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The Gazette of the Democratic Socialist Republic of Sri Lanka

EXTRAORDINARY

අංක 1375/6 - 2005 ජනවාරි 10 වැනි සඳුදා - 2005.01.10

No. 1375/6 - MONDAY, JANUARY 10, 2005

(Published by Authority)

PART I : SECTION (I) — GENERAL

Government Notifications

My No. : T23/CO/170/2001.

Ref. No. : T23/CO/170/2001.

THE INDUSTRIAL DISPUTE ACT, CHAPTER 131

In the matter of and Industrial Dispute

Between

THE award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Mr. S. L. Meera Sahibu, Gran Eastern Lane, Bazaar Street, Sammanthurai 02 of the one part and Corporative Wholesale Establishment, C.W.E. Secretariat Building, No. 27, Vauxhall Street, Colombo 02 of the other part was referred by order dated 22.05.2003 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. 1290/5—26.05.2003 for settlement by arbitration is hereby published in terms of Section 18 (1) of the said Act.

S. L. Meera Sahibu,
Gran Eastern Lane,
Bazaar Street,
Sammanthurai 02.

Case No. : A 2984.

AND

Corporative Wholesale Establishment,
C.W.E. Secretariat Building,
No. 27, Vauxhall Street,
Colombo 02.

The Award

MAHINDA MADIHAHEWA,
Commissioner General of Labour.

The Honourable Minister of Labour by virtue of the powers vested in him by Section 4 (1) of the Industrial Disputes Act, Chapter (3) of the Legislative Enactments of Ceylon (1956 Revised Edition) as amended by Acts, Nos. 14 of 1957, 40 of 1962 and 39 of 1968 (read with Industrial Disputes (Special Provisions) Act, No. 37 of 1968), apprehended by his order dated 22.05.2003 and referred the following dispute to me for settlement by arbitration.

Department of Labour,
Colombo 05,
30th November, 2004.

The matters in dispute between the aforesaid parties are :—

- (1) (a) whether the non granting of duty leave to Mr. S. L. Meera Sahibu who is presently employed as an acting Security Officer of the Corporative Wholesale Establishment in respect of the days he attended to give evidence at the disciplinary inquiries held in Colombo in the years 1992 and 1993 by the said Establishment while serving in its branches at Amparai and Trincomalee treating such days as no pay leave is justified and if not, to what relief he is entitled.
- (b) whether the deprivation of annual bonus and salary increments to him for the years referred to above as a result of non granting duty leave with pay is justified and if not, to what relief he is entitled.
- (2) Whether the deprivation of salary to Mr. S. L. Meera Sahibu for the period from 29.11.1996 to 05.06.2000 by the Corporative Wholesale Establishment without holding a disciplinary and only him a warning subsequent to the discharge of him in the Magistrate Court is justified and if not, to what relief he is entitled.

Appearance.—Mr. K. A. Shelton appeared for Mr. S. L. Meera Sahibu and Attorney-at-Law Osmond Jayaratne appeared for C.W.E.

Both parties have filed the statements under Regulations 21 (1) and 21 (2) of the Industrial Disputes Regulations 1958 as amended. The C.W.E. hereinafter referred to as the “Respondent Corporation” commenced the Case before me as the onus is as it to justify its action in relation to the matters in dispute. The Respondent Corporation led the evidence or Miss W. S. Sujeeva Priyanthie, Sales Assistant, Mr. P. C. W. K. Perera, a Manager Security, W. K. Silva, Senior Manager (Technical) and marked documents 1 (R1) to 14 (R14), Mr. Meera Sahibu, hereinafter referred to as the “Applicant” in his evidence marked documents (VI) P1 to P14 both sides have filed written submissions.

I have read the evidence led before me and also the written submissions of both Parties and I wish to deal with the matters in dispute referred to me for arbitration one by one.

Issue No. (1).—Whether non granting of duty leave to Mr. S. L. Meera Sahibu to attend to give evidence at the Disciplinary Inquiries held in Colombo in the years 1992 and 1993 is justified and if not, to what relief he is entitled.

The Respondent Corporation in their statement filed took up the position that there is no mention in the Holiday Regulations or in the Disciplinary Code that an accused be granted duty leave to participate in a disciplinary inquiry. To support their claim the Respondent Corporation submitted document R11 (©11).

