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The Gazette of the Democratic Socialist Republic of Sri Lanka

EXTRAORDINARY

අංක 1393/20 - 2005 මැයි 20 වැනි සිකුරාදා - 2005.05.20  
No. 1393/20 - FRIDAY, MAY 20, 2005

(Published by Authority)

PART I : SECTION (I) — GENERAL

My No. : CI/1608/2001.

THE INDUSTRIAL DISPUTES ACT (CHAPTER 131)

The award transmitted to me by the Arbitrator to whom the Industrial Dispute which has arisen between Ceylon Mercantile Industrial and General Workers Union (CMU), No. 03, 22nd Lane, Colombo 03 of the one part and Ceylon Oxygen Ltd., P. O. Box 322, Colombo of the other part was referred by order dated 31.01.2002 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. 1224/23, 20.02.2002 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.  
20 April, 2005.

In the matter of an Industrial Dispute

*between*

Ceylon Mercantile Industrial and General Workers Union (CMU)  
No. 03, 22nd Lane,  
Colombo 03.

*and*

Case No. A/2908  
Ceylon Oxygen Ltd.,  
P. O. Box 322,  
Colombo.

The Award

1. The Hon. Minister of Employment and Labour by virtue of the powers vested in him by section 4(1) of the Industrial Disputes Act, Chapter 131 of the Legislative Enactments of Ceylon (1956 revised edition), as amended by Act, 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 31st January 2002 and referred the aforesaid dispute to me for settlement by Arbitration.

2. The matter in dispute between the aforesaid parties is whether the dismissal of three (3) workers, namely, W.C.R. Fernando, D. W. Jayaratna and A. V. Perera, Branch representative of the Ceylon Mercantile Industrial and General Workers Union (CMU) is justified, and if not to what relief each of them is entitled.

3. At the inquiry Mr. E. V. N. Cabraal of the CMU appeared for the Applicant Union and Mr. Alagaratanam, Attorney-at-Law appeared for the respondent Company.

4. According to the statement of the respondent dated 21.03.2002, the workmen referred to above, were required to show cause in writing why disciplinary action should not be taken against them, in respect of the charges mentioned in the respective show cause letters. As the explanations given by the workmen were not acceptable to the Company, three separate domestic inquiries were held by a retired Labour Tribunal President who found them guilty of the charges preferred against them. Later, the services of the three workmen were terminated with effect from 10th July 2001.

5. The respondent is of the view that the question whether a 'formal' meeting was held or whether it was an informal discussion is irrelevant to the question of miscarriage.

6. The position taken up by the Applicant Union is that consequent on the suspension of one of their members, W. Ponnampuruma there had been some unrest among the members of the Branch Union and the three members mentioned in the reference and another committee, member Kulatunga had a brief consultation in the welfare room adjoining the Locker Room for a few minutes between 1.30 p. m. and 2 p. m. on 15.02.2001.

7. As the domestic inquiry has been held on the charge sheet dated 22.02.2004 and as the charge sheets issued to the three workmen were identical and in Sinhalese, I wish put down the contents of the charge sheet hereunder:

- (1) 2001.02.15 වන දින ප.ව. 2.00 ට ඔබගේ නියමිත සේවා ස්ථානයෙන් අනවසරයෙන් බැහැරව සිටීම.
- (2) 2001.02.15 වන දින රාජකාරි වේලාවන් තුළ අනවසරයෙන් රැස්වීම් පැවැත්වීම.

8. Mr. Hamid, stores manager stated in his evidence that he with the Factory Manager, Mr. Celders and the Technical Assistant had inspected the premises on 15.02.2001, when they came to the welfare Room, Mr. Caldera had looked into the room when Mr. Jayaratna (the Branch Secretary of the C. M. U.) came out of the room and spoke to Mr. Caldera.

Under Cross Examination he stated "They were discussing, it looked like some meeting" page 69.

In another place in his evidence Hamid had stated "Discussion was not mentioned in his report A1. He had also stated that although Caldera went in side the room he had not mentioned that fact in his report A1 (page 71). He also stated that he could not identify the others as he did not go inside the room.

9. The gap in the evidence of Hamid a *vis-a-vis* his report A1, could have been filled if Mr. Caldera under whom the three workmen worked, if he had given evidence either at the Domestic inquiry or in the arbitration proceedings.

10. The other witness who gave evidence for the Respondent is H. M. R. Fernando, who had completed 23 year of service in 2003. He too had been issued with a charge sheet A/2 containing 4 charges one of which was for sleeping in the Locker-Room on 15.02.2001.

