

(2016) 07 P&H CK 0220
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 48 of 2016.

**Mrs. Anuradha Sharma - Petitioner @HASH Director Higher Education
and Others**

Date of Decision : 08-07-2016

Acts Referred:

Punjab Civil Services Rules, 1970 — Rule 8.119

Citation : (2016) 4 PLR 785 : (2017) 2 SCT 27

Hon'ble Judges : Rajiv Narain Raina, J.

Bench : Single Bench

Advocate : Mr. Animesh Sharma, Advocate, for the Petitioner; Mr. I.P.S. Doabia, Advocate, for the Respondent Nos. 1 and 2; Ms. Shruti Jain Goel, AAG, Haryana, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Narain Raina, J. - The claim in this petition rests on whether the petitioner has a right to commuted leave on medical grounds for 58 days broken into two parts of 24 and 34 days each. The claim has been rejected by the impugned communication. In challenge to the order and to fortify her claim, the petitioner relies on Rule 8.119 (c) read with Rule 8.119 (a) of the Punjab Civil Services Rules, 1970 ("1970 Rules") as applicable to Haryana. The commuted leave is sought on medical grounds. The existence of medical reasons is not disputed. If she has right to commuted leave on medical grounds she would be entitled to leave salary admissible under Rules 8.119 and 8.122 Volume-I, Part-1 of the 1970 Rules. The petitioner serves in the Education Department, Haryana her parent State but has been on deputation with the UT Administration as an Associate Professor of Chemistry teaching in the Post Graduate Government College, Sector-11, Chandigarh. In the month of December 2013 the petitioner was diagnosed with Stage-III, Colo-Rectal Cancer. She has undergone surgery, extensive Chemotherapy and Radiotherapy over a prolonged period of time. The surgery was performed in Medanta Hospital, Gurgaon with permission to proceed for treatment. Thereafter, she had to take leave for her Chemotherapy which was sanctioned for 7 days from January 21, 2014 to January 27, 2014. The college

permitted ex post facto leave vide order dated February 13, 2014 but the order bears no clarity whether the leave sanctioned was earned leave or extraordinary leave or of what kind. In the line of treatment, she underwent several radiotherapy sessions followed by a second surgical intervention in October 2014, this time, at the PGI Chandigarh. She was unwell for 20 days following surgery and had to be re-admitted for treatment for 34 days from October to November 2014. This was covered on medical grounds. Her request to Director of Higher Education, Chandigarh Administration that she may be granted Extraordinary Leave for the period was found not admissible and instead she was asked if she wanted commuted leave on medical grounds. The petitioner clarified in her reply stating categorically that she really meant commuted leave under Rule 8.119 (c) read with Rule 8.119 (a) of the 1970 Rules and not Extraordinary Leave as earlier prayed. She further emphasised that she was seeking commuted leave of 58 days on medical grounds. Her request was accepted by the Chandigarh Administration when it granted her commuted leave on medical grounds for the period 34 days i.e. from October 16, 2014 to November 18, 2014 vide order dated December 29, 2014. There was correspondence exchanged between respondent DHE and the Principal of the respondent College where prima facie opinion formed was that petitioner was not entitled to commuted leave on medical grounds. Despite the order of the competent authority Chandigarh Administration, the College did not implement the decision despite order dated December 24, 2014 standing steadfastly in her favour. However, no order was passed qua the remaining 24 days of commuted leave. Instead, the college authorities at Chandigarh have asked, after sanction of leave vide order dated December 24, 2014 by memo dated February 26, 2015 (P-8) for supply of a copy of the relevant rules which show the non-entitlement of the petitioner for commuted leave on medical grounds for the periods in question. The Principal has intimated to the DHE vide letter dated October 03, 2015 the following:-

"In continuation of this office Memo No.PGGC- 11/EC-I/2015/160 dated 13.01.2015 it is intimated that Mrs Anuradha Sharma, Associate Professor in Chemistry is working in this college on deputation from the State of Haryana. As per the Service Book, the official is eligible only for earned leave. The employees of Haryana Government who are working on deputation in this College are not given the credit of Half Pay leave by the Haryana Govt. The Commuted leave on medical grounds is sanction with reference tot he above mentioned memo no. for 34 days to the official concerned. You are therefore, requested to revise the leave already sanction for the period from 16.10.2014 to 18.11.2014 = 34 days.

