CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.198/98

Dated the 17th January, 2000.

CORAM:
HON'BLE SHRI A.V.HARIDASAN, VICE CHAIRMAN
HON'BLE SHRI J.L.NEGI,MEMBER(A)

R.Mohanan,S/o.M.Raghavan, aged 34 years,
Cheruvila Puthenveedu,
Alayamon P.O., Anchal, Kollam
(casual labourer, Air Customs,
Calicut Air Port, Karippur). ..Applicant

(By Advocate Shri M.R.Rajendran Nair)

vs.

1. The Superintendent of Air Customs(Administration), Calicut Airport, Karipur.

2. The Air Port Director, Airport Authority of India, Calicut Air Port P.O.

3. The Commissioner, Customs & Central Excise, Central Revenue Building, I.S.Press Road, Kochi.
....Respondents

(By Advocate Shri S.Radhakrishnan,ACGSC)

The Application having been heard on 23.12.99,the Tribunal on 17.1.2000 delivered the following:

ORDER

HON'BLE SHRI A.V.HARIDASAN,VICE CHAIRMAN: The applicant has filed this application praying that it may be declared that the denial of work and wages to him is illegal and the respondents be directed to engage the applicant as casual labourer with full back wages for the period he was kept out of service. The applicant's case in brief is as follows:

2. From May 1995 onwards, the applicant has been continuously working as a casual labour cleaner under the respondents. On 24.7.97 one Mr Shaji a friend of the applicant who was an employee of the Airport Authority,

following a quarrel with the applicant made a complaint against him making false allegations. On receipt of the complaint the Air Customs Superintendent directed the applicant to take leave for a week which the applicant obeyed. However when he reported for duty after a week, he was not allowed to resume duty . Though Sri Shaji had withdrawn his complaint, the respondent refused to readmit the applicant for duty. He was served with a memo dated 7.8.97 issued by the respondent No.1 alleging that he had abused and manhandled an employee of the Airport Authority on 24.7.97 and had threatened to kill him within 40 days , that there had been complaints earlier on which he had been warned and calling upon him to furnish his explanation within 10 days as to why action should not be initiated to terminate his contract with the department in the light of the misconduct aforesaid. The applicant submitted his explanation (copy Annexure A2) within time denying the allegations against him and requesting that action proposed might be dropped. Finding no response and seeing that he was not allowed to resume his work, he made a representation to the Assistant Commissioner, Air Customs on 31.8.1997. Finding no respose, the applicant submitted a representation to the second respondent on 8.10.97. Seeing that one Mr.Vijayan a fresher has been engaged as X-ray Cleaner in his place, the applicant has filed this application for the reliefs, as aforesaid.

3. The contentions of the respondents as put forth in the reply statement can be summarised thus. The applicant is not a regular, temporary or casual employee and was engaged only as a contract worker for cleaning the X-ray machine for 89 days though the contract was renewed a number of times. The application submitted by the applicant produced as Annexure R1(R1A), R2 and (R2A) would show that he was only a contract worker and that the contract could be terminated without assigning any reason. Though a memo(Annexure A1) was issued as the misdemeanour on the part of the applicant was revealed in the preliminary investigation, the Airport being a sensitive place, the contract was not further renewed and no further correspondence made. As full remumeration for the period of contract has been given to the applicant he is not entitled to any back wages. The allegation that one Mr.Vijayan has been engaged in the place of the applicant is wrong and the X-ray cleaning is being done by part-time Sweeper engaged on contract basis . As the applicant is a non-industrial workman and the respondents' office is a Government office, the Industrial Disputes Act has no application. The respondent thus contend that the application being devoid of merit may be dismissed.

4. This Tribunal disposed of the Original Application by order dated 10th September 1998 holding that the applicant was a casual labour, that the action of the respondents in abruptly denying work to him was arbitrary

and directing the respondents to engage the applicant immediately for casual work which he had been performing and to pay him full back wages for the period he was kept out of work. It was also observed that the respondents were free to take appropriate action against the applicant pursuant to Annexure A1 memo, if they so decided. Aggrieved by the decision of the Tribunal, the respondents filed O.P. No.23137/98 before the Honourable High Court of Kerala. The Hon'ble High Court in its order dated 28th July 1999 opined that the matter required a fresh consideration by the Tribunal. It referred to the contention said to have been raised by the second respondent,that the jurisdiction of the Tribunal to entertain the grievance of the applicant, was doubtful and "remanded" the matter to the Tribunal for a fresh disposal giving the parties freedom to adduce further evidence and considering the question of jurisdiction, if raised.

