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. 87/2014

Date of Passing Award- 31.05.2022

Between:

Ms. Sandhya Jolly,
W/o Shri Sharad Jolly,
R/o C-30, Hauz Khas,
New Delhi-110016. Workman

Versus

The Management of British Airways,
DLF Plaza Towers,
DLF City Phase-1 Gurgaon,
Haryana 122002. Management

Appearances:-

Shri S.A Sebastian (A/R) For the claimant

Shri Sanjay Rawat (A/R) For the Management

A W A R D

This is a claim filed by the claimant invoking the provisions of section 2A of the Industrial Dispute Act 1947 wherein the action of the management in terminating her service illegally has been challenged. Prayer has been made for reinstatement into service with continuity, full back wages and other consequential benefits. Notice of the dispute being served the management appeared and participated.

As stated in the claim petition the claimant Sandhya Jolly was appointed in the Delhi Office of British Airways as an accounts clerk on 26.04.1996. That post was in Grade B of the Cadre. Subsequently she was promoted to the post of account Supervisor in Grade S1 and again as Accounting Team Leader and finance analyst in Grade S3. In the year 2009 the British Airways an organization engaged in the business of Transportation and Cargo through Air service announced finance reorganization and the said change being implemented worldwide all affected business management team members were asked to reapply for new roles that had evolved due to this global reorganization. As per that agreed British Airways redeployment process the affected staff had the option of

applying for new roles or to opt for the VSS Scheme. When the vacant position in the workman's Grade S3 was advertised the claimant was asked to reapply and prove her merit in the selection process. But she was not selected and offered with the proposal of VSS. But the claimant did not accept the same and after repeated meetings held the claimant took up a vacant role of Finance Assistant. No grade protection was allowed to her and she was advised to apply as and when a position in Grade S3 would be advertised. Since, 01.01.2010 the claimant continued to work as the Finance Assistant i.e till her job was illegally terminated. While the matter stood thus on 11.04.2014 Mr. Sandeep Rai the manager to whom the claimant was reporting invited the entire finance team including the claimant for a meeting. The meeting was joined by Mr. Sanjay Soni the manager HR who in the said meeting announced about the reorganization of South Asia Finance Team on the basis of 2011 BA-Iveria merger and formation of International Airlines Group (IAG). The claimant and others were made to understand that the reorganization is meant to achieve efficiency, synergies and integration etc. Mr. Soni also informed that after formation of IAG there was an urgent need of setting up a world class finance hub and as a consequence to the change all transactional financial processing work has been outsourced to Accenture Chennai and only the high value added work is to be done within the BA Finance Organization. The new South Asia Finance Team Structure was displayed on the screen for few minutes but never shared or published for the information of the workman and her co-employees. On the same day at 11.30A.M the claimant was invited for a discussion where some concern was expressed by the claimant with regard to the presence of Ms. Ritika Luthra a stranger. This annoyed Mr. Sanjay Soni who compelled the claimant to give a statement to the effect that she insisted for Ms. Ritika Luthra to leave the room. This was not acceptable to the claimant. In the said meeting the claimant was informed that for the reorganization of the finance team the impacted surplus employees have to apply for redeployment and it was also informed that 17th April will be the last day for submission of Role Preference Form and the selection process will be held on 22nd /23rd April. The claimant raised concern and about the interaction made during the meeting held on 11/04/14 and sent an email requesting for the information regarding the redeployment process, the vague redeployment form given which lacks clarity with regard to job requirement and benefit etc. on account of the said email on 17.04.2014 the claimant was called by Mr. Sandeep Rai, her manager for a one to one discussion and verbal meeting. In the said meeting the claimant again insisted and requested the information on the Finance Reorganization Pack. Mr. Sandeep Rai instead of answering the query of the claimant replied that she should trust the management. This prompted the workman not to apply for the newly created position of Finance Executive in Grade LM for want of clarity. On 22.04.2014 and 23.04.2014 interview was conducted in respect of the members of the finance team who had applied for the new position of finance executive in LM Grade. On 23.04.2014 at 4.40P.M when the

