

-9-

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.1828/2000

New Delhi this the 25th day of May, 2001.

HON'BLE MR. V.K. MAJOTRA, MEMBER (ADMNV)
HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

Ms. Pratibha Lalwani,
Commissioner of Income Tax,
C/o Km. Shanta Vashist,
B-125, Sarvodaya Vihar,
New Delhi.

...Applicant

(By Advocate Shri Rahul Srivastava)

-Versus-

1. Union of India through
the Secretary,
Department of Revenue,
(Central Board of Direct Taxes),
Ministry of Finance,
North Block, New Delhi.
2. Chairman of Central Board
of Direct Taxes,
New Delhi.

...Respondents

(By Advocate Shri V.P. Uppal)

ORDER

By Mr. Shanker Raju, Member (J):

The applicant, a Commissioner of Income Tax has assailed an order dated 1.11.99, whereby her request made on 7.7.97 for voluntary retirement under FR 56 (k) has been accepted by the President, resulting in the retirement of the applicant w.e.f. 4.7.97, as requested by her and further the period of absence w.e.f. 5.6.91 to 4.7.97 has been treated as dies non.

2. The applicant on account of her illness having various disorders proceeded on leave w.e.f. 5.6.91 and had remained on leave till 1996 upto a maximum period of five years as admissible to a Government servant. During this intervening period through various orders the respondents sanctioned her extraordinary leave on medical

(2)

grounds w.e.f. 5.6.91 to 29.10.92, 24.10.92 to 30.4.93, 1.5.92 to 31.8.93 and 1.9.94 to 29.2.96. The condition of the applicant had not improved and lastly she was granted extraordinary leave on private affairs w.e.f. 1.3.96 to 4.6.96 and the period from 5.6.96 to 4.7.97 was treated as dies-non. The applicant vide a letter dated 7.7.97 in responding to a letter of the respondents dated 24.6.97 exercised her option for voluntary retirement under FR 56 (k) on account of health reasons it had been requested to accept the voluntary retirement w.e.f. 4.7.97. Nothing was heard to his requested for voluntary retirement and with the passage of time as the applicant was declared fit to join duties she made a request on 5.8.98 for seeking permission to withdraw the request for voluntary retirement. Thereafter the applicant was asked to appear before a Medical Board on 5.5.99 by the respondents for the purposes of Rule 19 (3) of the CCS (Leave) Rules and also for the purposes of his request for withdrawal of voluntary retirement. The applicant appeared before the Medical Board and has stated to be declared fit to join duties by the Board.

3. The applicant has challenged the action of the respondents on the ground that as much before acceptance the applicant has made a request for withdrawal of the voluntary retirement as such his earlier request for voluntary retirement should not have legally been acted upon. It is further contended that in furtherance of her request for consideration for withdrawal of application for voluntary retirement the applicant has been asked to undergo a medical examination by the Board which clearly establishes that the respondents had not acted upon the

(3)

request for voluntary retirement. It is further contended that once the period of absence has been treated as leave of the kind due the same has been illegally treated as dies non, without issuing a show cause notice to the applicant. The learned counsel of the applicant contended that his case is covered by the ratio laid down by the Apex Court in a number of cases. It is further contended that the applicant has not been relieved, as such the effective date of acceptance of voluntary retirement would be 1.11.91 and before that the applicant had already withdrawn the request for voluntary retirement. The following cases have been relied upon by the applicant:

(i) Balram Gupta v. Union of India & Others, 1987 (Supp) SCC 228. In this case the petitioner had offered for voluntary retirement vide letter dated 24.12.80 to be effective w.e.f. March, 31 and in the meanwhile, he changed his mind and made a request to withdraw the notice of voluntary retirement by letter dated 31.1.81. In this conspectus it has been held that the notice for voluntary retirement can be withdrawn at any time before it becomes effective, as the same has to take effect from a prospective date, as such the petitioner therein has locus poenitentiae to withdraw the same.

(ii) Power Finance Corporation Ltd. v. Pramod Kumar Bhatia, 1997 (4) SCC 280. In this case the petitioner had made a conditional request for voluntary retirement and it has been held that unless the employee is relieved of the duty after acceptance of the notice of voluntary retirement, jural relationship of the employee

(4)

and the employer does not come to an end and as the order of voluntary retirement was conditional one, the conditions are to be fulfilled.

