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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 28th March 2008

No. 3797—li/1(BH)-5/2004-L. E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 18th March 2008 in I. D. Case No. 17 of 2004 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial disputes between the Management of Divisional Manager, Orissa Forest Development Corporation, Baripada(C) Division, Baripada and its Workman Shri Bijoy Kumar Mohanty was referred for adjudication is hereby published as in the Schedule below :

SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 17 OF 2004

Dated the 18th March 2008

Present :

Shri Srikanta Nayak , o.s.j.s. (Sr. Branch)
Presiding Officer, Industrial Tribunal
Bhubaneswar.

Between :

The Management of Divisional Manager .. First Party—Management
Orissa Forest Development Corporation
Baripada (C) Division, Baripada.

And

Their Workman Shri Bijoy Kumar Mohanty .. Second Party—Workman
S/o Damodar Mohanty
At Salabani, Via Remuna, Dist. Balasore.

Appearances :

Shri B.K. Patnaik, Assistant Law Officer	.. For the First Party— Management
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Shri B. K. Mohanty	.. The Second Party— Workman himself.

AWARD

The Government of Orissa in the Labour & Employment Department in exercise of powers conferred upon them by sub-section (5) of Section 12, read with clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) have referred the following dispute for adjudication vide their Order No. 7747— li/1(BH)-5/2004-L.E., dated the 2nd September 2004:—

“Whether the termination of services of Shri Bijoy Kumar Mohanty, Depot Assistant (Ex-daily wages employee) with effect from the 31st July 2001 by the Divisional Manager, Orissa Forest Development Corporation Ltd., Baripada (C) Division, Baripada, Dist. Mayurbhanj is legal and/or justified ? If not, what relief Shri Mohanty is entitled to ?”

2. The case of the second party (hereinafter referred to as the ‘workman’) is that he joined as a Depot Assistant on daily wage basis with the Similpal Forest Development Corporation Ltd. (In short S.F.D.C. Ltd.) on the 7th February 1983. Though he joined as a Depot Assistant, he worked in different capacities as per the orders of the authorities till the 31st July 2001 when his services were terminated. On the 1st October 1990 the S.F.D.C. Ltd. merged with the Orissa Forest Development Corporation Ltd. (In short O.F.D.C. Ltd.) and the O.F.D.C. had taken over the assets and liability of the S.F.D.C. Ltd. In between the year 1984 to 1986, 12 workmen were regularised and in the year 1989 six numbers of persons were regularised by the S.F.D.C. without considering his case. The O.F.D.C. also regularised the services of Shri Ramakanta Mishra in the year 1992, whose service was discontinued from 1987 to 1989 on the ground of misappropriation but the workman was not deliberately regularised in service and ultimately a notice was served on him for retrenchment and accordingly he was retrenched without complying with the provisions of Section 25-F of the I. D. Act. The management has not observed the principle of “last come first go” and illegally regularised the services of his juniors without regularising him in service. So, he raised the present dispute and after failure of conciliation the matter was referred to this Tribunal for adjudication.

3. The case of the first party (hereinafter referred to as the ‘Management’) is that the O.F.D.C. had taken over the S.F.D.C. on the 1st October 1990 and as per Clause 12 the service conditions of the employees are to remain the same. The workman did not raise any dispute when the services of his juniors were regularised by the S.F.D.C. Ltd. nor he raised any dispute when the services of Ramakanta Mishra was regularised in the year 1991. When the Corporation faced shortage of work a reference was made to M/s Tata Consultancy Services for assessment of workload and determination of manpower. Report was submitted in the year 1993 indicating that around 3,281 numbers of regular employees are in excess. The report was placed in the Board meeting of the O.F.D.C. Ltd. and it was decided to

retrench the daily wage workers. So, notice was issued on the 10th July 2001 to the workman including the present workman. The workman received Rs. 15,723 as retrenchment compensation and accordingly there was due compliance of the provisions of the I.D. Act. Since the workman has not raised any objection when Shri Ramakanta Mishra was regularised in service, he is not entitled to raise the same in this proceeding. The workman is not a sincere workman and he remained unauthorisedly absent for which a proceeding was initiated against him. So, he is not entitled to the reliefs prayed for in this proceeding and further, the reference is not maintainable.

4. On the aforesaid pleadings of the parties, the following issue has been framed:—

ISSUE

(i) Whether the termination of services of Shri Bijoy Kumar Mohanty , Depot Assistant (Ex-daily wage employee) with effect from the 31st July 2001 by the Divisional Manager, Orissa Forest Development Corporation Ltd., Baripada (C) Division, Baripada, Dist. Mayurbhanj is legal and/or justified ? If not, what relief is Shri Mohanty entitled to ?

5. The workman examined one witness in support of his case and the management also examined one witness in support of its case.

6. *Issue No. (2)*— The facts which are no more in dispute are that the workman worked with the S.F.D.C. Ltd. in the year 1982. M. W. No.1 deposed that the second party workman was originally engaged on daily wages basis in the Udala (Utilisation) Division by the Deputy Project Manager without following the procedure of recruitment and the S.F.D.C. Ltd. was merged with the O.F.D.C. on the 1st October 1990 and as per Clause 12 of the said merger agreement, the service conditions of all the employees remained unchanged. The workman while working in Udala was transferred to Jajpur. W. W. No.1 also deposed that he joined in service on the 7th February 1983 on daily wages basis and he was working at Jajpur and thereafter at Nilagiri (Sales) Subdivision, where his service was terminated. So, the evidence of M.W. No. 1 and W.W.No.1 clearly shows that from 1983 till retrenchment the workman was working with the management. The fact that there was retrenched is also not disputed but W.W. No.1 deposed that on the 31st July 2001 he was illegally retrenched though Ramakanta Mishra, who was junior to him being appointed on the 23rd June 1985 was regularised by the O.F.D.C.

