**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

***In the matter of an application for Leave to Appeal from an Order of the Provincial High Court of the Western Province Holden in Negombo dated 29th June 2018 in HC/ALT/332/2017, under section 31DD of the Industrial Disputes Act, as amended and the High Court of the Provinces (Special Provisions) Act No. 10 of 1990. Read with the Rules of the Supreme Court.***

## Case no.: SC Appeal 94/2020

**Leave to Appeal No: SC/HC/LA/ 80/2018**

**High Court Case No: HC/ALT 332/2017**

**Labour Tribunal No.: 21/123/2012**

Walihingage Karunarathne Silva,

No.53/G,

Gonagaha,

Makawita.

**APPLICANT**

vs.

Polytex Garments Ltd,

Minuwangoda Road,

Ekala, Ja-E1a.

**RESPONDENT**

AND BETWEEN

Polytex Garments Ltd,

Minuwangoda Road,

Ekala, Ja-E1a.

**RESPONDENT – APPELLANT**

***Vs***

Walihingage Karunarathne Silva,

No.53/G,

Gonagaha,

Makawita.

**APPLICANT-RESPONDENT**

AND NOW BETWEEN

Esquel Sri Lanka Ltd (Formerly

known as Polytex Garments Ltd)

Minuwangoda Road,

Ekala, Ja-Ela.

**RESPONDENT – APPELLANT-PETITIONER**

***Vs***

Walihingage Karunarathne Silva,

No.53/G,

Gonagaha,

Makawita.

**APPLICANT-RESPONDENT-RESPONDENT**

**BEFORE** : **MURDU FERNANDO, PC, J**
**S. THURAIRAJA, PC, J AND**
**KUMUDUNI WICKREMASINGHE, J**

**COUNSEL** : Chula Bandara with Gayathri Kodagoda for the Respondent-Appellant-Petitioner
P.K Prince Perera for the Applicant-Respondent-Respondent

**WRITTEN SUBMISSIONS** : Respondent-Appellant-Petitioner on 1st April 2021
Applicant-Respondent-Respondent on 27th April 2021

**ARGUED ON** : 18th February 2022

**DECIDED ON** : 22nd July 2022

**S. THURAIRAJA, PC, J.**

The Applicant-Respondent-Respondent, namely Mr. W. K. Silva, ("Hereinafter referred to as the "Respondent") filed application in the Labour Tribunal of Negombo against the Respondent-Appellant-Petitioner company (Hereinafter referred to as the "Appellant"), formerly registered under the name Polytex Garments Ltd and currently under the name Esquel Sri Lanka Ltd as amended by amended caption dated 29th March 2019, praying for reinstatement with back wages, or damages without reinstatement, costs and other reliefs. In this instance, The President of the Labour Tribunal delivered judgment in favour of the Respondent awarding damages without reinstatement.

Upon Appeal to the Provincial High Court of Negombo by the Appellant against the above judgment, Judgment was delivered dismissing the Appeal. In due course,

the Appellant filed Leave to Appeal application in the present Court by Petition dated 8th August 2018 and Leave to Appeal was granted on 16th September 2020 on the following question:

> *"Have the Learned President of the Labour Tribunal and the Learned High Court Judge erred in law by awarding exorbitant compensation."*

As such I find it pertinent to examine the surrounding circumstances of this case and the Judgments by the President of the Labour Tribunal and the Provincial High Court.

**The Facts**

In the application preferred to the Labour Tribunal of Negombo dated 20th September 2012, the Respondent stated that the Respondent joined the Appellant Company as a driver on 7th December 1992. The Respondent stated that he had been able to gain annual salary increases despite the fact that Appellant had served the Respondent with several warning letters. By letter dated 15th May 2012 the Respondent had been placed under interdiction without pay with effect from the same date stating that on 11th May 2012 and 14th May 2012 there had been certain irregularities committed by the Respondent in respect of fuel in vehicles driven by him and for being a bad influence on other employees.