claimant was in her desk she was called and guided by Mr. Sandeep Rai to the meeting room for an urgent meeting called by Mr. Sanjay Soni the HR Manager. With lots of hesitation the claimant went to the meeting room where Mr. Soni served her with a termination notice with immediate effect based on the Global Company arrangement of BA and IAG and the BA Finance India Organization. Thus, the service of the workman was illegally terminated w.e.f 24.04.2014 and the letter of termination was served on her via courier and speed post. In the termination letter it was mentioned that the entire transactional accounting, reconciliation payment and accounting functions being transferred to Accenture and due to non availability of any other opportunity in BA for such restructuring the service of the workman stands terminated w.e.f 24.04.2014. Thereafter an amount of Rs. 1815967/- was credited to her salary account. The claimant received the same under protest and without prejudice sent a cheque of Rs. 10207/- towards two days excess salary credited to her account. Subsequent thereto another Rs. 10,00,000/- was also credited to her account towards gratuity and the claimant by writing a letter dated 21.05.2014 protested the same. The claimant being aggrieved by the illegal termination of her permanent employment raised a dispute before the conciliation officer. But for the adamant and non cooperative attitude of the management the conciliation failed and she was advised to approach the Tribunal. Accordingly she has filed the present claim petition.

In the claim petition she has denied about the restructuring or reorganization in British Airways as stated in the termination letter. It has also been stated that she has been made a victim of hostile discrimination as no other employee of the finance department of British Airways in India was terminated. It is also stated that the work in Finance Department has not been sourced out as mentioned in the termination letter and the job performed by her was of perennial nature and the said post has been given a different nomenclature and a new LM Grade with a view to take out the employees from the category of workman defined in section 2(S) of the ID Act. It has also been stated that her termination of service on account of the alleged reorganization is violative of BA's Policy including the redeployment process which provides that the affected employees who are not fit to handle the job in the new position would be provided necessary training and the persons who cannot be redeployed at that instance will be given an option for any other post under the BA Business Response Scheme. She has further stated that the termination of her service is in violation of section 33(4) of the Industrial Dispute Act as she was on the date of her termination was a protected workman being the working President of the Federation of British Airways Employees Union. At the time of her termination the management least bothered to publish the seniority list of the employees and victimized her for the legitimate trade union activities undertaken in the capacity of the working president of the federation. Thus,

the claimant has described the action of the management in terminating her service as illegal discriminatory and contrary to the provision of Id Act amounting to unfair labour practice and thereby she has prayed for an award declaring the termination illegal with the relief of reinstatement continuity of service, full back wages and all other consequential service benefits.

The management British Airways entered appearance and filed written statement denying and challenging the claim advanced by the claimant workman. The stand taken in the WS is that the British Airways is an international carrier which encountered huge loss on account of the Global Economic slowdown, weaker consumer confidence and high oil price. This impacted the revenue flow and the survival of the company was at stake. Several initiatives were taken to reorganize and restructure its business in the year 2008-2009. As a consequence thereof in the year 2010 alongwith other restructuring measures the BA joined International Airlines Group (IAG) which was constituted as the parent company. There was a need to restructure and ensure that IAG has synergies and scalable finance platform. Accordingly a global decision was taken to engage some expert body to handle the Transactional Finance Activities of the entire IAG Group including BA. It was also decided to move away from individual transactional finance function and transfer it to a single entity. The British Airways thus decided to transfer the transactional accounting and reconciliation payments to an organization having essential credential and expertise in the matter. Accordingly the entire above said work was transferred to Accenture a global leader in providing consultancy, technology and shared service expertise to its client. This restructuring was rolled out in several offices of BA across UK, Europe and Asia including the South Asia Region to which the business in India falls. The work with Accenture commenced w.e.f 27th April 2014. As a result of such transfer of transactional accounting and reconciliation payment and finance payable work to Accenture the service of 10number of employees in the finance department was not required. This situation occurred for the transfer of undertaking envisaged u/s 25FF of the Industrial Dispute Act 1947 and no illegality was ever committed while terminating the service of the claimant. It has also been stated that as a progressive employer the management has a redeployment policy and under this policy the serving employees are free to apply for redeployment whenever a vacancy exists in a particular department. The employees who wish to seek alternate carrier opportunity in BA and the employees whose services are coming to an end in their department are free to offer their candidature for the vacant positions. The 10 impacted employees were conveyed about the redeployment selection process with respect to the posts available. At that time there were 6 LM Grade post vacant and those posts were in a higher grade then the grade held by the 10 affected employees. Out of the 6 ,2 posts of such LM Grade were already filled and the 10 impacted employees were called upon to apply and

