POWER HR FORUM

Labor & Industrial Law Review

RECENT IMPORTANT JUDGMENTS

1. Under what circumstances withdrawal of application by an employee for voluntary retirement before the expiry of the prescribed notice period is tenable ?

The Case : S.K.Sharma Vs Food Corporation of India and others
(Delhi High Court – 8/1/2004)

Background of the Case

The petitioner, a Dy Manager in Food Corporation of India on transfer to a new place submitted an application seeking voluntary retirement which was accepted by the respondent with due communication towards this end. After this event, but before the expiry of the three months notice period prescribed in the Food Corporation of India Staff Regulations, 1971 the petitioner forwarded another application seeking withdrawal of the first application for voluntary retirement.

In this context ***Section 22A of the Food Corporation of India Staff Regulations, 1971*** reads as follows.

22A – Voluntary Retirement of employees on completion of 20 years of qualifying service :-

(1) *At any time after an employee has completed 20 years qualifying service, he may by* ***giving notice of not less than three months in writing*** *to the Competent Authority, retire from the service of the Corporation .*

(2) The notice of voluntary retirement given under sub –regulation (1) ***shall require acceptance by the Competent Authority.***

(6) *The employee of the Corporation who is allowed to retire under this regulation and has given the necessary notice to that effect to the Competent Authority* ***should be precluded from withdrawing his notice except with the specific approval of such Authority***.

After tendering several requests for reconsideration, the petitioner approached the Court after a period of 3 years.

Referring the judgment of the Supreme Court in the case of J.N.Srivastava Vs Union of India the Court held that **even where the notice for voluntary retirement stood accepted, before the expiry of the notice period the employee could withdraw the same**.

The only question was left before the court was that whether as per rules the Competent Authority in FCI could deny the approval to the petitioner for withdrawing his notice under Clause 22A (6) mentioned above and if so under what circumstances ?

Referring to a similar consideration before the Supreme Court in the case of ***Balram Gupta Vs Union of India*** it was held that approval is not *ippse dixit* of the approving Authority who as the statutory Authority must act reasonably and rationally and **what is important in this connection to be borne in mind is not what prompted the desire for withdrawal but what prompted for withholding the withdrawal. It was also held that unless it can be said that any administrative setup or arrangement was affected , permission should be granted to withdraw the request for voluntary retirement. While rejecting the request for withdrawal, respondent did not state in the order dated 27.6.97 that it had made changes in the administrative setup and so arranged its working that petitioner's request could not be accepted.**

On the above backdrop the petition was allowed, but since the petitioner did not approach the court within a reasonable dispatch hence referring the judgement of the Supreme Court in the case of *Gurmail Singh Vs Principal , Govt College of Education and others*, the court held that rejection of the claim for reinstatement on the grounds of delay was unjustified but denial of back wages was.

Issue:- ***If the Statutory Provisions does not explicitly specify a notice period for seeking voluntary retirement, can the employee will have the liberty to withdraw his application for voluntary retirement after the expiry of the effective date requested for ?***

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2. With regard to a service condition i.e Change in ceiling of age of superannuating from 58 to 60 , which shall have overriding effect:

a) An agreement reached out of a settlement.
b) A notification issued by virtue of a Power conferred by a General Law i.e Electricity Supply Act- 1948.
c) An inclusion / amendment in the provisions of a Special Law i.e Certified Standing Order (CSO).

The Case* : *M.P. Vidyut Karamchari Sangh v M.P. Electricity Board
(Supreme Court of India – 18/3/2004)

Background of the Case *:*

Section 14A of the Service Rules of the M.P. State Electricity Board Reads as follows.

"14-A Retirement: (1) An employee shall retire from the service of the employer on the date he attains the age of 58 years. He may, however, be retained in service by the employer after the date of attaining the age of 58 years if his services are necessary in the interest of the undertaking but he shall not be retained in service after the age of 60 years:

Provided that nothing in this clause shall adversely affect the operation of the terms of any contract, agreement, settlement, or award on this subject, if the age of retirement is not less than 58 years."

Accepting the recommendation of the 5th pay commission for increasing the date of superannuating to 60 years the same was included in the provisions of the Wage agreement entered with the Union . The tenure of the said agreement expired on 31.3.1999.

The Board then by virtue of the Power vested on it by Section 79.C of Electricity Act,1948 notified to restore Section 14-A to which the Union resisted and the matter came before the court.

The court observed that unlike a service condition in CSO, an agreement i.e agreement for Wage Structure & Fringe Benefits etc. for 5 years, shall cease to operate after the expiry of the said period or by serving a notice for termination of the agreement by either party as per the relevant provisions of I.D Act.-1947 during the currency of the settlement.

The court also observed that the regulations made under the Electricity (Supply) Act being a general law and the terms and conditions laid down under the CSO being a special law, the latter shall prevail over the former.

