

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 3/2008

Dated this the 6th day of September, 2010

C O R A M

HON'BLE MRS. K. NOORJEHAN, ADMINISTRATIVE MEMBER

Smt.Margaret w/o Joseph
Retd. Head Cook
Southern Railway (TRCTC)
residing at Chaithanya
Karikuzhy, Parappakāya po
Kollam-691 503

..Applicant

By Advocate Mr. M.P. Varkey

Vs

- 1 Union of India represented by
General Manager,
Southern Railway
Chennai-600 003
- 2 The Chief Personnel Officer
Southern Railway,
Chennai-600 003
- 3 The Senior Divisional Personnel Officer
Southern Railway,
Trivandrum-695 014
- 4 The Regional Manager
Indian Railway Catering & Tourism Corporation Ltd.
AO/8194, Salih Arcade, 1st Floor
Convent Road Junction,
Ernakulam-680 035

..Respondents

By Advocate Mr.Thomas Mathew Nellimoottil for R-1-3

By Advocate Mr. M.C. Cherian for R-4

The Application having been heard on 3.8.2010 the Tribunal delivered the following:

ORDER

HON'BLE MRS. K. NOORJEHAN, ADMINISTRATIVE MEMBER

The applicant, a retired Head Cook of Southern Railway, had filed this Application aggrieved by the erroneous reckoning of his qualifying service resulting in reduced retiral benefits. However, as he expired on 21.11.2008 the widow of the employee is substituted as legal heir.

2 The applicant who was initially appointed as a Casual Labourer on 20.5.1964 in the New General Office Co-operative Canteen, Madras, was confirmed as Cleaner on 8.10.1968, promoted as Server and on 15.10.1981, and later appointed as Assistant Cook (A-1). In 1993 he was promoted as Cook, and in 2003 he was promoted as Head Cook in Dining Cars of various trains originating from Trivandrum Central. He retired on superannuation on 31.3.2007. According to the applicant, the practice followed in the Dining Car was that one week of work is followed by one week of rest. While in train, they were required to sign the Attendance register, on rest at headquarters they were never asked to sign any attendance register.

On the formation of Indian Railway Catering & Tourism Corporation Ltd, all the catering staff in Railways were treated as on on deemed deputation to IRCTC w.e.f. 16.11.2005 with an option after 3 years for retention in IRCTC or repatriation to the parent department.



The applicant was paid salary by the Railways upto April, 2006 and by IRCTC from May, 2006 till his retirement on 31.3.2007. The applicant submitted a representation on 9.1.2007 for counting his canteen service for pensionary benefits (A-3) which was rejected by A-4. On retirement he received Annexure A-5 in which no leave encashment amount or days of eligible leave was shown. His service in the Canteen before 15.10.1981 was not counted hence, he received a lower pension and DCRG. He submitted another representation on 30.4.2007 seeking leave encashment and for counting canteen service etc. (A-6) He came to know that the leave account had not been maintained properly and that a part of the idling days in the alternate weeks was marked as leave by IRCTC without his knowledge due to which he lost the earned leave. Hence he filed this O.A. to declare that he is entitled to count the service rendered in the canteen from 8.10.1968 to 14.10.1981 and that he is entitled to leave encashment and to quash A-4, A-5 and A-7.

According to him the new General Office Cooperative Canteen Southern Railway, Madras where he worked prior to joining the Railways, was a non-statutory subsidised one established in terms of Para 2833 & 2834 of IREM Vol. I, therefore he is entitled to count the service as qualifying service for pension and that the leave arbitrarily debited against the idling days in alternate weeks is unjust, illegal and without jurisdiction.

3 The respondents 1-3 filed reply statement contending that the service of the applicant in the New General Office Cooperative Canteen from 20.5.1964 is not supported by any documentary evidence. They stated that Annexure A-1 and A-2 documents cannot be accepted as

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proof of the alleged service. They stated that there are no entries in his Service Register in respect of any of the alleged service rendered prior to 15.10.1981 and that the service from 15.10.1981 to the date of superannuation has been taken into consideration as qualifying service to fix his pensionary benefits. They submitted that the applicant did not have any leave at his credit as on 31.3.2007 and that he frequently availed leave during his service.