participate in the redeployment process. Though all of the said impacted employees submitted the form and agreed to participate the claimant refused to participate despite repeated request. The selection procedure was taken up and 4 out of the 9 impacted employees were appointed to the new posts available in LM Grade. When the claimant refuse to participate in the redeployment exercise, on 17th April, and 21st April 2014 several email correspondences were made with her in which the time period for submission of the application was enlarged. Despite that the claimant refused to participate. The management thus had no other option than terminating the service of the claimant w.e.f 24th April 2014. While doing so the provisions of Id Act were strictly complied and the claimant was paid 3 weeks salary for each completed year of service in addition to one month pay in lieu of notice which was in a higher side then the retrenchment compensation payable under law. She was also paid Rs. 10,00,000/- towards gratuity and the claimant accepted the same. Thus, the management has stated that no unfair labour practice was adopted nor any hostile discrimination was meted out to the claimant. The claim advanced by her is baseless and liable to be rejected.

The claimant filed rejoinder saying that the termination of her service cannot fall under the scope of section 25FF of the Id Act in as much as the transfer of transactional accounting and reconciliation payments work to Accenture does not amount to transfer of undertaking. The finance is a service department of BA and transfer of a part of the work of that department to Accenture cannot be construed as the transfer of undertaking mentioned in section 25FF. It has also been stated that in the year 2008-2009 there was never any restructuring but only a transfer of business from one place to another between BA Offices. Similarly in the year 2014 there was no reorganization or restructuring of finance. It was merely a sourcing out of the perennial work done with a view to reduce the no. of work force. While disputing the cadre of the post offered to she has stated that there is no such LM Grade post in the binding settlement between the BA employees union and BA. No pay scale or nature of duty for the said LM Grade Post was ever announced. When it was announced that for the outsourcing the service of 10 employees in the finance department is not required, no seniority list was published. The work performed by the claimant was perennial in nature and as such the post held by her cannot be abolished. During the so called redeployment procedure the BA violated its own policy and the workman was never given any option besides the 4 LM Posts in finance for which the requisite details were never shared. No notice was given to the workman to exercise her option as per BA redeployment policy. The management opened only 4 LM Grade vacancies when there were 10 affected employees. It was within the knowledge of the claimant that the LM Grade is an unrecognized grade outside the purview of the scale/cadre/category of the workman to which she belongs to. The salary details and other connected

benefits were never shared by the management despite request made by her verbally and through email. The management had created pressure on her to opt for the redeployment to that post and participate in the selection procedure keeping her in dark about the job profile salary etc attached to the post. She was only called upon to fill up the form which was cryptic for having only 2 options accepted or not accepted. The workman had every reason to entertain doubt on the action of the management and intimated that she would prefer to continue in her current post. But the management without considering her submission immediately terminated her service we.f 24th April 2014 in gross violation of different provisions of Id Act. In the replication the claimant has also stated that the work handled by the workman continues to be performed by the other BA staff till date in the BA finance department. Hence, the claimant has stated that she was not a surplus staff to be redeployed and in that regard unfair labour practice has been adopted by the management.

On these rival pleadings the following issues are framed for adjudication.

