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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 29th August 2007

No. 10174-1i/1-(S)-44/1995/LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the award dated the 30th June, 2007 in I.D. Case No. 86 of 1996 of the Presiding Officer, Labour Court, Bhubaneswar to whom the industrial dispute between the management of M/s. Utkal Automobiles Ltd., Barbil and their workman Shri Harilal Sharma was referred for adjudication is hereby published in the schedule below :—

SCHEDULE

IN THE LABOUR COURT : BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 86 OF 1996

Dated the 30th June, 2007

Present:

Shri S.K. Mohapatra, O.S.J.S. (Jr.Branch),
Presiding Officer,
Labour Court,
Bhubaneswar.

Between:

The Management of M/s. Utkal
Automobiles Ltd., Barbil ... First-Party — Management

And

Their Workman
Shri Harilal Sharma ... Second-Party — Workman

Appearances :

Shri R. N. Rath.

... For First-Party — Management

Shri Kalu Panda, Advocate.

... For Second-Party— Workman

AWARD

The Government of Orissa, Labour & Employment Department referred the present dispute between the Management of M/s. Utkal Automobiles Ltd., Barbil and their workman Shri Harilal Sharma under Notification No. 7559/LE., dated the 27th June, 1995 vide Memo No. 6987(5)/ LE., dated the 19th June, 1996 for adjudication by this Court.

2. The terms of reference by the State Government is as follows :

“ Whether the action of the Management of M/s. Utkal Automobiles, Barbil in the district of Keonjhar in refusal of employment to Shri Harilal Sharma, Ex-Motor Cycle Helper with effect from 14th April, 1993 is legal and/or justified ? If not, what relief Shri Sharma is entitled to?”

3. Shorn of all unnecessary details, the case of the second-party workman (hereinafter referred to as the workman) is that the workman has been retrenched from service by the Management of M/s. Utkal Automobiles Ltd., (hereinafter referred to as the Management) with effect from 6th September, 1988 and for the said matter there was an industrial dispute between the workman and the Management which culminated in a reference to the Court of learned Presiding Officer, Labour Court, Jeypore who vide his Award dated the 26th February, 1992 in I.D. Case No. 12/91 of his Court held that the refusal of employment to the workman with effect from 6th September, 1988 was legal and justified and opined that the workman could join in his new place of posting at Barbil and that the period of absence from duty with effect from 6th September, 1988 till his joining in the new station at Barbil would be considered by the Management as they deem it fit and proper. After the said Award (Ext.1 in the present case) the workman who was working as Motor Cycle Helper in the Management concern wrote a letter of request to the Management to allow him to join his duty. In response to the letter of the workman, the Management vide its letter dated the 9th July, 1992 (Ext.2) directed the workman to report for duty at Barbil Branch of the Management. In response to the direction by the Management vide Ext.2, the workman joined his new posting at Barbil on the 26th August, 1992 on 12th September, 1992 the workman proceeded on leave for seven days to bring his family members from Berhampur but unfortunately on 19th Septemeber,

1992 the workman suffered from illness at Berhampur and was compelled to extend his leave till 12th April, 1993. On 12th April, 1993 the workman proceeded to Barbil and after reaching there submitted his joining report along with medical certificate before the Manager of the Management concern on 14th April, 1993, but the Manager of the Management concern refused to accept the joining report of the workman and asked the workman to wait for the General manager who was scheduled to arrive at Barbil on 16th April, 1993. Finding no other way out, the workman waited at Barbil till 16th April, 1993 and met the General Manager seeking permission to join his duty but the workman was not allowed to join his duty. Thereafter the workman sent his joining reports dated the 14th April, 1993 and 16th April, 1993 along with the medical certificates to the Management by registered post. On the very same day i.e. on 16th April, 1993 the workman also sent the copy of his joining reports along with the medical certificate to the District Labour Officer, Keonjhar. Because of the illegal action of the Management in refusing the workman to join his duty at Barbil on 14th April, 1993 after his leave on medical ground, the workman was again forced to put forth his grievances before the authorities of the Labour Department. The District Labour Officer, Keonjhar-cum-Conciliation Officer tried for a conciliation between the workman and the Management and accordingly issued notice to the Management. During conciliation proceeding while the workman took a stand that the Management has refused employment to him, the Management took a stand that the workman had absconded from his duty. While the workman insisted on reinstatement in service with full back wages, the Management during the conciliation proceeding offered fresh employment without back wages and service benefits and therefore the conciliation proceeding ended in failure and finally the same culminated in the present reference to this Court as already indicated.

