Central Administrative Tribunal, Principal Bench

O.A.No.2134/91

Hon'ble Shri A.V.Haridasan, Vice-Chairman(J)
Hon'ble Shri R.K.Ahooja, Member(A)

New Delhi, this 16th day of January, 1997

Shri Manoj Kumar
s/o Shri Mohinder Singh
r/o Village Mubarakpur Dabas
P.O.Rani Khera
Delhi. ... Applicant

(By Shri Shyam Babu, Advocate)

Vs.

1. The Commissioner of Police
Police Headquarters,
M.S.O.Building, I.P.Estate
New Delhi.

2. The Deputy Commissioner of Police
10th Bn. D.A.P., New Police Lines
Kingsway Camp
Delhi. ... Respondents

(By Shri Rajinder Pandita, Advocate)

O R D E R

Hon'ble Shri R.K.Ahooja, Member(A)

The services of the applicant, who was appointed as Constable in Delhi Police were terminated vide order dated 17.7.1990 (Annexure-A) in terms of proviso to Sub-Rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules 1965. A revision petition was rejected by the Respondent No.1 vide letter dated 20.9.1990 (Annexure B). The applicant alleges that the foundation of the order of termination was, in fact, his alleged misconduct, as pleaded in the counter affidavit, to the effect that he was an indisciplined person and did not take interest in his official duties. The applicant states that this shows sufficient nexus between the order of termination and the alleged misconduct and the respondents were required in terms of Article 311(2) to hold a regular departmental enquiry before termination of his services. The action of the

applicant being merely a camouflage for the disciplinary action, the order of termination is alleged to be arbitrary and unlawful and therefore liable to be set-aside.

2. The respondents in their reply state that the applicant was appointed on 28.7.1988 as a temporary Constable under section 12 of Delhi Police Act, 1978 and his services were terminated by impugned order dated 17.7.1990 (Annexure A) on the ground of general unsuitability, as he was found not likely to become a good police officer in future. They explain that the applicant showed himself to be a habitual absentee having absented himself eight times within a period of less than two years for which he was warned on various occasions verbally. As he did not take interest in the official duties assigned to him and did not mend his ways, his services were terminated. His representation was considered by the Respondent No.1 and the same was also rejected. He preferred an appeal to the Lt. Governor, Delhi which was also rejected and the fact intimated to him. The respondents deny that they were called upon to initiate disciplinary proceedings as the services of the applicant were terminated on the ground of general unsuitability and not due to any specific misconduct.

3. We have heard the learned counsel on both sides. Shri Shyam Babu, learned counsel for the applicant has led us through a number of decisions of the Hon'ble Supreme Court as well as of this Tribunal in support of his contentions, that firstly the order of termination could not be treated as an order simpliciter since it was directly based on the alleged misconduct of the applicant of frequently absenting from duty. The court was obliged to lift the veil and if it was found that such a nexus existed then to conclude the action

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of the respondents to be violative of Article 311(2). Secondly, the learned counsel argues, even if there was such a misconduct as alleged then the default being of a minor and marginal nature, the punishment of termination of services could not be justifiably imposed. He cited the case of Dr. Mrs. Simati P. Shere Vs. Union of India and Others, AIR 1989 SC 1431 wherein it was held that if services of an ad hoc employee are to be discontinued on the ground of unsuitability it is proper and necessary that he should be told in advance that his work and performance are not up to the mark. In the present case, the learned counsel submitted that if the respondents were not satisfied with the performance of the applicant, then he should have been given proper opportunity to improve his performance. We are in perfect agreement with the learned counsel but we find that such an opportunity had been afforded to the applicant. The respondents say in para 4.4 of their reply that not only the applicant was warned but was also awarded on one occasion a punishment of 15 days P.D. for his unauthorised absence. The applicant could not have been any more forcefuly warned than this yet there are atleast four more instances of unauthorised absence from duty thereafter. Learned counsel for the applicant also cited the case of Jarnail Singh and Others Vs. State of Punjab and Others, AIR 1986 SC 1626, in which many of the earlier pronouncements on the subject of termination of temporary services without proper enquiry have also been analysed. In that case ad hoc services of the appellants had been terminated as no longer required but the Court held that since respondents had retained their juniors the impugned order of termination of the services was illegal. The learned counsel for the applicant contended that in the present case also juniors were retained and therefore, obviously the termination was by way of a

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punishment. We are once again unable to agree with the applicant. The facts in Jarinal Singh's case were different inasmuch as the services of all the ad hoc employees were ordered to be regularised, yet the appellants had been left out while their juniors were retained. It was alleged that this had happened due to certain enquiries and allegations against the appelants. In the present case, the purpose of keeping the applicant as a temporary constable was to asses suitability for confirmation and retention in the police service and for this he had to be judged on his own performance and not in relation to those of his juniors. His case is therefore, not covered by the ratio of Jarnail Singh's case(Supra). Learned counsel thereafter cited the case of Governing Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr.Pandurang Godwalkar and Another, AIR 1993 SC 392. It will be useful to quote from the observation of the learned judges of the Hon'ble Supreme Court, at para 6 and 7:

> "Para 6: Generally in connection with an order of termination, a question is raised before the Court as to what is the motive behind the termination of the service of the employee concerned whether the reason mentioned in the order of termination has to be accepted on its face value or the background in which such order of terminationsimpliciter has been passed should be examined to find out aas to whether an officer on probation or holding a temporary appointment has been, in fact, dismissed from the service without initiating any departmental enquiry. If an employee who is on probation or holding an appointment on temporary basis is removed from the service with stigma because of some specific charge, then a plea cannot be taken that as his service was temporary or his appointment was on probation, there was no requirement of holding any enquiry, affording such an employee an opportunity to show that the charge levelled against him is either not true or it is without any basis. But whenever the service of an employee is terminated during the period of probation or while his appointment is on temporary basis, by an order of termination simpliciter after some preliminary enquiry it cannot be held that as some enquiry had been made

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against him before the issuance of order of termination it really amounted to his removal from service on a charge as such penal in nature.

