Government of India
Ministry of Labour & Employment,
Central Government Industrial Tribunal-Cum-Labour Court-II, New Delhi.

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

INDUSTRIAL DISPUTE CASE NO. 27/2017

Date of Passing Award- 02.11.2022

Between:

Shri Mahender Pal Singh Khurana,
48, LIC, Phase-II, Indrapuram Colony,
GMS Road,
Dehradun. Workman

Versus

1. The Chairman,
   Army Public School, Clement Town,
   Dehradun.

2. The Patron,
   Army Public School, Clement Town,
   Dehradun. Management

Appearances:-

Shri Saurabh Rastogi (A/R) For the claimant
Shri Paras Sachdeva (A/R) For the Management

A W A R D

The Government of India in Ministry of Labour & Employment has referred the present dispute existing between employer i.e. the management of Army Public School Clement Town, and its workman/claimant herein, under clause (d) of sub section (1)and sub section (2A) of section 10 of the Industrial Dispute Act 1947 vide letter No. L-14012/10/2017 (IR(DU) dated 24/07/2017 to this tribunal for adjudication to the following effect.

"Whether the action of the chairman, Army Public School, Clement Town, Dehradun, Uttrakhand

through letter No.1001/APS, dated 29/05/2015 in terminating the services of Shri Mahendra Pal Singh Khurrana worked as Accountant in the school is legal, fair and justified. If not than what remedies lie with the workman Shri Mahendra Pal Singh Khurana and what relief he is entitled to?"

As stated in the claim petition, the claimant, was initially appointed in the Army Public School, Clement Town Derhadun , in the year 2007 as a Lower Division Clerk on a fixed term contract for three years and by appointment letter dated 26.06.2007, he was asked to join his duty w. e. f. 03.07.2007 and accordingly he joined. On 18.05 2008, he was appointed as the accountant and letter of appointment was issued. Accordingly he joined as the accountant 18.05.2008 and his appointment was on fixed term basis for a period of three years and the pay scale given to him was 4500-125-7000 with admissible DA, HRA and other allowances. For his satisfactory performance, the said employment was again extended for a period of three years i.e upto May 2014 on an increased consolidated salary of Rs10500/- per month. On completion of that term and at the end of this three year period i.eon 24th May 2014, his service by appointment letter dated 24th May 2014, was again extended for a further period of three years as per the Army Welfare Education Society (AWES) Rules, on consolidated salary of Rs 15,300/- per month. That fixed term appointment for three years was to be over on 29th May 2017. But suddenly, on 29.05.2015, the principal of the school called him and handed over the letter of termination to his utter surprise. No reason was assigned for the harsh action taken in violation of the terms of his appointment. This action against him was taken to adjust their own men and the termination amounts to retrenchment. At the time of such retrenchment, no notice or notice pay was given to him. There was no disciplinary or administrative action was pending against him at the time of termination. After that termination the claimant visited the office of the respondent several time with a request for his reinstatement. But the grievance of the claimant was not considered. Having no other efficacious remedy, he approached the labour commissioner Derhadun. Though the respondent's AR appeared and participated in the conciliation proceeding, nothing fruitful could be achieved and the appropriate Govt. referred the matter for adjudication on the legality of the Termination.

Notice was served on the Management who appeared through it's counsel and filed written statement denying and disputing the stand of the claimant. The admitted facts as per the written statement are that the claimant was initially appointed as a lower division clerk in the Army Public School, Clement Town, Derhadun and subsequently appointed as the Accountant (term based) purely on contractual basis. The said appointment was renewed from time to time and the last appointment was vide appointment letter dated 29.05.2014. In the agreement for appointment it was clearly mentioned that the Management reserves the right of terminating the service by giving one month notice or one month pay in lieu of the notice. Similarly there was a clause that the employee can resign from the service by giving one month notice or one month salary in lieu of the notice. At the time of appointment the employee claimant had also furnished a certificate stating that he has read and understood the revised Rule of Army Public School, where in it has been clearly stated that the employer can terminate the service of the employee any time by giving one month notice or one month pay in lieu of the notice. The renewal of the service of the claimant was subject to satisfactory performance. But prior to the renewal and at the time of renewal, the claimant was fond not performing to the expected standard. Thus once on 22.07.2013 and again on 05.11.2014, he was issued performance counseling letters. Even after that the claimant did not improve his performance and the management being left with no other alternative, terminated his service with effect from29.05.2015. At the time of such termination, one month pay in lieu of notice along with all other legal entitlements were paid to the claimant and the same was received without protest. The post which fell vacant for the termination of the claimant's service was filled up by appointment of a new candidate as the same was necessary to meet the day to day work of the school. The claimant raised a false and frivolous claim before the labour commissioner and the Respondent placed all the materials supporting it's stand before the commissioner. Even then the matter was referred to this Tribunal. The Respondent has pleaded that the claim based on mis led facts is liable to be dismissed.