4. So far as the present case is concerned the stand of the Management as revealed from its written statement is that although the workman joined his duty at Barbil on 26th August, 1992 he worked there only for 17 days and thereafter the workman on 13th September, 1992 absconded from his duty and subsequently took a plea that he was suffering from illness and he was under going treatment at Berhampur. On 14th April, 1993 the workman intimated the Management by post that he was medically fit and intended to join at Barbil. Again on 16th April, 1993 the workman simply sent a joining report to the Management by post without actually joining at his place of posting at Barbil. On 30th April, 1993 the Management directed the workman to join his duty immediately but instead of joining his duty at Barbil, the workman raised an industrial dispute before the

District Labour Officer, Keonjhar. Further stand of the Management is that the workman has been gainfully employed at Berhampur by running a business there and therefore, the intention of the workman is to be posted at Berhampur Branch of the Management by hook or crook and for that evil intention, the workman is harassing the Management in various ways by raising industrial disputes one after another on false and frivolous grounds. On these averments the Management has prayed for rejection of the claim of the workman for his reinstatement in service with back wages.

5. On the aforesaid pleadings of the parties, the following issues have been framed for determination.

ISSUES

- (i) Whether the action of the Management of M/s. Utkal Automobiles, Barbil in the district of Keonjhar in refusal of employment to Shri Harilal Sharma, Ex-Motor Cycle Helper with effect from 14th April, 1993 is legal and/or justified ?
- (ii) If not, what relief Shri Sharma is entitled to ?

In the instant case it is not disputed that the Management concerned is an industry and the second-party is a workman and therefore, these matters do not required any discussion.

6. Now the only question that remains to be resolved in the instant case is as to whether the Management terminated the service of the workman with effect from 14th April, 1993 by way of refusal of employment as alleged by the workman and if so its legality or otherwise, or as to whether the workman abandoned from his service with effect from 13th September, 1992 and thereafter took a false plea of self illness from 13th September, 1992 till 14th April, 1993 as alleged by the Management.

On this question the workman W.W.1 in his evidence has stated that after the Award Ext.2 he proceeded to Barbil to join his new posting and submitted a letter of request to the Management on 15th June, 1992 and as per the direction of the Management he joined his duty at Barbil Branch on 26th August, 1992. Further evidence of W.W.1 is that on 12th September, 1992 he submitted an application for leave for one week in order to bring his family from Berhampur and the Management after accepting the leave application gave an advance of Rs. 500/- to the workman to proceed to Berhampur to bring his family. In his evidence W.W.1 has further stated that while he was at Berhampur he was suffering from Colic pain and therefore he extended his leave through

proper leave applications and the Management acknowledged receipt of such leave applications vide its letter dated the 17th December, 1992 (vide Ext.3). Further evidence of W.W.1 is that he again extended his leave by sending applications dated the 31st December, 1992, 30th January, 1993 and 3rd March, 1993 sent to the Management by post. Exts. 4 to 6 are certificates of posting regarding sending of such leave applications. In his evidence W.W.1 has further stated that on 14th April, 1993 when he submitted his joining report at Barbil along with the medical certificate he was refused employment and his documents were returned to him. In his evidence W.W.1 has further stated that on 16th April, 1993 he met the General Manager at Barbil and again submitted his joining report along with the medical certificate but the General Manager refused to receive the same and refused give him employment and therefore, he sent his joining reports dated the 14th April, 1993 and 16th April, 1993 along with the medical certificate to the Management by registered post. Ext.7 has been proved to be the postal receipt showing sending of joining report and medical certificate by registered post and Ext.8 has been proved as the acknowledgement card showing receipt of the registered letter by the Management. In his evidence the workman W.W.1 has further stated about industrial dispute raised by him and has further proved Ext.9 which is a letter dated the 12th April, 1995 written to the workman by the Branch Manager of Barbil Branch. Ext.10 is the Xerox copy of the reply of the workman to the letter Ext.9. During cross-examination the workman has explained that since he had not received any E.S.I. card at Barbil the doctor of E.S.I. Hospital, Berhampur refused to give him any treatment at Berhampur from where he had already been transferred to Barbil. W.W.1 has stoutly denied the suggestion that he was not ailing from 13th September,1992 to 13th April, 1993 and that he was unauthorisedly remained on leave on false ground. Ext.3 is the letter dated 17th December, 1992 written by the Branch Manager of Barbil Branch to the workman. The letter Ext. 3 reads as follows:

“Dear Sir,

We have received your doctor certificates advising continuous rest from dated the 27th September, 1992 to 27th October, 1992 vide certificate No. 24878, dated the 27th September, 1992 of Doctor A.M. Khan. Again from 28th October, 1992 to 29th November 1992 and 29th November, 1992 to 29th December, 1992. so it is presumed that your health will not permit you to work further. The undersigned is unable to

regularize your case due to want of Court order. Your above leaves will not be considered as you do not have leave in credit.

