and if the employment is in the capacity of personal secretary, personal clerk, personal attendant or chauffer to the employer or of domestic servant or in any other prescribed capacity of a description similar to those herein before mentioned, the award or order of a Labour Tribunal shall also contain a decision as to the payment of compensation as an alternative to his reinstatement.

The workman concerned may request the Arbitrator, Industrial Court or Labour Tribunal to make an award or order for compensation if the unjustifiable termination was a result of a strike or lockout arising out of an industrial dispute[11].

In *Caledonian (Ceylon) Tea and Rubber Estates, Ltd v. Hillman*[12], Sharvananda J held that the Labour Tribunal is entitled to grant compensation even where the termination was justified. He stated that where the termination was caused solely by the act and will of the employer in the exercise of his managerial discretion to organize and arrange his business, a Tribunal, exercising just and equitable jurisdiction, uninhibited by limitations of law but actuated by postulates of justice, is well entitled to grant relief in the nature of compensation to the discharged employee, even though, in law, the employer was justified in discharging him from service on account of surplus age. However, no compensation is awarded where the workman has been found guilty of misconduct and the punishment (termination) was proportionate to the misconduct committed.

[9]Section 33(1) (d) - Industrial Disputes Act No. 43 of 1950 (as amended)
[10] Sections .33(3),.33(5) and.33(6) of the Industrial Disputes Act (as amended)
[11] Section 33(5) ibid
[12] 79 (1) NLR 421

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In the case of *Rumblan v. Ceylon Press Workers' Union*[13], the workman was dismissed because he had caused damage to the machine and it was held that the dismissal was justified. It was in these circumstances that de Krester, J. held that where dismissal is proper and justified, no compensation can be awarded.

Justice Sharvanandada in *Caledonian (Ceylon) Tea and Rubber Estates, Ltd v. Hillman*[14] sought to distinguish common law jurisdiction and the special jurisdiction of a Labour Tribunal. It was held:

> *"In this case that the jurisdiction that is vested in a Labour Tribunal by the Industrial Disputes Act is not a jurisdiction of merely administering the existing common law and enforcing existing contracts. The relations between the employer and his workman are no longer governed by the contract of service. The Tribunal has the right, nay the duty, to vary contracts of service between the employer and the employee-a jurisdiction which can never be exercised by a civil Court. In the course of adjudication, a Tribunal must determine the ' rights' and ' wrongs' of the claim made, and in so doing it undoubtedly is free to apply principles of justice and equity, keeping in view the fundamental fact that its jurisdiction is invoked not for the enforcement of mere contractual rights, but for preventing the infliction of social injustice. The goals and values to be secured and promoted by Labour Tribunals are social security and social justice. The concept of social justice is an integral part of Industrial Law, and a Labour Tribunal cannot ignore its relevancy or norms in exercising its just and equitable jurisdiction. Its sweep is comprehensive as it motivates the activities of the modern welfare state. The jurisdiction is designed to produce, in a reasonable measure, a sense of security in a worker that in case he performs his duties efficiently and faithfully, he can be discharged by the employer only with adequate compensation for loss of employment."*

[13] 75 NLR 575

[14] Ibid at page 430

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In *Somawathie v Baksons Textile Industries Ltd*[15] the applicant's services were terminated mainly due to her conduct of indulging in gossip when admittedly she was a good worker. Rajaratnam J observed that the President may have given her some relief if he had directed his mind to this question. In any case she will not be entitled to any back wages as on the finding of the President, it cannot be said that the applicant was altogether not responsible for the situation that brought the parties to the Tribunal. Court did not think in the circumstances, that she should be forced upon the employer. However, Rajaratnam J did not find the punishment proportionate to the misconduct and thus awarded compensation. The court stressing the need to consider the gravity of the misconduct, observed:

> *"The cause for termination was not such a serious act of misconduct, in this case being mere female gossip on the part of the applicant and an occupational hazard at its worst as far as she was concerned, in a workplace where there were females…….Having regard to the short period she has been in employment, in my view compensation in a sum of Rs. 1,500 will be reasonable".*