ISSUES

1. Whether the termination of the claimant /workman is illegal and unjustified? If so its effect?
2. Whether the claim statement is maintainable if so its effect?
3. To what relief the claimant/workman is entitled to.

During the hearing both claimant and the management had filed applications u/s 11(3) of the Id Act seeking a direction from their adversary for production of documents. Both the petitions were disposed of after hearing the objection and by giving liberty to the applicant for filing secondary evidence.

The claimant testified as the WW1 and filed a series of document which have been marked as WW1/1 to WW1/21 and some papers marked as P1 to P9. The documents filed by the claimant workman include her initial appointment letter as Accounts Clerk and the subsequent appointment letter dated 12.01.2010 appointing her as a Finance Assistant the letter of confirmation, the contract of appointment dated 12.01.2010 under which she qualifies to be a workman the document relating to organizational hierarchy the memorandum of settlement between the management and the union the memorandum of settlement between the management and the federation the service termination letter dated 23.04.2014. One email dated 09.04.2014 evidencing that the entire work done by the claimant was not transferred to Accenture. Several email communications made between the claimant and her manager Sandeep Rai have been filed and marked as exhibit WW1/14 to WW1/18.

Similarly the management examined the Regional Finance Manager British Airways Mr. Sandeep Rai as MW1 who also proved several documents marked as M1to M17. These documents are the redeployment

role Preference form to be filled by the affected employees, the emails written to the individual affected employees thanking them for their confirmation to participate in the selection process, several emails written to the claimant on 17.04.2014 and reply to her email and emails extending the time line for submission of the role preference and self assessment form etc. One Sumer Adlakha the Customer Service Manager of BA testified as MW2. All the witnesses were cross examined thoroughly by their adversaries.

At the outset of the argument the Ld. A/R for the claimant by pointing out to Para 6 of the claim statement submitted that the claimant in the year 1996 was appointed as an accounts clerk. Though, she had got two promotions before 2010, in the year 2010 she was reappointed in the post of accounts clerk and appointment agreement to that affect was signed. Thus, it is stated that the claimant discharging the function of account clerk and having no power of a manager or supervisor is a workman coming under the definition 2S of the ID Act and the objection of the management with regard to the maintainability of the claim petition on that ground alone is liable to be rejected. He also argued that the case of the claimant is an example of hostile discrimination and unfair labour practice meted by a mighty employer to the poor workman. The claimant was never served with the notice required u/s 9A of the Id Act. She has been made a victim of termination citing that the termination falls under the scope of section 25FFof the Act which is illegal. On the other hand the Ld. A/R for the management submitted that the claimant in Para 4 of her evidence has admitted that she was discharging the supervisory nature of work and thus cannot be termed as a workman u/s2 (S) of the Id Act. Moreover, when no issue has been framed to adjudicate on the consequence of non compliance of section 9A the claimant cannot take a plea in that respect. He also argued that the burden is always on the claimant to prove the maintainability of the claim and the issue regarding non compliance of section 9A having not been raised in the claim the same cannot be entertained. He also argued that in terms of section 10 of ID Act the scope of the reference cannot be enlarged. He also argued that the workman was paid all the termination benefit and the same having been accepted the claimant cannot dispute the termination at this stage. By drawing the attention to the photocopy of the LinkedIn profile of the claimant marked as WW1/M1 he submitted that the claimant since described herself in the LinkedIn profile as a Finance Analyst and an accounting team leader she cannot take a back foot now to describe herself as a workman. He also argued that the claimant has concealed about her gainful employment which were brought out during cross examination. With regard to the claim of the claimant as a protected workman he submitted that as per the document marked as WW1/18 this letter was drafted on 18th April 2014 and received by the management on 22nd April 2014. Thus, there was no need of replying to the said letter or order of recognition. He also argued that this letter of the union for recognition of the protected workman need to be recognized within 15 days failing which it will be deemed to have been

rejected. Drawing attention to the Rule 61 (2) he argued that the said correspondence since received on 22nd April 2014 just before one day of the termination, the management cannot be found with fault for terminating the service of the protected workman when the industrial dispute was pending. To support his argument he has relied upon the judgment of the Hon'ble Apex Court in the case of P **H Kalyani vs. Air France Calcutta (1964) 2SCR 104** wherein it has been held that when the name of the protected workman of the Union was communicated to the management and the later replied to that letter pointing out certain defects it cannot be held that the recognition of protected workman was granted. He thereby submitted that the claimant is not entitled to the benefit of a protected workman as the proposal for recognition was not accepted on the date of termination.