(iii) J.N. Srivastava v. Union of India & Anr., 1998 (9) SCC 559. In this case the notice of voluntary retirement was given on 3.10.89 to be effective from 31.1.90. The withdrawal was made on 11.12.89 which was held permissible as made before the effective date of 31.1.90 and in case where the voluntary retirement notice is accepted by the authorities within the time fixed before the date of retirement is reached the employee has a right to withdraw the proposal.

(iv) Shambhu Murari Sinha v. Project & Development India and Anr., 2000 (5) SCC 621. In this case the application was made for voluntary retirement on 18.10.85 and was accepted on 30.7.97. The petitioner therein was relieved on 26.9.97 but before this date his application dated 18.10.95 was withdrawn on 7.8.97. It was in this conspectus held that the effective date of voluntary retirement on 26.9.97 and the withdrawal which was made before this date is permissible as the employee has not been relieved and was allowed to continue in service till 26.9.97.

4. Placing reliance on these ratio it is contended that what matters is the effective date of retirement and in the instant case as before acceptance i.e., on 1.11.99 the request of voluntary retirement the applicant has already withdrawn the same vide communication dated 5.8.98 and as such the retirement could not have been

(5)

accepted retrospectively and during this intervening period the applicant was not relieved and this is clear from that fact that no orders relieving the applicant were communicated to the applicant and rather on his request for withdrawal which is not permissible in a case where the person has retired. It is also contended that even during leave the jural relationship of the employee and employer subsists.

5. On the other hand, the respondents in their reply contended by resorting to rule 56 (k) (2) that a Government servant who has elected to retire shall be precluded from withdrawing his election subsequently except with the approval of such authority and this request should have been made within the intended date of retirement. As the notice for voluntary retirement was not of three months but rather under FR 56 (k) (b) that the request for curtailment of the period of notice the same has been made effective from the date from 4.7.97 as requested by the applicant and as such from that date she is deemed to have been accorded permission to retire and subsequently his withdrawal would be of no avail. It is further contended that no approval has been accorded by the respondents to the applicant for withdrawal of her request for voluntary retirement and the medical examination has been ordered only with a purpose to regularise the absence period of the applicant for the purpose of calculating her retiral benefits. It is also contended that the matter was referred to the DOPT as her leave had gone beyond the prescribed maximum limit of five years and as per Rule 12 of the CCS (Leave) Rules and FR 18 she is not entitled for leave beyond the period of five years. On the advice of

(6)

the DOPT the period of absence was treated as dies non w.e.f. 5.6.96 to 4.7.97, as extraordinary leave cannot run concurrently during the notice under FR 56 (k). As the DOPT has left the decision upon the respondents either to allow her voluntary retirement or to proceed against her for unauthorised absence the second option was exercised by the respondents. It is contended that the applicant had approached this Tribunal without awaiting for the outcome of the representation made to the respondents on 18.5.2000. It is contended that as desired by the applicant she had been retired under FR 56 (k) with immediate effect curtailing the period of notice w.e.f. 4.7.97. It is contended that her request for voluntary retirement was made on the basis of her letters and communication expressing her desire on account of medical severe illness and on the medical grounds. As before taking a decision and allowing her to retire voluntarily it was incumbent to take a decision on her absence the approval of the competent authority to accord leave for more than five years was necessary as such the decision to voluntary retire the applicant was not taken immediately. The conduct of the applicant was somehow strange that before making a request for withdrawal of request of voluntary retirement vide letter dated 1.7.98 the applicant had requested that her voluntary retirement may be acceded to. It is contended that withdrawal of voluntary retirement cannot be done without approval of the appointing authority and there was no approval by the appointing authority to this regard and the same was also not made within the prescribed time limit. It is contended that instead of taking a disciplinary action against the applicant her request for voluntary retirement was acceded to. It is

(7)

denied that any decision was taken by the authority to allow her to withdraw her notice of voluntary retirement by subjecting her to the medical board. As regards the ratio of the Apex Court cited by the learned counsel of the applicant it is contended that in all these cases statutory provisions of FR are not in issue and further the cases are distinguishable as in all these cases either the effective date had not reached when the request for withdrawal was made or the notice of the voluntary retirement was conditional.

6. We have carefully considered the rival contentions of the parties and have also perused the material on record.

7. Before proceeding to resolve the controversy in the present case it is necessary to highlight the provisions of FR 56 (k), which are reproduced hereunder:

(k)(1) Any Government servant may by giving notice of not less than three months in writing to the appropriate authority retire from service after he has attained the age of fifty years, if he is in Group 'A' or Group 'B' service or post, (and had entered Government service before attaining the age of thirty-five years), and in all other cases after he has attained the age of fifty-five years:

Provided that-

(a) Not printed (Since Clause (e) has been Omitted).