The official concerned has already given the request to grant commuted leave from 28.08.2014 to 20.09.2014 and from 16.10.2014 to 18.11.2014 vide letter dated 26.12.2014 which has been already sent to your office w.r.t. your office Memo No.904-DHE-UT-C1-12(1)88 dated 01.12.2014 vide this office Endst. No.PGGC-11/EC- I/2015/110 dated 09.01.2015.

The case for sanction of EOL with pay on medical ground for the period from 28.08.2014 to 20.09.2014 = 24 days with the permission to suffix Sunday holiday on 21.09.2014 is already sent to your office vide this office Memo No.PGGC-11/EC-I/2014/5561 dated 30.09.2014 but till date EOL with pay on medical ground for the period from 28.08.2014 to 20.09.2014 = 24 days is not sanctioned.

You are therefore, requested to revise the leave already sanctioned for the period from 16.10.2014 to 18.11.2014 = 34 days and sanction the leave for the period from 28.08.2014 to 20.09.2014 = 24 days. The official is on deputation from the State of Haryana. The Service Book of the official concerned is also enclosed herewith."

2. It is against this memo that the petitioner has approached this Court for directions in her favour setting aside the impugned order dated October 03, 2015 (Annex P-9). The DHE Chandigarh Administration has neither agreed nor disagreed with the advise of the Principal and the matter rests there. The only decision in writing remains the order dated December 24, 2014 (P-7) issued by the Chandigarh Administration in the Education Department sanctioning commuted leave on medical grounds under Rule 8.119 of the 1970 Rules for the period of 34 days.

3. On notices issued by this Court to the respondents calling for response, a short reply has been filed by the Joint Director, Colleges O/o Director, Higher Education, Haryana being the representative of the principal employer of the petitioner, the Haryana Government. It is not disputed that in terms of the stipulations contained in the deputation order dated January 20, 1987 issued by the Chandigarh Administration the allocation of leave salary and pension charges will be regulated by the rules of the parent Government. Therefore, the final call has to be taken by the Chandigarh Administration albeit in tandem with the Haryana Government Higher Education Department in accordance with rules.

4. The Haryana Government has contested the case while relying on their instructions dated April 09, 1987 wherein it was decided to grant earned leave instead of half pay leave to the teachers working in Haryana Government. These instructions specifically mention that teachers appointed after the date of issue of the instructions will not be entitled to any half pay leave and, therefore, there is no question of granting commuted leave on medical grounds. According to the provisions of these instructions, the petitioner it is said is not entitled to the relief claimed. At the same time, the answering respondent in the State of Haryana affirms that her office has only limited control in respect of matters directly related to the office of the first two respondents in UT Administration. Haryana Govt. is nowhere involved in sanctioning of commuted leave to the petitioner and, therefore, the ball falls in the park of the Chandigarh Administration. The State of Haryana has reserved its right to file a detailed para-wise reply to the petition. However, before looking to the reply of the 1st and 2nd respondents it would be fruitful to read and reproduce the instructions dated April 09, 1987

which are worded as under:-

"Subject: Earned leave for person serving in vacation Department.

Sir,

I am directed to address you on the subject noted above and to say that the grant of earned leave instead of half pay leave to teachers working in Haryana Govt. has been engaging the attention of Government. After careful consideration, it has been decided that the teachers working under Govt. except where otherwise provide will hence forth be permitted to 10-days earned leave on full pay during the year in lieu of 20 days half pay leave, as admissible at present.

2. It has also been clarified that half pay leave at the credit of teachers as on the date of issue of the instruction is to be shown separately in the leave account and may be granted as half pay leave/commuted leave on the same terms and conditions as applicable to them prior to date of issue of these instructions. Teachers appointed after the date of these instructions will not be entitled to any half pay leave and there is, therefore, no question of granting commuted leave on medical grounds. It is further clarified that encashment of leave would be admissible to teachers suo motu as to other Government servants subject to the fulfilment of the prescribed condition.