In the reply argument the Ld. Counsel for the workman submitted that at the time of alleged termination the claimant was working as the Accounts Assistant and a mere description made in the LinkedIn profile cannot upgrade him to the post of supervisor when no concrete evidence about the nature of work done has been adduced by the management. When the management is the custodian of all the documents and claims that the claimant was discharging a supervisory nature of work the same should have been proved by the management. The Ld. A/R for the claimant focused his argument to the points that the notice u/s 9A was never served in a clear violation of the mandatory provisions of law for which no formal issue need to be framed. He also argued that the claimant was kept in dark in respect of the redeployment procedure and her service was illegally terminated citing that the same was required for the transfer of undertaking in terms of section 25FF of the Id Act.

FINDING

ISSUE NO.2

In the preliminary objection the management has disputed the maintainability of the claim on the ground that the claimant is not a workman u/s 2(S) of the ID Act. By refereeing to Para 6 of the claim statement wherein the claimant has described herself according to her position and the functions discharged by her in the said post w.e.f 01.01.2010 the Ld. A/R for the management submitted that the claimant being engaged in the work of leading the teams through the finance audit and imparting training, her nature of work was supervisory and she cannot be termed as a workman. The responsibility and functions discharged by her gives insight of the managerial and supervisory function and as such she is not a workman. To support his contention he has relied upon the judgment of **Aeroflot Russion Airlines vs. Mohan Kumar Sharma and another decided by the Hon'ble High Court of Delhi in WPC 5289 of 2010** wherein it has been held that mere filing of affidavit by the claimant describing him as a workman cannot be regarded as sufficient evidence for any court or tribunal to come to a conclusion that the respondent no. 1 is a

workman. He thereby submitted that in this case except the oral evidence and the affidavit filed by the claimant there is no other evidence to presume that the claimant is a workman and the claim petition is maintainable. The Ld. A/R for the claimant on the contrary argued that the appellant is a workman within the meaning of the expression workman given u/s 2(S) of the Id Act and argued that in addition to her primary work as the finance Assistant if the workman is sometimes asked to discharge the function of imparting training or leading a team during the audit the same will not upgrade his status. In order to cease to be a workman he should have perform exclusively supervisory or managerial duty. Citing the judgment of **Arkal Goving Raj Rao vs. Cevageigy of India Limited reported in 1985 AIR 985** he submitted that the nature of the primary work done is to be considered. The taste to be employed is what was the primary basic or dominant nature of the duty discharged by the claimant. A few extra duties would hardly be relevant to determine his status. The Ld. A/R for the claimant has also placed reliance in the case of **Shri S.K Maini vs. Carona Sahu Company Limited and others reported in JT1994(3)SC151** and submitted that when an employee is employed to do a particular type of work enumerated in the definition of the workman u/s 2(S) of the Id Act there is hardly any scope treating him otherwise.

In the case of **Burmah Shell Oil Storage and Distribution Company vs. Burmah shell Management of staff association (1970)IILLJ590** the Hon'ble Supreme Court have held that the word supervise and its derivates are not the words of precise import. The determinative factor is the main duty of the concerned employee and not some works incidentally done. In this case no evidence has been adduced by the management to show that the claimant was discharging any supervisory or managerial nature of work. Her own description in the LinkedIn profile will not upgrade her to the post of Manager or supervisor or a team leader as it is beyond acceptance that the same would prompt the management to assign a higher designation or higher salary to her. Hence, it is concluded that the claimant is a workman and the claim petition is maintainable. This issue is accordingly answered.

