

Central Administrative Tribunal, Principal Bench

OA No.2123/2004

New Delhi, this the 12th day of August, 2009

Hon'ble Mr. Justice V.K. Bali, Chairman
Hon'ble Mr.L.K. Joshi, Vice Chairman (A)

Shri Jai Kanwar Kaushik

....Applicant

(By Advocate: Shri M.S. Reen)

Versus

UOI and others

....Respondents

(By Advocate: Shri Shailendra Tiwary)

1. To be referred to the Reporters or not ? *yes*
2. To be circulated to other Benches of the Tribunal or not ? *x*

L.K. Joshi
(L.K. Joshi)
Vice Chairman (A)

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**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA No. 2123/2004

New Delhi, this the 12th day of August, 2009

**HON'BLE MR. JUSTICE V.K.BALI, CHAIRMAN
HON'BLE MR. L.K.JOSHI, VICE CHAIRMAN (A)**

Shri Jai Kanwar Kaushik,
S/o Shri Ravi Dutt Kaushik,
Technician (Electrical) Gr. II,
Diesel Loco Shed,
Northern Railway, Shakurbasti,
New Delhi

...Applicant

(By Advocate: Shri M.S. Reen)

versus

Union of India through

1. The General Manager,
Northern Railway,
Baroda House, New Delhi
2. The Divisional Railway Manager,
Northern Railway,
State Entry Road, New Delhi
3. The Senior Section Engineer,
Diesel Loco Shed,
Northern Railway, Shakurbasti
New Delhi

... Respondents

(By Advocate: Shri Shailendra Tiwary)

ORDER

Mr. L.K.Joshi, Vice Chairman (A)

The short question, which is to be answered in this OA is whether the Applicant is entitled to payment of his pay and allowances during the interregnum when he was medically de-categorized from one job and till another suitable job was given to him.

2. The facts giving rise to this OA would show that the Applicant was

Shri Joshi appointed as a Cleaner under the Respondents in 1980 and rose to

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become Technician Grade III in 1997. While he was working as Technician (Electrical), Medical Board convened by the Respondents opined that the Applicant should be given duties "at such a place where he has not to come in contact with Diesel Oil, grease, Mobil Oil, chromic water and Petrol" (Annex A-1). By letter dated 23.08.2001 the Applicant was asked by the Respondents whether he would accept the post of Electrical Fitter (Power) in the grade of Rs.3050-4590/-, for which a committee of three officers had adjudged him suitable for the post. The Applicant submitted a representation dated 31.08.2001, drawing the attention of the first Respondent to the fact that he would face the same difficulty in the alternative job, of coming into contact with the same noxious substances because of which he was medically decategorised from the previous job (Annex A-4). The Respondents, at this juncture, stopped payment of salary to the Applicant. Thereupon, the Applicant sent another representation to the Chairman, Railway Board for a suitable posting (Annex A-5). Yet another representation dated 15.03.2002 to the first Respondent General Manager, Northern Railway on the same subject resulted in a reference being made to the Divisional Hospital, Northern Railway to advise whether the job of Technician (Electrical) Grade III would involve coming in contact with diesel oil, mobil oil, chromic water etc. (Annex A-7). The Deputy Chief Mechanical Engineer, on a query, informed the Chief Medical Superintendent of Divisional Hospital, Northern Railway by letter dated 8.01.2003 that it would indeed be so (Annex A-8). The Medical Board reiterated its earlier advice dated 28.05.1999 (Annex A-1) in their recommendation dated 13.01.2003 (Annex A-9). Strangely the case was again referred back to the Chief Medical Superintendent on 22.01.2003 by the Divisional Railway Manager, the second Respondent,

Advised

seeking clarification whether he would be coming in contact with diesel oil, mobil oil etc. in the alternative job of Electric Fitter (Power) (Annex A-10). In reply the Chief Medical Superintendent enclosed a copy of the letter dated 8.01.2003 from Deputy Chief Mechanical Engineer, already adverted to above, which had certified that the Applicant would still come in contact with those substances he has been recommended to avoid (Annex A-11). The Respondents, however, reacted strangely and another letter dated 16.02.2003 was sent by the second Respondent to the first Respondent raising some incomprehensible technical objection to the report of the Chief Medical Superintendent. The letter is quoted below:

"The General Manager (P),
Northern Railway,
Headquarters Office,
Baroda House,
New Delhi.