On the basis of the pleadings the following issues were framed by order dated 19.11.2018.

ISSUES

1- Whether the action taken by the Respondent in Terminating the service of the claimant /applicant is illegal, improper and contrary to the provisions of law.
2- whether the claimant is entitled to the relief of reinstatement with back wages

3- To what other relief the parties are entitled to.

The claimant examined himself as WW1 and produced several documents which were marked in a series of WW1/1 to WW1/6. These documents include all the appointment letters of the claimant starting from his initial appointment in 2007, appointment in the post of accountant in the year 2008, the letter of termination of service, a certificate of Merit issued in the year 2008 for the outstanding and meritorious service rendered and another letter of recommendation. At the time of cross examination he was confronted with two of his signatures given before the labour commissioner acknowledging receipt of Rs 32800/- from the principal of the Army Public School Derhadun.

On the other hand the Respondent examined the Head Clerk of the School as MW 1, who proved the document marked as MW1, which is the appointment letter of the claimant and contains a clause to the effect that the Respondent reserves the right of terminating the service of the employee after giving one month notice or one month pay in lieu f the notice. The witness also stated that respondent relies upon the documents marked as WW1/M1 and WW1/M2, acknowledging receipt of the notice pay. Both the witnesses were cross examined at length by their adversaries.

During course of argument the learned AR for the management submitted that the claimant was only a fixed term contractual employee whose satisfactory performance was sine qua non for extension of the contractual employment. The appointment was made and the appointment letter was issued in consonance with the AWES Rules and Regulation issued in Sept 2011. The appointment letter was containing a clause in the line of that Regulation according to which the employer reserves the right of Terminating the service of the employee and the claimant a term based contractual employee, while accepting the offer of appointment, had given a certificate that he read and understood

the said clause properly. All these facts are admitted by the claimant during cross examination and also proved from the documents filed. The performance of the claimant was not satisfactory which is evident from the fact that on two separate occasions performance counseling notices were issued to him. Photocopy of those notices was placed on record being marked as C and D. He thus argued that no illegality was committed in terminating the service of the claimant who was an under performer for years and all legal and financial dues have been received by him. Hence the claim petition is liable to be dismissed.

The counter argument advanced by the claimant s that no departmental inquiry was ever initiated against him nor he was called upon to reply to the performance counseling reports. Not only that, the notice pay as claimed by the Respondent was paid after he raised a dispute before the labour commissioner. He received the same under protest. One month pay was given by the respondent during the pendency of the dispute along with his PF deposits. That was his salary for the duty done in the month of June 2015 and not the notice pay as claimed by the respondent. The said fact is evident from the contents of the documents filed by the respondent and marked as WW1/M1 and WW1/M2. It was also argued that the respondent without any valid reason and without following the Regulation of AWES, terminated his service which amounts to unfair labour practice and he is entitled to the relief sought for.

FINDINGS

ISSUE NO 1

The admitted fact is that the claimant was appointed as a LDC from 3rd July 2007 to 11thMay 2008. Thereafter he was appointed as the accountant on 19th May 2008 for three years and con completion of that tenure he was appointed again on 26th May 2011 for another period of three years which ended on 25th May 2014. On completion of that tenure, he was re appointed as the accountant for another term of three years commencing from 2nd June 2015. The appointment letter filed by the claimant and marked as WW1/4 clearly shows that the appointment was contractual in nature and for a fixed term of three years. But on 29th May 2015, his service was suddenly terminated which is evident from the letter of termination filed by the Respondent and marked as E for identification. This fact is not disputed by the parties. But

the explanation offered by the respondent is that the claimant was an under performer and a continuance of the contractual appointment was purely performance based. Hence by following the due procedure of law and abiding by the termination clause mentioned in the appointment letter the order of Termination was passed. The claimant having knowledge of the said Termination clause is precluded from challenging the same .to prove the under performance of the claimant, the Respondent has placed on record two attested photocopies of the performance counseling letters issued to the claimant on 22nd July 2013 and 05th Nov 2015. Those documents were marked as C and D respectively for identification. The claimant, during cross examination admitted to have received the same. On perusal of the contents of the said documents, those appear to be warnings given to the claimant for improving his performance failing which disciplinary action may be taken against him. Admittedly no disciplinary action was taken against the claimant at any point of time before his termination. More surprisingly, though the first the first performance counseling letter was served on the claimant on 22nd July 2013, he was reappointed on 2nd June 2014. If at all he was found to be an under performer, the respondent had the opportunity of weeding out him at that stage. Instead, he was reappointed, which leads to a conclusion that at the time of reappointment the respondent had no grievance with regard to the performance of the claimant. Similarly after issue of the 2nd performance counseling letter dated 5th Nov 2015 and termination dated 29th May 2015, no departmental inquiry was held nor ay show cause notice or explanation for the underperformance was called for. This leads to a conclusion that the performance counseling letters were issued to the claimant a contractual employee as a matter of routine.

