

yes
Benefits of
period of Dismissal
& Reinstatement

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

(4)

AHMEDABAD BENCH

O.A. No. 72/89

~~XXXXXX~~

DATE OF DECISION 08.02.1993.

Shri Chandrasinh T. Jadeja Petitioner

Mr. Shailesh Brahmhatt Advocate for the Petitioner(s)

Versus

The Union of India & Others Respondent

Mr. B.R. Kyada Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. N.V. Krishnan : Vice Chairman

The Hon'ble Mr. R.C. Bhatt : Member (J)

1. Whether Reporters of local papers may be allowed to see the Judgement ? ✓
2. To be referred to the Reporter or not ? ✓
3. Whether their Lordships wish to see the fair copy of the Judgement ? ✓
4. Whether it needs to be circulated to other Benches of the Tribunal ? ✓

Shri Chandrasinh T. Jadeja

.. Applicant

Vs.

1. Union of India,
Through:
The Secretary,
Ministry of Railway,
Rail Bhavan,
New Delhi.
2. General Manager,
Western Railway,
Churchgate,
Bombay.
3. Chief Operating Superintendent,
Western Railway,
Churchgate,
Bombay.
4. Divisional Railway Manager (Est.)
Western Railway,
Rajkot Division,
Rajkot.

.. Respondents

J U D G M E N T

O.A. No. 72/1989

Date: 08.02.1993.

Per: Hon'ble Mr. N.V. Krishnan, Vice Chairman

The claim of the applicant in this case is that he should be paid full salary for the period for which he was kept-out of service from the date of dismissal in a D.E. to ^{his} reinstatement. As against this by the impugned order dated 22.7.1988, (Annexure A/11), the intervening period was treated as duty for all purpose

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but remuneration was restricted to 50 % of his salary, from the date of his dismissed^{al} on 13.2.1981 in a disciplinary proceeding, up to 31.12.1987, when he was reinstated in pursuance of the appellate order finding him not guilty of the of the charges for which he was punished.

2. The brief facts giving rise to this grievance are as follows:

(2.1) The applicant was dismissed from service on 13.2.1981, under Rule- 14 (2) of the Railway Servants Discipline and Appeal Rules - 1968, (Rules, for sought) without following the procedure laid down in Rule -9 and 10 for imposing major penalty, on the ground that the disciplinary authority was satisfied that it was reasonably not practicable to hold the enquiry in the manner provided under those Rules.

(2.2.) The applicant filed a Regular Civil Suit No. 789 of 1982, which was received on transfer by this Tribunal and renumbered as Transfer Application No. 1231 of 1986. The Transfer Application was disposed of on 30.4.1987, (Annexure A/1), by directing the applicant to

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file an appeal before the appellate authority against the impugned order, as such an appeal had not been filed earlier. √ (2.3.) The applicant filed such an appeal in which the order of dismissal was set aside by the appellate authority i.e., the third respondent, the Chief Operating Superintendent, Western Railway, Churchgate, Bombay., who remitted the case to the disciplinary authority to conduct a regular enquiry. Accordingly, while communicating the aforesaid order of the appellate authority by the Annexure-A/3, memorandum, the disciplinary authority, the Divisional Railway Manager, the fourth respondent, also commenced the enquiry proceedings under Rule- 9. √ (2.4.) The Inquiry Officer came to the conclusion that though the applicant had reported sick on 26.10.1980, and also remained absent from that date upto 13.2.1981, it cannot be proved beyond doubt that he had supported or abetted the agitation of Loco Running Staff, which was the essence of the charge. He, therefore, felt that the charge of remaining absent from duty for such a long period shall be dealt with

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separately under the Rules and should not have been mixed with the issue of the other agitating Loco Running Staff. He therefore, found him not guilty of the charges levelled against him, and award him benefit of doubt."

(2.5.) It appears that the enquiry report was submitted to the appellate authority, who agreed with the findings of the Inquiry Officer and did not hold the applicant guilty of the charges levelled against him in the Disciplinary Proceedings and he was ordered to be reinstated forthwith. He also observed that it was left to the administration to take up with him "for his negligence other than participation in an illegal strike which is surely not proved against him." It was also stated that the status of the intervening period will be decided on merits. √ (2.6.)