4 The applicant filed rejoinder reiterating his averments in the O.A. He filed M.A.929/2008 to direct the respondents to explain the basis on which he was appointed as Assistant Cook in Railways on 15.10.1981 at the age of 34, to produce his service Register, leave chart with leave applications, etc. and the trip schedules, leave chart etc.

5 The 4th respondent filed separate reply statement stating that the IRCTC maintained service details, payment of salary, etc. of the applicant only w.e.f. April, 2006 till his retirement on 31.3.2007. They have given details of leave to applicant's credit and the from May, 2006 till his superannuation. The employees like the applicant were being credited with 6 days duty for one to and fro trip from Trivandrum to Veraval and back, in addition full 6 days credited with duty he is also granted 5 days rest as compensatory rest with full pay. After the said 5 days of rest he will have to report for duty at Base depot and mark attendance though he has no specific work to be done during 3 days. After the 3 days the next cycle starts after 14 days (6 + 5 + 3). However, the applicant was consistently refusing to report to duty on the 3rd day following the 5 days compensatory rest and the said period has been accounted as Leave with pay or Casual leave or extra ordinary

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leave subject to availability. The applicant who marks his attendance in respect of the subsequent trips in the same attendance register was well aware of the manner in which the absence was being treated.

6 The applicant filed rejoinder to the reply filed by the 4th respondent disputing the leave account furnished by Railways. He stated that the leave was marked without his knowledge. Such forced marking of leave without any leave application from him is highly irregular.

7 The respondents 1 to 3 filed affidavit stating that in spite of earnest efforts to locate the old files pertaining to the period 1964 onwards the files concerned could not be traced out to verify the service records of the applicant prior to 14.10.1981.

8 The applicant filed rejoinder to the affidavit filed by R-3 stating that the respondents have not stated the circumstances under which the applicant could be appointed to the grade of Assistant Cook at the age of 34. He reiterated that he had worked in the NGO Staff Cooperative Canteen, Southern Railway, Chennai-600 003 from 8.10.1968 to 14.10.1981.

9 The respondents filed additional and 2nd additional reply statements

10 I have heard learned counsel appearing for the parties and perused the records produced before me.

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11 The first issue relates to the counting of service rendered by him prior to 15.10.1981 for the purpose of pension. The applicant himself stated that he was selected and appointed as Assistant Cook in the Railways on 15.10.1981. For the first time he has sought for counting of his service prior to 15.10.1981 only on 9.1.2007 for pensionary benefits when he was on the verge of his superannuation. He should have taken steps to get the past service counted at the appropriate time. The applicant himself had stated that he did not have any documentary proof supporting his past service. It may be true that he had worked in the said canteen, but in the absence of any documentary evidence I am not in a position to arrive at a concrete conclusion that the service rendered by him is a continuous regular service and is eligible to be counted for pensionary purposes. The evidence adduced before me is not sufficient to conclude that the service is pensionable. However, in view of para 2 of F.No. 38/37/08-P&PW(A) of DOPT dated 10.12.2009, the linkage of full pension with 33 years of qualifying service shall be dispensed with, w.e.f. 1.1.2006, instead of 2.9.2008. Paras 2, 3 and 4 of the said OM are extracted below:

2 This matter has been reconsidered by the Government. In partial modification of the instructions/order issued in this respect, it has now been decided that linkage of full pension with 33 years of qualifying service shall be dispensed with, with effect from 1.1.2006 instead of 2.9.2008. The revised provisions for calculation of pension in para 5.2 and 5.3 of the OM No. 38/37/08-P&PW(A) dated 2.9.2008 shall come into force with effect from 1.1.2006 and shall be applicable to the government servants retired/retiring after that date. Para 5.4 will further stand modified to that extent.

3 Consequent upon the above revised provisions, in partial modification of para 7.1 of the OM NO. 38/37/01-P&PW(A) dated 2.9.08, the extant benefit of adding years of qualifying

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service for the purpose of computation of pension and gratuity shall stand withdrawn with effect from 1.1.2006.

4 The overall calculation may take into account revised gratuity and revised pension, including arrears upto date of revision based on these instructions. However, no recoveries would be made in the cases already settled.

Therefore, the pension of the late employee may be regulated as per the guidelines in the OM supra.