Thereafter charge sheet dated 12th June 2012 had been issued to the Respondent by the Appellant on four charges directing the Respondent to show cause before 19th June 2012. Consequently, letter dated 18th June 2012 was forwarded by the Respondent to the Appellant containing reasons for his innocence. The Respondent states that in this same letter, he had requested that in the instance that the Appellant proceeds to hold a domestic inquiry that he be granted the assistance to appoint a defence officer to represent him at the inquiry. The Respondent states that Domestic Inquiry was held on 10th July 2012 where his request was denied, and copies of journal entries were not to be made available to him citing company procedure.

By the Answer dated 11th October 2012 in the Labour Tribunal the Appellant sates that the explanation tendered by the Respondent was unsatisfactory and therefore unacceptable to the management of the Appellant and as such domestic inquiry was conducted into the charges preferred against the Respondent by an external independent inquiring officer. The Appellant highlights that the Respondent had a poor past record of services during his period of employment. The decision of the inquiring officer was communicated to the Respondent by letter dated 29th August 2012 finding the Respondent guilty of three out of four charges, thus terminating the Respondent's services with immediate effect.

The Respondent had filed replication dated 30th October 2012 denying the averments contained in the Appellant's answer. Thereafter upon admitting witnesses and Written Submissions on behalf of both parties, the President of the Labour Tribunal Negombo made Order on 17th July 2017 in favour of the Respondent granting damages calculated at 3 months per each year of the Respondent's service (19 years on his last drawn basic salary of Rs. 16,985)

Being aggrieved by the above Order the Appellant appealed to the High Court of Negombo by a Petition dated 21st August 2017 praying for the Order by the Labour Tribunal to be set aside and for relief prayed for in the Petition. Judgment was delivered on 29th June 2018 upholding the Order of the Labour Tribunal and dismissing Appellant's Appeal with no order for costs. Aggrieved by the same the Appellant preferred Appeal to this Court by Petition dated 8th August 2018.

At this juncture it is important to note the circumstances under which the Respondent was interdicted by the letter dated 15th May 2012. The Respondent had been an employee for the Appellant company for a period of 19 years. The Appellant company had received several reports of theft of fuel from their vehicles over a period of time and the company had taken steps to monitor the problem by attaching Global Positioning Systems (GPS) for vehicles. The company which fitted the system was

capable of locating the vehicle at any given time as well as keeping track of fuel consumption, speed, and route real-time. This system was initially fixed only to the lorry driven by the Respondent in order to test the new technology.

On 11th May 2012 and on 14th May 2012, the company noted suspicious activity as there was a record that the vehicle was stopped at certain locations at which, between the engine being stopped and restarted, there had been a drastic drop in the fuel level of the vehicle. As per Siphon Consumption report marked R5, on 11th May 2012, there had been a drop of 22 Litres within 9 seconds, and on 14th May 2012 (as per Siphon Report marked R7) there had been a drop of 15 Litres within 5 seconds.

The charge sheet issued by the Appellant Company dated 12th June 2012 indicate four charges including the theft of approximately 30 Litres of fuel from a vehicle driven by him, teaching another driver employed by the company how to commit the same theft, compelling 2 of his assistants to aid in the commission of theft, and conducting himself in a manner destroying the trust placed upon him in regard to company property.

Both the Learned President of the Labour Tribunal and the Learned High Court Judge had expressed doubts in contemplating whether the technology was accurate and whether such a significant amount of fuel could be drained within such a short span of time due to certain discrepancies in the data and admissions by the Appellant's witnesses during proceedings at the Labour Tribunal. It was held that there was a lack of sufficient evidence presented to justify the termination of the Respondent.

Taking the question of law at hand into account, I believe this Court has not been called upon by the Appellant to disturb the decision of the Labour Tribunal pertaining to the course of action leading to the termination of the Respondent's services. As such, I will not attempt to disturb the merits of this case any more than necessary to address whether the compensation granted by the Labour Tribunal as affirmed by the High Court is of an exorbitant value.