ISSUE No.1 and 3

These two issues being interdependant have been taken up for consideration together. The claimant has challenged the action of the management as illegal and arbitrary on the grounds that she is a protected workman and the management in gross violation of section 33(4) shouldn't have terminated her service. It has also been pleaded and argued that the claimant was not a surplus staff to be redeployed and the outsourcing of the transactional financial processing to Accenture was only a high value added work and not a transfer of undertaking falling under the ambit of Sec 25FF of the Id Act. The other challenge is that if at all the management thought of restructuring of the business resulting in retrenchment of the workman a notice u/s 9A of the Id Act should have been served by the employer on the

employee as the same amounts to change in condition of service. This stand of the claimant has been vehemently opposed by the management on the ground that no issue in this regard has been framed and moreover, the management has a prerogative of restructuring its business which will never amount to change in service condition of the employee making it mandatory to serve a notice u/s 9A of the Id Act. Whereas the Ld. A/R for the claimant relied upon the judgment of the Hon'ble Apex Court in the case of **Lokmat Newspapers Pvt. Ltd. vs. Shankar Prasad reported in (1999) 6SCC 275** wherein it was held that "*Rationalization which was introduced had therefore two effects first that some workers would become surplus and would face discharge and secondly, the other workmen would have to carry more workload. The introduction of the rationalization scheme was therefore clearly an alteration of conditions of service to the prejudice of the workmen".* It has also been held that "*it become obvious that if the proposed scheme of rationalization has a likelihood of rendering existing workman surplus and liable to retrenchment then item No.10 schedule IV would squarely get attracted and would require as a condition precedent to introduction of such a scheme a notice to be issued under section 9A by the management."* The counter argument by the management is that the action would not amount to retrenchment but transfer of undertaking requiring payment of compensation u/s 25FF of the ID Act which was complied by the management. No notice u/s 9A of the Act was required. But this submission and stand of the management is not accepted since, the oral evidence adduced by the claimant and the management witness so also documents which is the letter of termination filed by the claimant clearly shows that as a consequence of finance team reorganization announcement in South Asia Region in 2014 all transactional financial processing work was only outsourced to Accenture which can never be accepted as a transfer of undertaking for which compensation is payable. The judgment of **Marco Polo and Co. vs. Marco Polo and Co. employees union** relied upon by the management is not applicable as distinguishable on facts. For the view taken by the Hon'ble Apex Court in the case of **Lokmat Newspaper** referred supra it is held that the restructuring since had the impact of rendering the existing workman surplus compliance of the provision of section 9A of the Id Act was mandatory and the management in this case had failed to comply the same. The objection of the Ld. Counsel for the management that no issue to that effect since has been framed no adjudication on the same cannot be held is not acceptable since, this is purely a question of law and framing of issue is not necessary and the same can be decided as incidental to the main issue and dispute.

The other stand of the claimant is that the action of the management in terminating the service of the claimant is in violation of section 33(3) and section 25(F)(G)(H) of the Id Act. She has described herself as protected workman which has been strongly denied by the management. Besides the oral evidence the workman has filed a documents which has been marked as WW1/18. This is a letter written by the British Airways Employees Union

on 18th April 2014 to the management mentioning the name and designation of the nominated protected workmen. This document has been challenged by the management on the ground that the said letter correspondence was made on 18th April 2014 when the restructuring and reorganization plan of the finance department was announced and it was made known to the claimant that she is one among the 10 impacted employees. The other challenge is that under Rule 61 of the Industrial Dispute Central Rules 1957 every registered Trade Union shall communicate to the employer before 30th April every year the names and addresses of the persons to be recognized as protected workman and the management shall within 15 days of receipt shall communicate to the union in writing the list of workmen recognized as protected workman. The Ld. Counsel for the management thus argued that mere receipt of the letter sent by the union two days before claimant's termination will not designate her as a protected workman. In order to avail the privilege she has to show that in the year 2013 she was declared as a protected workman which was valid till 30th April 2014. There being no other evidence except exhibit WW1/18 it is held that the claimant was not a protected workman on the date of termination of her service.

