

(2009) 03 DEL CK 0364

In the Delhi High Court

Case No : LPA 15 of 2009

Dr. Vishakha Kapoor

APPELLANT

Vs

National Board of Examination and Another

RESPONDENT

Date of Decision : 03-03-2009

Acts Referred:

Central Civil Services (Leave) Rules, 1972 — Rule 43(3)
Constitution of India, 1950 — Article 14, 21
Maternity Benefits Act, 1961 — Section 10, 12, 12(1), 5, 5(3)

Citation : (2009) 03 DEL CK 0364

Hon'ble Judges : A.P. Shah, C.J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Sumeet Sharma, for Prashant Bhushan, for the Appellant; Valimiki Mehta and Akanksha Sharma, for the Respondent

Judgement

1. Birth of a child is a source and cause for celebration, joy and happiness to the family and the mother. However, in the present case, the Appellant ? Dr. Vishakha Kapoor after giving birth to a child on 16.1.2008, was served with the pink slip i.e. the termination order/letter dated 8.2.2008 issued by National Board of Examination, the Respondent herein. This termination letter reads as under:

You were appointed as Deputy Director (Medical) with National Board of Examinations on probation for initial period of two years. You had joined your services on 9th October, 2006 and have not been confirmed till now and continue to be on probation.

You had attended the office from 9th October, 2006 upto 3rd May, 2007. You had to undergo an abortion and had availed abortion leave of 45 days from 4th May, 2007 till 17th June, 2007. The said leave was granted to you in accordance with Rule 43(3) of CCS (Leave) Rules, 1972. You were expected to join the office on 18th May, 2007. During this period of rest, you became pregnant and have neglected/failed to attend the office till date.

By the office letter dated 6th July, 2007 you were informed about your leave status and in no uncertain terms that your leave was to end on 29th July, 2007. It would be pertinent to mention here that 15 days earned leave was granted and credited to your account in advance for services to be rendered by you for the period 1.7.2007 to 31.12.2007. Since you had failed to resume your duties till date, the earned leave for the period 1.7.2007 to 31.12.2007 so credited in anticipation stands forfeited/cancelled in accordance with CCS (Leave) Rules, 1972.

However, since you had submitted applications for further extension of leave without certification by "Authorised Medical Attendant" as required in accordance with CS (Medical Attendance) Rules, 1944 and as stipulated for Gazetted Government servants, you were granted Extra Ordinary Leave (EOL) for a period of 62 days w.e.f. 30th July, 2007 upto 3rd October, 2007. Despite lapse of all leaves available to you, you have failed to resume your duties till date.

By the office letters dated 7th January, 2008 and 14th January, 2008, you were requested to revert back immediately. However, you have filed an application dated 17th January, 2008 informing that you have delivered a baby boy on 16th January, 2008 and have sought further maternity leave for 135 days from 26th January, 2008 upto 8th June, 2008.

Whereas CCS (Leave) Rules, 1972 are fully applicable in the National Board of Examinations.

The office has gone through your leave records and has found that no leave was available in your account after 3rd October, 2007.

Consequently, you have continued to be away from duties illegally after expiry of your leave period.

In view of the aforementioned facts and circumstances your probationary services are discharged with immediate effect.

2. Apart from legal infirmities the aforesaid termination letter shows complete insensitivity to basic human rights and values. Per se it is discriminatory and violates of Articles 14 and 21 of the Constitution of India. To say the least the Respondent should have been considerate about the rights of the Appellant as a woman and a mother should have acted in the manner which is more humane and just.

3. Some basic facts relevant for adjudication of the present appeal may be noticed-

A. The Appellant is a qualified Ophthalmic Surgeon with MBBS, DO and MS degrees from Gujarat University. She has also acquired DNB Qualification. From July 2002 till July 2005 she had served as a Senior Resident in Ophthalmology Department of Post Graduate Institute of Medical Education and Research (PGIMER), Chandigarh.

B. National Board of Examination the Respondent is a registered society under the administrative control of the Ministry of Health and Family Welfare, Government of India. It conducts post graduate examination in Modern Medicine and allied sciences at the national level.

C. The Appellant was appointed as an Assistant Controller of Examination in the Respondent society, which post was later re-designated as Deputy Director (Medical). The appointment made on 9.10.2006, was on probation for a period of two years.

D. On 4th May, 2007, the Appellant suffered miscarriage and was advised to take bed rest. The Appellant claims that she had become pregnant in April 2007 after five years of her marriage.

E. It is the case of the Appellant that she became pregnant once again while on leave. It is also stated by the Appellant that she was advised to remain on bed rest in view of the "high risk" pregnancy due to pregnancy induced hypertension and gestational diabetes mellitus. Accordingly, she made repeated leave applications along with medical certificates from the gynecologist/doctors to take her. The Respondent does not dispute applications for leave and the medical certificates, enclosed with the applications. The Respondent did not require and ask the Appellant to take second opinion or reconfirmation from any other doctor. The Respondent accepts that no response or reply was written to the repeated applications made by the Appellant asking for leave due to medical reasons.

