CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA No.362/2012

Thursday, this the 16th day of May, 2013.

CORAM

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE MR.GEORGE JOSEPH, ADMINISTRATIVE MEMBER

K.Mahesh Menon
Staff No.16420
HRD Officer, C-DAC
Trivandrum.
R/o 3/219, Vijayam
Major Santhosh Road, 5th Cross
West Nadakkavu
Kozhikode-673 011. Applicant

(By Advocate: Mr.V.Krishna Menon)

Versus

1. Centre for Development of Advanced Computing (C-DAC)
Vellayambalam, Thiruvananthapuram-695 033.
represented by its Executive Director

2. R.Ravindra Kumar
Executive Director
Centre for Development of Advanced Computing (C-DAC)
Vellayambalam, Thiruvananthapuram-695 033.

3. Head (HR&A)
Centre for Development of Advanced Computing (C-DAC)
Vellayambalam, Thiruvananthapuram-695 033.

4. Santha N
Senior HRD Officer
Centre for Development of Advanced Computing (C-DAC)
Vellayambalam,
Thiruvananthapuram-695 033. Respondents

(By Advocate : Mr.Sunil Jacob Jose, SCGSC (R1 &3)

This Original Application having been heard on 14.05.2013, this Tribunal on 16th May, 2013 delivered the following:

ORDER

HON'BLE DR.K.B.S.RAJAN, JUDICIAL MEMBER

The applicant, who had been appointed as Administrative Officer in the Centre for development of Advanced Computing (C-DAC) in pursuance of Annexure A-1 communication dated 3rd June, 2011 has, during the period of probation, been issued with an order of termination from service vide impugned order dated 7th May, 2012. Thus the challenge is against the said order of termination.

2. Briefly, the facts of the case are that the applicant was appointed as Administrative Officer in C-DAC. The offer of appointment provided, inter-alia, of the period of probation as one year which, at the discretion of the appointing authority could be either curtailed or extended and further that during the probation period, the services of the applicant are liable to be terminated without notice or without assigning any reason thereof, if his performance is found to be not satisfactory or if the Centre is satisfied that he was ineligible for recruitment to the service in the first instance itself. He had joined the duties on 01-07-2011. The functional responsibilities of the applicant have been duly prescribed, vide Annexure A-2 Office Memorandum dated 1st September, 2011 read with Annexure A-11 Office Order dated 24th February, 2012. According to the applicant, he was performing the duties as scheduled and in fact was awarded honorarium vide Annexure A-3 and A-4. Further, he was appointed as a member of selection committee for various posts and was authorized to conduct interview as well. Annexure A-5 series refer.

3. Respondent No. 4, the Section Head (HR) had made a complaint against the applicant vide her letter dated 15th November, 2011, enclosing a copy of the e-mail purported to have been sent by the applicant to her wherein certain derogatory comments were made by the applicant, which establishes his utter disregard for the modesty and respect for women in general and working women in special. Request was thus made by the said Respondent No. 4 to take appropriate action against the applicant. It appears that the said complaint was forwarded by the Executive Director, in his capacity as Disciplinary Authority sometimes in the last week of February, 2012 calling for explanation of the applicant and since no such explanation was forthcoming, a reminder memo dated 01-03-2012 was issued, vide Annexure A-7. The applicant had furnished his explanation vide Annexure A-8 dated nil. The aforesaid matter was also referred to the Complaints Committee, as could be seen vide Annexure A-9 dated 20th April, 2012.

4. Vide Annexure A-20 dated 23rd February, 2012, the applicant had requested for issue of "No objection Certificate" for seeking employment at the Central Manufacturing Technology Institute, Tumkur Road, Bangalore, which was, however, not issued as according to the respondents, there is no provision for issuing NOC for applying for a post outside C-DAC.

5. Independent of the complaint by respondent No. 4 and action pursuant thereto, the applicant was issued with a memorandum dated 5th March, 2012 over the alleged dereliction of duties, vide Annexure A-13, to which the applicant had furnished his reply, vide Annexure A-14 dated 16th March, 2012. Certain other correspondences vide Annexure A-15 to A-18 about the alleged poor performance of the applicant had been exchanged.