The applicant was therefore, reinstated with effect from 31.12.1987. √ (2.7.) The Memorandum dated 21.4.1988. (Annexure A/9) was issued to the applicant informing him that for the period of absence from the date of his dismissal till reinstatement, it was proposed to pay him leave salary on half average

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pay or half pay in terms of provisions of Rule 2044, of the Indian Railway Establishment Code, Volume II., The said period was not^u be^{to} treated as duty for any purpose. He was therefore, required to send a representation in this behalf. He was also asked to indicate whether under Rule 2044, of the Indian Railway Establishment Code, Volume II, he desires to convert any of the aforesaid period into leave due or admissible to him, instead of being regularised in the manner indicated earlier.

(2.8) The applicant made a representation dated 23.5.1988, (Annexure A/10). He contended that his dismissal was illegal and incorrect and as he was acquitted he cannot be denied the legitimate due wages. He therefore, requested that the entire period be considered as having been spent on duty and he be given full wages. (2.9) This representation was considered

by the Chief Operating Supdt., Western Railway, Churchgate, Bombay, the third respondent, and the order~~s~~ passed by him has been communicated to the applicant on 22.7.1988, by the fourth respondent. The third respondent decided to treat intervening period as having been spent

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on duty for all purposes, but restricted salary to only 50 % of his salary. The applicant is ^{reved} ~~agreed~~ by this restriction. He claims that, in the circumstances, under law, he is entitled to the full salary.

3. Therefore, the question for consideration is whether, in the circumstances of this case, the Rules required the payment of full salary to the applicant.

4. The ~~are~~ respondents have filed a reply contending that the application has no merit and that the applicant is not entitled to any relief. It is contended that the applicant had remained absent for duty till 22.10.1988, ^{13.2.81} ~~(28.10.1988, sic)~~, without reasonable cause and therefore, he is not entitled to get anything more. The competent authority has full discretion as to how to treat this period of absence. It is even contended that therefore, this is a matter ^{over} ~~through~~ which the Court cannot sit and decide because, being purely an administrative act, it is beyond the jurisdiction of the Tribunal.

5. We have perused the records and heard the learned counsel for the parties.

6. Shri Shailesh Brahmhatt, learned counsel for the applicant submitted that the applicant's case is covered by sub rule -2, of Rule 2044 of the Indian Railway Establishment Code, Vol. II, now re-issued as Rule -1343 in the 1990, first re-print of the said Code. His contention is that the appellate authority had found the applicant to be not guilty of the charges framed against him, and therefore, he was entitled to the full pay and allowances to which he would have been entitled had he not been dismissed from service, subject to the provisions of Sub- Rule-6 and Sub-Rule-7 of that Rule.

8. As against, this, Shri B.R. Kyada, learned counsel for the respondents submitted that this was a discretionary matter and the discretion cannot be interfered with by this Tribunal. However, when it was pointed out to him that the notice issued to the applicant Annexure A/9, was in terms of Rule- 2044, and he was asked to indicate the specific sub-rule which was in the mind of the third respondent, he submitted that he has no knowledge about this and that the original record might clarify the issue. Therefore, the original record was summoned and produced before us. As will be seen presently, the respondents appear to have applied sub rule (4) and (5) of the Rule to this case.

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9. It is thus clear that the dispute is whether the payment of salary to the applicant, in the above circumstances should be governed by sub-rule -2, of Rule-2044, (now Rule 1343) or sub rule -4, thereof read with sub rule - 5. It is only necessary to add that these rules correspond to F.R. 54-A. For a proper appreciation of the case it is necessary to reproduce the provisions of the relevant sub rules.