**Calculating compensation**

The President of the Labour Tribunal, by judgment dated 17th July 2017, decided that it would be redundant to order reinstatement of the Respondent and instead held that the Respondent is entitled to reasonable compensation under Section 33(5) and 33(6) of the Industrial Disputes Act. Accordingly, compensation was calculated to be awarded was for 3 months salary for each year of service on the last drawn basic salary of Rs. 16,985.00, which totalled to an amount of Rs.968,145.00 .

The Appellant in their Written Submission clarifies that the contention of the Appellant is not based upon the computation itself but the failure of the Learned President of the Labour Tribunal to consider relevant factors in the said calculation, resulting in an award for excessive compensation. In considering whether the awarded compensation is exorbitant, an examination of the provisions of the Industrial Disputes Act 43 of 1950 (as amended) is necessary.

As per Section 33 (1) (d), any order of a labour tribunal may contain decisions;

> *"as to the payment by any employer of 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 paid"*

The Labour Tribunal is well within their powers to have awarded compensation in lieu of reinstatement as Section 33(6) clarifies that the Tribunal may include in an award or order a decision as to the payment of compensation as an alternative to reinstatement, in any case where the court, tribunal or arbitrator thinks fit so to do. However, the Industrial Disputes Act does not contain a predetermined formula for the calculation of compensation, nor does it outline any list of factors to be considered by Tribunals in calculating the same, exhaustive or otherwise. While this allows for Tribunals to consider all factors in determining an amount to be deemed reasonable, as is in line with the objects of the legislation, it leaves room for ambiguity in reference to the statue alone.

In light of the same, I wish to examine other legislation regarding formula for compensation or payment for workmen, i.e. the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, The Workmen's Compensation Ordinance 19 of 1946, and the Payment of Gratuity Act, No. 12 of 1983.

As per the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (as amended), Section 6D states that:

> *"Any sum of money to be paid as compensation to a workman on a decision or order made by the Commissioner under this Act, shall be computed in accordance with such formula as shall be determined by the Commissioner in consultation with the Minister, by Order published in the Gazette"*

The calculation formula is found in the schedule of Gazette Extraordinary No. 1384/7 dated March 15, 2005, which utilises the number of years of service completed at the date of termination by the employee as the variable. Accordingly, the number of years of service completed at the date of termination by the employee directly coordinates with the number of months salary to be paid as compensation for each year of service, and it outlines the Maximum Cumulative Compensation for each category. As of 2021 the maximum compensation payable under the formula was increased to Rupees 2.5 Million while retaining the existing calculation formula.

Applying a similar formula to an instance as the present case of 19 years, the formula sets the number of months' salary to be paid as compensation for each year of service at 1.5 months' salary with a maximum cumulative compensation for 38 months.

The Workmen's Compensation Ordinance 19 of 1946 (as amended) operates on a different basis as the Ordinance intends to compensate workman who have suffered personal injury. Schedule IV to this same sets out the amount of compensation to be paid considering the salary range of a workman as the variable, with varying amounts

of compensation for each category based on the nature of injury; death of workman, permanent total disablement of workman, or half-month compensation for temporary disablement of workman. The Act was more recently amended by the Workmen's Compensation (Amendment) Act No.10 of 2022, as certified on 19th March 2022 for increased amounts of compensation and an introduction of a Section 6A which takes the nature of employment of a workman into account in relation to any injury in the case of permanent or partial disablement of a workman.

Given the distinct purpose of this Act the same scheme of calculation of compensation cannot be considered for compensation for termination of employment.

As per Part II of the Payment of Gratuity Act, No. 12 of 1983, Section 6 stipulates the rate of payment of Gratuity for a workman as follows:

> *" A workman referred to in subsection. (1) of section 5 shall be entitled to receive as gratuity, a sum equivalent to-*
>
> *(a) half a month's, wage or salary for each year of completed service computed at the rate of wage or salary last drawn by the workman, in the case of a monthly rated workman; and*
>
> *(b) in the case of any other workman, fourteen days' wage or salary for, each year of completed service computed at the rate of wage or salary last drawn by that workman:"*

While neither of the above tests can be strictly adopted for the purposes of the Industrial Disputes Act, they may Act as a certain guide for maximum compensation in deciding upon the number of months of salary for years of service and for the ascertainment of reasonable compensation.

