

The Odisha Gazette

EXTRAORDINARY
PUBLISHED BY AUTHORITY

No. 2436 CUTTACK, MONDAY, DECEMBER 31, 2012/PAUSA 10, 1934

LABOUR & E. S. I. DEPARTMENT

NOTIFICATION

The 19th December 2012

No. 10498—IR(ID)-43/2011-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 15th December 2012 in Industrial Dispute Case No. 41 of 2011 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of Kendrapara Electrical Division No. 1, CESU and their Workman Shri Akshaya Kumar Rout was referred to for adjudication is hereby published as in the Schedule below :—

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 41 OF 2011

Dated the 15th December 2012

Present :

Shri Raghubir Dash, o.s.J.s. (Sr. Branch),
Presiding Officer,
Industrial Tribunal, Bhubaneswar.

Between :

The Management of . . . First Party—Management
Kendrapara Electrical Division No. 1,
CESU, Kendrapara.

And

Its Workman Shri Akshaya Kumar Rout, . . . Second Party—Workman
S/o Late Banshidhar Rout,
At/P.O. Madhyapara, Raj Nagar, Dist. Kendrapara.

Appearances:

Shri D. Mohanty, Advocate . . . For the First Party—Management

Shri S. Dash, Advocate . . . For the Second Party—Workman

AWARD

The Government of Odisha in their Labour & E. S. I. Department in exercising of power conferred upon them by Section 12(5), read with Section 10(1) (d) of the Industrial Disputes Act, 1947 (for short, the 'Act') have referred the following dispute to this Tribunal for adjudication vide their Order No. 6411—ID-43/2011-LE., dated the 28th July 2011 :—

“Whether the termination of services of Shri Akshaya Kumar Rout, Customer Service Representative with effect from the 31st December 2010 vide Memo No. 9431, dated the 31st December 2010 of the Manager (Electrical) of Kendrapara Electrical Division No. 1, Kendrapara is legal and/or justified ? If not, what relief Shri Rout is entitled to ?”

2. The brief case of the second party-workman as narrated in the claim statement is that in response to a Newspaper advertisements the second party applied to and was invited by the First Party (then CESCO and now CESU) to an interview and being selected in the interview, he was appointed as Authorised Squad Personnel. On the 21st June 2002, he joined his duties as such in Kendrapara Electrical Division - I. Initially the Management used to pay wages to the second party through some outside Agency but later, with effect from the 1st January 2009 the Management paid wages directly. Introduction of the Outside Agency was a mere camouflage. As a matter of fact the second party was working under the direct control of the first party. While he had been working continuously under the direct control of the first party in October, 2009 he was compelled by the management to sign an Agreement accepting contractual engagement as Customer Services Representative. Though the Agreement was signed in October 2009, it was given retrospective effect from the 1st January 2009 to be in force for a period of two years. That amounted to illegal change of Service conditions having no binding effect on the workman. Yet, on the expiry of the term of two years, the Management issued an order relieving the second party from his duty with effect from the 31st December 2010. Since more than 100 workers are there in the establishment of the first party, the management should have complied with the provisions of Section 25-N of the Act. That apart, neither notice/notice pay nor retrenchment compensation was offered/paid to the second party. That apart after his retrenchment, the Management has engaged fresh persons for similar work which is in contravention of Section 25-H of the Act. Contending that he has been going without any gainful employment, the second party claims reinstatement with full back wages.

3. The Management in its written statement has contended that during 2002 around 850 ex-servicemen including the second party were deployed in CESCO (now CESU) for de-hooking and disconnection work through different outside Agencies. Subsequently, their services were utilised for Meter reading and Bill distribution work. In 2006 the, ex-servicemen formed a Union in the name “CESCO Ex-servicemen Employees Union” and demanded their permanent absorption as well as enhancement of their wages. In November, 2006, the Management floated a tender inviting outside Agencies for Meter reading and Bill distribution work. The Union challenged the Management's action in a Writ Petition [W. P. (C) No. 6641 of 2007]. The Hon'ble High Court allowed the Management to complete the process of tender making it clear that the successful bidder would consider employment of the existing employees on preferential basis taking into account their experience,