Yours faithfully

For UTKAL AUTOMOBILES LIMITED.

Sd/-

MANAGER.”

Again during the evidence of witness for the Management M.W.1, the workman proved another letter Ext. 11 which is a letter dated the 28th October, 1992 written by the Management. The letter Ext. 11 reads as follows :

“ Dear Sir,

We received your extension of leave application along with Doctor's certificate No. 24878, dated the 27th September, 1992 to take rest for a period of one month. Today you are supposed to join on duty. Since you did not join in your duty you are advised to join in your duty at the earliest. Please note at the time joining in your duty please do not forget to bring Court order (Xerox copy duly attested by your legal advisor) as agreed by you to produce.

Thanking you.

Yours faithfully

For UTKAL AUTOMOBILES LIMITED.

Sd/-

MANAGER.”

Both from Exts. 3 and 11 it is very clear that from time to time the workman was ending leave applications to the Management along with medical certificates and therefore there is no force in the pleading of the Management that the workman had abandoned his service or that he had unauthorisedly remained absent on false ground of illness. Admittedly the Management was in receipt of the leave applications of the workman along with medical certificates Ext. 7 is the postal receipt dated the 16th April, 1993 sent in the Barbil address of the Management from Barbil Post Office and Ext.8 is the postal acknowledgement card showing receipt of the registered letter sent to the Management under Ext. 7. In his evidence W.W.1 has categorically stated that on 14th April, 1993 the Branch Manager of Barbil Branch refused his joining report submitted along with medical certificates and asked him to wait till 16th April, 1993 till the arrival of the General Manager and further that on 16th April, 1993 when the workman met the General Manager his

joining report along with the medical certificates was not accepted and he was refused employment forcing the workman to send both joining reports dated the 14th April, 1993 and 16th April, 1993 along with medical certificates to the Management concerned by registered post. Such evidence of W.W.1 has not been countered by the Management during his cross-examination. Further more M.W.1 during his evidence has stated that on 16th April, 1993 the workman sent one letter by post but did not actually join his duty at Barbil. Therefore the evidence of the workman has to be accepted that he has submitted his joining report to the Management both on 14th April, 1993 and 16th April, 1993. In his evidence M.W.1 has stated that on 16th April, 1993 the workman only sent one letter by post to the Management regarding his joining but actually he did not join at Barbil. Since the registered letter in question had been sent to the Management from Barbil Post Office itself it can reasonably said that on 16th April, 1993 the workman himself was physically present at Barbil and therefore the evidence of the workman that his joining report on 14th April, 1993 to the Branch Manager and his joining report on 16th April, 1993 to the General Manager were refused by the concerned officials appears to be *prima facie* true. Ext. A proved by M.W.1 relates to the matter regarding the joining of the workman at Barbil with reference to Award under Ext.2 and therefore, it does not need any further discussion in the present case. Under Ext. B which is the letter dated the 12th April, 1995 the Management had issued direction to the workman to join his duty immediately at Barbil within fifteen days but by that time an industrial dispute was already pending. Similarly Ext.D is also a letter written to the workman in connection with I.D. Misc. case No. 77/90 under which the workman had made certain claim on the Management and therefore. Ext.D is of little relevance so far as the present case is concerned. Ext.E is the office copy of the letter dated 22nd November, 2002 during the pendency of the present case advising the workman to give his willingness to join at Barbil Branch within ten days. Ext.F is the registered postal cover containing the original of Ext.E which returned to the sender (Management) undelivered. Since Ext.E had been sent to the workman during the pendency of the present case and had not been received by the workman it can not be said that the workman was not interested to join his duty or was negligent in joining his duty. Therefore, having regard to the evidence of W.W.1 and the evidence of M.W.1 it is rather clear that the workman was regularly sending leave applications to the Management by post along with medical certificate and from the evidence of the workman it can *prima facie* be believed that his applications for joining at Barbil on 14th April, 1993

and 16th April, 1993 had been refused by the concerned officials. Thus it is a clear case of termination of service by way of refusal of employment.

7. Now the question arises as to whether the termination of service in question of the workman with effect from 14th April, 1993 by the Management was legal? On this score it is the evidence of the workman that he had joined his service under the Management as a Helper on 11th January, 1973. It is not the case of the Management that the workman was not in continuous service or was a contract labourer. Since the workman was a regular employee under the Management since 11th January, 1973 and after his first termination of service he had raised an industrial dispute vide I.D. Case No. 12/91 before the Presiding Officer, Labour Court, Jaypore and under Award Ext.2 he again joined under the Management at Barbil on 26th August, 1992 it can safely be said that the workman was in continuous service under the Management. In O.J.C. No. 9693 of 1992 the Hon'ble High Court of Orissa had ordered that it was just and proper that the period between 6th September, 1988 and 26th August, 1992 was not treated as a break in service and was treated as special leave for the purpose of continuation in service without any entitlement to back wages or financial benefits for the said period. Therefore, it can safely be said that the workman was in continuous service within the meaning of Section 25-B(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as the I.D. Act). Therefore it was incumbent on the part of the Management to comply the provisions under Section 25-F of the I.D. Act when the Management retrenched the workman from his service. In the instant case since the Management has not complied with the provisions under Section 25-F of the I.D. Act before retrenchment of the workman from his service, such retrenchment of service of the workman with effect from 14th April, 1993 is definitely illegal and for the same reason such act of the Management can not be justified. The issue No. (i) is answered accordingly.