(2) Where the authority competent to order re-instatement is of opinion that the railway servant who had been dismissed, removed or compulsorily retired has been fully exonerated the railway servant ~~xx~~ shall, subject to the provisions of sub- rule (6), be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement as the case may be;

Provided that where such authority is of opinion that the termination of the proceedings instituted against the railway servant had been delayed due to reasons directly attributable to the railway servant, it may, after giving him an opportunity to make his representation and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the railway servant shall, subject to the provisions of sub- rule (7), be paid for the period of such delay only such amount of such pay and allowances as it may determine.

(3) In a case falling under sub-rule (2), the period of absence from duty, including the period of suspension preceeding dismissal, removal or compulsory retirement, as the case may be, shall be treated as a period spent on duty for all purposes.

(4) In case, other than those covered ~~xxx~~ by sub-rule (2) (including cases where the order of dismissal removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non- compliance with the requirements of clause (2) of Article 311 of the Constitution ~~xxxxxx~~ and no further inquiry is proposed to be held) the railway

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the railway servant shall, subject to the provisions of sub- rules (6) and (7), be paid such amount to which he would have been entitled, had not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement as the case may be, as the competent authority may determine, after giving notice to the railway servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period, which in no case shall exceed 60 days from the date on which the notice has been served, as may be specified in the notice.

Provided that any payment under this sub-rule to a railway servant (other than a railway servant who is governed by the provisions of the Payment of Wages Act, 1936, (4 of 1936), shall be restricted to a period of three years immediately preceeding the date on which orders for re-instatement of such railway servant are passed by the appellate authority or reviewing authority or immediately preceding the date of retirement on superannuation of such railway servant, as the case may be.

(RLY.Board's letter No. F(E) III 68 SPN/3dt. 16.10.1974).

(5) In a case falling under sub rule (4) the period of absence from duty including the period of suspension preceeding the dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specific purpose: provided that if the railway servant so desires, such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall be converted into leave of any kind due and admissible to the railway servant.

NOTE:

The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of-

- (a) extraordinary leave in excess of three months in the case of temporary railway servant: and
- (b) leave of any kind in excess of five years in the case of permanent railway servant.

(6) The payment of allowances under sub- rule (2) or sub- rule (4) shall be subject to all other

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conditions under which such allowances are admissible.

(7) The amount determined under the proviso of sub- rule (2) or under sub- rule (4) shall not be less than the substance allowance and other allowances admissible under Rule 1342 (F.R.53).

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servant

(8) Any payment made under this rule to a railway servant on his re-instatement shall be subject to adjustment of the amount, if any earned by him through an employment during the period between the date of removal, dismissal or compulsory retirement, as the case may be, and the date of re- instatement. Where the emoluments admissible under this rule are equal to or less than the amounts earned during the employment elsewhere, nothing shall be paid to the railway servant."

10. This is a case where apparently, the appellate authority itself passed the final order, after consideration, the enquiry report^{as} is clear from the Annexure A/6, order dated 8.12.1987. In^{u no} uncertain terms, he has held the employee not guilty of the charges leveled against him. Therefore, the provisions of sub rule - 2 will apply because this is a case where the Railway servant has been fully exonerated. The question of benefit of doubt and the arguments based thereon do not arise, because the appellate authority has found that the evidence available did not prove the charges levelled against the applicant and hence he ~~was~~ was not guilty.

11. On the contrary, sub-rule-4, will apply in cases not covered by sub-rule -2, i.e. cases where after setting aside the penalty of dismissal, removal or compulsory retirement, some other penalty has been imposed or, in a case where the proceedings are quashed due to non- compliance of the provisions of Constitution. In

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such cases, the competent authority has the right to determine what proportion of his pay and allowances should be given to him after considering his representation. Sub-rule- 5, provides that the period of absence shall not be treated as duty unless the competent authority specifically directs otherwise and also that the period of absence may be treated as a period spent on leave as may be due to the applicant.