(b) nothing in the clause shall also apply to a Government servant, including scientist or technical expert who (i) is on assignment under the Indian Technical and Economic Co-operation (ITEC) Programme of the Ministry of External Affairs and other aid Programmes, (ii) is posted abroad in a foreign based office of a

(8)

Ministry/Department and (iii) goes on a specific contract assignment to a foreign Government unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year, and

(c) it shall be open to the appropriate authority to withhold permission to a Government servant under suspension who seeks to retire under this clause.

(1-A) (a) A Government servant referred to in sub-clause (1) may make a request in writing to the appointing authority to accept notice of less than three months giving reasons therefor;

(b) On receipt of a request under sub-clause (1-A) (a), the appointing authority may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the Government servant shall not apply for commutation of a part of his pension before the expiry of the period of three months.

(2) A Government servant, has elected to retire under this rule and has given the necessary intimation to that effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority:

Provided that the request for withdrawal shall be within the intended date of his retirement.

8. The contention of the learned counsel of the applicant placing reliance on the ratio referred supra that as the request for voluntary retirement has not been accepted and before that the applicant had by her letter dated 5.8.98 has withdrawn the request for voluntary retirement and as such before the effective date of acceptance of voluntary retirement w.e.f. 1.11.99 the same would not take effect and the applicant would be deemed to

(9)

be in service is liable to be rejected on the ground that the rules i.e. FR 56 (K) pre-requisites giving notice of not less than three months and this has to be curtailed if a request to that effect is made, by giving reasons in the letter of voluntary retirement. The applicant who had been running absent for more than six years had been continuously writing and showing her intentions to the competent authority to either resume duty or to forward the application for resignation. In her communication dated 12.1.96 it has been categorically written to the authorities that she is seeking further leave till the end of February, 1997 and by that time if she is not declared fit shall seek voluntary retirement. The competent authority had written letter regarding her absence to her and in response to one of it the applicant voluntarily by her letter dated 7.7.97 had requested the authorities to consider her case on humanitarian grounds and also medical grounds have been assigned. It is in this letter it has been further requested that the voluntary retirement had made effective from 4.7.97. The applicant thereafter also on 1.7.98 had reiterated her request for voluntary retirement. In our view the voluntary retirement of the applicant has become effective w.e.f. 4.7.97 as desired by her in her letter dated 7.7.97. The subsequent action of the applicant to withdraw the request for voluntary retirement will not be acted upon as per the FR which holds the field. A Government servant is precluded from withdrawing his election subsequently without any specific approval of such authority and this request for withdrawal shall have to be made within the intended date of his retirement. In the instant case admittedly there was no specific approval given by the competent authority to

(10)

withdraw the notice for voluntary retirement and also the fact that the request was made beyond the intended date of his retirement. According to the rules the retirement would have taken effect w.e.f. 4.7.97 and the request for withdrawal should have been made before that date as the notice for voluntary retirement and the effective date was not prospective the voluntary retirement had taken effect from the intended date of 4.7.97. The request for withdrawal has not been in consonance with the provisions of FR 56 (k) (2). Apart from it, we are of the confirmed view that if nothing has been heard from the Government in response to the notice for voluntary retirement the same would be effective from the intended date given in the notice. In the event the notice was of not less than three months in absence of any decision by the Government the same would be effective from the expiry of three months, but, as in the instant case the notice period on health grounds is requested to be curtailed by giving the effective date of 4.7.97 the retirement had taken effect from that date and as no request has been made for withdrawal before that date the same would not be legally justifiable in accordance with FR 56 (k).

9. As regards the contention of the applicant that in pursuance of his application for withdrawal dated 5.8.98 she has been asked by the department to undergo medical examination wherein it is stated that the same would be for the purposes of leave and request for withdrawal of application for voluntary retirement shows that the respondents have yet to take a final view in the matter of voluntary retirement and his request made on 7.7.97 it had not been acted upon till that date is