Sub: Absorption of Shri Jai Kanwar Kaushik, Technician
Grade III/Elect/SSB, Delhi Division, medically
decategorised.

Ref: Your office letter No. 522-E/70/Tech./EIIA dated
19.12.2002.

The abovenamed had been directed to C.M.S./Delhi in response to your letter at reference, under the para-meters of instructions contained in P.S. No. 12512, vide this office letter of even number dated 30.10.2002.

As per instructions in the said P.S. number mentioned in the aforesaid paragraph, Medical Attendant is required to specify distinctly in its medical decategorisationof medical classification in which he is fit and is supposed not to add any rider to report in the case of Safety categories. In the case of Shri Jai Kanwar Kaushik CMS/ Delhi vide letter No. 54-Med/MB/JK/Review/2993 dated 13.1.2003 has maintained her old decision stating that he is fit in R-One medical category with glasses in a job where he is not to come in contact with Diesel Oil, Grease, Mobil Oil, Chromic Water and Petrol (Copy enclosed).

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Hence, contrary to the instructions contained in P.S. No.12512 CMS- Delhi had used a rider in her report the above named was again directed to CMS vide this office letter of even number dated 22.1.2003, CMS-DLI again has upheld the earlier decision vide letter No. 54-Med/MB/JK/Review/03 dated 30.1.2003 (Copy enclosed).

Accordingly, the employee has been returned to his parent office to be kept on his leave due up till the date he is called before the Medical Board and provided an alternative job. The date of Medical Board has yet not been fixed.

Sd: -----

6.2.2003

for Divl. Railway Manger
Northern Rly., New Delhi"

3. The Applicant continued to be without any job and his salary. He then approached this Tribunal in OA number 2123/2004. The Tribunal gave the following directions:

"5. In the circumstance, we are left with no alternative but to dispose of present OA directing the respondent No.2 to constitute a Board of five specialists/Senior Doctors of relevant fields to adjudge and consider applicant's suitability for various posts to which he could be considered and thereafter regulate his posting/appointment. We may make it clear that we are not inclined to grant arrears of pay and allowances as claimed, particularly when he had not discharged functions of any post. The aforesaid exercise shall be completed within a period of three months from the date of receipt of the order, including the orders passed after conducting medical examination. No costs."

Dissatisfied with the direction that he would not be eligible for payment of arrears of pay and allowances between the period of medical decategorisation and fresh posting after medical examination as per the direction of the Tribunal, the Applicant approached the Honourable Delhi High Court in WP (C) No.3768/2008. The High Court observed thus:

"Learned counsel for the petitioner refers to the Provisions of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, as per which on his decategorization the petitioner was entitled to be considered for another job which he could perform notwithstanding his disability and during the interregnum it

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was the duty of the employer also to continue to pay the salary to the petitioner.

Learned counsel for the respondent, on the other hand, submits that the alternate job was offered to the petitioner even earlier but he did not join and demanded the job of Ticket Collector (TCR). Thus, it is argued that since it is the petitioner who is at fault in not joining the job, in that case he is not entitled to salary for the intervening period. The respondents, in this behalf, have referred to instructions contained in circular being PS No.12144 issued by Railway Board.

From the orders of the Tribunal, it is apparent that the Tribunal has not discussed the aforesaid contentions of the parties. Only on the ground that the petitioner did not perform any duties, he has been denied wages for the intervening period. This approach of the Tribunal may not be entirely correct having regard to the provisions contained in Section 47 of the Disabilities Act. At the same time, it was also necessary for the Tribunal to deal with the contentions of the respondents as to whether it was the fault of the petitioner in not taking of the job which was allegedly offered to him. As the past salary is denied without giving any reasons and dealing with the above contentions, we set-aside the order of the Tribunal and remit the case back to the Tribunal to pass a speaking order after hearing the parties on this aspect. The parties shall appear before the Tribunal on 06th April, 2009."