3. Necessary amendment in the Rules will be made in due course."

5. The Director, Higher Education, Chandigarh Administration has filed a short reply taking the cue from the reply of the 3rd respondent and have now relied on the instructions dated April 09, 1987. It is clarified that engagement of leave is admissible to teachers as it is to other Government servants subject to the fulfilment of the prescribed conditions. It is noteworthy that the instructions dated April 09, 1987 were issued after the petitioner was appointed in the year 1986 as Lecturer in Chemistry, Haryana Education Service (Group-"B") by the Haryana Government on provisional basis on probation for two years vide appointment memo dated December 15, 1986. The two periods involved in the petition for which commuted leave on medical grounds was applied for, as said earlier, broken into two parts, is August 28, 2014 to September 20, 2014 (24 days) and from October 16, 2014 to November 18, 2014 (34 days). It is stated that all the teachers working on deputation from the State of Haryana are being granted all kinds of leave except half pay leave subject to availability of leave to their credit. The benefit of any kind of leave cannot be claimed as a matter of right, unless, it is made admissible by the competent authority to all similarly situated employees. However, in case, the Parent State/Department-DHE, Haryana is prepared to allow the benefit then Chandigarh Administration can also consider the matter regarding grant of said benefit to the petitioner. As a coup de grâce UT Administration says in its written statement that if the petitioner has any grievance she can always seek reversion to her parent State.

6. Above all else, two issues stand out before the rules of service relied upon are adverted to. First and foremost is that the instructions dated April 09, 1987 stipulate that necessary amendment in the rules will be made in the due course. But this has not translated into rules of service.

7. I have heard Mr. Animesh Sharma, learned counsel appearing for the petitioner, Mr. I.P.S. Doabia, learned counsel appearing for respondents No.1 and 2 and Ms. Shruti Jain Goel, AAG, Haryana for the respective parties at considerable length.

8. Learned counsel appearing for the parties are agreed that the said instructions have not been transformed into codified rules through the process of amendment under proviso to Article 309 of the Constitution. The other thing which plainly stands out is that the petitioner was appointed to Government service in Haryana before the moot instructions were issued. The stark reality is that instructions are prospective in nature. It is equally true that the purpose of executive instructions is to fill gaps in the statutory law but not to supplant it, being supplemental in nature. They must always be read in the context of rule, if there is one occupying the field. It would, therefore, be necessary to carefully read the rules relied upon by the petitioner i.e. Rules 8.119 and 8.122 of the 1970 Rules and see if they are of any help to the petitioner. If the rules provide for commuted leave on medical grounds then it must be so declared as rightful due of the petitioner as a matter of legitimate right. In addition to the two rules, Mr. Animesh Sharma, learned counsel appearing for the petitioner also relies on additionally to Rules 8.113, 8.114 and 8.121. Therein, "Commuted leave" has been defined as leave taken under Clause (c) of Rule 8.119. "Half Pay leave" means leave earned in respect of each completed year of service. "Half pay leave due" means the amount of half pay leave calculated in the manner prescribed in Rule 8.119 for the entire service diminished by the amount of leave on private affairs and leave on medical service and half pay leave already availed. As per Rule 8.114 any kind of leave under the rules may be granted in combination with or in continuation of any other kind of leave. It would be best to read Rule 8.119 in its relevant provisions and, therefore, it is reproduced below as it deals with the subject of "commuted leave":-

8.119 (a) The half pay leave admissible to an officer in permanent employee in respect of each "completed year of service" is 20 days.

Note.-xxxx

Note 2.- xxxx

Note 3.-xxxx

Note 4. -xxxx

(b) The half pay leave due may be granted to a Government employee on medical certificate or on private affairs.

(c) Commuted leave not exceeding half the amount of half pay leave due may be granted to a Government employee on medical certificate or for prosecuting an approved course of study i.e. a course which is certified to be in the public interest by the leave sanctioning authority, subject to the following condition:-

(i) half pay leave upto a maximum of 180 days shall be allowed to be commuted during the entire service where such leave is utilised for an approved course of study.

(ii) when commuted leave is granted, twice the amount of such leave shall be debited against the half pay leave due:

(iii) Omitted.

