2023 SICASH
SLIIT INTERNATIONAL CONFERENCE ON ADVANCEMENTS IN SCIENCES & HUMANITIES

Domestic Inquiry and the Principles of Natural Justice: A Critical Analysis of the Labour Law Regime of Sri Lanka

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ARTICLE INFO

Article History:
Received: 10 September 2023
Accepted: 01 November 2023

Keywords:
Domestic inquiry; Principles of natural justice; Disciplinary punishments; Labour law

Citation:

R. L. W. Rajapakse., P. K. Seneviratne, P. K. S. K. Seneviratne (2023). Domestic Inquiry and the Principles of Natural Justice: A Critical Analysis of the Labour Law Regime of Sri Lanka. Proceedings of SLIIT International Conference on Advancements in Sciences and Humanities, 1-2 December, Colombo, pages 217-223.

ABSTRACT

Within the employer-employee relationship, the principles of natural justice demand a fair procedure to be followed before imposing punishments on employees. ILO Convention 158 and other selected foreign jurisdictions support the view that the existence of a valid reason such as a capacity problem or a conduct problem of the employee alone is not sufficient for a termination of service or another punishment to be justified and it is necessary to have applied a fair procedure by the employer in arriving at the said decision. However, the Sri Lankan labour law regime does not stipulate a statutory requirement for a domestic inquiry before imposing punishments on employees. Therefore, the sole responsibility of upholding the rule of law in workplace disciplinary matters by ensuring the principles of natural justice lies on the judiciary of Sri Lanka. Under the above context, this research explored whether the judiciary of Sri Lanka has fulfilled the said responsibility. This research study utilized the qualitative methodology where the researchers studied, analyzed, and synthesized a variety of materials gathered through primary and secondary sources to formulate a conclusion and come up with the study results. Finally, the

research revealed that the lacuna of a statutory requirement for a domestic inquiry has become a great barrier to uphold the principles of natural justice by the judiciary. Therefore, the principles of natural justice are upheld by the judiciary only when implementing the Writ jurisdiction and Fundamental Rights jurisdiction. This creates discrimination between private and state sector employees including state corporation sector employees for similar matters. Finally, the research suggests stipulating the requirement of holding a domestic inquiry in Sri Lanka by way of an amendment to be made to the Industrial Disputes Act No. 43 of 1950.

1. INTRODUCTION

Industrial harmony is of utmost importance for the economic stability of a country. Nevertheless, the State's responsibility to maintain industrial harmony is inseparable from its duty to uphold the Rule of Law. Principles of Natural Justice stand as a significant element of the rule of law.[1] Within the employer-employee relationship, natural justice demands a fair procedure to be followed before changing the status of the employee. Non-observance of rules of natural justice may be justifiable in cases where changing the status of the employee caused by non-disciplinary grounds such as strong demands of employee unions, since allowing to collapse of the industry would badly affect the economy of the country, but it is unlikely so on disciplinary grounds.

However, in the labour law regime of Sri Lanka, there is no statutory requirement to conduct a domestic inquiry before imposing punishments on employees.[2] Therefore, unless it is mentioned in the letter of appointment or there is a procedure developed by the management of the employer organization for a domestic inquiry, the employee cannot demand it as a right. However, there is a comprehensive disciplinary procedure developed by the Department of Public Administration of Sri Lanka which applies to state sector employees including public corporations,[3] while some public corporations have their own disciplinary procedures.[4] Thus, it is obvious that the legislature of Sri Lanka intends to grant discretion to the employer on conducting domestic inquiries. Therefore, the sole responsibility to uphold the rule of law by ensuring the principles of natural justice on workplace disciplinary matters lies on the judiciary of Sri Lanka.

Under the above background, this research expects to explore international standards, legislative provisions, and judicial decisions regarding disciplinary punishments for employees in light of the principles of natural justice. Thus, the central research problem of this study is 'how far the rule of law is upheld in Sri Lanka in the employee disciplinary matters by applying the principles of natural justice' To unfold the above research problem, the research questions, firstly, what is meant by principles of natural justice in the employment context? Secondly, what are the international standards on workplace disciplinary matters? Thirdly, what are the views of the judiciary on upholding the principles of natural justice in workplace disciplinary matters? will be examined.

2. MATERIALS AND METHODS

This is a doctrinal or non-empirical, reform-oriented research that intensively evaluates the labour legislation of Sri Lanka in light of the principles of natural justice and international standards. The researchers read and analyzed materials gathered through primary and

1 Iwrin Jayasuriya, The concept of misconduct in the termination of employment, page 13, Stamford Lake publication, 2013.