5. Pursuant to the order of the Hon'ble High Court, the O.A. was restored to file. Though sufficient opportunities were given to parties to raise additional pleadings and to adduce further evidence, no fresh pleading or evidence was adduced.

6. We have very carefully gone through the pleadings and the documents placed on record, keeping in view the observations made in the order of the Division Bench of the High Court and have also heard the arguments of

Mr.Rajendran Nair, learned counsel of the applicant and Sri S.Radhakrishnan, the learned Additional Central Government Standing Counsel appearing for the respondents.

7. Though the Hon'ble High Court has in its order directed that the question of jurisdiction if raised should be gone into by the Tribunal, we find that no such question was raised by the respondents. Though in ground D of the application it has been stated that the denial of work to the applicant without observing necessary formalities required under the Industrial Disputes Act amounted to illegal retrenchment, the relief in the application has been mainly claimed basing on the alleged violation of Article 14 of the Constitution and deprival of natural justice. The contention raised by the respondent is that the Industrial Disputes Act has no application at all. Only in case the Tribunal finds no material on which a decision can be properly arrived at, as to whether the applicant is a casual labour or contractor, an occasion to direct the applicant to take recourse to the remedies before the forum prescribed under the Industrial Disputes Act would probably arise.

8. The pivotal question in this case is whether the applicant is a casual labour or a contractor? . We would attempt to find an answer to the question from the materials on record first. While the Tribunal disposed of the O.A. earlier taking note of the fact that the applicant was referred to as casual labour by the respondents in the impugned order A1 itself and that the fact that the

applicant had in his application Annexure R1 and R2 stated that either he or any worker engaged by him would carry out the work would not take the applicant out of the definition of workman as had been observed by Their Lordships of the Supreme Court in Dharangadhra Chemical Works Ltd. vs. State of Saurashtra and others(AIR 1957 SC 264) it was held that the applicant was a casual labour and not an independent contractor and the respondents were directed to reengage the applicant and to pay him back wages, as his services were dispensed with arbitrarily and unilaterally without considering his explanation to the show cause notice .The Hon'ble High Court felt that such over importance should not have been given to the reference of the applicant as casual labour and it had to be viewed along with the reference in para 2 of A1 to the contract between the parties and applying the tests as laid down by the Apex Court in Dharangadhara Chemical Works Ltd. V. State of Saurashtra and others, AIR 1957 S.C. 264 and other decisions.

9. Since no additional material has been brought on record after remand, we have to reexamine the issue on the basis of the same material but in the light of the observations made by the High Court in its order. Sri S.Radhakrishnan, the learned Additional Central Government Standing Counsel argued that the recital in para 2 of the impugned order regarding termination of contract and the statement of the applicant in his application Annexure R1

and R2 that the contract could be terminated at any time and that as contractor he or his worker would not raise any claim of right against the Department would establish beyond any doubt that the applicant was only an independent contractor. The learned counsel of the applicant on the other hand argued that the fact that the applicant had been continuously engaged from May 1995 onwards as X-ray Cleaner though he had been given several letters like Annexure R1 and R2, that he alone had been working in spite of the recital that he could engage others also as per statement on R1 and R2 and that the respondent had issued Annexure A1 memo calling for explanation from him for an alleged 'misconduct' informing him that if no "explanation" be received "within 10 days" appropriate action would be initiated against to terminate his contract would establish beyond any shadow of doubt that the relationship between the applicant and the respondent was that of master and servant and not of a contractor and principal. For the purpose of easy reference and understanding, we would reproduce Annexure A1 memo and one of the application made by the applicant Annexure R2. Annexure A1 memo reads:

"OFFICE OF THE ASSISTANT COMMISSIONER OF AIR CUSTOMS,CALICUT AIRPORT,KARIPUR.

C.No.VIII/11/Admn/97 Con./1315 Date:7.8.97

MEMO

The Airport Director, Airport Authority of India, Calicut Airport has informed this office that Shri R.Mohan, Casual Labourer, has abused and manhandled an employee of the Airport Authority on 24.7.97 and has further threatened to kill him within 40 days. Earlier also oral complaints have been received from other agencies working at this airport and you have been cautioned not to repeat such misconduct in future.

