ID No. 119/2021
02nd t May 2023
Present : Sh. Mohan Bir Singh, Ld. A/R for the claimant along with claimant.
Sh. Anil Bhatt, Shri Akhil Anand Ld. A/Rs for the mgt.

This order is intended to decide issue no 2 regarding the fairness of the enquiry and adoption of the principles of natural justice in the domestic enquiry conducted against the claimant/workman as a preliminary issue.

The facts leading to the present Industrial Dispute and relevant for answering the preliminary issues are that the claimant was employed as a Cabin Crew with O.P no. 1 since 05.12.2008. She was one of the group of Cabin Crew employed on the same day with the mgt of O.P no.1. Her service was confirmed with effect from 25.06.2009 along with the other persons who had joined on the same day. On 28.01.2020, a show cause notice was served on her alleging that she had posted a picture of herself on the social media profile which was displaying her Lufthansa Air Lines ID. It was further alleged in the said show cause notice that although on 28.04.2019 she had reported sick and proceeded on sick leave for three days and again reported sick on 15.09.2019 and proceed on sick leave for five days and also had submitted a medical certificate wherein she was advised bed rest for 3-4 days, it came to the knowledge of the mgt that during the said period the claimant/complainant was attending an event. It was alleged that the claimant/complainant misrepresented to the employer with regard to her illness and the said act amounts to gross and serious misconduct. The claimant replied to the show cause notice stating that in the month of April she had not attended any audition or event as alleged, but had submitted a video for the audition of a contest on 23.04.2019 and one magazine had taken her photograph on 22.12.2019 which was her designated off day. In the month of May, she was sick on 15th and 16th and had not attended any event. However, on 17.05.2019 she had been to the venue of the event for few hours and came back home as she was unwell. Again on 18th May, she attended the event from afternoon till evening and had gone there with the permission of her treating doctor as she was not bedridden at that time. Thereby the claimant had denied the allegations described in the show cause notice. On 7th Feb 2020, an order was issued by which she was placed under suspension in contemplation

of a domestic enquiry on the basis of the show cause notice dated 28.01.2020. On 14th Feb 2020 the notice of enquiry was served on her where under information was provided that one Mr. Kumar Prem Anand has been appointed as the enquiry officer and she was asked to appear before the enquiry officer on 19.02.2020. The enquiry was conducted through virtual mode as it was the time when the Covid-19 had broke out. At the conclusion of the enquiry Mr. Kumar Prema Anand submitted his report and a copy of the same was forwarded to the claimant along with the second show cause notice dated 19.05.2021. In the said show cause notice it was mentioned that the charge against the claimant for participation in the event from 15.05.2019 to 18.05.2019 stands proved and it is also proved from the admission of the claimant that she had posted a picture in the social media with Lufthansa ID. The fact that she had lied to the employer about her illness but during that period participated in an event, amounts to gross conduct which may lead to disciplinary action including termination. The claimant gave reply to the said show cause notice on 21.05.2021. However, the mgt terminated her service with immediate effect and a later dated 08.06.2021 to that effect was served on her. Being aggrieved, she filed the present complaint invoking the provisions of section 33 A of the ID Act on the ground that her service condition was changed by the employer during the pendency of Industrial Dispute registered as ID no. 05/2018 raised by Lufthansa Cabin Crew Association, of which, the claimant is a member and the said dispute is with regard to the general demands of the members of the Association and has been referred by the appropriate Government. In this complaint, the complainant had prayed that in view of the Constitution Bench judgment of the Hon'ble Supreme Court in the case of **Jaipur Zila Sahakari Bhumi Vikas Bank vs. Ram Gopal Sharma and Ors.** the employer cannot make any alteration in the service condition of the employee in any manner connected with the dispute pending before an Industrial Authority. Thus, in this complaint the claimant has alleged violation of the provisions of the section 33 of the ID Act.

Being noticed the mgt appeared and filed a written statement denying the stand taken by the complainant. It has been pleaded that the service of the claimant has been terminated on the charge of serious misconduct which stood proved by her own admission and the validity of the said enquiry having not been disputed by the complainant the reliefs

pleaded that for invoking the provisions of section 33A the complainant is required to prove violation of section 33, and in fact, there had been no violation of the provisions of section 33 or 33(2) of the ID Act as alleged by the complainant. The mgt took a further stand that the claimant had lied about her illness to the employer and remained in sick leave from 15th May 2019 to 18th May 2019 and during the domestic enquiry, she admitted her guilt and thus the charge stood proved. Hence, there was no illegality or unfairness in the conduct of the enquiry and the punishment was appropriately imposed on her.

On the basis of the pleading, by order dated 02.06.2022 three issues were framed. On 03.08.2022 before examination of the claimant as a witness the mgt moved an application for recasting of the issues requesting framing of two additional issues relating to the status of the claimant if a workman and if the enquiry against the workman was conducted fairly or not. This Tribunal by order dated 08.08.2022 rejected the application observing that the issue whether the claimant is a workman or not is covered under issue no. 1. The other proposed issue relating to fairness of the enquiry cannot be adjudicated in this proceeding which is in the nature of a complaint filed under section 33A of the ID Act.

