

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present

Mr. Justice Umar Ata Bandial

Mr. Justice Munib Akhtar

Civil Appeal No. 735 of 2016

(On appeal from the judgment dated 12.11.2014 passed by the Sindh Service Tribunal at Karachi in Appeal No.119 of 2014)

Usman Ali Chhachhar

...Appellant

VS

Moula Bux Chachhar and others

...Respondents

For the appellant: : Mr. Muhammad Munir Paracha,
ASC.

For the respondent No.1 : In person

For Govt. of Sindh : Mr. Sibtain Mahmood, Addl. AG

Dates of hearing: : 12 and 13.03.2019

ORDER

Munib Akhtar, J.- This appeal assails the judgment of the learned Sindh Service Tribunal dated 12.11.2014. Both the appellant and the respondent No. 1 are employed with the Sindh Assembly Secretariat. At the relevant time the appellant held the post of Director Information Technology (BS 18) (Non-Cadre). By notification dated 14.04.2013 the Speaker of the Sindh Assembly re-designated this post as Deputy Secretary (BS 18); it thus became a cadre post. At the relevant time, the respondent No. 1

held the cadre post of Assistant Secretary. This was originally a BS 17 post, but was upgraded to BS 18 on or about 08.03.2013. The respondent No. 1 was aggrieved by the aforementioned re-designation because according to him the post of the Deputy Secretary, being a cadre post, could only be filled, inter alia, on merit by selection from eligible Assistant Secretaries who had the relevant three years experience. He accordingly filed a representation/revision before the Speaker on or about 21.02.2014 against the aforementioned notification of 14.04.2013. The representation remained unattended to for a period of 90 days, which led to the respondent No. 1 filing an appeal before the learned Service Tribunal. The appellant and the Speaker of the Assembly were joined as respondents in the said appeal.

2. In the service appeal the respondents therein took a preliminary objection that since the representation had been made to the Speaker beyond time the appeal was incompetent, and ought to have been dismissed as such. This was, insofar as we are presently concerned, the principal point on which the parties joined issue, and to which almost the whole of the (lengthy) impugned order of the learned Tribunal is devoted. A large number of decisions of this Court were cited, and were carefully and painstakingly considered. The learned Tribunal finally concluded as follows:

"58. For the foregoing reasons it is held that notwithstanding the fact that the departmental appeal was filed after expiry of period of limitation and the issue of limitation has remained undecided no finding is given on merits as well the delay shall be deemed to have been condoned. It is, therefore, held that the appeal before the Tribunal which has been filed within the period of limitation is competent in law."

The merits of the appeal were disposed off in the final, concluding para of the impugned order. It was held that the notification under challenge was in violation of law and of no legal effect. The appeal was accordingly allowed.

3. Being aggrieved by the aforesaid decision, the respondent No. 2 therein (i.e., the present appellant) sought leave to appeal, which was granted vide order dated 09.03.2016 in the following terms:

"Having heard the learned ASC at some length, subject to limitation, leave to appeal is granted in this petition to examine whether the question of limitation involved in the service appeal filed by respondent No. 1 before the Sindh Service Tribunal, Karachi, being Appeal No. 119/2014, has been rightly decided by the Tribunal, or it is contrary to the ratio of various judgments of apex Court referred therein."

4. Before us the principal point argued by learned counsel for the appellant and by the respondent No. 1 (who appeared in person) was whether the law laid down by this Court was that if a departmental appeal was barred by limitation then the appeal before the Service Tribunal was *ipso facto* incompetent and had to be dismissed. Learned counsel argued that this was indeed the position, and that therefore the service appeal filed by the respondent No. 1 ought to have been dismissed on this ground alone. It was also submitted that the learned Tribunal had erred on the merits of the case. The respondent No. 1 argued that, as held in the impugned order, the position was not so. His service appeal had been rightly held to be maintainable, and correctly allowed on the merits. The learned Addl. AG, on the question of maintainability, assisted the Court so that the correct conclusion could be reached.