2 Silva, S.R.D. (2004) *Law of Dismissal*. Rvised Edition 2004. The Employers Federation of Ceylon (Monograph No.8).

3 Volume II of the Establishments Code of the Government of the Democratic Socialist Republic of Sri Lanka.

4 Chapter XXII of the Establishments Code of the University Grants Commission and the Higher Educational Institutions.

secondary sources to formulate a conclusion and come up with the study results. Being primary sources, labour legislations of Sri Lanka including the Government's Establishments Code, Universities' Establishments Code, and the case law on the subject were studied and analyzed to identify the areas which cry for upholding the rule of law. Secondary sources such as reports, journal articles, legal treaties, etc. were used to explore the importance of having sound disciplinary procedures in the workplace.

3. RESULTS AND DISCUSSION

3.1 International context

The duty to act judicially by every administrative authority that deals with the rights of people was emphasized in *Ridge vs. Baldwin*[5] by the House of Lords of the United Kingdom. Functioning judicially entails substantive fairness and procedural fairness, and the omission thereof renders the action ultra vires. Natural Justice is concerned with the observance of procedural fairness, which has traditionally meant a person must be heard before a decision is made against him or her and the decision must be made by an unbiased decision-maker. The third emerging component of natural justice is the right to receive reasons for the decision,[6] since not conveying the reasons will deprive the affected person of implementation of effective appeal rights.

In the employment context, the need for a valid reason and a level of procedural fairness are the basic requirements for a dismissal to be fair, hence, the existence of a valid reason such as a capacity problem, conduct problem or genuine redundancy alone is not sufficient if the procedural fairness is breached.[7] The Fair Work Act, 2009, of Australia, defines unfair dismissal as a harsh, unjust, and unreasonable dismissal.[8] It further introduces eight criteria to decide whether a dismissal was harsh, unjust, and unreasonable from which four criteria are related to procedural fairness, namely, whether the person was notified of the reason; whether the person was allowed to respond to the reason; is there any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and if the dismissal is related to unsatisfactory performance by the person, whether the person had been warned about the same previously.[9]

The ACAS Code of Practice for Disciplines and Grievances which was issued under the Trade Union and Labour Relations (Consolidation) Act, 1992 of the United Kingdom requires employers to adopt a fair procedure on disciplinary issues which includes elements such as dealing promptly, consistently, conducting necessary investigations to establish the case, informing the employee of the basis of the problem, allowing him to put his case in response, allowing the employee to be accompanied at the formal disciplinary hearing, and allowing the employee to appeal against the formal decision made.[10]

Anderman (1978) by referring to the ACAS Code states that the reasonableness of the employer can be tested in three steps; firstly, there must be a valid ground for dismissal, secondly, the employer should have adopted a reasonable procedure in taking his decision and thirdly, the overall merit of the case should be considered.[11] He further states that a procedural omission will not, as a matter of

5 Ridge vs. Baldwin (1964) AC 40

6 Gomez, M. (2011) "Natural Justice and the Right to a Fair Hearing," *Master of Laws, University of Colombo*, 5 November.

7 Orr, G. and Tham, J.-C. (2023) *Work and employment; NATURAL JUSTICE IN DISMISSALS?*, *https://www.researchgate.net*. Available at: https://www.researchgate.net/publication/47380007_Work_and_employment?_sg=zh_r8T-uYeND-9VSbGXRqi7nFerLNtG8ZHnaO6AAFluWL7QRs-1PFJK-ns8lkt-vYUlcR78RFNyq6KXUc (Accessed: March 23, 2023).

8 Section 385 of the Fair Work Act, 2009.

9 Section 387(b) to (e) of the Fair Work Act, 2009.

10 Paragraph 4 of the ACAS Code.

11 Anderman, S.D. (1978) "Did the employer act reasonably?," in *The Law of UNFAIR DISMISSAL*. London: Butterworths.

law, always result in a finding of unfair dismissal, yet the unreasonable procedure itself justifies unfair dismissal if the procedure adopted by the employer would not have been–adopted by a "reasonable employer."[12] For instance, in *Chrystie vs. Rolls Royce*[13] the dismissal was declared to be unfair for the reason that the employer in the course of his investigation had not attempted to do a supplementary investigation to check why the employee was absent for the investigation, and decided the case without giving him a hearing disregarding the letter sent by him informing his illness, which was received by the employer, a few minutes after the conclusion of the exparte hearing.[14]

ILO Convention 158[15] stipulates that there shall be a valid reason connected with the capacity, or conduct of the employee, or the operational requirement of the employer to terminate the employment of an employee.[16] Furthermore, it underpins procedural fairness by stipulating the requirement of being heard before termination[17] and granting the appeal rights against the decision.[18] Thus, it is evident in the international scenario that observing the principles of natural justice in employee disciplinary matters is a statutory requirement which has been further reinforced by the court of justice.