Being aggrieved the mgt had challenged the order dated 08.08/.2022 before the Hon'ble High Court of Delhi by filing W.P.C no. 12549/2022. The Hon'ble High Court while disposing the writ petition directed that order dated 08.08.2022 passed by this Tribunal is modified to the extent that the Tribunal shall examine and decide the issue relating to the just and fairness of the domestic enquiry and to give a finding whether the enquiry was conducted in accordance with law and following the principles of natural justice, as part of issue no. 2 already framed. Hence, both parties were called upon to adduce evidence on the fairness of the enquiry in order to examine if the principles of natural justice were followed during the said enquiry.

The complainant examined herself as WW1 and proved the documents marked in a series WW1/1 to WW1/12. These documents include the show cause notice dated 28.01.2020, the reply given by her to the said show cause notice, the order of suspension dated 07.02.2020, the notice for the enquiry, the second show cause notice and the enquiry

report served on her and the order of termination dated 08.06.2021. She has also filed her pay slip and other documents showing payment of membership fee to Lufthansa Cabin Crew Association. On the other hand, the mgt examined Mr. Kumar Prem Anand the enquiry officer of the domestic enquiry as MW1. He proved the documents relating to the enquiry proceeding and the report marked as MW1/1 to MW1/2 (colly).

At the outset of the argument, the Ld. A/R for the mgt submitted that in this complaint the claimant has challenged the action of the mgt for imposing punishment on her during the pendency of an Industrial Dispute raised by the Cabin Crew Association relating to general demand. It is the mgt who pleaded that the complaint is not maintainable and the domestic enquiry has been conducted in a fair and unbiased manner. Proper opportunity was granted to the charged employee to set up her defense.

The counter argument of the Ld. A/R for the complainant/claimant is that the entire enquiry proceeding should be held vitiated for non compliance of the procedure laid down under the model standing order. The appropriate charge head was never framed, for which the workman was not aware of the charges leveled against her. Moreover the claimant was denied opportunity of taking the assistants of a lawyer when the mgt had appointed a lawyer as the enquiry officer. Not only that, on conclusion of the enquiry, though the report of the enquiry was served on the claimant, she was not informed about the appellant authority as if the order of the enquiry officer is final for all purpose. In reply, the Ld. A/R for the mgt submitted that this is typical case, where the allegations are part of the record and photos posted in the public domain. The claimant was made aware of the allegations and she had actively participated in the enquiry. Her admission of the allegations, led to the passing of the impugned order and the allegations were properly proved during the enquiry, he has also advanced extensive argument on the merit of the evidence pointing to the proceeding recorded during the enquiry, the transcript of which was supplied to the Tribunal during the hearings. It is the argument advanced by Ld. A/R for the claimant that for deciding the preliminary issues relating to the fairness of the enquiry, the Tribunal at this stage cannot look into the evidence recorded or the probative value of

the evidence so adduced. The scope of preliminary issue hearing is only to examine the procedure adopted, and the fairness of the enquiry.

It is a settled principle of law that the Tribunal authorized to decide the dispute relating to punishment inflicted on workman pursuant to a disciplinary proceeding, is required to consider at the first instance if the domestic enquiry proceeding has been held properly and the same is valid. The departmental enquiry being a quasi judicial proceeding, the same, as per the different pronouncements is required to be done in an unbiased manner following the principles of natural justice.

In this case, the claimant Manisha Thakur, during her examination has stated that no formal charge was framed against her or served. The Ld A/R for the claimant submitted that framing of charge is a pre condition for conduct of the enquiry. The counter argument of the mgt is that the show cause if contains the details of the allegations, there is no hard and fast rule for framing of a formal charge. He replied to the objection of the A/R for the claimant that the procedure laid down under the model standing order was not followed, in this case since the model standing order is not applicable to the mgt establishment. It is a matter of principle that for taking any action against any person or employee, the authority contemplating action has to follow the procedure laid down by itself or to follow the model standing order. In this case, no material has been placed on record by the mgt to show that the establishment has its own standing order as it has admittedly more than 100 employees engaged or there are internal guidelines issued by the management for conduct of the domestic enquiry. At this juncture, the Ld. A/R for the mgt argued that it is incumbent upon the claimant to prove that the model standing order applies to the establishment she is working. The Industrial employment standing order Act 1946 applies to an establishment that employees 100 or more workmen. That burden has not been discharged by the claimant as there is no pleading to show that the mgt has employed 100 or more workmen. This argument does not sound convincing as the mgt is an Airlines and certainly has the employees strength exceeding the number 100.