5. As noted above, there are a large number of decisions of this Court, which were considered at length by the learned Tribunal. Some are leave refusing orders, while others are decisions on appeal. Some are decisions of two-Member Benches, while others are decided by three-Member Benches. It is also clear that the question raised is one of importance and general application since it applies in respect of appeals in all service tribunals in the country, both Federal and Provincial. Before proceeding to consider the decisions, it will be appropriate to set out, in tabular form, the

relevant extracts from the provisions regarding departmental appeals and representations, as contained in the relevant rules:

(Federal) Civil Servants (Appeal) Rules, 1977	Balochistan Civil Servants (Appeal) Rules, 2013	Punjab (Extracts from the Civil Service Rules, Chapter XIV)	Khyber Pakhtunkhwa Civil Servants (Appeal) Rules, 1986	Sindh Civil Servants (Appeal) Rules, 1980
<p>5. ... (4) Every appeal shall be submitted within a period of thirty days of the communication of the order appealed against.</p> <p>7. (1) An appeal may be withheld by an authority not lower than the authority from whose order it is preferred if:— ...</p> <p>(c) it is not preferred within the time specified in sub-rule (4) of rule 5 and no reasonable cause is shown for the delay; ...</p> <p>Provided that in every case in which an appeal is withheld, the appellant shall be informed of the fact and the reasons for it:</p> <p>Provided further that</p>	<p>5. Period of Limitation.—No Review/Appeal preferred under these rules shall be entertained unless such appeal is preferred within a period of sixty (60) days from the date on which a copy of order appealed against is delivered to the appellant;</p> <p>Provided that the Reviewing Authority /Appellate Authority may entertain the appeal/representation after the expiry of the said period, if it is satisfied that the appellant had sufficient cause for not preferring the appeal/Review/Representation in time or that the earlier appeal or Review Petition was not addressed to the correct Authority.</p>	<p>(xiii) Withholding of appeals or applications for revision. ...</p> <p>14.21</p> <p>1. An appeal or application for revision may be withheld by an authority subordinate to Government if-- ...</p> <p>(c) it is an appeal and is not preferred within six months after the date on which the appellant was informed of the order appealed against, and no reasonable cause is shown for the delay; or ...</p> <p>Provided that, in every case</p>	<p>3. Right of Appeal-(1) A civil servant aggrieved by an order passed or penalty imposed by the competent authority relating to the terms and conditions of his service may, within thirty days from the date of communication of the order to him, prefer an appeal to the appellate authority:</p> <p>Provided that where the order is made by the Government there shall be no appeal but the civil servant may submit a review petition:</p> <p>Provided further that the appellate or the reviewing authority, as the case may be, may condone the delay in preferring the</p>	<p>3.-(1) A civil servant aggrieved by an order of the competent authority relating to the terms and conditions of his service may, within 30 days from the date of the order, prefer an appeal to the appellate authority:</p> <p>Provided that where the order is made by the Government there shall be no appeal by the civil servant but he may apply for review of the order:</p> <p>Provided further that the appellate authority or as the case may</p>

<p>an appeal withheld on account only of failure to comply with the provisions of sub-rule (2) or (3) of rule 5 or clause (d) may be resubmitted within one month of the date on which the appellant is informed of the withholding of the appeal and, if resubmitted in a form which complies with those provisions or is addressed to the proper appellate authority, as the case may be, shall not be withheld.</p> <p>(2) No appeal shall lie against the withholding of an appeal by an authority competent to do so.</p>		<p>in which an appeal or application for revision is withheld the appellant or applicant shall be informed of the fact and the reasons for it: ...</p> <p>2. No appeal or application for revision shall lie against an order withholding an appeal or application passed by a competent authority.</p>	<p>appeal or the review petition, if it is satisfied that the delay was for reasons beyond the control of the appellant or for the reasons that the earlier appeal or review petition was not addressed to the correct authority.</p>	<p>be, the Government may condone the delay in preferring appeal or review petition, if it is satisfied that the delay was for reasons beyond the control of the appellant or for the reasons that the earlier appeal or review petition was not addressed to the proper forum.</p>
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6. It will be seen from the foregoing that the provisions can be regarded as falling into two categories. One category comprises of the Federation and the Punjab, while the other is in relation to Balochistan, Sindh and KPK. Taking up the latter category first, it is clear that if the departmental appeal/representation/review is filed beyond the prescribed period, then the delay may be condoned if the appellate authority is satisfied that, inter alia, it “was for reasons beyond the control of the appellant”, or “sufficient cause” is shown (as the case may be). As regards the first category, the appeal/representation/ revision may be “withheld” if filed after the prescribed period and the appellant is unable to show any