Sri R.Mohan, Casual Labourer is therefore called upon to furnish his explanation as to why action should not be initiated to terminate his contract with this Department in the light of his misconduct as stated above. He should furnish his explanation to the undersigned within 10 days of receipt of this memo failing which it will be presumed that he has nothing to offer in explanation and appropriate action will be initiated to terminate his contract."

(emphasis supplied)

Annexure R2(A) reads:

> "Application submitted by Shri R.Mohanan PT.Quarters, Kottapuram Ward, Malappuram District, before the Commissioner of Customs and Central Excise Cochin.
>
> I am ready to work on temporary contract basis the cleaning and other related works of X-Ray machinary at Air Customs, Calicut Airport during the period 7.4.97 to 4.7.97(89 days). During the contract period myself or my workers will do the said work and ready to do the said work on contract basis for Rs.600/- per month. The said contract will be temporary and the Department can terminate the contract at any time without any reasons and also as the contractor myself and my workers will not claim any rights or demands in the Customs Department."

The 1st respondent has in Annexure A1 memo described the applicant as "casual labourer". It is argued on behalf of the respondents that the word "casual labourer" used in Annexure A1 order itself is not decisive and that the recital in para 2 of the same document regarding termination of contract, clearly shows that the applicant is an independent contractor. It is further argued that as the applicant had agreed to have the work done either by himself or through others and that the contract could be terminated

at any time the claim of the applicant that he is a casual labourer is absolutely untenable.Sri Rajendran Nair, the learned counsel of the applicant on the other hand argued that the applications Annexure R1 and R2 are obtained by the respondents periodically as a safeguard against claims for regularisation and they do not really reflect the true nature of the relationship. He further argued that the stipulation of a period of 89 days in one spell clearly indicate that the engagement was as casual labour, for it is usual for departments to engage casual labour or adhoc appointees for a period less than three months . If the idea was to entrust a certain work on purely contract basis without there being a relationship of master and servant, the engagement would normally have been for definite terms of one month, two months, six months, one year or a fixed number of days and the choice of 89 days in this case exposes the camouflage , argued the learned counsel. He further argued that the statement in R1 and R2 that the contract is temporary, that it could be terminated at any time and that the applicant or his men would not make a claim of right really exposes the anxiety of the respondent to make out that the transaction is that of an independent contractor rather than reflecting the real nature of the transaction.

10. We find considerable force in the argument of the learned counsel of the applicant. The averment in the application that the applicant had been continuously engaged

to do X-ray cleaning work from May 1995 onwards is not disputed in the reply statement. Even though in Annexure R1 and R2 the applicant has stated that either he or his men would perform the duty, there is no case for the respondent that the applicant has not been continuously doing the work and that somebody else has been doing. In Dharangadhra Chemical Works Ltd. vs. State of Saurashtra and others, AIR 1957 S.C. 264, the Supreme Court has held:

> "What determines whether a person is a workman or an independent contractor is whether he has agreed to work personally or not. If he has, then he is a workman and the fact that he takes assistance from other persons would not affect his status."

Therefore that in Annexure R1 and R2 it was stated that the work would be done by the applicant or his men, does not make the applicant an independent contractor if the real nature of relationship is that of employer and employee. Even going by the control and supervision test the relationship in the instant case can only be held to be that of employer and employee for the applicant has agreed to carry out on temporary contract basis the cleaning and related work of the X-ray machinary of Air Customs,Calicut Air port for Rs.600/- a month. Since the nature of work is cleaning the X-ray machinery kept in the premises of the respondents ,the control and supervision obviously would be with the respondents in the absence of a stipulation to the contrary. The stipulation of a period of 89 days while the

remuneration is Rs.600/- per month evinces that a device was invented to prevent continuous engagement of more than three months as is generally done in the Government office while engaging casual labour and adhoc employees. The description of the engagement as on contract basis as "temporary" also , is more in consonance with the concept of employment rather than a contract. A contract for a particular work need not be stated to be temporary . A contract is a contract and not a temporary arrangement. The stipulation of a period of 89 days, the clause that the applicant or his men would do the work, that the engagement is temporary and that the applicant or his men would not put forth any claim can all be treated as statements designedly obtained to foreclose any claim for continuous engagement in the facts and circumstances of the case.

