IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

....

DATE OF DECISION: 21/2/92

(1) OA No.1530/89

NIRMAL SINGH ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

(2) O.A. 1219/89

SOM DUTT ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

(3) OA 34/90

ASHWANI KUMAR ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

(4) OA 123/90

A.K. JAIN ...APPLICANT

VERSUS

UNON OF INDIA & OTHERS ...RESPONDENTS

(5) OA 182/90

ASHOK KUMAR SHUKLA ...APPLICANT

VERSUS

UNION OF INDIA ...RESPONDENTS

(6) OA 262/90

HASAN AFSAR KAZMI & OTHERS ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

(7) OA 360/90

AMRISH PURI ...APPLICANT.

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

(8) OA 584/90

SMT. ASHA KHURANA ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

(9) OA 587/90

SUSHIL KUMAR SHARMA ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

(10) OA 395/90

SANJAY MEHTA ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

(11) OA 105/89

V.K. THAREJA ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

S/Shri R.K. Relan, B.S. Mainee, Kulshreshtha, & E.X. Joseph, ...counsel for the Applicants.

S/Shri S.N. Sikka, Romesh Gautam, & O.P. Kshastriya ...counsel for the Respondents.

CORAM:

Hon'ble Justice Shri Ram Pal Singh, Vice-Chairman.

Hon'ble Shri I.P. Gupta, Administrative Member.

J U D G E M E N T

(Delivered by Hon'ble Shri I.P. Gupta)

The issues raised in the aforesaid OAs being similar the Original Applications are being considered together. The applicants were appointed as Junior Accounts Assistant/ Clerk Grade I (Rs.330-550 revised to Rs., 1200-2040) in the Railway Divisions between April, 1985 and May/June, 1986 and one was appointed even on 1.9.1986. They have approached the Tribunal against orders of termination which were either issued or were being issued but stayed by the orders of Tribunal. In case of Nirmal Singh, no

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interim stay order was issued since the termination order had been effected and ante-status quo could not be granted. The termination was being done without any notice as they could not qualify in Appendix II examination of IREM within the prescribed period and within the prescribed chances.

2. The reliefs sought are:-

i) quashing the termination orders and treating the applicants as continuing in service;

ii) grant of more opportunities to appear in Appendix II Examination;

iii) In the event of applicants' failure to pass in 5 attempts, the applicants may be transferred as Sr. Clerk on the executive side by change of category.

3. The learned counsels for the applicants contended that-

i) The applicants had taken either 2 or 3 chances in the Appendix II Examination and their requests for more chances were not acceded to. The Indian Railway Establishment Code contain Statutory rules governing general conditions of service applicable to Railway servants. Rule 217 says that the rules for the recruitment of non-gazetted railway servants are contained in the Indian Railway Establishment Manual and therefore it follows that the rules in IREM assume statutory force. Rule 167 of IREM lays down inter alia that directly recruited clerks, Grade I (applicants were such clerks Grade I) will be on probation for one year and will be eligible for confirmation only after passing the prescribed departmental examination in Appendix II.

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Necessary facilities will be given to them to acquire a knowledge of the rules and procedure. Appendix 2 prescribes the syllabus for exam' which includes papers on Book-keeping, General Rules & Procedure, Accounting etc. Paras 3 & 4 of Appendix 2 read as follows:-

'3. The examination will be conducted by the Head of each Office, who will also decide the intervals at which it should be held.

4 (a) Normally no railway servant will be permitted to take the examination more than thrice, but the Financial Adviser and Chief Accounts Officer may in deserving cases permit a candidate to take the examination for a fourth time, and, in very exceptional cases, the General Manager may permit a candidate to take the examination for the fifth and the last time.

(b) No railway servant, who has less than six months service in a Railway Accounts Office or who has not a reasonable chance of passing the examination will be allowed to appear in the examination prescribed in this Appendix

In exceptional circumstances the condition regarding six months minimum service may be waived by the General Manager.

(c) Temporary railway servants may be permitted to sit for the examination, but it should be clearly understood that the passing of this examination will not give them a claim for absorption in the permanent cadre.

(d) A candidate who fails in the examination but shows marked excellence by obtaining not less than 50% in any subject may be exempted from further examination in that subject in subsequent examination.'

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The rules provide for 3 chances but the 4th and 5th chances could be given by the appropriate authorities in deserving and exceptional cases, but none of the applicants were given more than 3 chances.

ii) The letters offering appointment to the applicants incorporated certain clauses viz:

(a) They would be on probation for one year and would be confirmed only after passing the prescribed examination in Appendix II of Rule 167 of IREM

(b) During probation 6 months' training would have to be undergone

(c) If the candidate does not pass Appendix II examination in two chances within 3 years of service or if his progress is not satisfactory, his services would be terminated.

