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The Gazette of the Democratic Socialist Republic of Sri Lanka

EXTRAORDINARY

අංක 1386/13 – 2005 මාර්තු 29 වැනි අඟහරුවාදා – 2005.03.29

No. 1386/13 – TUESDAY, MARCH 29, 2005

(Published by Authority)

PART I : SECTION (I) — GENERAL

Government Notifications

My No. : T23/CO/141/2002.

Reference No.: T23/Co/141/2002.

THE INDUSTRIAL DISPUTES ACT, CHAPTER 131

In the Matter of an Industrial Dispute

THE award dated 07th March, 2005 transmitted to me by the Arbitrator as an interpretation to his former award made on 22.10.2004 regarding the industrial dispute which has arisen between,

BETWEEN

1. Mr. U. J. Wilson, Soysa Mawatha, Koralaima, Gonapola.
2. Mr. G. Nimal Fernando, Thimbiriyaya, Talagawatta, Nikaweratiya.
3. Mr. K. D. Ariyasiri, 366/7, Katukurundugahakanda, Payagala.
4. Mr. R. B. Justin Perera, 70, Minuwangoda Road, Kanuwana, Ja-Ela.
5. Mr. G. W. Fernando, 171, Sri Rahula Mawatha, Katubedda, Moratuwa.

1. Mr. U. J. Wilson, Soysa Mawatha, Koralaima, Gonapola.
2. Mr. G. Nimal Fernando, Thimbiriyawa, Talagahawatte, Nikaweratiya.
3. Mr. K. D. Ariyasiri, 366/7, Katukurundugahakanda, Payagala.
4. Mr. R. B. Justin Perera, 70, Minuwangoda Road, Kanuwana, Ja-Ela.
5. Mr. G. W. Fernando, 171, Sri Rahula Mawatha, Katubedda, Moratuwa;

Who were employed at Werahera Engineering Services Company Ltd., of the one part ; and

Case No. : A/3037

AND

Werahera Engineering Services Company Ltd.,
No. 04, "Latec House",
Chandra Wettasinghe Mawatha,
Nawala,
Rajagiriya ;

Werahera Engineering Services Company
Ltd., No. 4, "Latec House", Chandra
Wettasinghe Mawatha, Nawala, Rajagiriya.

of the other part, made under Section 4(1) of the Industrial Disputes Act, Chapter 131 (as amended) and published in the *Gazette* of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 1,331/24 of 12.03.2004, is hereby published in Terms of Section 18(1) of the said Act.

of the other part.

The Award

The Hon. Minister of Employment and Labour by virtue of the powers vested in him by Section 4(1) of the Industrial Disputes Act (Cap. 131) of the Legislative Enactments of Ceylon (1956 Revised Edition) as amended by Acts, Nos. 14 of 1957, 4 of 1962, and 39 of 1968 (read with the Industrial Disputes [Special Provisions]) Act, No. 37 of 1968, appointed me as Arbitrator by his Order dated 20.02.2004 and referred the aforesaid dispute to me for settlement by arbitration.

MAHINDA MADIHAHEWA,
Commissioner General of Labour.

Department of Labour,
Labour Secretariat,
Colombo 05,
18th March, 2005.

The matter in dispute between the aforesaid Parties is whether the termination of the services of M/s. U. J. Wilson, G. Nimal Fernando, K. D. Ariyasiri, R. B. Justin Perera and G. W. Fernando who were employed at Wesco, Werahera with effect from 26.04.2001 by Werahera Engineering Services Company Ltd., is justified, and if not, to what relief each of them is entitled.

Statement by the Workers :

- (1) That the Company had arbitrarily closed down temporarily after payment of salaries for the month of April 2001 but denied that there was any unrest caused by them to induce closure of the Company ;
- (2) That the workmen were requested to report for work on 26.04.2000 but when they did report for work on 26.04.2001, the gates were closed with a notice that the Company will be closed until further notice ;
- (3) That these workmen did not apply for relief under the Termination of Employment (Special Provisions) Act since they were unaware that others had applied under the said Act ;
- (4) Though the Company had decided to reopen on 18.02.2002 and though letters had been sent to some employees, the workmen in this dispute did not received such letters ;
- (5) These workmen state that they were treated as having vacated their employment with the Company ;
- (6) These workmen state that they had no intention to vacate their employment with the Company ;
- (7) That they have applied to this Court for compensation and other reliefs.

