We therefore allow the appeal in part and set aside the award in so far as it directed the payment of 50% of the total emoluments for the strike period but maintain the rest of the award. There will be no order as to costs.

Appeal allowed.

ASSAM OIL COMPANY
v.
ITS WORKMEN

(P. B. GAJENDRAGADKAR and K. C. DAS GUPTA, JJ.)

Industrial Dispute—Termination of service in accordance with contract—If can be questioned before industrial tribunal—Termination on basis of misconduct of workman—If amounts to dismissal—No enquiry—Reinstatement if appropriate relief.

One S was employed by the appellant as a secretary and one of the terms of employment was that the appointment may be terminated on one month's notice on either side. The appellant was thoroughly dissatisfied with the work of S and disapproved of her conduct in joining the union. Purporting to act under the contract, the appellant terminated the services of S and gave her one month's pay in lieu of notice. No enquiry was held by the appellant before terminating the services of S. The industrial tribunal held that the termination of services amounted to a dismissal for misconduct and since no enquiry was held it was illegal and unjustified and it passed an order for the reinstatement of S. The appellant contended that as the termination was strictly in accordance with the terms of the contract it could not be challenged before an industrial tribunal, that even if no enquiry was held the order of discharge was justified as the evidence led before the tribunal established the misconduct of S and that at the highest it was a case for awarding compensation and not for reinstatement:

Held, that the discharge amounted to punishment for alleged misconduct and was unjustified in the absence of a proper enquiry. Even where the discharge was in exercise of the power under the contract it was competent for the tribunal to enquire whether the discharge had been effected in the *bona fide* exercise of that power. If the tribunal found that the purported exercise of the power was in fact the result of the misconduct alleged then it would be justified in dealing with the dispute on the basis that the order of discharge was in effect an order of dismissal.

Western India Automobile Association v. *Industrial Tribunal, Bombay*, [1949] F.C.R. 321, followed.

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Held, further, that in the circumstances of the present case compensation and not reinstatement was the appropriate relief that should have been awarded. The normal rule was that in cases of wrongful dismissal the dismissed employee was entitled to reinstatement but there could be cases where it would not be expedient to follow the normal rule. In the present case the appellant's office was a small one and S occupied a position of some confidence. The appellant was dissatisfied with the work of S and had lost confidence in her. In such a case it would not be fair either to the employer or the employee to direct reinstatement.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 24 of 1959.

Appeal by special leave from the Award dated September 18, 1957, of the Industrial Tribunal, Delhi, in I. D. No. 3 of 1957.

H. N. Sanyal, Additional Solicitor-General of India, Vidya Sagar and *B. N. Ghosh*, for the appellant.

Frank Anthony and *Janardan Sharma*, for the respondents.

1960. April 4. The Judgment of the Court was delivered by

Gajendragadkar J. GAJENDRAGADKAR, J.—This appeal by special leave arises from an industrial dispute between the appellant, Assam Oil Company Ltd., and the respondent, its workmen. The dispute was in regard to the termination of services of Miss P. Scott, one of the employees of the appellant. The respondent alleged that the said termination of Miss Scott's services was illegal and that was one of the points referred to the Industrial Tribunal, New Delhi, for its adjudication. The other point of dispute between the parties was in regard to the quantum and conditions of the payment of bonus for the year 1955-56 to the appellant's workmen. The industrial tribunal has directed the appellant to reinstate Miss Scott and to pay her all the back wages from the date of her dismissal until the date of her reinstatement. It has also ordered that Miss Scott should be paid bonus for the two years in question as specified in the award. The direction for the payment of bonus is not challenged by the appellant; but the validity of the order asking the appellant to reinstate Miss Scott and to pay her the whole of the back wages during the relevant period is questioned before us, and so the main point which calls for

our decision is whether the appellant was justified in terminating the services of Miss Scott, and if not, whether in the circumstances of this case it would be appropriate to direct an order of reinstatement?

The appellant company is chiefly engaged in searching for and refining crude oil and it has a refinery at Digboi in Assam. At New Delhi it has a small office with 3 or 4 employees. Miss Scott was originally in the employment of M/s. Burmah-Shell, New Delhi, as a lady secretary. Her services were lent to the Delhi representative of the appellant company sometime in January, 1954. In September, 1954, the appellant set up its own office at New Delhi and then offered Miss Scott direct employment on the same terms and conditions that governed her employment with M/s. Burmah-Shell. Miss Scott then resigned her service from M/s. Burmah-Shell and joined the appellant as a regular employee in October, 1954. Her appointment was subsequently confirmed on September 1, 1955, on terms and conditions which were communicated to her and which she accepted. One of the terms was that the appointment in question may be terminated on one month's notice on either side.