In *Alexander v Gnanam and others*[16] , the Labour Tribunal whilst commenting the conduct of the workman whilst in employment was contentious and the management of the employer and that termination was justified, granted the Appellant Rs.27,000 as compensation which was equivalent to one year's salary. The Appellant made an appeal to the High Court to enhance the compensation awarded but the Labour Tribunal order was affirmed in the High Court. The Appellant made an appeal to the Supreme Court from the order of the High Court for the enhancement of the compensation. The Supreme Court held that the termination was so justified, not with reference to a single incident but with regard to a series of lapses within the span of a period of seven years. The Supreme Court held that such a situation does not warrant an award of compensation. Therefore, the principle appears to be that if the termination is justified due to a misconduct of the employee or improper conduct of

[15] 79 (1) NLR 204
[16] 2002 1 SLR 274

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the employee, compensation should not be awarded unless the punishment is disproportionate to the misconduct committed.

In *National Lotteries Board v Kulatunga, labour officer, Colombo-South*[17] the Labour Tribunal awarded compensation of Rs.14, 569.00 in lieu of reinstatement by order dated 30th December 1976. After the change of government in 1977, the Applicant was re-employed on a directive of the Minister of Labour in consequence to a Political Victimization committee reference. The Applicant was reinstated on 12.09.1977 and was paid a higher salary and compensation sum of Rs.18, 931.67. The Commissioner of Labour upon a complaint made by the applicant prosecuted the employer for non-compliance of the Labour Tribunal order which resulted in a conviction in the Magistrates Court. In the appeal by the employer, the Court of Appeal held that the Applicant had already received higher relief in excess of the order of the Labour Tribunal and therefore the Employer was justified in law, for not complying with the order of the Labour Tribunal.

It was held in *Merril J Fernando & Co. v Deimon Singho*[18] that a casual employee is not entitled to compensation in lieu of reinstatement.

The Arbitrator, Industrial Court or a Labour Tribunal is also given the discretion to make an award for the payment of compensation as an alternative to reinstatement if the Tribunal is of the view that such an order is just and equitable[19]. The Arbitrator, Industrial Court or Labour Tribunal may make such an award for compensation if for some reason the reinstatement is not possible or in the interest of Industrial Peace or having regarded to the fact that award of reinstatement may not be in the best interest of the workman. In *De Silva v. Ceylon Estates Staffs' Union*[20] the Supreme Court stated that:

[17] 1991 1 SLR 127
[18] [1988] 2 SLR 242
[19] Section 33(6) of the Industrial Disputes Act (as amended)
[20] SC 211/72, SCM 15/5/74

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> *"The Tribunal must be mindful of the nature of the applicant's employment, the impact a reinstatement can make on the industry and the employer/employee relationship. It should also consider whether an order of reinstatement would disrupt and disorganize the management or administration of the business. It must also take into account that efficiency, discipline and sound business principles should never be impaired by its order. A workman cannot enjoy the security of his employment in which he slacks, or have lost the confidence of his employer. It is to ensure the efficient running of industrial concerns that the law in its wisdom allows the tribunal to order compensation as an alternative remedy. It is imperative that all views of a Labour Tribunal is required to withstand the test of Just and Equitable principle".*

The Industrial Disputes Act does not provide for any particular formula or principle to decide the quantum of compensation except the test of just and equity.

In interpreting the just and equitable concept, our courts have pronounced that the test for just and equitable order is those qualities that would be apparent to any fair-minded person reading the order[21].

T.S.Fernando J in *Richard Pieris & Co. v Wijesiriwardene*[22] stated that just and equity can themselves be measured not according to the urgings of a kind heart but only with the framework of the law. However, the application of just and equitable principle for computation of compensation has proven to be unsatisfactory as the Arbitrators, Industrial Courts and Labour Tribunals have awarded compensation in numerous cases where no basis of computation was given in the reasons and in some cases was held by superior courts that such computation could not stand the test of just and equity.