11. Under cross examination he stated that Fernando was not sleeping but was seated leaning against a wall. He further stated that Hamid had lied when he stated in his report and in his evidence that he (Fernando) was sleeping. He admitted that at the time of interdiction he was a member of the C.M.U. and the reply to the show cause letter A4 was drafted by Jayaratna and signed by him although he earlier denied that he signed the reply letter.

12. He admitted that he had been found guilty at the inquiry and that as a punishment four increments had been deferred and re-instated in service on 21.2001. However, he admitted that he had given evidence against the 3 workmen in the Domestic inquiry at the request of the Assistant General Manager. *vide* page 20 in the proceedings of 04.12.2003 which is reproduced below:

- ප්‍ර : “ඩබ්. සී. ආර්, ප්‍රනාන්දු, ඩී. ඩබ්. ජයරත්න, ඒ, වී පෙරේරා තිදෙනා වෙනුවෙන් පැවති පරීක්ෂණ වලදී තමන් සාක්ෂි දුන්නාද?  
උ : ඔව්.  
ප්‍ර : ඒ තිදෙනාගේ පරීක්ෂණ වලට සාක්ෂි දෙන්න තමන් ගියේ කොහොමද?  
උ : සාක්ෂි දෙන්න කියලා මට කලා කලා. ඒ නිසා මම ගියා.  
ප්‍ර : කවුද තමන්ට කලා කළේ?  
උ : සහකාර පිරිස් කළමණාකාර ක්‍රියාණන් මහතා.  
ප්‍ර : තමන්ගෙන් ඉල්ලීමක් කල නිසා නේද සාක්ෂි දුන්නේ?  
උ : ඔව්.”

13. This shows that the management had a keen interest in the domestic inquiry held against the three workmen who were Office Bearers of the C.M.U. Branch Union and the *bone fides* of the Management were in doubt.

14. Rex Fernando reluctantly admitted that at the relevant time there was an agitation by the C.M.U. that the collective agreement between the C.M.U. and Ceylon Oxygen Co. Ltd., should be revised. *vide* proceedings on 04.12.2003 of page 24 and 25 where he stated as follows:-

- ප්‍ර : තමන් ඇතුළුව අනෙක් සේවකයින් තිදෙනාගේ වැඩ තහනම් කළ කාලයේ දී සාමූහික ගිවිසුමක් සංශෝධනය කරලා වැටුප් වැඩිකළ යුතුයි කියලා ලංකා වෙළෙඳ සේවක සමිතියේ උද්ඝෝෂණයක් තිබුණාද ?  
උ : ඔව්.  
ප්‍ර : ඒ උද්ඝෝෂණය කරන කාලයේ දී තමන් සී. එම්. යූ සමිතියේ සාමාජිකයෙක් ද?  
උ : ඔව්.

15. A copy of letter dated 11.01.2001 addressed by the Branch Secretary of the C.M.U. was produce marked A22 on 9.11.2004 under re-examination.

16. This fact is suggestive of the fact that an anti-C.M.U atmosphere was brewing in the respondent Company at this relevant time. The Management apparently was not happy for the agitation regarding the revision of the collective agreement.

#### **Evidence of the D. W. Jayarathna :**

17. D. W. Jayarathna, Secretary of the Branch Union giving evidence on behalf of the three workmen stated that he had been a member of the J. S. S. at the beginning but later he joined the C.M.U. and continued as the Branch Union Secretary, at the time of his suspension, information of the interdiction of Wimal Ponnapperuma another C. M. U. member without recording even a statement from him there has been same restlessness among the C.M.U. members, working in the respondent company. Four members including Rex Fernando and A. V. Perera had met him around 1.30 p.m. on 15.02.2001. After informing his immediate superior, Mr. Peris of the Nitrogen Oxide Plant Operator Jayarathna had gone to the welfare room with W. C. R. Fernando, A. V. Perera and Kulathunga and after a short discussion in the Welfare room they decided to write a letter to the management (A5). What took place in the Welfare Room has been described in the charge sheet as a “meeting” whereas the workmen called it as an exchange of views or a “short discussion.”

18. It is generally accepted that “he who asserts shall prove.” The burden is in the Management, who issued charge sheets on the workmen to prove the ingredients of each charge. In the absence of sufficient evidence to prove that the workmen were holding a meeting in the Welfare Room on the day in question there is no acceptable evidence as to the time taken for the “meeting” or “discussion” or “exchange of views”. The Stores Manager, Mr. Hamid started in his evidence that it looked like a “meeting” while H. M. R. Fernando said that “he did not see what they were doing”.