Provided that no commuted leave may be granted under this rule unless the authority competent to sanction leave has reason to believe that the Government employee will return to duty on its expiry."

9. Mr. Sharma continues his contentions in the following manner in his pleaded case so that his reasoning is not lost in paraphrase. The same is reproduced:-

"A perusal of the Rule 8.119 shows that Commuted Leave sanctionable to a Government Employee is a maximum of half the amount of "half pay leaves due". The maximum half pay leaves admissible, as per Rule 8.119(a) are 20 for each completed year of service. "Half Pay leave due", as per Rule 8.113(v) is the total amount of half pay leave for the entire service, diminished by the half pay leaves already taken. Therefore, since the petitioner had been in service since December 1986, she has, till date completed 29 years of service. This amounts to a total of 580 days of Half Pay leave (29 years x 20 half pay leaves each year). The "half pay leave due" will be calculated by subtracting the half pay leaves already taken by the petitioner. As per Rule 8.119 (c), the petitioner is entitled to 50% of the "half pay leave due" as Commuted Leave.

Therefore, clearly the petitioner is entitled to Commuted Leave, which can be taken on the basis of a medical certificate. The impugned letter/order is clearly wrong and contrary to the Civil Services Rules, in stating that because her service book does mention it, the petitioner is not entitled to credit of "Half Pay Leave Due" or "Commuted Leave".

(e) That further still, as per Rule 8.122 Volume 1, Part 1 of the Punjab Civil Services Rules (as applicable to Haryana), an officer on commuted leave is entitled to leave salary equal to the amount admissible for a Government Employee on Earned Leave, that is he is entitled to leave salary equal to pay drawn by him immediately before proceeding on leave. Therefore, the petitioner is fully entitled to leave salary for the period of 58 days for which she has sought commuted leave.

(f) That further still, in any case the Respondent No.1, vide its order dated 29.12.14, has already granted Commuted Leave on medical grounds under Rule

8.119 of the Volume 1, Part 1 of Punjab Civil Services Rules (as applicable to Haryana) for a period of 34 days, from 16.10.14 to 18.11.14. The respondent No.2 has to comply with the order dated 29.12.14. The order dated 29.12.14 passed by the Respondent No.1 qua 34 sanctioned leaves, which is clearly binding on the Respondent No.2 College, has never been set aside.

Further, once the Respondent No.1 has already sanctioned the commuted leave for 34 days, there is no reason for it not to sanction the remaining 24 days of commuted leave sought as well, on the grounds and under the same Rules."

10. There can be no manner of doubt that commuted leave on medical certificate is not unknown to the rules and on the other hand the formula for calculating it is incorporated in Rule 8.119 in its relation to half pay leave. On the other hand, the instructions dated April 09, 1987 specifically deal with persons serving in "Vacation Department". Vacation Department has not been defined in the rules or in the instructions and one would presume that teachers hold a job which has vacations because of the academic sessions which close with examinations and re-open in the next semester/year of the academic pursuit. These instructions in the Vacation Department replace the system of 20 days of half pay leave as defined in the rules calculated in the manner prescribed in Rule 8.119 for the entire service diminished by the amount of certain kinds of leave including half pay leave itself used earlier and change the nature of half pay leave to 10 days earned leave on full pay. The instructions are emphatic when they proclaim that teachers appointed after the date of the issue of instructions will not be entitled to half pay leave and, therefore, also not entitled to commuted leave on medical grounds. There appears to be substantial merit in Mr. Sharma's argument that since the petitioner was appointed in December 1986, prior to the instructions, then instructions on their own strength cannot take away the petitioner's accrued and vested right of commuted leave as per rules.

11. This is not the end of the argument. Even assuming *arguendo* that the instructions apply to the petitioner then they violate basic fundamental rights of equality and right to life. If the instructions seek to take away the possibility of commuted leave on medical grounds, without providing any other alternative provision for medical leave, these instructions would be clearly illegal and transgressing fundamental human values to deny a person who is sick and is kept away from work on account of prolonged treatment to be deprived of salary. All things said and done, this Court is called upon to examine whether the petitioner has a right to salary of 58 days for which permissions were duly granted by the respondents in the Chandigarh Administration. How these 58 days are to be treated is a pure legal issue which does not depend on the nature of disease or sickness with which an employee is inflicted and over which he or she has no control.