During the course of her employment Miss Scott did not give satisfaction to the appellant and on many occasions she was verbally warned to improve her work and not to repeat her lapses. On February 26, 1957, Mr. Gowan, the Delhi representative of the appellant, warned Miss Scott in writing about her lapses and added that he did not consider her work satisfactory. He told her to strive to improve her work and mend matters failing which he would have to consider whether she was suitable to continue in the appellant's employment. On February 28, 1957, the services of Miss Scott were terminated by Mr. Gowan and she was told that the faults pointed out to her had not been corrected and that her performance during her service had not matched up to the standard required. Miss Scott was given one month's pay in lieu of notice and she accepted it. At the time when her services were terminated Miss Scott used to receive the total remuneration of Rs. 535 per month.

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On March 13, 1957, Miss Scott made a representation to the Conciliation Officer, New Delhi, against the termination of her services, and it is out of the proceedings taken by the Conciliation Officer on this representation that the present dispute ultimately came to be referred to the industrial tribunal for adjudication. The union of the appellant's workmen which sponsored her case alleged before the tribunal that the termination of Miss Scott's services was wrongful and illegal and she was entitled to reinstatement. It was urged on her behalf that no enquiry was held by the appellant before terminating Miss Scott's services and that made the impugned termination illegal and unjustified. A claim for bonus for the years 1955 and 1956 was also made on her behalf.

The appellant resisted this claim. It was urged by the appellant that the dispute was an individual dispute and as such the reference was incompetent. It was alleged that Miss Scott was not a workman under s. 2(s) of the Industrial Disputes Act, 1947 (hereinafter called the Act), and so the tribunal had no jurisdiction to deal with the dispute. On the merits the appellant's case was that it had purported to terminate the services of Miss Scott in terms of the contract after paying her one month's wages in lieu of notice, and that the industrial tribunal would not be justified in interfering with such an order.

The tribunal has held that Miss Scott was a workman under s. 2(s) and since the union had sponsored her cause the dispute was an industrial dispute under s. 2(k) of the Act. According to the tribunal the termination of Miss Scott's services in substance amounted to dismissal for misconduct, and since no enquiry had been held it was illegal and unjustified. On the merits the tribunal took the view that even if Miss Scott had been guilty of some negligence the punishment of dismissal was unduly severe. The tribunal also observed that in dismissing her Mr. Gowan was influenced by the consideration that Miss Scott had become a member of the union and that was substantially responsible for her dismissal. It is on these findings that the tribunal has passed an order of reinstatement.

In the present appeal the learned Additional Solicitor-General has raised two points before us. He contends that the appellant has terminated the services of Miss Scott in pursuance of the terms of the contract and an order of discharge passed strictly according to the contract cannot be questioned before the industrial tribunal. Alternatively he argues that even if the order of discharge is found to be unjustified because no enquiry was held the whole evidence relating to the alleged misconduct of Miss Scott has been led before the tribunal and in the light of the said evidence the order of discharge should not have been interfered with and reinstatement should not have been ordered. At the highest it may be a case for awarding compensation and no more. The other findings recorded by the tribunal against the appellant have not been challenged in the present appeal.

The wide scope of the jurisdiction of industrial tribunals is now well established. As early as 1949 it was held by the Federal Court in *Western India Automobile Association* v. *Industrial Tribunal, Bombay* (1) that the argument based upon the sanctity and the validity of contracts between the employer and the employees "overlooks the fact that when a dispute arises about the employment of a person at the instance of a trade union or a trade union objects to the employment of a certain person, the definition of industrial dispute would cover both those cases. In each of those cases, although the employer may be unwilling to do so, there will be jurisdiction in the tribunal to direct the employment or non-employment of the person by the employer. This is the same thing as making a contract of employment when the employer is unwilling to enter into such a contract with a particular person". It was also observed that the industrial tribunal "can direct in the case of dismissal that an employer or employee shall have the relation of employment with the other party, although one of them is unwilling to have such relation" (p. 337). In other words, the jurisdiction of the industrial tribunal to direct reinstatement of a discharged or dismissed employee is no longer in doubt. That being the nature and extent of the juris-

(1) [1949] F.C.R. 321, 336.