On behalf of the mgt argument was also advanced relying upon the judgment of the Hon'ble High Court of Delhi in the case of **Ashok Kumar Monga vs. UCO Bank and Ors, 1999(51)DRJ** to the effect that

when the perusal of the memo of show cause discloses the complete particulars of the allegations made against the employee, no prejudice can be said to have been caused in treating the said show cause as charge sheet. He further submitted that it is the substance which matters and not a particular format of charge head. Admittedly, no charge head was framed and supplied to the claimant. The show cause notice marked as ww1/1 is stated to have contained all the details of the allegations. But this show cause notice ww1/1 only informs the claimant that during the sick leave period, she had participated in an event and had posted pictures in the social media with the ID of Lufthansa which amounts to misconduct. But this information as incorporated in the show cause notice do not seem to be a complete and exhaustive information provided to the claimant with reference to the specific rules and guidelines she had violated. As understood in the common parlance, charge is the specific formulation of accusation meant to enable the charged person to know the violation of the specific provisions attracting liability. Merely because a show cause notice was issued, the same cannot take the place of the charge. Moreover, when the standing order applicable to the industrial establishments specifically provides for framing of charge, in this case the same cannot be overlooked for the stand of the mgt that the standing order is not applicable. No convincing evidence has been placed to make the Tribunal believe the submission of the Ld. A/R for the mgt who submitted that it is incumbent upon the claimant to show that standing order is applicable to the establishment and the workman. The counter argument of the Ld. A/R for the claimant is that the certified standing orders are not in the nature of delegated/subordinate legislation. Though the standing order contains the statutorily imposed conditions of service it is an all together different thing to say that the same does not apply to the mgt establishment. He also pointed out relying upon the judgment of the Hon'ble Supreme Court in the case of **Anil Kumar vs. Presiding officer and Ors. (1985) SSC 378,** that the enquiry officer in the present case merely recorded that the charges stands proved without assigning any reason as to why the evidence produced by the mgt appealed him. A disciplinary enquiry being a quasi judicial enquiry is to be held according to the principles of natural justice and the enquiry officer has to act judicially. He further argued that the impugned order of enquiry has

disclosed the conduct of the proceeding in a reckless disregard of the rights of the claimant.

The law is well settled that the enquiry officer at the beginning of the enquiry is required to apprise the charged employee about the procedure of enquiry. But from the transcript of the enquiry report it is no where revealed that the procedure to be adopted was explained to the claimant who was the charged employee. The transcript of the enquiry and the enquiry report marked as MW 1/1 no where reveals that opportunity was granted to the charged employee to be assisted by a defence assistant. Not only that there is no material on record to believe that while serving the copy of the enquiry report, the charged employee was informed about the appellate authority and the time limit within which the departmental appeal could have been filed by her.

During course or argument, the Ld. A/R for the mgt submitted that that the Hon'ble Supreme Court in the case of **Air India Corporation vs. V.A. Rebflow and another reported in AIR 1972SC 1343** and in the case of **Indian Airlines vs. Prabha D Kanan decided in appeal (CIVIL) 4767 of 2006**, have held that the mgt has power to dismiss an employee for loss of confidence even without conducting a domestic enquiry. In this case when the enquiry was conducted, the same cannot be found with fault on trivial grounds like non framing of formal charge or non informing of the name and designation of the appellate authority. But this argument does not sound convincing as the principles of natural justice demands that the charged employee should be informed about the allegations against him and the remedy which is available including the right to engage a defense assistant, which was not done in this case. In the case of **M/s Firestone Tires and Rubber Company of India vs. Management and others, 1973 SCR(3) 587** the Hon'ble supreme court in para 40 of the said judgment after analyzing all earlier judgments have held that before imposing the punishment an employer is expected to conduct a proper enquiry in accordance with the provisions of standing order, if applicable and following the principles of natural justice. The enquiry should not be an empty formality. When a proper enquiry has been held by an employer, and the finding of the misconduct is the plausible conclusion flowing from the evidence, adduced at the said enquiry the tribunal has no jurisdiction to sit in judgment over the

decision of the employer as an appellate body. The interference with the decision of the employer will be justified when the finding arrived at in the enquiry are perverse or the mgt is guilty of victimization, unfair labour practice or mala fide. The tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only if no enquiry has been held or the enquiry conducted by the employer is found to be defective.

In this case, as discussed in the preceding paragraphs the enquiry against the claimant was not conducted in a fair manner following the principles of natural justice since that before commencement of enquiry no charge was farmed and communicated to the employee. The procedure of enquiry was not explained to the employee, opportunity of availing of defence assistance was not provided and at the time of communication of the termination order, the charged employee was not apprised of her rights to make a departmental appeal, the detailed designation of the appellate authority, and the time permissible for the same. The enquiry was conducted and concluded by the enquiry officer as if he is the final authority and on the basis of the said report punishment was imposed. Thus, for the defects found in the enquiry the said enquiry, against the claimant is held improperly conducted and thus stands vitiated issue no. 2 is accordingly answered in favour of the claimant.

There is an application filed by the mgt seeking permission to adduce evidence to prove the change, in case the domestic inquiry is held vitiated. But in my considered view, in this proceeding the opportunity of proving the charge cannot be given to the mgt since it is a proceeding field by the claimant u/s 33A of the ID Act and the domestic inquiry or the proportionality of the punishment has not been questioned.

Hence, the matter is adjourned to 11.07.2023 for argument to be adduced by both the parties on issue no. 1 & 3 framed by order dated 02.06.2022, which shall include the objection of the mgt with regard to the status of the claimant if a workman or not.

Presiding Officer