(කල දෙයක් මම දන්නේ නැහැ. 122 පිටුව)

19. Jayarathna in his evidence further said that the Union members on that day never held a meeting of any kind or even a committee meeting and there was no question about a quorum or recording of the minutes.

20. According to the evidence led in the arbitration proceedings the highest ranking officer who was in the inspection team was Mr. Caldera, the Factory Manager, Mr. Caldera does not seem to have taken a serious view of the "meeting" or "discussion" or "exchange of views" of the four members of the Branch Union on 15.02.2001 at the welfare room. There is nothing to indicate that he complained against the workmen to the Management about this incident, but unfortunately, he had not given evidence at the domestic inquiry or at the arbitration proceedings.

21. The applicant Union had addressed several letters to the Director General of Employer's Federation (A10) and the Commissioner General of Labour, (A12) (A15) and (A16) against the issue of belated "show cause" letters to the Branch Secretary and Branch representatives. A10 has drawn my attention to the I. L. O. convention No. 98 and 135.

22. Article 1 of convention 98 stipulates that "workers shall enjoy adequate protection against Acts of anti-Union discrimination in respect of their employment."

23. I.L.O convention No. 135 concerns "Protection and facilities to be afforded to the workers representative in the undertaking", Article 1 of convention 135 states that workers shall enjoy effective protection against any Act prejudicial to them, including dismissal, based on their status or activities as worker representatives."

24. Charge No. 2 is the charge sheet while refers to holding a meeting on 15.02.2001. without authority during during working hours. In the light of the evidence led in the arbitration proceedings, I am of the view that this charge has done some violence to the I. L. O. convention referred to above. However, as I have referred to earlier, respondent has failed to prove that what took place in the welfare room on 15.02.2001 was a "meeting" as stated in the second charge.

25. Applicant union in its written submission has stressed that Kulatunga who was also issued with a charge sheet similar to these issued against the three workmen in these proceedings was differently treated by the employer in allowing him to retire under a V.R.S, and that it was a case of imposing selective punishment, and cited the case Lipton Ltd., United Tea, Rubber and Local Produce workers Union.

26. I have perused Para. 3(e) of the statement dated 04.10.2002 filed by respondent which gives good reasons for treating Kulatunga differently. The settlements states :

(e) At the inquiry against W. P. Kulatunga the said workman pleaded guilty to the charges against him. Accordingly and in view of the workman having repented his actions, the employer imposed a mitigated punishment." I am satisfied that the employer acted reasonably in dealing with Kulatunga.

27. Taking all oral as well as documentary evidence and the written submission into introduction, I am convinced that the charge No. 2 has not been proved against the three workmen.

28. The first charge in the charge sheets states as follows:-

2001.02.15 වන දින ප. ව. 2.00 ට ඔබගේ නියමිත සේවා ස්ථානයෙන් බැහැරව සිටීම.

This means that the workmen were out of their place of work without authority at about 2.00 p.m. on 15.02.2001 for about half an hour. The totality of the evidence conforms that the three workmen were away from their place of work on 15.02.2005. Whether they were holding a meeting or discussing some problem faced by them is immaterial so long as they absented themselves without proper authority. In their defence the workers conceded that they were away from their places of work during a period between three to Thirty minutes.

29. Jayawardena's explanation was that he informed D.E.D. Peiris his immediate superior about his absence, but Peiris did not attend the Tribunal confirm this.

30. Peiris had not given evidence even at the Domestic inquiry, although a letter dated 21.05.2001 was handedover to Human Resources Development Division A25.

31. There was no explanation given by the other two workmen whether they informed a superior officer prior to leaving their place of work. Their silence amounts to acceptance.

32. Being officials of a Trade Union in the caliber of the C.M.U. it is their duty to conform to the rules and regulations of their employer company. It is a bad example set by the union official to the other workers.

33. I am satisfied on the evidence had in the Arbitration proceedings Charge No. 1 has been established. The substance of this charge is that the workman has been away from their place of work without authority. The duration of their absence without authority according to the evidence is about half an hour. The question is whether the three workmen with fairly a long period of Service in the Company warrant termination of employment for this short period of absence without permission.

34. Normal punishment for an offence of this nature is to impose a fine of a half a day's pay or reprimand for repetition of such action.

35. It is unjust and unreasonable to dismiss them on account of this offence. In the circumstance, I order reinstatement of these three workers with back wages within "one month of the publication of this." award in the Gazette of the Socialist Democratic Public of Sri Lanka

36. I consider this Award just and equitable and make this award accordingly)

T. Piyasoma,  
Arbitrator.

Dated at Colombo,  
29th March, 2005.

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