Compensation is derived from the Latin word, *compensate* and what is expected is that after a weighing in together of the evidence of the probabilities of the case, the

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[21] Peiris v Podi Signo 78 CLW 46

[22] 62 NLR 233

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Tribunal must form an opinion of the nature and extent of the amount arriving in the end an amount that a sensible person would not regard as a mean or extravagant amount but would rather consider it to be just and equitable of all the circumstances of the case[23].

As Vythialingam J stated in *Ceylon Transport Board v Wijeratne*[24],

> *"Although our Industrial Disputes Act provides for the payment of compensation in lieu of reinstatement it does not lay down the basis on which it is to be computed. In this connection it is important to remember that where this is so much a matter for the exercise of the Tribunal's discretion and depends on the peculiar facts and circumstances of each individual case it is undesirable to confine that discretion within too narrow and rigid limits."*

However, in the above case it was held that in making an order for the payment of compensation to a workman in lieu if an order of reinstatement under S.33(5) of the Industrial Disputes Act, a Labour Tribunal should take into account such circumstances as the nature of the employer's business and his capacity to pay, the employees age, the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal, including the nature of the charge level of the workman, the extent to which the employees actions were blameworthy and the effect of the dismissal , on future pension rights etc.

In the case of *Manager Nakiadeniya Group v the Lanka Estate Worker's Union*[25] , De Kretser J held that;

> *"to grant the demand that the management of the estate cannot transfer a Kangany from his division in such circumstances is to interfere with the discretion of the management as to where in the interest of the estate – and it may be of the man*

[23] Dr.Amerasinghe J in Jayasuriya v State Plantation Corporation 1995 2 SLR 379 at 407
[24] 77 NLR 481
[25] 77 CLW 52

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> *himself – the workman should be best employed. Such interference in the management of estates is not in the best interest of their productivity and therefore not in the interest of the country. In the making of a just and equitable order, one must consider not only the interest of the employees but also the interest of the employers and the wider interest of the country for the object of social legislation is to have not only contended employees but also contended employers".*

Account should also be made on any sums paid or actually earned or which should also have been earned since dismissal took place. Vythialingam J further added that the amount however should not mechanically be calculated on the basis of salary, he would have earned till he reached the age of superannuation and should seldom if not never, exceed a maximum of three years' salary.

Imposing an arbitrary seal on the number of years for the calculation of compensation was not favoured by many decisions that followed *Ceylon Transport Board v Wijeratne*. In fact, in *Henderson & Co. v. Wijetunga*[26] Vythialingam J himself awarded 5 years' salary as compensation.

In *Caledonian (Ceylon) Tea and Rubber Estates Ltd. v Hillman*[27] Sharvananda J referring to Vythialingam J's restriction to three years of salary held that flexibility is essential and pointed out that circumstances may vary in each case and the weight to be attached to any particular factor depends on the context of each case.

Dr.Amerasinghe J in *Jayasuriya v State Plantation Corporation*[28] case whilst agreeing with the observations of Justice Sharvananda was of the view that flexibility cannot be open ended but certain parameters have to be identified to *"determine the orbit of every tribunal so as to prevent it from straying off its course"*

[26] (unreported SC 33 of 73. SC minutes 21st March 1975,cited by Dr.Amarasinghe J in Jayasuriya v State Plantation Corporation at Page 409)

[27] 79 NLR 421 at 436

[28] [1995] 2 SLR 379 at 407

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In Associated *Newspapers of Ceylon Ltd. v Jayasinghe*[29] Soza J held that,

> *"It must be remembered that there is a distinction between compensation and damages though there are occasions when the two words are synonymous. As a concept, compensation is remedial but damages can be enhanced and punitive or be diminished and even nominal. damages are not always related to the actual money equivalent of the loss - (see the discussion by Lord Esher, M.R. in Dixon v Calcraft (1) and by Dixon, J. (later C.J.) in Nelungaloo, Pty. Ltd. v The Commonwealth. (2) What the Industrial Disputes Act speaks of is compensation as an alternative to reinstatement (ss. 31B(b)(c)). To order back wages and compensation as an alternative to reinstatement would be to duplicate one factor which should enter into the computation of compensation. One among the several facto which should enter into the computation of compensation in the type of case we are considering is the period of unemployment and that would include back wages. The object of the exercise should be to as ascertain as far as possible the money equivalent of the loss employment from the date of unjust dismissal"*

It is clear from the above decision that no compensation can be awarded on the basis of wrongful termination on account of losses which cannot be calculated in terms of money.