6. It was, thereafter, the applicant has been served with the order of termination vide impugned order dated 07-5-2012 and the applicant has moved

this OA seeking the following reliefs:-

1. *Call for the records leading to A-21 and set adie the same;*
2. *Declare that the applicant is entitled to continue in service;*
3. *Grant such other reliefs which this Hon'ble Tribunal may deem fit and proper in the circumstances of the case;*
4. *Award cost to the applicant.*

7. Respondents have furnished their reply, wherein they had stated that the applicant has directly approached the Tribunal, without exhausting the administrative remedies. They have justified the action taken against the applicant as provision exists in the offer of appointment that the services of the applicant could be terminated during the probation period, without notice or without assigning any reason, if the performance was found to be unsatisfactory. The respondents have referred to the previous services of the applicant prior to his joining the CDAC to hammer home the point that within a period of nine years, the applicant has shifted to six organizations, which shows his attitudes and capabilities. Further during the period of work, he has not exhibited flair for "keen planning" "enterprising leadership" or ability to motivate personnel towards achieving Organization goals as claimed by him. The respondents have also contended that the applicant was always exhibiting the habit of avoiding work and shirking responsibility. Certain instances (Annexure R-3 to R-9) have also been given to demonstrate his casual approach to work, without understanding the objectives of the task in detail.

8. The respondents have also stated that the mail sent to the respondent No. 4 was totally unwarranted and the same had no official purpose. They have also annexed vide Annexure R-12 that the statement depicted women in very bad light, as if women are embodiment of all vices. Disrespect for women stands out in all statements in the mail.

9. The respondents have further stated that the applicant was in advance warned that his activities would be under strict surveillance and accordingly, the Surveillance Committee and Review Committee furnished their reports, recommending the termination of services of the applicant if the rules provide, vide Annexure R-13. Annexure R-15 to R-18 are the warning letters issued to the applicant for improving his performance.

10. The applicant has filed his rejoinder, in which apart from contending that respondents No. 2 and 4 having been impleaded in their individual capacity, a common reply for all the four respondents would not be valid and the Tribunal be pleased to ignore the contentions put forth on behalf of the said private respondents, he had questioned the very competence of the authority (Respondent No.2) to issue the order of termination. According to the applicant, the said respondent is not even eligible to be appointed as Executive Director and to substantiate the same, he has filed a copy of the recruitment rules and certain other details collected through RTI, vide Annexures A-23 and A-25. Similarly, the applicant contended that the fourth respondent who started her career as a Steno typist and worked in the clerical cadre in most of her career was incompetent to handle a Senior HR professional. It has been alleged that the whole incident is a conspiracy by the said fourth Respondent and the respondents are making a mountain out of a molehill. He has annexed a copy of the complaint against the said Respondent, vide Annexure A-26, alleging that the said respondent had used vitriolic language against the applicant in front of the subordinates. Various other documents referring to certain suggestions made, holding of selection on holidays etc., have also been filed by the applicant.

11. Additional reply and additional rejoinder have also been filed by the respective side.

12. Counsel for the applicant argued that the impugned order suffers from legal infirmities on more than one count. First, the same has been issued by an authority not competent to issue the same. The second respondent could not have been appointed as Executive Director as per the recruitment rules. Secondly, there has been no reason given in the order of termination. The power to terminate the services is conditional, i.e. if the performance is found to be not satisfactory. There has been no such mention in the order of termination that the performance of the applicant was not satisfactory. Thirdly, all along, vide various correspondences, all that had been stated was that the applicant would be subjected to disciplinary proceedings and at no point of time it was informed to the applicant that the services of the applicant would be terminated. Fourthly, the surveillance reports etc., have all been behind the back of the applicant and no opportunity has been given to the applicant to rebut the same. Again, it could be seen from the sequence of events that initially there had been absolutely no memos issued to the applicant whereas it was after the complaint made by the respondent No. 4 that successively memos and warning letters started pouring in. This is nothing but a malafide attempt. As regards the alleged sexual harassment in working place, the counsel stated that vide the report of the Committee, the Committee which went to inquire into the alleged sexual harassment concluded that the e-mail cannot be considered as an act of sexual harassment at workplace. The counsel concluded his argument with the contention that termination before the completion of the probation period is invalid. The counsel for the applicant relied upon the decision of the Apex court in the case of **Jarnail Singh & Ors vs State of Punjab (1993) supp (1) 588 and Dipti Prakash Bannerjee vs Satvendra Nath Bose National Centre for Basic Sc. Calcutta.**