competence and fitness. The successful bidder did not find suitable ex-servicemen to be engaged by them and engaged their own employees. When the Union filed a fresh Writ Petition before the Hon'ble High Court, it was mutually agreed between the Management and the Union in a meeting held on the 9th September 2008 that the ex-servicemen would continue in 13 Distribution Divisions. Thereafter, the Management in a meeting held on the 5th November 2008 decided to consider the cases of the ex-servicemen working through different Agencies for direct contractual engagement under the Management for a period of two years and accordingly a settlement was signed between the Management and the Union on the 27th March 2009. As per the terms of the settlement, the ex-servicemen fulfilling the eligible criteria were provided with contractual engagement for a period not exceeding two years from the 1st January 2009. Thus, the second party has entered into an Agreement with the Management signed on the 26th October 2009 agreeing to continue on contractual appointment. Thereafter, the OSEB Shramik Mahasangha to which the Ex-servicemen Employees' Union is affiliated made a demand for extension of the service period of the ex-servicemen beyond the 31st December 2010. On that demand, a settlement was signed between the Management and the Mahasangha. In terms of that settlement, the Management invited performance report of the ex-servicemen from the field units to extend the contractual engagement for a period of one/two years with effect from the 1st January 2011. The second party's performance report was not satisfactory. So, further extension was not allowed in his favour and for that his term of employment automatically terminated with effect from the 31st December 2010.

4. In terms of the reference, the following issues have been settled—

ISSUES

“(i) Whether the termination of services of Shri Akshaya Kumar Rout, Customer Service Representative with effect from the 31st December 2010 vide Memo No. 9431, dated the 31st December 2010 of the Manager (Electrical) of Kendrapara Electrical Division No. 1, Kendrapara is legal and/or justified ?”

(ii) If not, to what relief Shri Rout is entitled ?

5. Either side has examined one witness. The second party is examined as W. W. No. 1 and the S. D. O. (Electrical), Rajnagar Subdivision is examined as M. W. No. 1. Exts. 1 to 7 are marked on behalf of the second party and Exts. A to C on behalf of the first party.

FINDINGS

6. *Issue No. (i)*—The pleadings of the parties make it clear that the services of the second party stood terminated with effect from the 31st December 2010. It also transpires that while the second party claims that it is a case of retrenchment which requires compliance of the statutory provisions contained in Section 25-N of the Act, it is contended by the first party that the retrenchment comes within Clause (oo) (bb) of Section 2 of the Act. It can also be construed from the pleadings of the parties that the workman had completed more than one year of continuous service under the first party before his employment got terminated. Therefore, the reference is to be adjudicated by way of a finding as to whether the retrenchment is covered under Section 2 (oo) (bb) of the Act.

7. It is not disputed by the Management that in response to the newspaper advertisement (Ext. 1) the Management of CESCO had invited the second party to attend an interview (Ext. 2) and being selected the second party joined on the 21st June 2002 as an authorised squad personnel. Ext. 3 is a copy of the guidelines issued by the CESCO on the 11th June 2002 which reflects that all the squad members were being treated as employees of CESCO. Thus, the workman has *prima facie* shown that he joined as an employee of the Management of CESCO. Though the Management claims that the second party like other ex-servicemen were deployed through different outside Agencies, no material to support that claim is placed before this Tribunal. It is stated in the Written Statement that the Hon'ble High Court while disposing of W. P. (C) No. 6641/2007 have observed that the ex-servicemen represented by their Union are not directly employed by CESU but a copy of the said order is not placed before this Tribunal for perusal to find out if and on which context the Hon'ble Court have so observed. However, the second party has stated in his claim statement that from the date of his joining till the 1st January 2009 the Management used to pay him wages through some outside Agency. At the same time he has pleaded that the outside Agency was really not in existence and the Management was falsely showing his engagement through a Security Agency. Contending that the so called device of contract system was a mere camouflage, the workman has pleaded that the real employer and employee relationship was between the parties to this case.

Thus, it is found that from the very date of joining of the second party to work for the first party he was being paid through an Outside Agency. As already stated there is neither pleading nor materials to find out as to how and why the management invited ex-servicemen for an interview and subsequently shown them to have been engaged through different outside Agencies. But the question as to whether the second party was directly engaged by the first party or he was engaged through an outside Agency is not within the scope of the reference to make an enquiry as to whether the contract system was a mere camouflage.

8. The other dispute raised by the second party is that in October, 2009 the second party was compelled by the Management to accept contractual engagement as 'Customer Service Representative' and he was compelled to sign an Agreement on the 26th October 2009. Ext. 5 is a copy of the said Agreement which reflects that agreeing to work as Customer Service Representative on contract basis for a period of two years the second party signed the Agreement and as per the terms and conditions of the Agreement the contract period of two years was agreed to commence from the 1st January 2009. According to the Management such individual Agreements were signed by all the ex-servicemen who were working through different outside Agencies and that the Management entered into such Agreement with the ex-servicemen only after a settlement in Form-K was signed between the Management and the CESCO Ex-servicemen Employees' Union on the 27th March 2009 before the Joint Labour Commissioner, Bhubaneswar. Ext. B is a copy of the settlement, dated the 27th March 2009. The settlement reflects that the Ex-servicemen Employees' Union agreed with the Management that the ex-servicemen who fulfil all the eligibility criteria and found suitable and fit to the satisfaction of the Management will be provided with contractual engagement for a term not exceeding two years with further contemplation that any of them can be removed from contractual engagement before expiry of the term, if his performance is not found satisfactory or his continuance on contractual appointment is considered to be detrimental in the interest of the Management.