It should also be noted that compensation cannot be awarded for pain of mind or as a punishment for wrongful termination. Mental hardships undergone by a workman due to loss of employment cannot be taken into consideration.

In Jayasuriya's case, Dr. Amarasinghe J observed,

> *"I am of the view that privations caused by injured feelings, anguish, unpleasantness, loss of face or inconvenience, do not, in the absence of evidence that they could be*

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[29] 1982 2 SLR 595

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translated into calculable financial loss, enter into the computation of compensation in this case."

Dr.Amarasinghe J in the said case sets out many matters that can be taken into consideration in the calculation of compensation. The loss of earning from the date of dismissal till the determination of the matter in court, that is the date of the order of the tribunal or if there is an appeal, to the date of the final determination of the appellate court would constitute major part of compensation. Further the allowances, bonuses, the value of the use of a car for private purposes, the value of residence and domestic servants and all other perks and benefits having a monetary value to which the workman was entitled to take into consideration in calculating the value of compensation.

In addition to the above, the loss of future earnings can also be taken into consideration. The calculation of loss of future earnings is another area which a Tribunal needs careful consideration. The question is as to until what age and for how long the loss of future earnings is to be taken into consideration.

The Supreme Court in, *Up country Distributors (Pvt) Ltd v Subasingha*[30] took an entirely different stand with regard to computation of compensation in a Labour Tribunal. In the said case, the court was of the view that computation of compensation should be a matter entirely for the Labour Tribunal. Which will depend on the facts and circumstances of each case. The Supreme Court also held that the discretion of the President of the Labour Tribunal should not be unduly fettered. It is interesting to note that, the bench comprising of G.P.S de Silva CJ, Ramanadan J, and Wijetunga J has considered the decisions of several cases including the case of Jayasuriya.

Per Wijetunga J :

[30] 1996 2 SLR 330

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"the legislature in its wisdom left the matter in the hands of the Tribunal, presumably with the confidence that the discretion would be duly exercised. To my mind some degree of flexibility in that regard is both desirable and necessary if a Tribunal is to make a just and equitable order".

It seems that the Supreme Court in *Subasingha*'s case, was of the opinion that the compensation should be computed applying only the just and equitable principle. It should be noted that there is no definition or method of calculation provided for computation of compensation in the Industrial Disputes Act.

In *Associated Cables Ltd v Kalutarage*,[31] where Dr.Amarasinghe J was a member of the bench, adopted the criteria set out in the Jayasuriya case in determining whether the award of compensation to the workman in a sum of Rs.150, 000.00 was bad for want of adequate basis for computing the said amount of compensation awarded by the Tribunal. Weerasekera J (Dr.Amarasinghe J and Gunasekera J agreeing) cited *Jayasuriya v State Plantation Corporation* Case with approval. The Supreme Court reduced the compensation awarded to Rs.68, 200.00, which was equivalent to three year's salary, although the workman had been out of employment for 10 years and termination was not justified purely on the basis that the basis of computation was totally inadequate. It is difficult to ascertain the basis of the award of Rs.68, 200.00 since the Supreme Court too had failed to give the basis of computation. As per the case record the applicant was in receipt of Rs.1900.00 per month at the time of termination. He had been out of employment for 10 years at the time of award and all courts have held that termination was unjustified. In the circumstances ordinarily, the workman should have got Rs.228, 000.00 as back wages and in addition a further sum on account of future loss of employment as reinstatement was not ordered in this case. The compensation in lieu of reinstatement, in the event the termination was unjustified, should consist of back wages and some amount of compensation calculated as per the criteria given above for future loss of earnings and loss of employment, provided that there was no fault on the part of the employee and that

[31] 1999 2 SLR 314

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the employer has the capacity to pay. There had been no conclusion pertaining to the capacity of the employer, or the conduct of the employee in the above case. Thus, it seems that there is no consensus among the several cases referred to above with regard to the method of computation of compensation in lieu of reinstatement.