13. The senior Central Government Standing Counsel argued that the applicant was under probation and during the probation period, the authorities have full power to watch the performance and if not satisfied, they could

terminate the services of the applicant. There was no need to specifically reflect the reason in the impugned order. The copious documents added to the reply would evidence that the performance of the applicant was far from satisfactory. In addition, the same is the conduct of the applicant in using derogatory and defamatory language about the females. Such comments are totally unwarranted. The Senior Central Government Standing Counsel further submitted that if this could be the conduct, behaviour and performance of the applicant during the very first year of his appointment (i.e. during probation period) one could imagine his conduct after he is confirmed.

14. Arguments have been heard and documents perused. As regards competence of Respondent No. 2 to issue the impugned order, the contention of the applicant has to be rejected since the said respondent was appointed as Executive Director w.e.f. 02-06-2011 and in all expectation, his appointment would have been by the very same authority, as communication to offer the appointment to the applicant is dated 3rd June, 2011. If so, the competence of the said respondent cannot be held to be valid for appointing the applicant but invalid in so far as issue of termination order is concerned. As regards the contention that there has been no reason specified in the impugned order, non communication of the reason is not fatal to the issue, as the very offer of appointment stipulates that during probation period, the services of the applicant could be terminated without notice or without assigning any reason. All that has to be held is that records must reflect that the performance of the applicant has not been found to be satisfactory and the same is the main reason for termination. This part has been adequately fulfilled by the respondents. Various warning letters and memos issued to the applicant vide Annexure R-15 to R-18 would go to show that the performance of the applicant cannot be held to be that satisfactory.

15. But the main issue is whether the termination order is invalid either on the ground of the same having been issued prior to the completion of probation or of punitive character.

16. The period of termination is upto 30th June, 2012. The authorities could curtail the same (if the performance during probation be found to be satisfactory) or extend the same, if the performance is not found satisfactory. Clause (d) of the offer of appointment order refers. Termination during probation is fully justified if the same is on the ground that the applicant was ab initio not eligible for appointment vide clause (e) of the terms of appointment at Annexure A-1. Here the termination was not on account that the applicant was ineligible for appointment. Termination has been resorted to as the services of the applicant were not found satisfactory.

17. There does not appear to be any bar to terminate the services of a probationer during the period of probation if his performance was not found satisfactory. In other words, if the performance is not found satisfactory, there is no need to extend the period of probation. In the instant case, the services of the applicant were terminated after 10.5 months of probation period, while the probation period was for one year. Had the termination taken place, say after five or six months itself, there could be a justification that the period of five or six months is too short to evaluate or assess the performance. That not being so, termination during probation cannot be said to be illegal by itself.

18. In so far as the law relating to termination, as well as foundation of the termination order, it is appropriate to refer to the decisions of the Apex Court.

'Parshotam Lal Dhingra' can be said to be the leading and the oldest case in this regard. The Apex Court has referred to the said decision in a very recent judgment in the case of ***SBI v. Palak Modi,(2013) 3 SCC 607.*** The Apex Court in this case has observed as under:-

"15. In Parshotam Lal Dhingra v. Union of India (AIR 1958 SC 36), which can be considered as an important milestone in the development of one facet of service jurisprudence in the country, the Constitution Bench was called upon to decide whether the order of reversion of an official holding a higher post in an officiating capacity could be treated as punitive. After elaborate consideration of the relevant provisions of the Constitution and judicial decisions on the subject, the Constitution Bench observed: (AIR p. 49, para 28)-

> "*28.* ... In short, if the termination of service is founded on the right flowing from contract or the service rules then prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with."