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diction of the industrial tribunal it is too late now to contend that the contractual power of the employer to discharge his employee under the terms of the contract cannot be questioned in any case.

If the contract gives the employer the power to terminate the services of his employee after a month's notice or subject to some other condition it would be open to him to take recourse to the said term or condition and terminate the services of his employee; but when the validity of such termination is challenged in industrial adjudication it would be competent to the industrial tribunal to enquire whether the impugned discharge has been effected in the *bona fide* exercise of the power conferred by the contract. If the discharge has been ordered by the employer in *bona fide* exercise of his power then the industrial tribunal may not interfere with it; but the words used in the order of discharge and the form which it may have taken are not conclusive in the matter and the industrial tribunal would be entitled to go behind the words and the form and decide whether the discharge is a discharge simpliciter or not. If it appears that the purported exercise of the power to terminate the services of the employee was in fact the result of the misconduct alleged against him then the tribunal will be justified in dealing with the dispute on the basis that despite its appearance to the contrary the order of discharge is in effect an order of dismissal. The exercise of the power in question to be valid must always be *bona fide*. If the *bona fides* of the said exercise of power are successfully challenged then the industrial tribunal would be entitled to interfere with the order in question. It is in this context that the industrial tribunal must consider whether the discharge is *mala fide* or whether it amounts to victimisation or an unfair labour practice, or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in *bona fide* exercise of the power conferred by the contract. In some cases the employer may disapprove of the trade union activities of his employee and may purport to discharge his services under the terms of the contract. In such cases, if it appears that the real reason

and motive for discharge is the trade union activities of the employee that would be a case where the industrial tribunal can justly hold that the discharge is unjustified and has been made *mala fide*. It may also appear in some cases that though the order of discharge is couched in words which do not impute any misconduct to the employee, in substance it is based on misconduct of which, according to the employer, the employee has been guilty; and that would make the impugned discharge a punitive dismissal. In such a case fairplay and justice require that the employee should be given a chance to explain the allegation weighing in the mind of the employer and that would necessitate a proper enquiry. Whether or not the termination of services in a given case is the result of the *bona fide* exercise of the power conferred on the employer by the contract or whether in substance it is a punishment for alleged misconduct would always depend upon the facts and circumstances of each case. In this connection it is important to remember that just as the employer's right to exercise his option in terms of the contract has to be recognised so is the employee's right to expect security of tenure to be taken into account. These principles have been consistently followed by industrial tribunals and we think rightly (Vide: *Buckingham and Carnatic Company Ltd.* v. *Workers of the Company* (2). Therefore we are not prepared to accede to the argument urged before us by the learned Additional Solicitor-General that whenever the employer purports to terminate the services of his employee by virtue of the power conferred on him by the terms of contract, industrial tribunals cannot question its validity, propriety or legality.

In the present case there is no doubt that the order of discharge passed against Miss Scott proceeds on the basis that she was guilty of a misconduct. As we have already pointed out Mr. Gowan communicated to her what he thought were grave defects in her work and in the letter of discharge itself the same allegations are made against her. That being so, it must be held that the discharge in the present case is

(2) [1952] L.A.C. 490.

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punitive. It amounts to a punishment for alleged misconduct and so the tribunal was right in holding that the appellant was not justified in discharging Miss Scott without holding a proper enquiry.

It, however, appears that evidence has been led by the appellant before the tribunal in support of its case that Miss Scott was guilty of dereliction of duty on several occasions which justified her dismissal. Mr. Gowan has given evidence about the quality and standard of Miss Scott's work and he has sworn that a long series of instances of bad work and failure to carry out orders, insolence and untruthfullness had come to his notice. On one occasion the letter typed from a draft had been incorrectly typed and more than a complete paragraph had been omitted, and in addition Miss Scott told him that she had checked the letter. According to Mr. Gowan she was disobedient to him and he had occasion to warn her verbally several times in the past. It is true that Mr. Gowan has also stated that he knew that Miss Scott had become a member of the union and he thought that a person who was holding a confidential position in his office should not have become a member of the union. The evidence given by Mr. Gowan on the whole appears to be straightforward and it leads to two conclusions: (1) that Mr. Gowan was thoroughly dissatisfied with the work of Miss Scott, and (2) that he did not approve of Miss Scott's conduct in joining the union. Since the latter circumstance has at least partially weighed in the mind of Mr. Gowan in terminating the services of Miss Scott it must be held that the said termination is not justified. It would not be open to an employer to dismiss his employee solely or principally for the reason that he or she had joined a trade union. That is a fundamental right guaranteed to every citizen in this country and it would be idle for anybody to contend that the mere exercise of the said right would incur dismissal from service in private employment. Therefore we are prepared to accept the finding of the tribunal that the dismissal of Miss Scott is not justified.