8. On the question about entitlement of relief, the workman is entitled to the relief of reinstatement in service. On the question of back wages, the evidence of the workman W.W.1 is that he is unemployed since 14th April, 1993. During cross-examination of W.W.1 the Management only put a suggestion that the workman was having tea stall business at Berhampur but the workman denied the said suggestion. Suggestion by itself is not evidence. M.W.1 has not stated anything in the matter during his evidence. Simply because the workman in his evidence has stated that he is unemployed since 14th April, 1993, it would not entitle him full back wages. Many factors are to be considered before granting the relief of back wages. In the case of J.K.SYNTHETICS LTD. Vs.

K. P. AGRAWAL AND ANOTHER reported in (2007) 2 Supreme Court Cases 433, the Hon'ble Apex Court have held as follows :

“ But the manner in which “back wages” is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. We may refer to the latest of a series of decisions on this question. In U.P. State Braasware Corpn. Ltd. Vs. Uday Narain Pandey, this Court following Allahabad Jal Sansthan Vs. Daya Shankar Rai and Kendriya Vidyalaya Sangathan Vs. S.C. sharma held as follows” (Uday Narain Pandey case SCC P.488d-g)

“ A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the Court realising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident.

No precise formulas can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act. While granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages cannot be the natural consequence.”

In G.M., Haryana Roadways Vs. Radhan Singh this Court observed. (SCC p. 596, Para 8)

“8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether *ad hoc*, short term, daily wages, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.”

Thus it is clear that in itself back wage is not a matter of right on reinstatement of a worker. A copy of the order of the Hon'ble High Court of Orissa in O.J.C. No. 9693 of 1992 had been filed by the Management in the present case. Although the Management did not exhibit the said copy of the order of the Hon'ble Court, the same is available in the case record. In O.J.C. No. 9693 of 1992 wherein the present workman of this case was the petitioner, the Hon'ble High Court of Orissa vide order No. 7, dated the 10th April, 1996 at Para 6 have held as follows :

“ Considering the fact that the petitioner is in employment of the Management since 11th January, 1973, we felt that it would be just and proper if the period between 6th September, 1988 to 26th August, 1992 is not treated as a break in his service, but is treated as special leave for the purpose of continuity of his service and we so direct, we make it clear that the petitioner will not be entitled to any back wages or financial benefits for the said period.

7. With the above observation, the writ application is disposed of.”

In the instant case also it would be just and proper to give only continuity of service and not any back wages to the workman who apparently had not rendered any service to the Management in any way since the date of his retrenchment. Therefore in the facts and circumstances of the present case it is ordered that the period between 14th April, 1993 till the date of reinstatement of the workman in service is not to be treated as a break in service but is to be treated as special leave for the purpose of continuity of service but the workman will not be entitled to any back wages or any kind of financial benefits for the said period. In view of my answer to issue No. (i) as discussed above the workman is entitled to the benefit of reinstatement in service but without any back wages. Hence the issue No. (ii) is answered accordingly.

9. In the light of discussion made above the reference is answered as follows :

(i) The action of the Management of M/s. Utkal Automobiles Barbil in the district of Keonjhar in refusal of employment to Shri Harilal Sharma, Ex-Motor Cycle Helper with effect from 14th April, 1993 is illegal and consequently unjustified. (ii) The workman Shri Sharma is entitled only to the benefit of reinstatement in service but he is not entitled to any back wages. The period between 14th April, 1993 till the date of reinstatement of the workman in service is not to be treated as break in service but is to be treated as special leave for the purpose of continuity of his service. The workman shall not be entitled to any back wages or financial benefits of any kind at any time for the said period i.e. from 14th April, 1993 to the date of his reinstatement in service.

Dictated and corrected by me.

S. K. Mohapatra
30-6-2007
Presiding Officer,
Labour Court,
Bhubaneswar.

S. K. Mohapatra
30-6-2007
Presiding Officer,
Labour Court,
Bhubaneswar.

By order of the Governor

N. C. RAY
Under-Secretary to Government