12. A perusal of the original record shows that a note was put up as follows: "In terms of Rule 2044 (5) R.II. since the employee has been imposed a penalty and not acquitted, the period cannot be treated as spent on duty unless the competent authority specifically directs that it shall be treated as duty for any specified purpose such as retirement benefits, leave etc. C.O.P.S. may also decide what proportion of pay and allowances should be paid to the employee for the intervening period which should not be less than the subsistence allowance admissible under Rule -2043-R-II (emphasize supplied)"

The COPS (Chief Operating Superintendent) issued the following orders:

"It is evident that the ex-employee was negligent in attending to his duty. He ever stayed on leave, but he did not participate in the illegal strike. It is still open to the administration to take up the matter with the ex-employee in any manner deemed fit. In other words, the ex-employees is not entirely free from blemish

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as such, he should be paid a sum equivalent to the substance allowance payable to any employee kept under suspension for the entire intervening period. The intervening period will, however, count for all other benefits including retirement benefits, ^(emphasize supplies) 2"

It is thus clear that the competent authority applied sub-rule -4 and sub-rule -5 to decide this case.

13. The question is whether that decision is proper.

14. We are of the view that in taking such a decision the competent authority had taken into account a totally extraneous consideration which was not part of the charges made against the applicant, in the disciplinary proceeding. For, it is clear that the only charge against the applicant in the disciplinary proceedings was that he participated in the illegal strike, as mentioned in the earlier order of the disciplinary authority dated 13.2.1981, which was, however, found to be not true. This is clear from the under^{lin}signed portion of the ^{extract}~~extract~~ in para 12 supra. The charges did not include his absence without leave for the period from October, 1980, to February, 1981. Again in ^{the extract,} the same ~~extract~~ the COPs has observed that the administration ^{it comes to take} ~~covered to be~~ up this matter with the employee afresh. We are of the view that, in the first place, the office note put up to the COPs which has been ^{it emphasizes} ~~emphasize~~ by ~~is~~ ^{is} ~~potentially~~ ^{potentially} wrong. The applicant was, no doubt, ^{penalized} ~~penalized~~ in the first instance without an enquiry but that order was


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and
set aside ^{by} the order passed ^{office} enquiry, he was
found not guilty and therefore, he was ^{exonerated} ~~exhausted~~. In
these circumstances, the Sub-rule- (4) and (5) of Rule
2044 would not have applied to this case at all, ^{and} ~~in~~ the
case should have been dealt with under sub-rule 2 only.
In these circumstances, the third respondent could not
have held that the employee was not free from blemish,
on which ground only he has restricted the salary to 50 %
as in the case of suspension. This is a totally extraneous
consideration as this was not a part of the charges against
the applicant.

15. We are satisfied that this was a case which
ought to have been considered under Sub-rule -2, to
regularise the salary payable to the applicant for the
period 13.2.1981 to 31.12.1981. We notice that the
proviso of Sub- rule-2, authorises the competent authority
to pay such proportion of the pay and allowances as it
deems fit, if it is of the opinion that the conclusion of
the proceedings resulting in the reinstatement had been
delayed due to reasons attributed ^{able} ~~to~~ to the Government Servant.
The question is whether, after setting aside the impugned
order, we should remand ~~in~~ the case to the third respondent
for a direction under the provis^{ion} ~~ion~~ to Sub-rule - (2) of
Rule 2044, correspond^{ing} ~~ent~~ to Rule 1343 of the revised Code.
As the period is long, it is only fair to allow the
respondents to consider this question.

16. The Annexure 11 memorandum dated 22.7.1983 is quashed and set aside. The period of absence from 13.2.1981 to 31.12.1987 should be treated as a period spent on duty for all purposes under sub-rule (3) of Rule - 2044 (now Rule 1343). The third respondent shall consider the question of payment of salary to the applicant for the period 13.2.1981 to 31.12.1987 in accordance with the provision of Sub-rule 2 of Rule-2044 read with Sub-rule 6 and 7 thereof, and pass an appropriate order within three months from the date of receipt of this judgment and disburse the dues, if any, to the applicant within a further period of one month therefrom.

17. The application is partly allowed with the aforesaid directions.


(R.C. Bhatt)
Member (J)
08.02.1993.


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(N.V. Krishnan)
Vice Chairman
08.02.1993.

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