The management has pleaded and adduced documentary evidence to prove that in the letter of appointment there was a clause that the management reserves the right of terminating the service of the employee at any time by giving one month notice or one month pay in lieu of the notice. The claimant has admitted during cross examination that he had knowledge about the same. As discussed in the preceding paragraph, the respondent had not given any termination notice to the claimant. Though it has been stated that one month pay was paid in lieu of the notice no evidence to that effect is available on record. Though it has been argued that the notice pay was paid before the labour commissioner, no proof to that effect has been placed on record.

The document filed by the respondent as Annexure H along with the WS appears to be the calculation with regard to the final settlement of his dues during termination. This document bears the date 26th Aug 2015. But in this document there is no indication that one month pay as against the notice was paid. It shows payment of duty pay for the month of June 2015 as the claimant's service was terminated on 29th June 2015. The claimant had accepted the same on 14.09.2015. Though the document marked as WW1/M2, confronted and admitted by the claimant during cross examination contains the observation of the Labour commissioner that the management pleads about payment of notice pay, there is no observation in the said proceeding that the claimant admitted receipt of the same, In absence of any document of receipt of the said amount, the stand of the claimant with regard to nonpayment of termination compensation appears convincing.

The other argument of the respondent emphasizes the termination clause in the appointment letter. But that clause does not confer an unfettered right on the employer for exercise of the discretion. Right of discretion is always associated with the duty of reasoning and diligence. In the case of **VedPrakash vs. Apparel Training and Design, decided on 10th Feb 2021,** the **Hon'ble High Court of Delhi** have held that the management is permitted to pick and choose to terminate the service of an employee on the pretext of Termination clause. It is to be exercised cautiously, following the principle laid down under law and extra precaution is to be observed when the post is not abolished. In the WS, management has admitted about the continuance of the post in which the claimant was working and that a new person has been appointed in the place of the claimant to meet the work. Thus on consideration of the evidence adduced by both the parties, it appears that the management/ respondent without any valid reason and in violation of the Regulation of AWS, Terminated the service of the claimant with effect from 29th May 2015, though the post against which he was working has not been abolished and while doing so the provisions of ID Act were not followed as no notice on notice pay for termination was paid. The amount equivalent on month salary paid is the duty pay paid to him. The pled taken by the Respondent with regard to the under performance of the claimant is not accepted considering the fact that the performance counseling letter communicated to the claimant was never followed by any departmental action. Rather, he was re appointed after issue of that letter. Had the claimant been an under performer, the

Respondent would have certainly thought of not re appointing him at that point of time. The action of the Respondent amounts to unfair labour practice and this issue is decided in favour of the claimant and it is held that the termination of the service of the claimant is illegal.

ISSUE No2&3

In view of the finding reached while deciding issue no 1, it is held that the claimant is entitled to reinstatement for the illegal Termination of his service as the post in which he is working still exists. But the evidence adduced by the claimant reveals that he has attained the age of superannuation i.e .sixty years in the meantime. Hence his reinstatement with full back wages for the remaining period of the contractual employment would not be in the interest of justice. Hence it is felt proper to direct the management to compensate the claimant suitably for the unfair labour practice adopted by the management in terminating his service. These two issues are accordingly answered in favour of the claimant. Hence, ordered.

ORDER

The Reference be and the same is answered in favour of the claimant. It is held that the service of the claimant was illegally terminated by the Respondent/ Management w. e. f. 29th June 2015, though his contract of service was subsisting for 24 months more. Considering the said period, it is directed that the management shall compensate the claimant by paying Rs 4 Lakh which could have been earned by him as salary, Rs 17,300 as notice pay and Rs 1 lakh as litigation expenses with interest @ 3% per annum from the date of termination and till the actual payment is made. The Management is directed to pay the amount as stated above, to the claimant within one month from the date of publication of this award, failing which, the amount stated above shall carry interest @ 7% per annum from the date of accrual and till the actual payment is made. Send a copy of this award to the appropriate government for notification as required under section 17 of the ID act 1947.

The reference is accordingly answered.

Dictated & Corrected by me.

Presiding Officer.
CGIT-Cum-Labour Court.
2nd November, 2022.

Presiding Officer.
CGIT-cum-Labour Court.
2nd November, 2022.