(d) During probation services can be terminated with 14 days' notice from either side.

Thus the learned counsels contend that Condition (c) is not in confirmity with Rule 167 Appendix 2 quoted earlier and is stricter. Further the applicants were either not given any training or were given training for ½ day for 3 months. No notice for the termination was given.

iii) According to Rule 301 of IREC, temporary railway servants with over 3 years continuous service shall be entitled to a months notice but in the cases of the applicants, one month's notice was not given.

iv) Four chances have been given in some cases even as late as 1990. The cases of Shri N.C. Walia and Shri R.K. Sood were cited. Five chances were availed of by Shri Attar Singh and Shri Iqbal Ahmad.

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v) Appointments of all applicants were made prior to 3.9.86 by which instructions dated 24.6.1986 were circulated. These instructions laid down inter alia that in respect of directly recruited Clerk Grade I, the Railways/Units should ensure that two clear chances to appear in the Appendix 2 (IREM) examination within 3 years of their service should be made available duly taking into consideration the training period involved. After their training is over, the employees should be made to appear in two examinations within 3 years from the date of their appointment. Those who have availed of 2 chances within 3 years and who still apply for a third chance, within or beyond 3 years, their cases if found justified could be referred to the Board. The other clauses of the instructions mentioned:-

(c) In respect of candidates who did not avail of any chance within three years of service, on medical grounds, involving request for leave of absence supported by Sick Certificate from the Railway Doctor, in spite of the examinations having been conducted during that period, request for grant of chance after completing of three years of service, will be considered by the Board only on the basis of the personal approval of the FA&CAO concerned and if the case is otherwise found to be justified.

(d) In case the employee did not appear in the earlier Examinations within three years due to genuine health reasons duly supported by proper Railway Medical Certificate, and a chance was granted by the Board after completion of three years of service, vide (c) above, which was availed by the emloyees requests for grant of one more chance, i.e., the second chance after three years service may be referred to the Railway Board, with the personal approval of the General Manager. It is felt that instances of such cases, as also

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of those dealt with the (c) above would be extremely rare as for example on occasion of maternity leave taken by female employees. However, such cases may be recommended in such a manner that the employees will have an opportunity to appear in the examination within one year thereafter i.e. within a total span of four years from the date of appointment.

(e) Merely absenting in the two examinations held within three years of service will not amount to chance 'Not counted' and no reference should be made to the Board for additional chance, and the employee's service should be terminated without any reference to Board and in terms of extant orders.

The learned counsel for the applicants contended that Appendix 2 of IREM allowed 3 normal chances and the 4th and 5th in the discretion of authorities specified and instructions of 24.6.1986 could not override the provisions of the manual which had statutory force and moreso when the instructions were subsequent to the appointments. Even the offers of appointment which provided similar conditions of two chances in 3 years could not be against the provisions of the rules.

vi) Some of the applicants' were appointed or compassionate ground and in the case iof Raj Bir Singh Vs. G.M. N.R. etc. (OA 1742/89 decided ion 11.1.90 where the applicant had been given three chances, the Bench held that while he cannot claim, as of right, that he should be retained as Clerk Grade I in the Accounts Deptt., the termination would run counter to the very purpose of appointing the applicant on compassionate grounds. The termination order was quashed and the respondents were directed to allow the applicant to continue to work as a temporary Clerk Grade I in the Accounts Department till an alternative job commensurate with his qualification and experience was given to him.

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vii) There have been instances where Clerk Grade I on Accounts side were allowed to change category as Senior Clerk in same scale even subsequent to Railway Board's instructions of 24.6.1986 after not qualifying in 3/4 chances. The cases of Alka Sahani, Sharda Singh, R.K. Shrivastav, Harjit Singh & Km. Neeru Nighawan were quoted. Orders dated 9.5.1989 regarding change of category by Harjeet Singh and Km. Neeru Nijhawan and dated 14.6.89 in respect of R.K. Shrivastav were also shown.

viii) The CAG of India in 1987 by order dated 31.3.87 i.e. after Railway Board's instructions of 26.6.1986 ordered that directly recruited auditors in the scale of Rs.330-560/1200-2040 the chances of departmental examination stood increased from 4 to 6 to enable staff to pass confirmatory examination. The Department is no doubt different but the employees in Railways hold similar posts and perform similar functions. On 24.11.1988 the All India Railwaymen Federation in the light of CAG's decision of 31.3.1987 represented to the Railway Board for enhancing the number of chances to six on the same analogy and the matter is still under the consideration of Railway Board. But the service of the employees have been ordered to be terminated. For not passing the Appendix 2 examination their annual increments already stood stopped and termination orders resulted in double jeopardy.

The learned counsel for the respondents argued that-

i) The applicants had training even as CG II in the same syllabus. Therefore training was curtailed to 3 months. In the case of Nirmal Singh he did not apply through proper channel and so the question of training did not arise. Had he passed the confirmation examination in 1986 he would have asked for confirmation without undergoing training.