12. There is another prism on which the case of the petitioner can be viewed and that is through Article 14 and the myriad equal protections contained therein which the courts have painted in many colours in different fact situations dealt

with in case law. The instructions cannot abrogate the main rule and teachers cannot be discriminated by the Haryana Government as against other employees only to deprive them of right to commuted leave on medical grounds, while all other Government servants in the many departments continue to enjoy the benefit in force of adverse circumstances, illness etc. There is thus a clear violation of Article 14, says; Mr. Animesh Sharma, there being no reasonable classification or intelligible differentia to wit the teachers who cannot apply for and be granted medical leave and a particular case can only be considered for earned leave because the service book says so or the instructions do.

13. A part of disputed 58 days (34 days) stand sanctioned by the Chandigarh Administration in the Education Department vide order dated December 24, 2014 relying on Rule 8.119 of the 1970 Rules and by that logic the remaining period of 24 days also deserves to be treated in the same manner. It was only the recalcitrant stand taken by the Principal of the College - respondent No.2 that the case of the petitioner was scuttled even without specifically referring to the instructions or analysing them to know what they mean and whether they applied to a person like the petitioner. In the reminder letter dated October 03, 2015 the Principal wrote to DHE Chandigarh Administration the words: "the employees of Haryana Government working on deputation in this College are not given the credit of Half Pay leave by the Haryana Govt." The Principal has virtually overruled the decision of the DHE in her letter dated October 03, 2015 and has instead asked the DHE to sanction leave as Extraordinary Leave with pay on medical grounds for the entire period of 58 days but not commuted leave on medical grounds. The Principal has virtually asked the DHE to revise the earlier leave granted for 34 days by sanctioning EOL with pay on medical grounds. Lamentably, even this part has not been implemented till the filing of the petition or thereafter. The situation is that neither of the kind has been actually sanctioned. There are now two views emerging. One, commuted leave on medical grounds and two, extraordinary leave with pay on medical grounds for the same period.

14. Learned counsel for the respondents are unable to shed any light on the position in the rules and what the instructions of 1987 do to destroy the rule and to destroy the right of the petitioner which flows naturally from the rules relating to commuted leave on medical grounds or explain the position to reason and common sense as to whether the instructions can be applied to teachers already in service of the Haryana Government before the policy circular was issued in 1987. It does not require a legally trained mind to understand what is meant by the instructions when they say that teachers appointed after the date of "these" instructions will not be entitled to any half pay leave and by deductive logic it would not be I think wrong to hold that the instructions do not apply to the petitioner, having been appointed in the year 1986 although on provisional basis before the birth of the executive instructions. It has not been disputed that the petitioner would not take her seniority of 29 years of service and other serviced benefits from the date of initial appointment. This is not the case set up by the

respondents that she became a member of the service in HES (Group "B") after the issue of instructions. Once it is held that the moot instructions do not apply to the petitioner then the third prayer for issuance of writ of certiorari quashing the instructions would not arise and, therefore, no further comment is made despite the argument that the instructions are discriminatory in nature and violate the equality principle in Article 14. That part is left for another case.

15. For the many reasons recorded above, I find substantial merit in this petition worthy of acceptance. The petition is allowed. A writ of certiorari is issued quashing the letter dated October 03, 2015 (Annex P-9). The stand of the respondents in their respective written statements is deprecated as narrow and oppressive. The rules thus prevail since they are statutory in nature and when interpreted in the manner canvassed by the petitioner are detached and separated from the instructions to bring relief to the petitioner. A direction is issued by way of mandamus to the respondents while allowing this petition to pay the petitioner leave salary of 58 days within 6 weeks and to treat the period as commuted leave on medical grounds. At the end it may be noticed that the medical justification for leave taken for the periods in question was not disputed and the issue was only debated as to entitlement to the relief prayed with the rules in one hand and the instructions in the other. The order dated December 24, 2014 relying on Rule 8.119 of the 1970 Rules is held to be legal and valid and the logic inherent for 34 days would suitably cover both the periods in question.

16. There will be no order as to costs.