Statement by the Respondent Company :

- (1) That the Company had to be closed down temporarily due to unrest caused by employees ;
- (2) That the Company decided to reopen and accordingly letters were sent to all employees except the 5th Applicant requesting them to return to work but that the said 5th Applicant did not report to work ;
- (3) That in terms of the Company's regulations, letters and telegrams were sent to these Applicants but that they did not return to work ;
- (4) That the said employees had thereby vacated their employment with the Company.

Proceedings

As no appearances were recorded before this Court on behalf of the Respondent Company on 27.05.2004 and 01.07.2004, Court determined that an *ex parte* trial would be held against the Respondent Company on 30.07.2004 in the event of the continued absence of the Respondent Company. Accordingly, the Registrar of this Court was instructed to send them a letter dated 20.07.2004 informing the Respondent Company of the decision of the Court.

Accordingly, since there was no appearance on behalf of the Respondent Company, the *ex parte* trial was conducted and concluded on 30.07.2004. At the *ex parte* trial, R. B. Justin Perera gave evidence on behalf of the Applicants.

Award

The Respondent Company had taken up the position that the said 5 workmen had vacated their employment with the Company. The question of the vacation of employment is based on the twin concept of mental and physical intention not to report to work.

The Respondent Company decided on 18.02.2002 to request their workmen to return to employment but the 5 workmen concerned took up the position that they will take a decision later as to whether to return to work. This was due to the application they had made to this Court.

The question at issue therefore is whether they had vacated their employment or not. Modern thinking is that there are two essential elements to the vacation of employment - the physical aspect of absence without leave constituting the physical abandonment of employment and the mental aspect of the absence of any intention on the part of the employee to return to his employment. This means that the long absence of an employee without notification of his absence is the result of the presence of both qualities for desertion or abandonment of employment. This concept has been defined clearly in the judgement of *Justice F. N. D. Jayasuriya* in the Court of Appeal in 1996 in the case of **Nelson de Silva Vs. Sri Lanka State Engineering Corporation - (1996 2 SLR 342)**. Again in **Nandasena Vs. Uva Regional Transport Board (1993 1 SLR 318)** *Justice Mark Fernando* said "It (abandonment of employment) contains both a physical and mental element. A temporary absence from a place does not mean that the place is abandoned ; there must be shown an intention not to return". Also, in Indian Industrial Law, the Supreme Court of India has held that the abandonment of service is tied to the question of intention, and normally, such an intention cannot be read into the action of the employee in abandoning his employment without adequate evidence. In **Express**

Newspapers (Private) Limited Vs. Michael Mark (AIR 1963 SC 114) where the employees absented themselves from work because they had gone on strike to enforce specific demands, the Indian Supreme Court held that they cannot be deemed to have abandoned employment. **Court further said that by going on strike the workers clearly indicated that they wanted to continue in employment but were only demanding better terms.**

According to the above judgements, would it be correct to assume that the said 5 workmen had abandoned their employment totally and without any intention to return to their employment ? The logical answer would be "No". The Sri Lankan judgement of Justice F. N. D. Jayasuriya and the above quoted Indian judgement show very clearly that both aspects of mental and physical absence is important in deciding on the question of vacation of employment.

In the instant case these 5 workmen had no intention of abandoning employment but had made application to this Court for a fair and equitable determination with regard to their continue employment with the Company. Neither the absence of these 5 workmen at the Company on 18.02.2002 to resume employment nor the application of these 5 employees to this Court does not reveal that they have permanently

abandoned or relinquished their employment with the Company.

Accordingly, I hold that there has been no vacation of employment and that the services of these workmen have been terminated by the Respondent Company and that they are entitled to relief by way of compensation of three (03) months salary for each year of service from the date of their joining the service of the Werahera Engineering Services Company Ltd. and the payment of back wages for the past three years and seven (07) months from April 2001 to the date of this Award, and further that they be awarded the EPF and ETF contributions to which they are entitled for the aforesaid period.

Accordingly, I order that the aforesaid compensation be deposited within one calendar month of the publication of this Award in the *Gazette* of the Democratic Socialist Republic of Sri Lanka with the Assistant Commissioner of Labour (Colombo South) of the Department of Labour.

DR. V. IRWIN JAYASURIYA,
Arbitrator.

07th March, 2005.

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