11. The reference in Annexure A1 to the applicant as "casual labourer" , allegation that the applicant committed a "misconduct" and that the applicant had been warned earlier on complaints and the warning that "action would be initiated to terminate his contract" all lead to the irresistible conclusion that the relationship between the respondents and the applicant was only that of employer and employee and that the applicant was a casual labour. This conclusion is not reached giving undue importance to the word "casual labourer" used in the impugned order Annexure A1. The cumulative effect of the entire statement in Annexure A1 and in Annexure R1 and R2 clearly points to the

fact that the parties intended a relationship of employer and employee subjecting the applicant to the control and supervision as also amenable to the disciplinary jurisdiction of the respondents,though apparently an attempt was made to make it appear that the transaction was a contract.. The use of the following words,"misconduct", "explanation","appropriate action will be initiated to terminate his contract" etc. make it abundantly clear that the relationship is of master and servant. Authority to initiate action for "misconduct" against the employee is an important right of an employer. The use of the word "contract" in para 2 of Annexure A1 does not indicate that the applicant is an independent contractor and not a casual labour for the relationship of employer and employee can also be created under a contract. If a party to a contract commits a breach of contract, it may be open for the other party to rescind the contract , sue for damages or take recourse to other remedies available under the General Law. Taking "action" for "termination" for "misconduct" is one of the rights of employer and not that of a party to a contract. The impugned order Annexure A1 was issued not by a low level official to preume that the words were used without understanding their meaning. When there is dispute regarding the nature of a transaction between the parties, the conduct of the parties also has to be taken into consideration in determining the real nature of the transaction. The terms and tenor of Annexure A1 clearly indicate that the respondents have treated the applicant

only as a casual labour and not as an dependent contractor. Even in the reply statement in para 3 referring to the applicant, the respondent have stated "He was not on the rolls of the department. He was only a contract worker engaged for cleaning X-ray machines for a period of 89 days, though the contract was renewed a number of times". It is further stated in the same paragraph of the statement "Misdemeanour on the part of the applicant as reported by Airport Director in his letter dated 24.7.1997 was revealed during the preliminary investigation...." This also indicate that the respondents considered the applicant as a worker. In the light of the above discussion, we have no hesitation to hold that the applicant is a casual labourer and not a independent contractor under the respondents.

12. We have found that the applicant is a casual labourer. It is not disputed that the applicant has been continuously engaged since May 1995. The last application submitted by the applicant was for the period between 7.4.97 and 4.7.97 for 89 days (Annexure R2). The respondent contend that his contract was not further renewed. But the Annexure A1 show cause notice was issued on 7.8.1997 according to the respondents on the basis of a complaint by the Director of the Airport Authority dated 24.7.97. Therefore it is evident that even after the expiry the period mentioned in R2 the applicant was continuing to be engaged . After serving the show-cause notice Annexure A1 though the applicant submitted his explanation denying the

allegations within the time given in A1, the respondents unilaterally decided to deny work to him holding that he is guilty of misdemeanour without considering the explanation submitted by him and without giving him an opportunity to establish that he was innocent. This action of the respondent amounts to violation of the principles of natural justice. The contention of the respondents that no employee by name Vijayan has been engaged in the applicant's place and that the part time employee is doing the work now is not a justification for denying the applicant the work which he has been doing since May 1995 for alleged misconduct condemning him without being heard. The respondents are therefore bound to reengage the applicant for the work which he has been performing and to pay him the wages for the period he was kept out of work,though thereafter it may be open to them to terminate the engagement in accordance with law.

13. In the conspectus of facts and circumstances, we allow the application, declare that the denial of work to the applicant is illegal and direct the respondent to renegage the applicant as casual labour X-ray cleaner and pay him the full back wages for the period he was kept out of service. It is made clear that this order will not preclude the respondents from terminating the casual service

of the applicant for any valid reason including the misconduct mentioned in Annexure A1 in accordance with law. The direction to re-engage the applicant and to pay him back wages shall be complied with by the respondents within a period of two months from the date of receipt of a copy of this order.

Dated the 17th January,2000.

(J.L.NEGI)
MEMBER(A)

(A.V.HARIDASAN)
VICE CHAIRMAN

/njj/

List of Annexures referred to in the Order

1.	Annexure A1	True copy of the Memo dated 7.8.97 No.VIII/11/Admn/97 Con./1315 issued by the ist respondent.
2.	Annexure R-1	True copy of the application submitted by the applicant on 7.1.1997 before the Commissioner of Central Excise and Customs, Cochin.
3.	Annexure R-1(A)	English translation of Annexure R-R-1.
4.	Annexure R-2	True copy of the application submitted by the applicant on 6.4.1997 before the Commissioner of Central Exicse and Customs,Cochin.
5.	Annexure R-2(A)	English translation of Annexure R-2.