Given the discretion left to tribunals in regard to the calculation of compensation, a wealth of cases has examined the elements to be considered in the allocation of compensation.

As per Lord Denning in **Ward v James 1965 1 AER 564**,

> *"When a statute gives a discretion, the Courts must not fetter it by rigid rules from which a Judge is never at liberty to depart. Nevertheless the Courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those that should be ignored"*

In the context of the Industrial Disputes Act it was clarified by His Lordship Justice Sharvananda in **Caledonian Estates Ltd. vs. Hillman (1977) 79(i) NLR 421** aptly noting that:

> *"The Legislature has wisely given untrammelled discretion to the Tribunal to decide what is just and equitable in the circumstances of each case. Of course, this discretion has to be exercised judicially. It will not conduce to the proper exercise of that discretion if this Court were to lay down hard and fast rules which will fetter the exercise of the discretion, especially when the Legislature has not chosen to prescribe or delimit the area of its operation. Flexibility is essential. Circumstances may vary in each case and the weight to be attached to any particular factor depends on the context of each case."*

Despite this view, the unbridled discretion granted to tribunal's should not suggest inconsistency in the computation of compensation without clear direction as to the relevant factors to be considered by tribunals. The above followed the case of **Ceylon Transport Board vs. Wijeratne (1975) 77 NLR 481** wherein His Lordship Justice Vythialingam observed:

*"The Labour Tribunal should normally be concerned to compensate the employee for the damages he has suffered in the loss of his employment and legitimate expectations for the future in that employment, in the injury caused to his reputation in the prejudicing of further employment opportunities. Punitive considerations should not enter into its assessment except perhaps in those rare cases where very serious acts of discrimination are clearly proved.* ***Account should be taken of such circumstances as the nature of the employer's business and his capacity to pay, the employee's 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 levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights and any other relevant considerations.*** *Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place. The amount however should not mechanically be calculated on the basis of the salary he would have earned till he reached the age of superannuation..."*

*(Emphasis Added)*

Building upon the same, the case of **Jayasuriya vs Sri Lanka State Plantations Corporation (1995) 2 SLR 379** broke ground in terms of computation of compensation. His Lordship Justice Dr. Amerasinghe was correctly of the view that there must be a stated basis for the computation, taking the award beyond the realm of mere assurance of fairness. He considered that:

*"While it is not possible to enumerate all the circumstances that may be relevant in every case, it may be stated that the essential question, in the*

*determination of compensation for unfair dismissal, is this: What is the actual financial loss caused by the unfair dismissal? for compensation is an "indemnity for the loss".*"

*"What are the matters to be considered? There ought to be at least an approximate computation of immediate loss, i.e. loss of wages and benefits from the date of dismissal up to the date of the final Order or Judgment, and another with regard to prospective, future loss, and a third with regard the loss of retirement benefits, based as far as possible on a foundation of solid facts given to the Tribunal by the parties.*"

Mental hardship or injured feelings were considered non-compensable in the absence of evidence that they could be translated into calculable financial loss. In regard to financial hardship :

*"With regard to financial loss, there is, first, the loss of earnings from the date of dismissal to the determination of the matter before the 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.* ***The phrase "loss of earnings" for this purpose would be the dismissed employee's pay (net of tax), allowances, bonuses, the value of the use of a car for private purposes, the value of a residence and domestic servants and all other perquisites and benefits having a monetary value to which he was entitled****. The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss he had incurred."*

Thereafter:

*"Once the incurred, i.e., the ascertainable past, losses have been computed, a Tribunal should deduct any wages or benefits paid by the employer after termination, as well as remuneration from fresh employment… If the employee had obtained equally beneficial or financially better alternative*

*employment, he should receive no compensation at all, for he suffers no loss… And compensation should be reduced by the amount earned from other, less remunerative employment. The principle is this: He is entitled to indemnity and not profit."*