2) No candidate was given more than 3 chances after the instructions of 26.6.1986 or for that matter even after 1983.

3) The appointments of the applicants were subject to the conditions in the appointment letter and the services were terminated in terms of these conditions. On failure to pass the examination within prescribed chances and within prescribed

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period the services were terminable without notice.

4) Rules in para 167 of IREM regarding the number of chances pertained to category CG II and not for CGI.

Analysing the facts and issues involved in these cases, we find that Rule 167 clearly says that Confirmation of directly recruited Clerks Grade I will depend on passing the departmental examination in Appendix 2 to Rule 167. Appendix 2 is therefore squarely applicable. The termination orders were violative of Rule 301 of the IREC (Indian Railway Establishment Code) in case of applicants who were not given one month's notice and who had served continuously for over three years. The appointment letters did say that the services were terminable in the event of failure to pass the confirmatory tests within 3 years in two chances but such terminations without notice against the principles of natural justice and against Rule 301 of IREC cannot be sustained. Further the respondents cannot take the plea that one part of the offer of appointment viz 6 months' training would be imparted during probation was not necessary to be implemented and the other part was mandatory (viz passing of the Confirmatory examination) notwithstanding the provisions of Rule 301 of IREC. Still further, the Railway Board by their letter of instructions dated 24.6.86 cannot vary statutory rules which were not amended. There are a catena of judgements to the effect that administrative order/instructions cannot compete with a statutory rule and if there be contrary provisions in the rules, an administrative instruction must give way and the rule shall prevail (C.L. Verma Vs. State of U.P. - ATJ 1990(1)49 SC; Bindeshwari Ram Vs. State of Bihar - SLJ 1990(1) SC 82; D.P. Gupta Vs. UOI - SLJ 1989 (3) 434 CAT). A somewhat identical case was decided by the Lucknow Bench of the CAT in OA No.115/90

on 31.7.1991 (Raj Kumar Gupta & Anr. Vs. U.O.I. & Ors.) where the order of termination was considered illegal and arbitrary and was quashed and the applicants were deemed to be in continuous service. In the conspectus of the above view of the matter, the termination orders without one month's notice in case of applicants who had served continuously for over three years are quashed and the applicants would be deemed to be in continuous service with no back wages for the periods they have not actually worked as CG I.

It is further observed that para 167 provides that normally no railway servant will be allowed to take the examination more than thrice but the FA&CAO may in deserving cases permit a candidate to take examination fourth time and in very exceptional cases, the General Manager may permit a candidate to take examination for the fifth and the last time. In the instant cases, the applicants were not given the opportunity beyond three chances. The learned counsels for the respondents had brought out that after 1983 none had been given more than 3 chances. This was controverted by the learned counsels for the applicants who cited cases, as mentioned earlier, where more than three chances were given. Therefore, we would direct the respondents to consider each case on merit with a view to determining whether more chances should be given. This would also be in keeping with the directions given by the Lucknow Circuit Bench in OA No.86/90 decided on 31.7.1991 (R.S. Panu & Ors. Vs. U.O.I. & Ors.)

Still further it is observed that notwithstanding the Railway Board's instructions dated 24.6.1986 which had mentioned that in cases where the employees did not qualify in the examination even after availing of chances

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referred to their services as CGI should be terminated and in case the employees so requested their cases for appointment as CGsII as fresh entrants in the Accounts Department would be considered, there have been instances as brought out earlier in this order where CGI on Accounts side were allowed to change category as Senior Clerk in same pay scale after not qualifying in 3/4 chances. Therefore we direct that the cases of the applicants should also be considered for change of category.

To sum up the directions are-

1) The termination orders without one months' notice in case of applicants who had served continuously for over three years are quashed and the applicants would be deemed to be in continuous service with no back wages for any periods they have not actually worked as CGI;

2) The respondents should consider each case on merit to determine whether more chances should be given for passing the confirmatory examination; and

3) The respondents should consider the cases of the applicants for change of category in the same scale of pay. In cases where any additional chance for confirmatory examination on accounts side is given in pursuance of (2) above, the change of category should be considered thereafter. These directions should be complied with as early as possible.

With the aforesaid directions, the OAs are disposed of and interlocutary orders passed would stand merged into these directions.

प्रमाणित सत्यप्रतिलिपि
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(I.P. GUPTA)
ADMINSTRATIVE MEMBER

21/2/92
अनुभाग अधिकारी/Section Officer
केन्द्रीय प्रशासनिक अधिकरण
Central Administrative Tribunal
प्रधान न्यायपीठ, नई दिल्ली
Principal Bench, New Delhi

(RAM PAL SINGH)
VICE CHAIRMAN(J)