Thus, it is found that it is the Union of which the second party was a member who entered into a settlement with the management agreeing for contractual engagement of the members of the CESCO Ex-servicemen Employees' Union. Therefore, it cannot be said that the second party was compelled to sign the Agreement, dated the 26th October 2009. Rather it becomes quite clear that with the intervention and consent of the Union the ex-servicemen were given contractual appointment for a term not exceeding two years. In this individual dispute raised by the second party under Section 2-A of the Act it is not permissible for the Tribunal to decide whether the introduction of contractual engagement amounts to illegal change in conditions of service of the second party or whether it amounts to unfair labour practice.

9. It is found that the termination of service under challenge was given effect to from the date of expiry of the period of two years of the contract marked Ext. 5. The termination is challenged on the following grounds :—

- (1) The Management has not paid notice pay and retrenchment compensation which are conditions precedent for retrenchment of a workman under the provisions of the Act;
- (2) The staff strength of the first party being more than 100 the Management did not comply with the mandatory requirements of law as envisaged in Section 25-N of the Act;
- (3) The termination is in gross violation of the provisions contained in Section 25-G of the Act;
- (4) Despite availability of same work in the establishment of the first party the second party was not considered for re-engagement and the former engaged outsiders for similar work in gross violation of Section 25-H of the Act; and
- (5) The termination of service being on the ground of poor performance of the second party, the Management ought to have conducted a domestic enquiry before going to remove him from employment.

If the management's contention that the retrenchment is covered under Section 2 (oo) (bb) of the Act is found to be valid then the grounds raised by the second party in challenging the legality of the retrenchment cannot be taken into consideration. Therefore, it is to be considered as to whether the retrenchment is covered by Section 2 (oo) (bb) of the Act which runs as follows :—

“termination of service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation on that behalf contained therein.”

In the case at hand it is found that there is a contract of employment which is not renewed by the Management as a result of which the termination of service of the second party resulted. The term of the contract (Ext. 5) is very clear. The terms and conditions of the Agreement contained in Clauses-1, 21 and 22 relevant for the present dispute run as follows :—

“1. That the first party shall engage the second party purely on contract terms for a period of two years commencing on 1st day of January month of 2009 and ending on the 31st day of December month of 2010 as agreed to by both the parties and the contract of this engagement *ipso facto* shall stand terminated automatically on the last working day of the date specified for which no formal notice or order will be required to be issued by the first party.

21. That the second party has agreed to serve in the manner as would be required by the first party and perform the duties assigned/target fixed for him by the first party from time to time. The second party can be removed from contractual engagement without any notice and without assigning any reason thereof before the expiry of two years term if his performance is not found satisfactory by the management and/or it is decided that his continuance on contractual appointment is felt detrimental in the interest of the first party.

22. That both Parties reserve the right to terminate this contract before expiration of the contract period by giving one months written notice or one month notice emolument in lieu thereof. No compensation or remaining wage for un-expired period of contractual engagement will be payable by the first party, if engagement of second party is terminated before the aforesaid specified fixed period of contract for any reason.”

The terms and conditions do not contain any provision for renewal of the Agreement on the expiry of the two years term. On the expiry of the terms of the Agreement the Management has served a notice (Ext. 6) on the second party relieving him from his duties with effect from the 31st December 2010. Therefore, the present case is clearly covered by Section 2 (oo) (bb) of the Act, Consequently, the termination of service of the second party does not amount to retrenchment.

Issue No. (i) is accordingly answered against the second party.

10. *Issue No. (ii)*—In view of the finding on Issue No. (i) the second party is not entitled to any relief.

The reference is disposed of accordingly.

Dictated and corrected by me.

RAGHUBIR DASH

15-12-2012

Presiding Officer

Industrial Tribunal, Bhubaneswar

RAGHUBIR DASH

15-12-2012

Presiding Officer

Industrial Tribunal, Bhubaneswar

By order of the Governor

J. DALANAYAK

Under-Secretary to Government