4. The circular number R.B.E. No.213/2000 placed at Annex A-13 provides for absorption of medically de-categorised staff in alternative employment. It also provides that the Applicant should be kept on a special supernumerary post till suitable post is found for him. If the Applicant does not join the alternative post, suitable for him, then payment of salary should be stopped. The aforesaid circular is reproduced below:

"R.B.E. No.213/2000

Subject: **Absorption of Medically de-categorised/disabled staff in alternative employment.**

[No.E(NG)1-96/RE3/9, dated 11.12.2001]

In terms of Para 1303 of IREM Vol.I, 1989, as amended vide ACS No. 77 issued under Board's letter of even number dated 29.4.1999 (Bahri's 89/99, p. 88), if a medically

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decatagorised Railway servant cannot be immediately adjusted against or absorbed in any suitable alternative post, he may be kept on a special supernumerary post in the grade in which the concerned employee was working on regular basis before being declared medically unfit, pending location of suitable alternative employment for him with the same pay scale and service benefits. The special supernumerary post so created will stand abolished, as soon as the alternative employment is located.

2. It has come to the notice of this Ministry that medically decategorised employees posted to alternative posts are declining to join the same and continue to draw salary against special supernumerary posts, resulting in a large number of medically decategorised employees continuing to hold special supernumerary posts without any work, thereby adversely affecting the Railway's functioning. The Ministry of Railways wish to clarify that in the extant provision in the Manual, **no option is available to a medically decategorised employee to decline the alternative employment** to which he is posted. Accordingly, in the order appointing a medically decategorised employee to an alternative post, it should be provided that if he does not take up the alternative employment immediately, the payment of salary to him against special supernumerary post would be discontinued forthwith."

5. We have given the facts of the case in detail in paragraph 2 above to highlight the insensitivity of the Respondents towards the Applicant. The Applicant, while working as Technician (Electrical), was medically decategorised and was advised not to work in an environment where he would encounter diesel oil etc. The Respondents posted him as Technician (Power). It is surprising that the Respondents should not know that in that alternative job also the Applicant was likely to come in contact with the same compounds like diesel oil, mobil oil, chromic water etc. What is more surprising is that they should make such a query to the Chief Medical Superintendent. When the Chief Medical Superintendent has made enquiries from the Deputy Chief Engineer (Mechanical) and informed them about it, some unacceptable objection is raised and the Applicant is left in the lurch. We can only say that this is most unjust and

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unfair. The Respondents are totally responsible for not giving the Applicant a suitable job and depriving him of pay and allowance.

6. Section 47 of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 reads thus:

"47. Non-discrimination in government employment (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. (emphasis added)

The Applicant, under the provisions of this Act also had to be accommodated by the Respondents against a suitable post and till such time a suitable post was found for him, he should have been kept on a supernumerary post. In this context, the Honourable Supreme Court has observed thus in **Kunal Singh Vs. Union of India and another**, 2003 (4) SCC 524:

"9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of "disability" and "person with disability". It is well settled that in the same enactment if two distinct definitions are given defining a word/ expression, they must be understood accordingly in terms of the definition. It must be remembered that a person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The section further provides that

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if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. ***In construing a provision of a social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service.*** (emphasis added)

7. The Respondents placed the Applicant in the post of Technician (Power) after he was medically decategorised on the ground that he should not come in contact with diesel oil, mobil oil, chromic water etc. without taking into account that he would suffer from the same problem in the new post also. Therefore, it cannot be said that the Respondents have adjusted the Applicant on a suitable post after he acquired the aforesaid disability of inability to work in an ambience where diesel oil etc. were present. In spite of the certificate of the Deputy Chief Engineer (Mechanical), forwarded to the Respondents that in the post offered to the Applicant he would suffer from the same disability, the Respondents did not still offer him a suitable post and also did not keep him on a supernumerary post. The Respondents are to be entirely blamed for the fact that the Applicant remained without work during the period when he was medically decategorised and subsequently offered the post of 'Halwai' on the directions of this Tribunal, as has been noted in the first

High paragraph of the judgment of the Honourable High Court.

8. In the light of the above discussion, the Applicant would be eligible for payment of his pay and allowances during the time these were stopped by the Respondents till such time as he was adjusted in an alternative job after the directions of this Tribunal. The above amount would be paid to the Applicant within three months from the date of receipt of a certified copy of this order. No costs.

L.K. Joshi

(L.K. JOSHI)
Vice Chairman (A)

V.K. Bali

(V.K. BALI)
Chairman

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