It is also a principle established in *Jayasuriya*'s case that employee must mitigate his loss by taking any offer of employment that is reasonably offered to him, acting as if he had no hope of seeking compensation from his previous employer. Therefore, the first important issue to be considered in calculating loss of future earnings is whether the workman has taken any reasonable attempt to mitigate his losses. The Tribunal should also consider the workman's ability to find alternative employment along with his age at the time of termination. New suitable employment may not be possible if a workman is too closer to his age of retirement. Furthermore, if the employment is in the nature if highly specialized skill where only few employers require such workmen, the employee's ability to find alternative employment maybe very low. In such circumstances the next issue that a Tribunal may be faced with is up to what age compensation is awarded for future loss of earning? Dr.Amarasinghe J observed that, it would be unlikely for Mr.Jayasuriya to find alternative employment outside the plantation sector having failed to do so when he was younger and he held that compensation can be calculated only up to the age of retirement which in that case was up to 55 years. Mr.Jayasuriya was not awarded compensation under the head of loss of retirement benefits as there was no loss established under that head.

In *Ceylon Planter's Society (on behalf of Weerasinghe) v Bogawanthalawa Plantations Limited*[32] the question of law that was before the Supreme Court was whether in computing compensation for *mala fide* and unjustified termination of service, a Labour Tribunal is entitled to take into account the workman's loss of earnings only during the period between termination and his due date of retirement or even for a subsequent period. In the disciplinary inquiry held against the estate superintendent, Mr.Shelton Perera (a retired judicial officer) who conducted the inquiry stated that the

[32] [2004 1 SLR 88

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superintendent was not guilty of any of the charges and he further observed that charges *"seem to have been dug out to get rid of him by hook or by crook".* The Superintendent's services were terminated despite the findings of the inquiry officer and the Labour Tribunal concluded that the termination was *mala fide* and unjust. Mark Fernando J was of the view that the question of whether compensation should be restricted to the period prior to the optional date of retirement was not considered in Jayasuriya's case. Per Mark Fernando J;

> *"However there is another circumstance which supports the Tribunals Assessment of compensation which did not arrive in Jayasuriya's case: whether in exceptional circumstances 'the outside limit' could be a date even after the mandatory date of retirement. The Tribunal held that the manner of termination was such that the superintendent could not have obtained other employment in the plantation sector until his name was cleared. The difficulty which a workman faces in mitigating his loss, particularly in the plantation sector, was discussed by Amarasinghe J (at page 412).*
>
> *Even after the mandatory age of retirement, when no further extensions are permissible, an employee is nevertheless entitled to obtain employment under another employer………. If however his services are terminated malafide he would generally be unable to obtain suitable employment elsewhere until his name is cleared.[33]"*

In the aforesaid circumstances it was held that, in the computation of compensation, inclusion of wages not only up to the date of order but for a period of nearly five months thereafter would be just and equitable.

It is also important to note that the burden of proof of financial loss due to wrongful termination is on the workman. In this regard, Dr.Amarasinghe J in *Jayasuriya v State Plantation Corporation*[34] observes that:

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[33] Ibid; at p 93

[34] [1995] 2 SLR 379 at 407

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"The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss he had incurred. For instance if an employee claims that he would have earned more than his basis salary he must adduce supporting evidence."

The Labour Tribunal or the Arbitrator is not permitted to assume that a workman would have earned the next promotion and a higher salary scale if the workman continued in service if not for the termination. It is the workman who must establish that he would have benefitted and /or that he was on a regular ladder of promotion along which he would have progressed.