4. It is the case of the Respondent that leave was granted and extended from time to time up to 3.10.2007 and not thereafter. The Appellant it is claimed was on unauthorized absence after 4.10.1997.

5. The Respondent claims that they had written two letters dated 7.1.2008 and 14.1.2008 informing the Appellant that no leave was due to her and directing her to resume duties with immediate effect. In the second letter dated 14.1.2008 it was stated as under:

I am directed to refer to our letter of even number dated 7th January, 2008 seeking reply from your end with regards to status of your leave account. Despite a lapse of one week, no reply has been received from your end. In view of the above explained position, you are once again directed to either resume your duties with immediate effect or else intimate the likely date of your resumption of duties along with details of kind of leave you wish to avail with appropriate justification. In case no reply is received from your side within three days of receipt of this letter, it will be presumed that you have nothing to state in the matter and your leave shall be treated as unauthorized absence.

6. On 16.1.2008 the Appellant gave birth to a child and immediately thereupon wrote an application seeking maternity leave. This letter was duly received by the Respondent as is clear from the order/letter dated 8.2.2008 terminating services of the Appellant.

7. The aforesaid letter dated 8.2.2008 terminating the services of the Appellant is liable to be struck down on two legal grounds, in addition to violation of Articles 14 and 21 of the Constitution of India. Firstly, the letter as per se stigmatic. Even if the Appellant was on probation, her services could not be terminated by letter, which is stigmatic without holding enquiry Refer V.P. Ahuja Vs. State of Punjab and Others, and Rambabu and Others Vs. Secy. to Govt., Fin. and Planning Deptt. and Others, .

8. Secondly, the services of the Appellant could not have been terminated in view of the provisions of Maternity Benefits Act, 1961 (Act for Short). Learned Counsel for the Respondent admitted during the course of hearing before us that the Respondent is an establishment within the meaning of the said Act. Section 5 of the said Act stipulates right to payment of Maternity Benefits. Sub-section (3) of Section 5 reads as under:

(3) The maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery.

Provided that where a woman dies during this period, the maternity benefit shall be payable only for the days upto and including the day of her death. Provided further that where a woman, having been delivered of a child, dies during her delivery or during the period immediately following the date of her delivery for which she is entitled for the maternity benefit, leaving behind in either case the child, the employer shall be liable for the maternity benefit for that period but if the child also dies during the said period, then, for the days upto and including the date of the death of the child.

9. Section 6(2) of the said Act provides:

(2) In the case of a woman who is pregnant, such notice shall state the date from which she will be absent from work, not being a date earlier than six weeks from the date of her expected delivery.

10. A reading of the aforesaid Sub-sections makes it clear that woman is entitled to maternity leave benefit of not over a period of 12 weeks, out of which not more than six weeks can precede the date of expected delivery.

11. Section 12(1) of the Act reads as under:

12. Dismissal during absence of pregnancy.- (1) When a woman absents herself from work in accordance with the provisions of this Act it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to give notice of discharge or dismissal on such a day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her service.

12. Section 12 of the Act makes it clear that where a woman absents herself from work in accordance with the provisions of the Act, it shall be unlawful for

her employer to discharge or dismiss her on account of such absence. The second part of said Sub-section further stipulates that any notice of discharge or dismissal that would expire during such absence or which would vary to her disadvantage any of the conditions of her service shall be unlawful. A reading of the aforesaid Sections makes it clear that the Appellant was entitled to 12 weeks of leave including upto six weeks before delivery and the rest after birth of the child on 16.1.2008. This aspect was completely unnoticed and has been ignored while passing the termination order dated 8.2.2008. The entitlement to leave upto maximum period of 12 weeks is statutory and mandatory. The termination order ignores this and treats this period of 12 weeks as unauthorized leave and is, therefore, contrary to law. Secondly, the notice of discharge/dismissal could not have been issued during this period of statutory leave/absence. The Appellant was entitled to at least six weeks leave from the date of birth of her child on 16.1.2008. The notice of discharge/termination was issued on 8.2.2008 within this period of six weeks.

13. Apart from the above, we also find that the Appellant is entitled to some other leaves under Sections 9 and 10 of the Act. At least the leave due and entitled u/s 10 of the Act has not been taken into consideration while passing the termination order.

14. We would have gone into further details and also on the question of discrimination and violation of human/fundamental rights but refrain from making any further observations as the Respondents have placed before us letter dated 26.2.2008 stating that they have decided to withdraw the discharge letter dated 8.2.2008 subject to the Appellant not claiming consequential or monetary benefits for the period of absence or leave and she would resume duties on the same rights, terms and conditions available to her on 3.5.2007. Accordingly, the appeal is allowed and the impugned order dated 27.11.2008 dismissing the writ petition filed by the Appellant is set aside. The discharge letter dated 8.2.2008 stands withdrawn. The Appellant will resume her service on 12th March, 2009 in terms of the earlier appointment letter and as per rights, terms and conditions available to her on 3.5.2007. The appellant will not be entitled to back wages, but she will be entitled to salary for the maternity leave period in accordance with law. Appeal is disposed of accordingly.