concerned, we are inclined to go alongwith the respondents and of the confirmed view that the medical examination has been done for the purpose of regularising the absence period of applicant as she has been absent from duty for a long period of more than five years. Even if the applicant has been declared fit by the Medical Board that would not automatically entailed her to be entitled for restoration keeping aside the request for voluntary retirement. As we find that the applicant has has exceeded the limit of five years as per Rule 12 of the CCS (Leave) Rules, the DOPT advised to treat the period as dies non w.e.f. 5.6.91 to 4.6.97 as the same cannot run cocurrently to the notice of voluntary retirement. The respondents took a decision to retire her voluntarily treating the period as dies non instead of proceeding her for unauthorised absence. There was no decision by the respondents for allowing her to withdraw the notice of voluntary retirement and despite on medical examination the same was not accepted by the Department. The resort of the applicant to the ratio of Apex Court would be of no avail to her as in the case of Balram Gupta (supra) the notice period was on a prospective date and before expiry of that period the request for withdrawal was made. As such the applicant had locus penitentiae but in the instant case the request of the applicant was not from a prospective date but was from an anterior date as such he could not have withdrawn the notice for voluntary retirement. In the case of Pramod Kumar Bhatia (supra) the question was of relieving of duties after acceptance of the offer of voluntary retirement. As the voluntary retirement was conditional on payment of certain amount the outstanding dues made the voluntary retirement ineffective. In the instant case

notice for voluntary retirement is not a conditional one and rather is an absolute unconditional. In the cases of Shambhu Murari Sinha and J.N. Srivastava (supra) the employees locus poenitentiae as the date of retirement was prospective which is not existing in the present case. Lastly, the case of Shambhu Murari Sinha (supra) would not be applicable to the facts of the present case as in that case the acceptance of voluntary retirement would have ensured release of the concerned employees under the circulars of management as the applicant was not relieved from service despite giving his option on 18.10.85 the effective date was made was treated as 26.9.97 and before that the letter for withdrawal has been served upon the management. But in the instant case the effective date is not when the applicant is relieved but it is 4.7.97 as requested by the applicant and acted upon by the respondents. The contention of the applicant that if the notice for voluntary retirement is not accepted and before that the request for withdrawal has been made would be of no avail to him as the effective date as laid down under FR 56 (k) is either the expiry of three months from the date of the intended notice or from the date intended after curtailment of period of notice which is 4.7.97 in the case of the applicant and as no request for withdrawal was made before that date the notice for voluntary retirement has been made rightly effective and accepted w.e.f. 4.7.97 vide an order dated 1.11.99. Merely because the notice for voluntary retirement has been accepted on 1.11.99 would not have given a right to the applicant to contend that the notice for voluntary retirement has not been acted upon by the respondents at the time when it was tendered to them and subsequently they are stopped from accepting the same

(13)

particularly when the request for withdrawal has been made during the intervening period. The decision of the respondents is in conformity with FR 56 (k) and the withdrawal of the applicant is not in accordance with FR 56 (k) (2) and cannot be legally acted upon by the respondents. As such we are of the confirmed view that the request of the applicant for withdrawal has been made after the effective date, i.e., 4.7.97 and as such the same is not legally tenable under the rules *ibid*, as there was no approval by the competent authority to withdraw the voluntary retirement the same has been made effective rightly by the respondents w.e.f. 4.7.97 vide an order passed on 1.11.91. We find no fault in the order impugned.

10. As far as the contention of the applicant that the period from 5.9.91 to 4.7.97 has been treated as *dies non* without issuing a notice and affording reasonable opportunity to the applicant is concerned, we find that the period from 5.6.91 to 4.6.96 had already been regularised by according EOL to the applicant on medical grounds as well as private affairs, although the period from 5.6.96 to 4.6.97 has been treated as *dies non* by the respondents but in the order passed on 1.11.99 the period already treated as EOL has been decided by revoking the previous order as *dies non*, is not in conformity with FR 17 and principles of natural justice as *dies non* would amount to break in service causing civil consequences to the applicant which requires a prior notice to the Government servant before taking any action. In this view of ours we are fortified by the ratio laid down by the Apex Court in D.K. Yadav v. J.M.A. Industries Ltd., 1993 SCC (L&S) 723 as well as Bhagwan Shukla v. Union of India & Others, 1995 (2) SLJ

221

(14)

30. We hold the action the, of the respondents by treating the period from 5.6.91 to 4.7.97 as dies non, neither justified nor reasonable.

11. In the result, the OA is partly allowed. Although the order passed by the respondents accepting the voluntary retirement notice of the applicant under FR 56 (k) is not interfered with but the latter part of the action of the respondents treating the period from 5.6.91 to 4.7.97 as dies non is set aside. The respondents are directed to afford a reasonable opportunity to the applicant before taking a decision of regularising this period. The aforesaid directions shall be complied with by the respondents within a period of two months from the date of receipt of a copy of this order. No costs.

S. Raju

(Shaker Raju)
Member (J)

"San."

V.K. Majotra

(V.K. Majotra)
Member (A)