3.2 DOMESTIC CONTEXT

In the Sri Lankan labour law regime, there is no statutory requirement to conduct a domestic inquiry before the imposition of disciplinary punishments, though their desirability has been emphasized by the Courts as well as legal experts.[19] Jayasuriya (2013) states that there is no law or statute anywhere in the world that defines the term 'misconduct' and therefore a reasonable investigation is considered to be the cornerstone of a fair dismissal.[20] As pointed out by Adikaram (2017), though there is no legislation in Sri Lanka prescribing disciplinary procedures or punishments to be imposed in instances of misconduct, very importantly, a disciplinary policy would ensure that the principles of fairness and reasonableness are applied in dealing with matters that may warrant disciplinary action in organizations.[21]

The three components to be satisfied on a disciplinary punishment, suggested by ILO and other foreign jurisdictions discussed above, namely a genuine reason, fair procedure, and appeal rights, have been well applied to the State sector organizations of Sri Lanka by the Government's Establishments Code. Some of the State corporations such as universities have developed disciplinary procedures applicable to them through their own Establishments Codes prepared in line with the Government's Establishments Code. Thus, as genuine reasons, these Establishments' Codes have introduced categories of misconduct that warrant disciplinary actions namely, inefficiency, incompetence, negligence, lack of integrity, improper conduct, and indiscipline.[22] As a fair procedure, conducting a preliminary investigation and a formal inquiry are made mandatory. An appeal procedure is also given for those who are not satisfied with the punishments imposed.

12 Ibid
13 Chrystie vs. Rolls Royce (1976) IRLR 336
14 Supra 11
15 Termination of Employment Convention of International Labour Organization.
16 Article 4 of the ILO Convention 158.
17 Article 7 of the ILO Convention 158.
18 Article 8 of the ILO Convention 158.
19 Silva, S.R.D. (2004) "Relevance of Domestic Inquiries," in *LAW OF DISMISSAL*. Revised Edition 2004. The Employers' Federation of Ceylon, p. 41. And *D.R.D. Fernando vs Union Apparel (Pvt)Ltd.* (2021).
20 Jayasuriya, I. (2013) "Misconduct, Discipline and the Principles of Natural Justice - An Introduction," in *The Concept of Misconduct in the Termination of Employment*. A Stamford Lake Publication, pp. 15–19.
21 Adikaram, A.S. (2017) "Managing Discipline," in *Labour Law and Relations, A Human Resource Management Approach*. 2nd edition. A Stamford Lake Publication, p. 430.
22 Appendix I of Chapter XLVIII of the Government's E-Code and Section 2 of Chapter XXII of the Universities' E-Code.

Since there is no statutory requirement to conduct a domestic inquiry before punishing an employee in Sri Lanka, it is important to see how the judiciary has acted in such situations. In an old case of *All Ceylon Commercial and Industrial Workers Union vs. Weerakoon Bros. Ltd (1973),*[23] it was held that the dismissal without holding a domestic inquiry was against the principles of natural justice so that the court could review it for correctness. However, in a later case of *All Ceylon National Milk Board Trade Union vs. The Board of Directors of CWE,*[24] the absence of domestic inquiry was not considered to be an issue regarding the justification of the dismissal. Similarly, in *St. Andrews Hotel vs. Ceylon Mercantile Union (1993),*[25] it was held that the dismissal cannot be set aside as wrongful solely on the basis that no domestic inquiry was held. By referring to all these cases, in *D.R.D. Fernando vs. Union Apparel Pvt. Ltd (2021),*[26] the Court took the view that while a domestic inquiry is desirable, in certain cases, due to the nature of the circumstances, a domestic inquiry could be dispensed with. In this case, the Supreme Court mentioned that it is a misdirection of law holding the termination of the services of an employee without a domestic inquiry as unjust and unreasonable. It was further stated that it would be an additional burden to require the employer to hold a domestic inquiry by default in all instances especially where the employee in question is guilty of conduct that warrants termination without any need for further investigation. However, by considering the classic nature of this case, which cried for a domestic inquiry, the Court decided that not holding the domestic inquiry before termination was unjust and therefore directed for reinstatement with back wages.

Thus, it is very clear in the Sri Lankan context, that if no requirement of conducting a domestic inquiry is stipulated by the letter of appointment or the internal rules of the employer organization, the principles of natural justice will not come into play as long as there exists a valid reason for the punishment. Accordingly, the court sees only whether there is a valid and genuine reason for the punishment imposed by the employer. For instance, in *K.F.R. Fernando vs. Brandix Apparels Solutions Ltd. (2022),*[27] the contention of the employee that the employer had violated the principles of natural justice as he was not allowed to be represented at the disciplinary inquiry held against him, was rejected by the court stating that, as of a right an employee cannot seek for representation at a disciplinary inquiry unless there is an internal rule for the same. In this case, the court considered only whether there was a valid reason for the punishment given.