7. M. W. No.1 deposed that due to reduction of work the matter was referred to M/s Tata Consultancy Service for assessment of workload, which submitted its report in the year 1993 indicating that 3,281 numbers of regular persons were in excess. So, the Board decided to retrench the daily wage workers. As per the decision of the Board, notice was issued on the 10th July 2001 asking to show cause as to why the daily wage workers should not be retrenched. The workman was paid retrenchment compensation amounting to Rs. 15, 723 in the shape of an Account Payee Cheque No.119950, dated the 31st July 2001 and the workman received the same. W. W. No. 1 also deposed to that effect.

8. It is well settled that the management is the best person to decide the strength of its labour force. In this case, Ext. C, the report of the Tata Consultancy Service reveals that there was excess employees under the Corporation and Ext. D reveals that the Board decided to retrench them after paying retrenchment compensation and accordingly the workman was retrenched. In the decision reported in AIR 1970 (S.C.) Page-1334 (M/s Parry & Co. Vrs. Judge, 2nd I.T., Calcutta), Their Lordships held that “ it is within the managerial discretion of an employer to organise and arrange his business in the manner he considers best. So long as that is done *bona fide* it is not competent for a Tribunal to question its propriety. If a scheme for such reorganisation results in surplusage of employees no employer is expected to carry the burden of such economic dead-weight and retrenchment has to be accepted as inevitable, however unfortunate it is, so long as it is not vitiated by considerations of victimisation or unfair labour practice.”

In this case, the workman challenged the retrenchment on the ground that his junior Ramakanta Mishra was regularised but his representation was rejected without any reason. In other words, the grievance of the workman appears to be that the management has not observed the principle of “ last come first go”. In the decision reported in AIR 1980(S.C.) Page-1454(Workman, Jerehaut Tea Co. Vrs. Its Management), Their Lordships held that “ the rule is that the employer shall retrench the workman who came last, first popularly known as ‘last come first go’ of course, it is not inflexible rule and extraordinary situations may justify variation. For instance, a junior recruit who has a special qualification needed by the employer may be retained even though another who is one up is retrenched. There must be a valid reason for this deviation, and obviously, the burden is on the management to substantiate the special ground for departure from the Rule.” In the case in hand, it is not disputed that Ramakanta Mishra was regularised in the year 1992 by the management. It is specifically stated in the written statement that since the workman had not raised any objection when Ramakanta Mishra was regularised in service, he cannot challenged the same and this indicates that the O.F.D.C. Ltd. has regularised the services of Shri Ramakanta Mishra. W. W. No. 1 deposed that Ramakanta Mishra joined service on the 23rd June 1985 and his service was regularised in the year 1992. Ramakanta Mishra was not only junior to him but his service was discontinued on the ground of misappropriation. He made representation but the management did not pay any heed to it. Ext. 7 shows that the workman made representation to the management when Ramakanta Mishra was regularised in service. So, the averment in the written statement that the workman had not raised any objection at time of regularisation of service of Shri Ramakanta Mishra does not appears to be true one. The only thing brought out from W.W. No. 1 in cross examination is that once he remained unauthorisedly absent for which he was warned. This is not sufficient to reject his candidature for regularisation, when Ramakanta Mishra, whose service was discontinued for misappropriation was regularised. In fact, the management has not assigned any reason nor produced any material as to why they had not followed the principle of “ last come first go” and this is a violation of the industrial law.

9. It is contended that the workman has received the compensation amount and therefore, he is not entitled to raised the present dispute. It is true that the workman received the retrenchment compensation but receiving the compensation will not put an end to the right

of the workman when he was victimised. In the decision reported in AIR 2000 (S.C.) Page-1401 (Nar Singh Pal Vrs. Union of India), Their Lordships held that “ The Tribunal as also the High Court, both appear to have been moved by the fact that the appellant had encashed the cheque through which retrenchment compensation was paid to him. They intended to say that once retrenchment compensation was accepted by the appellant, the chapter stands closed and it is no longer open to the appellant to challenge his retrenchment. Thus, we are constrained to observe, was wholly erroneous and was not the correct approach.” Since the management has not observed the principle of “ last come first go” the workman is entitled to reinstatement in service.

10. So far as the back wages are concerned, the burden lies on the workman to prove that he was not gainfully employed elsewhere during the period. In the decision reported in 2006 (108) FLR page-201 (U.P. State Brassware Corporation Ltd. Vrs. Udai Narain Pandey) their Lordships held that “ it is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Indian Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.”

In the present case, nothing was mentioned in the claim statement nor W.W. No.1 uttered a single word to the effect that he was not gainfully employed elsewhere during the period he suffered retrenchment. So, he is not entitled any back wages.

11. In the result, the reference is answered in the following manner :—

The termination of services of the workman with effect from the 31st July 2001 by the management is neither legal nor justified. the workman is held entitled to reinstatement in service, but without any back wages.

Dictated and corrected by me.

SRIKANTA NAYAK
18-3-2008
Presiding Officer
Industrial Tribunal, Bhubaneswar

SRIKANTA NAYAK
18-3-2008
Presiding Officer
Industrial Tribunal, Bhubaneswar

By order of the Governor
P. MALLICK
Under-Secretary to Government