The other grievance of the claimant is that she was the senior most employee from among the 10 employees impacted for the outsourcing. But before termination of her service no seniority list was displayed by the management. It has also be asserted that the post in which she was discharging the work of perennial nature and after her termination one Mr. Atul Sarin is performing the same job. She has also stated that the entire work done by her has not been transferred to Accenture. This evidence of the claimant has no way been rebuted by the management.

Now the question comes whether the claimant was offered the avenues of redeployment. In the WS and by examining two persons of the management as witnesses the management has asserted to prove that outsourcing of the work to Accenture is a part of reorganization and that being a prerogative of the management the redeployment of the surplus staff was expedient. The 10 surplus staff including the claimant were called upon to participate in the process in accordance to the redeployment policy of the management. Whereas other impacted employees participated and four of them were reemployed in different positions within the management the claimant opted out of the same though several correspondences in this regard were made with her. The case of the claimant is that the appellants plea of reorganization is not genuine nor the statement with regard to surplus staff. But the admitted facts are that on 11.04.2014 Mr. Sandeep Rai MW1 had invited the finance team including the workman for a meeting which was joined by the HR Manager. In the said meeting the proposal of finance team reorganization was announced. It was informed that as a consequence of this change all transactional financial processing work will be outsourced to Accenture w.e.f 27.04.2014. The impacted employees were called to submit the Roll Preference Form on or before 17th April and it was also informed

that the selection process will be held and the result will be published on 22nd -23rd April. It is also admitted by both the parties and the witness examined by the management that on 17.04.2014 the claimant had a verbal meeting with MW1 where she raised objection about the recognized cadre LM Level posts for which they were asked to submit the form for redeployment. Despite repeated demand the manager refused to give concrete answer and insisted that she should trust the management. The claimant during her examination has filed the copies of the email communication between her and the manager Sandeep Rai. Sandeep RAi during his examination as MW1 has countered the statement of the claimant that she was not properly informed about the vacancy position and the benefits attached to the same. MW1 has filed the copy of the redeployment role preference form exhibited as MW1/2. During his examination the witness has stated that during the meeting held between him and the claimant on 17.04.2014 it was explained to the claimant that the salary structure of the grade of the new assignment has already been explained to her including what would be her salary on the event, she is successful in the selection process. The witness has also stated that the claimant was informed that the salary is an individual variant and never published for such roles. The witness has filed and exhibited the emails communicated between him and the claimant on 17.04.2014 and 21.04.2014. On the basis of this oral and documentary evidence the Ld. A/R for the management argued that the claimant was called upon to submit the form by 4.00 P.M of 17.04.2014 which was extended from time to time specially for the claimant Upto 10.00 A.M of 21.04.2014. On that day another reminder email was also sent to her at 11.00 A.M. But the claimant remained adamant and did not submit the form complete in all respect which forced the management to select the successful candidate leading to termination of the service of the claimant as a surplus employee on account of reorganization.

The preference form marked as exhibit WW1/2 supports the stand of the claimant that she was only called upon to tik either column expressing her wish to apply or not to apply for the new role. The form never disclosed the job requirement, job responsibility the salary package and other benefits attached to the role. Hence, she raised objection and demanded the detail information. The email communication between the manager Sandeep Rai (MW1) and the claimant marked in a series of MW1/3 to MW1/17 nowhere shows that the detail information sought by the claimant was made available to her. Not only that during this proceeding the management has not produced the evidence with regard to the deployment policy, the duties and benefits attached to the LM Grade Post offered to the claimant. Even though the claimant had called for the said documents the management disputed the same as a result of which liberty was granted to the claimant for adducing secondary evidence. But obviously the documents being in the possession of the management the claimant has not adduced secondary evidence. Thus, from the totality of this evidence it is evidently clear that the claimant was

kept in darkness with regard to the job profile of the job offered to her and the benefits attached thereto.

