

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

UNION 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

To 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.

JUDGEMENT

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

The issues raised in the aforesaid OAs being similar
in nature, the same are being decided together.

The applicants were appointed as Junior Accounts Assistant/
Grade II (Rs.330-550 revised to Rs. 1200-2040) in
various Railways 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.'

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.

before finally The letters offering appointment to the applicants to the job incorporated certain clauses viz:

(a) They would be on probation for one year and final confirmation 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 joining services 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 conformity with Rule 167 Appendix 2 quoted earlier and is stricter. Further the applicants were either not given any training or were given training for $\frac{1}{2}$ 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 month's 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 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 should be made 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 themselves 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 completion 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 employees 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

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 more so 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, ~~as regards~~

vi) Some of the applicants' were appointed or compassionate ground and in the case of ^{decided} ~~not~~ Raj Bir Singh Vs. G.M. N.R. etc. (OA 1742/89 decided on 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 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 & Scedt at Hav. Km. Neeru Nighawan were quoted. Orders dated 9.5.1989 regarding change of category by Harjeet Singh and Km. Neeru Nighawan and dated 14.6.89 cases in respect of R.K. Shrivastav were also shown.

viii) The CAG of India in 1987 by order dated 31.3.87 notwithstanding i.e. after Railway Board's instructions of 26.6.1986 itself 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 times service 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 consideration of Railway Board. But the service to not of the employees have been ordered to be terminated for not passing the Appendix 2 examination their annual increments already stood stopped and terminated nation orders resulted in double jeopardy.

The learned counsel for the respondents argued to the effect that to prosecute the Railways nothing was required. 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 to category CG I.

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 conti-

nuously for over three years. The appointment letters

did not 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 appoint-

ment viz. 6 months' training would be imparted during proba-

tion was not necessary to be implemented and the other

part was mandatory (viz. passing of the Confirmatory exami-

nation) 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

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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 passed do not give 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 for the 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, the learned would direct the respondents to consider each case again 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.)

It is observed that notwithstanding another 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
the 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.

It may be noted that the directions are as follows:

- 1) 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 any periods they have not actually
worked as CGI; the OAs and the OAs of the
respondents should be merged into these directions.
- 2) The respondents should consider each case on merit
to determine whether more chances should be given
for passing the confirmatory examination and
placement exercise.
- 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
interlocutory orders passed would stand merged into these directions.

(I.P. GUPTA)

21/2/92

ADMINISTRATIVE MEMBER

(RAMPAL SINGH)

VICE CHAIRMAN (J)