Issue *: In the event of Power of " Appropriate Govt. " under I.D Act is delegated by the Central Govt. to the State Govt., whether the jurisdiction of Central Govt. as "Appropriate Govt." under Electricity Act shall have overriding effect upon a contrary provision under I.D Act.*

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Discussion :

1. Unauthorized Absence from duty .

It is observed that due to lack of awareness of legal provisions Management avoids or dilates to take stern action to deal with unauthorized absence from duty. Hence greater understanding of the crucial legal points on the above subject shall truly facilitate a convincing and timely decision.

In this context, a sample provision brought out by Heavy Engineering Corporation Limited in its Certified Standing Order (CSO) is illustrated below.

" The workman / Employee who remains absent from duty without leave, or in excess of the period of leave originally sanctioned or subsequently extended , shall be liable to disciplinary action unless he is able to explain his absence in a manner satisfactory to the sanctioning Authority.

Where the period of such absence exceeds 15 days , the management may terminate his lien on his appointment after giving one months notice of their intention to terminate his lien, unless the workman / employee returns to duty before the expiry of the period specified in the notice and submits application for regularizing his absence "

Points to be noted :

A) If an establishment comes under the purview of Industrial Employment (Standing Orders) Act,1946 then not having a CSO grossly weakens its position since in such cases the generalized Model Standing Order shall apply.

In this context, the provisions of the Misc. Rules i.e Service Rules, Conduct & Discipline Rules etc. shall not go beyond the Model Standing Orders (MSO) i.e introduce a new provision or limit the extent of applicability of the provisions of the Model Standing Orders. Hence if not done yet, first get a CSO and among other specific provisions, insert a provision like the one mentioned above.

B) In the CSO, provisions for unauthorized absence must contain an *in-built principle of Natural Justice* as mentioned in the Para 2 of the sample provision mentioned above to avoid any legal infirmity afterwards.

C) *The ceiling limit of 15 days mentioned above is not a rule of thumb. This is 10 days as per Central Rules, 8 days as per MSO Andhra Pradesh, MSO Gujarat, MSO Karnataka & MSO Maharastra.*

D) *The notice period of one month is also not a rule of thumb. There are instances where notice period of 10 days / 7 days or even lesser than that have been upheld by the Court. The notice period should be as such it provides a reasonable time for a two-way communication to complete. In an age of advanced communication technology, if you could substantiate with tangible evidence, a notice may even be verbal and is affirmed by Supreme Court.*

E) Where the workman fails to comply with the offers to resume his duties within the stipulated statutory period, Striking off the name of the alleged employee on the ground of Unauthorized absence does not imply Termination on account of punishment. *Afterwards a communication intimating such striking off from the rolls of the Establishment is optional but a good practice.*

F) Generally Unauthorized Absence from duty beyond permissible period if it specifically provides under the CSO is treated as abandonment from service whereas Habitual Absence from duty is generally treated as a misconduct which may entail termination from service. *In the first case even if the employee wants to join his duty within the permissible period with a seemingly false or procured medical certificate or alleges that he was prevented to join his duty within the stipulated time frame, domestic enquiry is not warranted if you have substantial evidence to the contrary, because the burden of proof in a litigation afterwards shall lie upon the alleged.* In the latter case i.e Habitual Absence, Domestic Enquiry may precede Termination.

G) The *preliminary notice to the alleged employee should be by Registered Post not by an advertisement.* Even in case of mass absenteeism connected with a unique terms & conditions of service i.e Strike , Legal or Illegal, while asking the employees to rejoin their duty within the prescribed timeframe, *give individual notices not a single notice through advertisement.*

H) Legally one notice by Registered Post delivered in the last known Home Address of the workman is sufficient. In case it is refused and comes back undelivered, publish the same in the newspaper in the *local / Regional language.*

I) Presumably *a person on illegal strike and a person on legal strike are both absent, but the absence of the first is unauthorized and that of the second is not, but in both the cases it is not an abandonment of service unless it violates the provision of the CSO* mentioned above.

J) You could make a similar provision in the CSO whereby *a contract of service can also be terminated when a workman / employee has voluntarily abandoned his employment by non-compliance of transfer order.*

K) A *protected workman under Trade Union Act shall have no immunity from these provisions.*

Q & A

1.0 If a plea has not been taken before a Industrial Tribunal then subsequently can it be taken before a High Court ?

2.0 Can an employee withdraw his option for voluntary retirement after accepting a part benefit.

3.0 Will Ex-gratia payment to employees under a settlement attract ESI contribution ?

4.0 Can a workman seek representation by a lawyer as a right when the management is not being represented by a Lawyer in a disciplinary proceeding ?

5.0 If the enquiry officer is an advocate will that entitle the employee to take the assistance of a Lawyer ?

6.0 Whether disengagement of a daily wager amounts to retrenchment.

Ans : 1- No, 2 – No, 3 – Yes, 4- No, 5 – No, 6- No

For inclusion in the upcoming issues, HR Professionals in member organizations are requested to send us articles, comments, with one photograph on any unique practical cases on IR / Labor Laws that they come across in their organization. Our E-mail addresses are cnnagakumar@rediffmail.com / dmrpanda@pmintpc.com