It is a settled position that there cannot be a selection process without letting the aspirants know the prospects and the benefits of the post to be considered. Unless the same is made available to the aspirants/candidate he cannot take a informed decision which is his legal right. As it is important for the employer to determine and decide the relevancy and suitability of the candidate, in the same manner the candidate has a right to obtain material information with regard to the post he is to compete. Unless the candidate is informed about the same before he opts to participate it cannot be said that the selection procedure was undertaken with fairness and transparency. In this case the action of the management in not disclosing the details about the job in LM Grade which the claimant disputes as a post outside the recognized grade the only oral evidence to the effect that it is a higher grade post than held by the claimant will not suffice. In this aspect alone it can be safely concluded that the claimant was intentionally kept out of the selection process by not informing her about the details of the job profile for which the selection was to be undertaken and ultimately her service was terminated. In view of the evidence adduced it is also observed that while terminating the service of the claimant no notice u/s 9A of the Id Act was served and the provisions of section 25F, G and H were not complied which makes the termination of the service illegal and the stand of the management that the termination of service falls within the ambit of section 25FF is not accepted.

Now it is to be adjudicated as to what relief the claimant/workman is entitled to. During course of argument the Ld. A/R for the management submitted that during cross examination the claimant has admitted about her gainful employment as a designated partner of Soul Entertainment LLP. Hence her claim for reinstatement back wages is not tenable. Be it's stated here that the management has not pleaded about the gainful employment of the claimant. But by relying upon the judgment of **Managing Director, Balasaheb Desai Sahakari S.K Ltd. vs. Kashinath Ganapati Kambale, (2009)2SCC 288** and **Kendriya Vidyalaya Sangathan and another vs. S. C Sharma, (2005) 2 SCC 363** the Ld. A/R for the management argued that when the question of determining the entitlement of a person to back wages comes up, the employee has to show that he was not gainfully employed. The initial burden is on him. When he places material in this regard, the employer can bring on record the materials to rebutt the claim. In the instant case the claimant has not placed any material on record in that regard. On the contrary she has admitted herself to be a designated partner of Sole Entertainment LLP. Thus, for having no vacancy in the management he is neither entitled to reinstatement nor the back wages.

But the Hon'ble Supreme Court in a later judgment i.e. **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (2013)10SCC324** have held that:-

> "Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments".

It is thus, a settled legal position that the workman when claims reinstatement or back wages the employer has to plead and prove by way of positive averments about the gainful employment of the claimant/employee. In this case the management has miserably failed to do so. It is worth mentioning that mere pleading or laying some evidence about the gainful employment will not deprive the claimant of the benefits unless it is proved that the benefit if at all the claimant is gaining from an employment post his illegal termination is at par or more than the income he was having prior to his termination.

Thus, after hearing the argument and on perusal of the pleading and evidence it is held that the claimant for the wrongful termination of service is entitled to reinstatement with continuity of service and back wages as the evidence on record clearly proves that the nature of work discharged by the claimant was perennial and the work done by her then are being discharged by some other employees in the finance department of the management which again leads to a conclusion that there is a vacancy in which the workman can be reinstated. Both the issues are accordingly answered in favour of the claimant/workman. Hence, ordered.

ORDER

The claim be and the same is answered in favour of the claimant. It is held that the service of the claimant was unjustifiably and illegally terminated. She is held entitled to reinstatement in service with continuity and full back wages alongwith all consequential benefits thereof from the date of termination. The management is directed to reinstate her into service within 3 months from the date of publication of this award and settle her financial benefits within 2 months from the date of reinstatement failing

which the amount accrued shall carry interest @ 6% per annum from the date of illegal termination and till the final 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.

Dictated & Corrected by me.

Presiding Officer.
CGIT-Cum-Labour Court.
31st May, 2022

Presiding Officer.
CGIT-cum-Labour Court.
31st May, 2022