Additionally, consideration may also be given to any failure of the applicant to mitigate losses incurred, and for certain future losses. In the calculation of future losses, Justice Vythialingam expressed opinions on the date of retirement being viewed as an outer limit in **Ceylon Transport Board vs. Wijeratne (Supra)** in that:

*"He may die. His services may be terminated for misconduct or on account of retrenchment. The business may cease to exist or close down."*

It is agreeable that there are no guarantees that the applicant, even if he were to remain in employment, would have reached the age of retirement or stayed in the same position till such date. However, Hon. Justice Dr. Amerasinghe, argues against the factors considered by His Lordship Vythialingam, J, with the view that assuming for certainty all the disadvantageous possibilities and to take no account of the advantageous, seems hardly fair.

In light of the same, his Lordship Justice Dr. Amerasinghe found it pertinent to consider the time remaining for retirement as one of the many factors in awarding compensation for termination in the case of **Jayasuriya vs Sri Lanka State Plantations Corporation.**

In the case of **United Industrial Local Government & General Workers' Union v. Independent Newspapers Ltd. (1973) 75 NLR 529** it was considered that:

*" Before making an order that is just and equitable as provided for in section 31 C of the Act, the tribunal must consider, in cases where reinstatement may be one of the reliefs the question whether it is a fit case for an order for compensation to be made as an alternative to*

*reinstatement.* ***Evidence placed before the tribunal in regard to the previous conduct of the workman will be very relevant in this connection***."

*(Emphasis Added)*

Taking all the above into account there appears to be a plethora of elements to be considered by a Tribunal in awarding compensation. The nature of the employer's business, the employer's capacity to pay, the age of the employee, 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, the effect of the dismissal on future pension rights, the actual financial loss suffered by the dismissal, any benefits enjoyed by the employee (including allowances, bonuses, and any property or services provided for the employee's private purposes which may have an ascertainable monetary value), deductions for any payments made by the employer to the employee subsequent to and in relation to such dismissal, remuneration from employment subsequent to dismissal, any failure of mitigation of losses by the employee, and future losses taking the remaining period to date of retirement into due account all with the view of exercising discretion in a just and equitable manner. While this is not an exhaustive list of factors to be considered in awarding compensation, it is of course reasonable to be of the understanding that not all factors are relevant to every case and as such only those factors as suited for the circumstances of each application need be considered by Tribunals.

In awarding just and equitable compensation, it must be noted that the discretion given is not to be exercised arbitrarily. In exercising such discretion, the Tribunal must provide reasons justifying the compensation awarded with the circumstances of a case. In this endeavour, attention is to be paid to any of the factors mentioned above or any other relevant circumstances present in a given case.

To this effect, I am inclined to agree with the outlook expressed by Hon. Justice Aluwihare, PC in the case of **Inter Company Employees Union vs Asian Hotels Corporation Ltd S.C. Appeal 101/10 (S.C Minutes dated 24.7.2018)** in which the following was expressed in regard to just and equitable orders determining the quantum of compensation:

> *"It is not satisfactory to simply say that a certain amount is just and equitable. There should be a stated basis for the computations, supported by the factors taken into consideration, in arriving at the amount of compensation awarded. In the case of* ***Brook Bond (Ceylon) Ltd v. Tea, Rubber, Coconut and General Produce workers Union (supra)*** *it was held that "for an order to be just and equitable it is not sufficient for such order merely to contain a just and equitable verdict. The reasons for the verdict should be set out to enable the parties to appreciate how just and equitable the order is. In the absence of reasons, it would not be a just and equitable order."*

In the instant case, the Order by the President of the Labour Tribunal examines the evidence before the Tribunal in holding in favour of the Respondent but does not at any juncture state the basis upon which compensation has been calculated. The consequent decision by the High Court Judge dismissing the Appeal of the Appellant does not rectify this matter and merely reconsiders the evidence placed before the Labour Tribunal. Regardless of the judgment of the High Court stating that compensation has been computed according to law, neither decision has elucidated the basis and circumstances upon which the awarded compensation is justified.