Now, it is important to see how the courts have acted in situations where internal rules have provided for domestic inquiries before punishing an employee. In *Dr. Darshana Wickramasinghe vs. University of Ruhuna & Others (2016),*[28] which was filed under the writ jurisdiction, the Supreme Court upheld the decision of the Court of Appeal to quash the charge sheet and thereby the decision of termination imposed by the University of Ruhuna to one of its employees was declared null and void. The sole reason for this decision is the failure of the University Council, which is the disciplinary authority, to consider the charge sheet before issuing it to the employee as stipulated in the disciplinary procedure applicable to the university. In *N.K. Sooriyabandara vs. University of Peradeniya & Others (2021),*[29] which was filed under the Fundamental Rights jurisdiction, the Supreme Court declared that the Fundamental Rights of the petitioner have been infringed by the university by non-observing the principles of

23 Sri Lanka Gazette No. 19 of 14.12.1973
24 Sri Lanka Gazette No. 261/10 of 07.09.1983
25 CA/138/85 decided on 01.04.1993
26 SC Appeal 19/2015 decided on 28.10.2021
27 SC Appeal 60/2018 decided on 05.05.2022
28 SC Appeal 111/2010 decided on 09.12.2016
29 SC/FR/79/2019 decided on 12.11.2021

natural justice while conducting the disciplinary investigation regarding the allegations made against the petitioner. Therefore, though the Court noticed that the allegations made against the petitioner were serious, the termination of the services of the petitioner was made null and void and the university had to reinstate him with back wages.

Thus, in the above two cases, the court did not consider whether there was a valid and genuine reason such as a violation of the organizational discipline by the employee. However, the termination of employment in those two cases has not been challenged by the petitioners under the labour laws though, they being employees belonging to organizations categorized as public corporations, could have done so. Therefore, the Court has applied only administrative law in deciding those cases, though they are purely related to disciplinary violations and procedural aspects of domestic inquiries.

It is now worth exploring how Labour Tribunals and other superior Courts have decided on the termination of employment matters of public corporations, which have been challenged under labour laws. In cases where termination of services has been carried out without conducting an inquiry, the Labour Tribunal tends not to turn down the decision solely on non-observance of the principles of natural justice but investigates whether there is a valid reason for the termination. For instance, in *R.A.C.R. Perera vs. the Open University of Sri Lanka,*[30] the university had not conducted an inquiry before the termination of service of an employee but the Labour Tribunal by pointing out the non-requirement of a domestic inquiry under the labour law of Sri Lanka went to the merit of the case and made the termination justified. On the other hand, if a domestic inquiry has been conducted before termination, still the Labour Tribunal requires the employer to lead evidence again to prove the charges, without depending on the outcome of the domestic inquiry.[31]

4. CONCLUSION

From the above exploration, it can be concluded that the principles of natural justice in workplace disciplinary matters in Sri Lanka have been considered only under the Writ and Fundamental Rights jurisdiction, which applies only to the Government and Semi-Government sector employees. In the labour law regime, the tendency of the Courts is only to find out whether a valid reason exists for the termination of employment. The reason for this is evident to be the absence of a statutory requirement of Sri Lanka to conduct a domestic inquiry before imposing punishments which may be considered as non-adherence to ILO Convention 158.

Also, discrimination has been developed between private sector and public sector employees including public corporations. Especially, public corporation sector employees have the discretion to challenge their dismissals either in Labour Tribunal under the Industrial Disputes Act or in the Court of Appeal under the Writ jurisdiction or in the Supreme Court under the Fundamental Rights jurisdiction. Thus, the Supreme Court, while exercising appellate jurisdiction under the Industrial Disputes Act has justified the termination of employment of private sector employees on the ground of having a valid reason even though no domestic inquiry has been conducted at all. On the other hand, the same Supreme Court, while exercising Fundamental Rights jurisdiction over an employee of a university, has declared the letter of termination as null and void for the mere reason that the employer while conducting the disciplinary inquiry has made a procedural error

30 LT Colombo, Case No. 1/Add/93/2011 decided on 16.12.2016

31 H.M.P.A. Herath vs. Open University of Sri Lanka – LT Colombo, Case No.08/305/2009 decided on 06.06.2012

which amounts to a breach of principles of natural justice, compelling the university to re-instate the employee with back wages.

Accordingly, it is suggested that a statutory requirement of conducting a domestic inquiry before punishing employees for disciplinary matters be stipulated to uphold principles of natural justice without any discrimination against employees belonging to the public sector, public corporation sector, or private sector. This could be done by way of an amendment made to the Industrial Disputes Act.

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