Mr. Vipula Kithsiri Silva, Senior Manager (Technical) who is in charge of discipline in his evidence on 08.04.2004 (Page 11 and 12) stated that even though there is no provisions in the Holiday Regulations to grant duty leave to an accused officer, in the event the inquiry has to be postponed due to absence of the Inquiring Officer or witnesses, the accused would be granted duty leave by the Respondent Corporation.

The witness further stated answering questions of the Tribunal that an accused will be granted duty leave at the stage of first inquiry. He further stated other than an accused all others take part in a disciplinary inquiry to give evidence on behalf of accused or the Respondent Corporation entitled to duty leave.

The applicant stated in his evidence that a disciplinary inquiry had been conducted against him by the Respondent Corporation in the years 1992 and 1993 in Colombo and he had to travel from Ampara/ or Trincomalee to give evidence and subsequently he had been discharged. His request for duty leave had been turned down by the Respondent Corporation.

In his written submission the representative of the Applicant cited the Establishment Code to justify that why should the Applicant be granted duty leave. He further stated that there had been instances such duty leave had been granted to accused officers when they got discharged from a disciplinary inquiry, but failed to prove his position in his evidence. The Respondent in his statement dated 22.09.2003 attached annexures 2 and 3, annual increments granted to the Applicant for the years 1992 and 1993 even though the Applicant was under investigation during the said period.

In his written submission Attorney-at-Law of the respondent has stated that the Holiday Regulations of the Respondent Corporation applies to each and every employee irrespective of their position. And further he submitted according Rs 11 (©11) there is no provision granting duty leave for an accused to attend an inquiry. In my opinion such regulations are needed to maintain discipline and for proper administration of an organization.

On the overall analysis of an entirety of evidence placed before me I have no option but to answer the issue (1) (a) and (b) in the positive.

Issue No. 02.—Whether deprivation of salary of Mr. S. L. Meera Sahibu for the period of 29.11.1996 to 05.06.2000 without holding a disciplinary inquiry and giving him only a warning subsequent to the discharge of him in the Magistrate’s Court is justified.

The Respondent in his statement dated 22.09.2003 stated that the Applicant was charged in Magistrate's Court Fort under Case No. 78 115 for changing forged Rs. 1,000 note. Subsequently the Applicant had been discharged due to the failure of Central Bank to submit a report on the said forged Rs. 1,000 note. The Respondent had further stated in his statement that on 19.11.1996 the Respondent changed another forged Rs. 1,000 as per W. Sujeewa Priyanthi.

In her evidence dated 13.10.2003 Sujeewa Priyanthi has stated that when she was working in Vauxhall Street, C.W.E. Outlet on 21.11.1996 accused produced a Rs. 1,000 forged note for his purchases. When she examined the note holding it to the light the Applicant pulled it forcefully and produced Rs. 500 note for his purchases. Thereafter she informed about this incident to the Security Section as well as the Stores Manager. In her evidence dated 13.10.2003 she further stated as follows (in page 11)—

Question : Do you accept that the Rs. 1,000 note given to you by the Applicant had been taken back ?

Answer : He took it forcefully.

Question : If you say that if he took it by force can it be found in the stores ?

Answer : The note which was taken by force cannot remain in the stores after taking the note from me by force there is no possibility that it to be returned to the stores. But there were other such notes.

Question : As far as you know did you handover this note to the Slave Island Police on 21st ?

Answer : I didn't hand over.

It is clear that the Police had no forged Rs. 1,000 rupee note in their possession. Therefore the fact that the Applicant was discharged because the Central Bank failed to submit the report on forged Rs. 1,000 note cannot be accepted.

In her evidence Sujeewa Priyanthi failed to mention anything with regard to the Applicant changing a forged note on 19.11.1996. Therefore the Respondent stating in his statement dated 22.09.2003. Sujeewa Priyanthi stated that the Applicant changed Rs. 1,000 note on 19.11.1996 cannot be accepted.

In his evidence dated 02.12.2003 R. S. Kithsiri Fernando has stated on 19.11.1996 a forged Rs. 1,000 had been received at the C.W.E. Outlet. In cross-examination he had stated that up to date he had no knowledge of the person who gave the Rs. 1,000 forged note on 19.11.1996.

A. Ashok De Silva in his evidence dated 02.12.2003 stated that on 21.11.1996 he came to know from Sujeewa Priyanthi the Applicant tried to change a forged Rs. 1,000 note. He also stated his duty point was about 6 or 7 feet away from the Cash Counter. In cross-examination he stated as follows :

Question : Can't she inform you at the very moment when she realised that a person had brought a forged note ?