12 In respect of his eligibility for leave encashment, the learned counsel for the applicant drew my attention to Annexure A-9 which is the salary slip issued by Railways for the month of March, 2006 which is to be treated as Last Pay Certificate, as his pay from April, 2006 onwards was drawn by IRCTC. Therein the leave credit is shown as 75 days of LAP and 50 days of LHAP approximately. The learned counsel for R-4 stated that the columns relating to LAP and CHAP were left blank in the LPC sent to IRCTC and the applicant produced Annexure R-4(D) in support of her claim. The third respondent produced the Service Book of the applicant wherein the LAP at his credit for the month of November, 2006 is shown as nil. No further information, as requested for by the counsel for the applicant, regarding offsetting period of absence after the rest period towards LAP, was filed by the Respondent No.3 by an affidavit. The Respondent No. 4 as directed, has filed an affidavit dated 17.8.2010, explaining the manner in which rostered duty hours are accounted for, eligibility for overtime allowance computed, etc.

13 According to the submission of R-4, as per Section 132(2) the employee was bound to work upto 54 hours in a week on an average in a two weekly period of 14 days. This would mean a total of 108 hours in a

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bi-weekly period of 14 days which will work out to an average of 54 hours per week. As per the principle of averaging as contained in Section 132 (2) if the hours of work in one week come to 60 hours, and the next week of the bi-weekly period, it come to 48 hours, the total in the bi-weekly period will be 108 hours (60+48), in which case also the average in a week will not exceed 54 hours work. On the other hand if the hours of work in one week is 60 hours and the next week of the bi-weekly period is 50 hours, the total will be 110 hours, which is 2 hours in excess of the total permissible hours of work in the bi-weekly period of 108 hours at 54 hours each per week. In such a contingency, the employee can be said to have worked 2 hours in excess of statutory period of 108 hours in the averaging bi-weekly period, at 54 hours per week.

As regards Rule 8 and 10 of the 2005 Rules, it can be seen that the rostered hours of work of such "continuous category" of employees is 48 hours per week on the average which come to 96 hours during the average period of two weeks (bi-weekly period).

Under the above circumstances an employee will be entitled to OT at 1 1/2 hours times if excess of 96 hours of work in a bi-weekly period (as the average rate of 48 hours per week) and OT at two times of excess of 108 hours of work in a bi-weekly period. It is obvious from what is stated above and the earlier affidavit and pleadings that the total hours of duty during periods spread out to more than 10 days but not including the three days in question is only less than 75 hours. It is also admitted that on the 3 days in question in every bi-weekly period, he has not done any work. Therefore, the applicant cannot have any claim for OT also in respect of the 3 days in question, in every bi-weekly

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period. In any case, an employee can have no OT claim in respect of periods during which he has not turned up for work even.

14 Since the employees do notice that the period after compensatory off and rest days being marked as leave, when they do not turn up to sign attendance register for the 3 days, they should have either signed and left in the absence of any duty being entrusted to them or taken up the matter in the periodical staff meetings with the officers, to have a satisfactory arrangement for the 3 days. It was open to the IRCTC, to engage them in stationery canteens if any or overnight train when the regular staff of those trains were on leave and granted overtime allowance if the duty hours exceeded rostered duty hours in a biweekly or four weekly days cycle. Now, having slept over the issue for years, it cannot be raked up now. But the respondent No. 4 should have engaged them if needed and issued a circular under acquittance to all such running staff to warn them about their loss of leave due to their failure to sign attendance register. In view of failure on the part of the late employee to prefer claims for OTA or sign the attendance register, on the 3 days treated as duty no direction can be given about encashment of leave. The late employee was also expected to peruse the Service Book at the time of service verification before his superannuation, to checkup about the leave at his credit for encashment. Normally, all employees check with the Accounts branch as certain conversion from LHAP to LAP is permitted under certain circumstances before superannuation. The late employee had not been vigilant to claim his rights if any when he was in service.

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15. In the result, the Application is disposed of with the direction to the respondents to refix the pensionary benefits of the deceased employee in the light of OM No. 38/37/08-P&PW(A) dated 10.12.2009 and disburse the arrears to the applicant within three months from the date of receipt of a copy of this order. There shall be no order as to costs.

Dated 6th September, 2010



K. NOORJEHAN
ADMINISTRATIVE MEMBER

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