As such I find it pertinent to attend to several prominent factors, including the previous conduct of the Respondent. The Appellant highlights that the dismissal of the Respondent follows multiple infractions occurring over the period of employment.

The documents R16 to R21 were marked in the evidence of one Nammuni Saman Dapunu Kumara ie. Manager Human Resources and Administration of the Appellant.

The document marked R16 in the Appeal Brief refers to a document from the General Manager to the Respondent dated 5th November 2003, the contents of which refer to a domestic inquiry at which the Respondent has been found guilty of the charges on a charge sheet dated 14th October 2003, for having met with a number of accidents and for driving far below the expected standards of caution and safety resulting in damage to the company vehicles. The same warns the Respondent that should the company vehicles meet with an accident while being driven by him or owing to his carelessness, his services shall be terminated.

The document marked R17 refers to a document from the General Manager to the Respondent dated 30th January 2003 seemingly warning the Respondent for unnecessary delay and for going on unauthorised work without returning to the factory promptly given an incident of a long period of delay from leaving the premises for a drop off and returning to the premises 4 hours later.

The document marked R18 refers to a document from the General Manager to the Respondent dated 12th March 2003 drawing attention to failure of the Respondent in carrying out duties allocated to him and the loss of 1 and half hours of production due to his negligence by forgetting to report for work on a given date, resulting in suspension for 3 days and a severe warning.

The document marked R19 refers to a document from the General Manager to the Respondent dated 25th May 2005 noting a severe warning for failure to check the Driver's Instruction Book and leaving company premises as well as for manhandling a security officer under the influence of alcohol.

The document marked R20 and R21 refers to documents from the Manager Human Resources and Administration to the Respondent in 2009 regarding driving

while under the influence of alcohol, acting in a disruptive and indecent manner while on a recreational company trip under the influence of alcohol. R21 is a final warning letter reinstating the Respondent without backwages after the suspension from service stating that any future infractions will result in the termination of his employment.

The Respondent in his witness statement admits that he is 54 years of age and discloses that he had approximately 5 years of service remaining prior to retirement (page 231 of brief). In regard to the Respondent's financial position subsequent to termination of employment it has been admitted by the Respondent that despite lack of permanent employment, the Respondent was earning a monthly income between Rupees 18,000 and 20,000, which is a higher amount than that earned via his employment with the Appellant Company.

In light of the previous conduct of the Respondent, the multiple letters of warning issued by the Appellant, the resulting deterioration in the relationship between the Appellant Company and the Respondent, as well as the fact that the Respondent has managed to secure non-permanent remuneration sufficient to compensate for the salary he earned while employed by the Respondent, the compensation awarded by the Labour Tribunal as affirmed by the High Court seems excessive in nature.

The Respondent had a maximum of 5 years of service left with the Appellant. However, the multiple blemishes on his service record in the 19 years of service, the penultimate of which resulted in suspension with a warning for termination of employment for future infractions must be noted. Thus, there is no assurance that the Respondent would have remained employed by the Appellant if not for this infraction resulting in termination. As such, the termination was not an isolated incident and I do not find that future losses of the Respondent can be a reasonable element to be considered in these circumstances.

Based on all the facts and circumstances before this Court, I find that the computation of compensation at a rate of three months per each year of service is exorbitant. For the reasons stated above, the Order of the Labour Tribunal and the Judgment of the High Court are amended to compensation calculated at one month per each year of the Respondent's service (ie. 19 years of service), on his last drawn basic salary of Rupees 16,985. As such compensation is to be valued at a total of Three Hundred Twenty-Two Thousand Seven Hundred and Fifteen Rupees ( Rs. 322,715/=) in addition to any other legal entitlements, to be paid to the Respondent by the Appellant. I make no order as to costs.

***Appeal Allowed.***

**JUDGE OF THE SUPREME COURT**

**MURDU FERNANDO, PC, J**

I agree.

**JUDGE OF THE SUPREME COURT**

**KUMUDUNI WICKREMASINGHE, J**

I agree.

**JUDGE OF THE SUPREME COURT**