That raises the question as to whether reinstatement can be ordered in the present case. There is no doubt

that the normal rule is that in cases of wrongful dismissal the dismissed employee is entitled to reinstatement; but there can be cases where it would not be expedient to follow this normal rule and to direct reinstatement. In the present case the appellant's office is very small and Miss Scott undoubtedly occupied a position of some confidence with Mr. Gowan. The warnings given by Mr. Gowan to Miss Scott from time to time clearly bring out his dissatisfaction with her work, and if Mr. Gowan has sworn that he has lost confidence in Miss Scott it would be unfair to hold that the loss of confidence is due solely or substantially because Miss Scott joined the union of the appellant's workmen. It is no doubt true that the effect of the employer's plea that he has lost confidence in the dismissed employee cannot ordinarily be exaggerated; but in the special circumstances of this case we are inclined to hold that it would not be fair either to the employer or to the employee to direct reinstatement.

It appears that subsequent to her dismissal and in spite of it Miss Scott found employment with Parry & Company and Nestles Products (India) Ltd., between May 19, 1958 to October 31, 1958 and December 1, 1958 to November 30, 1959, respectively. The first of the said two companies paid her Rs. 500 per month except for October when she was paid Rs. 525 and the latter company has paid her Rs. 500 per month except for November when her salary was Rs. 525 and for December and January when she was paid Rs. 15 per day. Besides she has received from the appellant Rs. 2,700 as subsistence allowance during the pendency of the present appeal. We are, therefore, satisfied that it would be fair and just to direct the appellant to pay a substantial amount of compensation to her. The learned Additional Solicitor-General has agreed to pay Rs. 12,500 in addition to Rs. 2,700 which have been already paid to her as subsistence allowance. We think that in the circumstances of this case the amount of Rs. 12,500 represents a fair amount of compensation on the payment of which the order of reinstatement passed by the tribunal should

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be set aside. We would accordingly set aside the order of reinstatement and direct that the appellant should pay to Miss Scott Rs. 12,500 as compensation. The order in respect of bonus has not been challenged and is confirmed. There will be no order as to costs.

Appeal partly allowed.

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April 6.

THE STANDARD-VACUUM REFINING CO. OF INDIA LTD.

v.

ITS WORKMEN AND OTHERS.

(P. B. GAJENDRAGADKAR, K. N. WANCHOO and K. C. DAS GUPTA, JJ.)

Industrial Dispute—Abolition of contract system of labour—Dispute raised by regular workmen of company—Reference to Tribunal, if competent—Industrial Disputes Act, 1947 (14 of 1947), ss. 2 (k), 10.

A dispute was raised by the respondents, the workmen of the appellant company, with respect to contract labour employed by it for cleaning maintenance work at the refinery including premises and plant belonging to it. They made a demand for abolition of the contract system and for absorbing the workmen employed through the contractors into the regular service of the company. The matter was referred to the Tribunal under s. 10 of the Industrial Disputes Act, 1947. The company objected to the reference on the grounds (1) that it was incompetent inasmuch as there was no dispute between it and the respondents and it was not open to them to raise a dispute with respect to the workmen of some other employer, viz., the contractor, and (2) in any case, it was for the company to decide what was the best method of carrying on its business and the Tribunal could not interfere with that function of the management. The Tribunal held that the reference was competent and on the merits it was of opinion that the work which was being done through the contractor was necessary for the company to be done daily, that doing this work through annual contracts resulted in the deprivation of security of service and other benefits, privileges, leave, etc., of the workmen of the contractor and that therefore the contract system with respect to this work should be abolished:

Held, (1) that the dispute in the present case was an industrial dispute within the meaning of s. 2(k) of the Industrial Disputes Act, 1947, as interpreted in *Workmen of Dimakuchi Tea Estate* v. *The Management of Dimakuchi Tea Estate*, [1958],