19. Again, the Apex Court in the said case of Palak Modi (supra) referred to another landmark judgment in the case of Samsher Singh. The Apex Court has in Para 18 has stated as under:-

"18. In Samsher Singh v. State of Punjab (1974) 2 SCC 831, a seven-Judge Bench considered the legality of the discharge of two judicial officers of the Punjab Judicial Service, who were serving as probationers. A.N. Ray, C.J., who wrote opinion for himself and five other Judges made the following observations: (SCC p. 851 & 855, paras 63 & 80)

> "*63.* No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311 (2) of the Constitution.
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> *80.* ... The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave

character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside."

19. Krishna Iyer, J., who agreed with the learned Chief Justice, made the following concluding observations:

"160. ... Again, could it be that if you summarily pack off a probationer, the order is judicially unscrutable and immune? If you conscientiously seek to satisfy yourself about allegations by some sort of enquiry you get caught in the coils of law, however harmlessly the order may be phrased? And so, this sphinx-complex has had to give way in later cases. In some cases the rule of guidance has been stated to be 'the substance of the matter' and the 'foundation' of the order. When does 'motive' trespass into 'foundation'? When do we lift the veil of 'form' to touch the 'substance'? When the court says so. These 'Freudian' frontiers obviously fail in the work-a-day world and Dr Tripathi's observations in this context are not without force."

20. In **Ajit Singh vs State of Punjab (1983) 2 SCC 217**, the Apex Court has stated as under:-

"7. When the master-servant relation was governed by the archaic law of hire and fire, the concept of probation in service jurisprudence was practically absent. With the advent of security in public service when termination or removal became more and more difficult and order of termination or removal from service became a subject-matter of judicial review, the concept of probation came to acquire a certain connotation. If a servant could not be removed by way of punishment from service unless he is given an opportunity to meet the allegations if any against him which necessitates his removal from service, rules of natural justice postulate an enquiry into the allegations and proof thereof. This developing master-servant relationship puts the master on guard. In order that an incompetent or inefficient servant is not foisted upon him because the charge of incompetence or inefficiency is easy to make but difficult to prove, concept of probation was devised. To guard against errors of human judgment in selecting suitable personnel for service, the new recruit was put on test for a period before he is absorbed in service or gets a right to the post. Period of probation gave a sort of locus poenitentiae to the employer to observe the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserved a right to dispense with his service without anything more during or at the end of the prescribed period which is styled as period of probation. Viewed from this aspect, the courts held that termination of service of a probationer during or

at the end of a period of probation will not ordinarily and by itself be a punishment because the servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to (see Parshotam Lal Dhingra v. Union of India). The period of probation therefore furnishes a valuable opportunity to the master to closely observe the work of the probationer and by the time the period of probation expires to make up his mind whether to retain the servant by absorbing him in regular service or dispense with his service. Period of probation may vary from post to post or master to master. And it is not obligatory on the master to prescribe a period of probation. It is always open to the employer to employ a person without putting him on probation. Power to put the employee on probation for watching his performance and the period during which the performance is to be observed is the prerogative of the employer."

21. **This extract is taken from *SBI v. Palak Modi,(2013) 3 SCC 607*, at page 622:**

In Dipti Prakash Banerjee (1999) 3 SCC 60, relied upon by the applicant's counsel, the Apex Court has stated as under:-

"*19.* As to in what circumstances an order of termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. In this area, as pointed out by Shah, J. (as he then was) in *Madan Gopal* v. *State of Punjab* there is no difference between cases where services of a temporary employee are terminated and where a probationer is discharged. This very question was gone into recently in *Radhey Shyam Gupta* v. *U.P. State Agro Industries Corpn. Ltd.* and reference was made to the development of the law from time to time starting from *Parshotam Lal Dhingra* v. *Union of India* to the concept of 'purpose of enquiry' introduced by Shah, J. (as he then was) in *State of Orissa* v. *Ram Narayan Das* and to the seven-Judge Bench decision in *Samsher Singh* v. *State of Punjab* and to post-*Samsher Singh* case-law. This Court had the occasion to make a detailed examination of what is the 'motive' and what is the 'foundation' on which the innocuous order is based.

* * *

21. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad.* But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because

of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."(emphasis supplied)."