Answer : Can.

Question : But on 21st had she informed you ?

Answer : I was informed after Meera Sahibu left.

The Security Manager Mr. P. S. W., Perera stated in his evidence dated 12.01.2004 he came to know that the Applicant attempted to change forged Rs. 1,000 note on 21.11.1996 and he recorded statements of 09 persons in respect of this incident. He also stated that he didn't receive any forged Rs. 1,000 during his investigation.

The Applicant Meera Sahibu in his evidence dated 01.07.2004 stated as follows :—

He was discharged from the disciplinary inquiry conducted on the years 1992 and 1993. Since he was deprived of duty leave to attend the aforesaid inquiry he complained to Assistant Commissioner of Labour. The Assistant Commissioner of Labour directed C.W.E. to pay *nee* Applicant dues as per the document marked A1. He further stated that on 21.11.1996 when he produced Rs. 1,000 note at C.W.E. in Vauxhall Outlet he was informed by the Cashier that the aforesaid note was a forged note and referred to him. Then he gave Rs. 500 to the Cashier for the purchases made, he further stated that the said note he received from a boutique where he changed his money. Subsequently he was charged in the Magistrate Court and later discharged due to lack of evidence.

The Applicant marked the order by the Fort Magistrate Court Case No. 78115 as P9.

The Applicant was cross-examined in length by the Respondent but failed to justify why the Applicant should not be paid his back-wages.

Taking into consideration the totality of the evidence led before me, I make award that Mr. S. L. Meera Sahibu—

- (1) Be paid the salary due to him for the period from 29.11.1996 to 05.06.2000 within thirty (30) days of the date of publication of this award in the *Gazette of the Democratic Socialist Republic of Sri Lanka*.

I consider this award just and equitable.

KAPILA M. SARATHCHANDRA,
Arbitrator.

Date at Colombo
this 07th November, 2004.

01-512

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

The Award

THE INDUSTRIAL DISPUTES ACT, CHAPTER 131

THE Award transmitted to me by the Arbtrator to whom the Industrial Dispute which has arisen between

1. Mr. U. J. Wilson, Soysa Mawatha, Korallaima, Gonapola
2. Mr. G. Nimal Fernando, Thimbiriyaya, Talagahawatta, Nikawaratiya
3. Mr. K. D. Ariyasiri, 366/7, Katukurundugahalanda, Payagala
4. Mr. R. B. Justin Perera, 70, Minuwangoda Road, Kanuwana, Ja-ela, and
5. Mr. G. W. Fernando, 171, Sri Rahula Mawatha, Katubedda, Moratuwa

who were employed at Werahera Engineering Services Company Limited of the one part ; and

Werahera Engineering Services Company Ltd., No. 04, "Latec House", Chandra Wettasinghe Mawatha, Nawala, Rajagiriya of the other part was referred by order dated 20.02.2004 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. 1331/24 - 12.03.2004 for settlement by Arbitration is hereby published in terms of Section 18 (1) of the said Act.

MAHINDA MADIHAHEWA,
Commissioner General of Labour.

Department of Labour,
Colombo 05,
30th November, 2004.

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

In the Matter of an Industrial Dispute
between

1. Mr. U. J. Wilson, Soysa Mawatha, Korallaima, Gonapola.
2. Mr. G. Nimal Fernando, Thimbiriyawa Talagahawatta, Nikawaratiya.
3. Mr. K. D. Ariyasiri, 366/7, Katukurundugahalanda, Payagala.
4. Mr. R. B. Justin Perera, 70, Minuwangoda Road, Kanuwana, Ja-ela, and
5. Mr. G. W. Fernando, 171, Sri Rahula Mawatha, Katubedda, Moratuwa who were employed at Werahera Engineering Services Company Limited of the one part

AND

Case No. : A/3937.

Werahera Engineering Services Company Limited, No. 04, "Latec House", Chandra Wettasinghe Mawatha, Nawala, Rajagiriya of the other part.

The Hon. Minister of Employment and Labour by virtue of the powers vested in him by Section 4 (1) of the Industrial Dispute Act, Chapter 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 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.

The matter in dispute between the aforesaid parties is whether the termination of the services of Messrs. 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 05 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 05 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 that 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. De 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 05 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 shown 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 05 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 05 workmen at the company on 18.02.2002 to resume employment or the application of these 05 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.

Dr. V. IRWIN JAYASURIYA,
Arbitrator.

Dated at Colombo
this 22nd day of October, 2004.

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