Para 7: When an appointment is made on probation, it presupposes that the conduct, performance, ability and the capacity of the employee concerned have to be watched and examined during the period of probation. He is to be confirmed after the expiry of probation only when his service during the period of probation is found to be satisfactory and he is considered suitable for the post against which he has been appointed. The principle of tearing of the veil for finding out the real nature of the order shall be applicable only in a case where the Court is satisfied that there is a direct nexus between the charge so levelled and the action taken. If the decision is taken, to terminate the service of an employee during the period of probation, after taking into consideration the overall performance and some action or inaction on the part of such employee then it cannot be said that it amounts to his removal from service as punishment. It need not be said that the appointing authority at the stage of confirmation or while examining the question as to whether the service of such employee be terminated during the continuance of the period of probation, is entitled to look into any complaint made in respect of such employee while discharging his duties for purpose of making assessment of the performance of such employee."

4. It is clear from the above that the following criteria has to be followed in determining whether there has been a violation of Article 311(2) in the case of termination simpliciter of the services of a temporary government servant:

(i) "Whether there was any specific allegation of charge against the temporary servant casting a stigma upon him.

(ii) Whether there is a direct nexus between the charge so levelled and the action taken".

The learned counsel for the applicant submitted that there was a charge of habitual absence from duty and stigma was caused because this has been disclosed by the respondents in their counter reply. To us this does not appear to be a correct view of the matter. If a person on probation is discharged obviously he has been found wanting in the eyes of

the employer in some respect or the other. These lack of quality would be exhibited in the work and conduct of the probationer. The services of the applicant in the present case have not been terminated merely because of one particular instance of absence from duty but on the basis of number of such instances spread over a period of almost two years. This proclawity towards unauthorised absence exhibits a trait reflecting and determining his suitability for retention in service. The nexus has to be with the particular instance in order to establish a sequence of action and reaction but termination of services in the present case has not resulted from any one instance of absence but from an impression created by the conduct of the applicant in remaining absent over a period of time. As such the nexus would be between the trait or habit of the applicant and the termination of his services and not by way of punishment on account of one particular instance of absence. We also do not agree with the contention of the learned counsel for the applicant that the reason for termination having now become evident through the counter reply, a stigma has been caused. It is the applicant who has sought the veil to be lifted and the respondents cannot be blamed for stating the facts when called upon to do so by the process of Court. The order of termination (Annexure A) only speaks of termination of services and does not say that his services have been terminated on account of habitual absence from duty or any other such cause. Thus, we find no stigma is shown to be attached by the impugned order.

5. The learned counsel for the applicant sought to counter this by citing the case of State of Haryana and Another Vs. Jagdish Chander, (1995) 2 SCC 567. In that case the respondent a Constable was discharged under Rule 12.21 of

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the Punjab Police Rules, 1934 on the ground that he was a habitual absentee, negligent to his duty and indisciplined. It was held that the findings of habitual absence and indiscipline necessarily cast a stigma on his career and that would be an impediment for any future employment elsewhere. In that case however, the impugned order of discharge specifically enumerated that the official was negligent and that he was unlikely to prove an efficient police officer "because he is an habitual absentee, negligent to his duty and indisciplined". It will be seen that the impugned order in the present case carries no such description of the applicant of being an habitual absentee. There is thus no stigma and hence no violation of Article 311(2). State of Haryana and Another Vs. Jagdish Chander (Supra) is therefore, of no help to the applicant.

6. Learned counsel for the applicant finally cited the case of Malkiat Singh Vs. State of Punjab & Others, JT 1996 (2) S.C. 648 and Mandeep Kumar etc. Vs. State of Haryana and Anr. etc., JT 1995(8) S.C.445 to show that short absence from duty should not be visited with a harsh penalty like termination of services. In the first case of Malkiat Singh the Hon'ble Supreme Court had found that absence may sometimes be inevitable and in the facts and circumstances of the case another opportunity may be given to the official. In the latter case of Mandeep Kumar etc. a fresh opportunity was ordered to be given to improve the performance with the stipulation that in case the official remained absent even on a single occasion during the next two years, his services may be discharged. Learned counsel for the applicant submitted that on the showing of the respondents themselves over a period of two years, the applicant was shown to be an absentee without leave on seven occasions but only on one

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occasion he was absent for two days, and on another for one day, while in the remaining cases, the absence was only in hours. Learned counsel for the applicant submitted that the same condition could be imposed here as in the case of Mandip Kumar's case(supra). To us such a direction is obviously outside the purview of the Tribunal. In exercising the power of judicial review we can neither take the place of the appellate authority nor presume to exercise powers analogous to those bestowed only upon the Supreme Court under Article 142 of the Constitution of India.

7. In view of the above discussion, we conclude that there is no ground for interference by the Tribunal in the present case. The OA is accordingly dismissed. There shall be no order as to costs.

(R.K.AHOOJA)
MEMBER(A)

(A.V.HARIDASAN)
VICE-CHAIRMAN(J)

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