22. ***In Paramjit Singh v. Director of Schools (Public Instructions), (2010) 14 SCC 416,*** the Apex Court has held -

"It is a settled legal position that termination of a probationer on account of his non-satisfactory performance can never be treated as "penal".

And, prior to the above decision, in the case of ***State of W.B. v. Tapas Roy, (2006) 6 SCC 453,*** the Apex Court has stated -

"It is only when there is something more than imputing unsuitability for the post in question, that the order may be considered to be stigmatic."

23. In yet another decision of the Apex Court in the same vintage, in the case of ***State of Punjab v. Bhagwan Singh, (2002) 9 SCC 636,*** the Apex Court has held -

"In our view, when a probationer is discharged during the period of probation and if for the purpose of discharge, a particular assessment of his work is to be made, and the authorities referred to such an assessment of his work, while passing the order of discharge, that cannot be held to amount to stigma.

5. *The other sentence in the impugned order is, that the performance of the officer on the whole was "not satisfactory". Even that does not amount to any stigma."*

24. In the latesst case of Palak Modi (supra), in Para 36 of the Judgment, the Apex Court has held -

"36. *..... In a given case, the competent authority may, while deciding the issue of suitability of the probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect his future prospects but, if the misconduct/misdemeanour constitutes the basis of the final decision taken by*

the competent authority to dispense with the service of the probationer albeit by a non-stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, the employer has punished the employee for an act of misconduct."

25. As to the protection of service of a probationer, like a temporary government servant, the Apex Court has held in the case of ***V.P. Ahuja v. State of Punjab, (2000) 3 SCC 239***, as under:-

"7. A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of natural justice."

26. Thus, the law that could be discerned from the above is that certain protection is available to a probationer and his services cannot be terminated arbitrarily nor in a punitive manner without complying with the principles of natural justice.

27. In the instant case, of course, the applicant was one of many officials who were granted honorarium, but the same has been held to be as routine by the respondents. In so far as the derogatory remarks about females, the Committee had, though commented in general about the belittling the status of women, come to a conclusion that the same cannot constitute any sexual harassment. In other words, the mischief aimed at by the relevant provisions of Conduct Rules did not exist in this case.

28. The counsel emphatically argued that the entire action on the part of the respondents is as a consequence of the complaint, despite the fact that the complainant hereself has requested the authorities not to take any action on the complaint till the said complainant informs to proceed on the matter further. Senior Central Government Standing Counsel replied to the same stating that the same reflects the magnanimity of the said complainant. In any event,

according to the respondents, the said episode did not influence the decision to terminate the services of the applicant which is based on assessment of the applicant's performance. This is evident from the reply furnished by the respondents wherein the respondents have stated as under:-

> *"The respondents beg to submit that the above subject has no bearing to the termination of services of the applicant, though the applicant's mail referred was against office decorum."*

Similarly, the report about the applicant's taking videographs of his colleagues in his mobile camera, while on duty, also does not have any relevance to the applicant's termination from service. Thus, the foundation for terminataion is not such act which called for disciplinary proceedings.

29. The counsel for the applicant further argued that the surveillance is behind the back of the applicant and a decision arrived at on the recommendation of the surveillance committee is thus bad in law. We disapprove this contention. First of all, the applicant was duly warned that his performance would be duly watched and if need be disciplinary proceedings might be also conducted. This warning is a curve corrector and had the applicant improved his performance, perhaps, the surveillance committee would have given a better report. Watching the performance during the probation period is the prerogative of the employer as held by the Apex court in the case of **Ajit Singh (supra)**.

30. Admittedly, the final settlement has been made and the applicant had accepted the termination order and the cheque, which were sent to him. Once he has accepted the same without any protest, he cannot be permitted to agitate against the termination. (See the decision in the case of Bank of India vs O.P. Swarnakar (2003) 2 SCC 721 wherein the Apex Court has stated that employees concerned having accepted a part of the benefit could not be

permitted to approbate and reprobate.

31. The tenor of the termination order does not reflect any stigma which may affect the career prospects of the applicant.

32. In view of the above, we do not find any merit in the OA and thus, the same is dismissed. No costs.

(George Joseph)
Administrative Member

(Dr.K.B.S.Rajan)
Judicial Member

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