reasonable cause for the delay. Thus, in both categories, a departmental appeal is not to be dismissed outright if beyond time; the delay can be condoned. While the language used in the two categories is different, what is important for present purposes is that the delay is condonable.

7. With this conspectus in mind, we now turn to the case law. In many ways one of the basic judgments is *Chairman PIAC and others v. Nasim Malik* PLD 1990 SC 951 ("the PIAC case"), an appeal decided by a learned three-Member Bench. (The judgment was authored by Ajmal Mian, J. (as he then was).) This is so because it is cited in a number of the subsequent decisions. As the title indicates, it related to the period when appeals lay to the (Federal) Service Tribunal from decisions by PIAC on departmental appeals. It was held as follows (pp. 957-58; emphasis supplied):

"9. Adverting to the question of limitation, it may be recapitulated that the respondent's resignation was accepted on 15-8-1983 and upon his request the resignation was converted into termination on 28-3-1984 and, therefore, the alleged cause of action, if any, accrued to the respondent in 1984. The respondent after having received the monetary benefits on account of converting his resignation into termination could not have filed the departmental appeal on 12-3-1986 i.e. after the expiry of about two years as Regulation 87 of the Pakistan International Airlines Corporation Rules, 1985, provided 30 days period of limitation. It has been concluded by the Tribunal that it could be presumed that the delay was condoned by the appellate authority.... In our view, the above conclusion is not warranted by law. The rejection of the aforesaid belated appeal of the respondent through appellants' letter dated 6-4-1986 cannot be said to be a rejection of the appeal on merits. It does not indicate that the appellate authority had noticed the question of limitation or had applied its mind to the question of limitation....

10. ... [I]t cannot be held that the appellant's Chairman was conscious of the question of limitation while turning down the above belated respondent's appeal... *We are, therefore, inclined to hold that since the appeal before the department was time-barred, the appeal before the Tribunal was also incompetent on that account.*"

It is the sentence emphasized in the extract above that is referred to and relied upon in the subsequent case law. It is of course the point in contention before us.

8. In deciding the point of limitation, the Court referred to Regulation 87 of the applicable regulations (being the Pakistan International Airlines Corporation Employees (Service and Discipline) Regulations, 1985). This regulation requires careful consideration. It provided in material part as follows:

"87. Procedure for appeal and application for review: ...

- (4) Every appeal or review application shall be submitted within a period of thirty (30) days of the receipt of the order appealed against.

...

- (6) An appeal may be withheld by an authority not lower than the authority from whose order it is preferred if: ...

- (b) it does not comply with the provisions of sub-regulations (2), (3) or (4); or

It is not preferred within time specified in sub-regulation (4) and no reasonable cause is shown for the delay; or ...

Provided that in every case in which an appeal is withheld, the appellant shall be informed of the fact and the reasons for it;

Provided further that an appeal withheld on account only of failure to comply with the provisions of sub-regulation (3) and (4) or clause (d) may be resubmitted within one month of the date on which the appellant is informed of the withholding of the appeal, and, if resubmitted in a form which complies with those provisions or is addressed to the proper appellate authority, as the case may be, shall not be withheld.

- (7) No appeal shall lie against the withholding of an appeal by an authority competent to do so...."

It will be seen from the passages extracted above that it was only sub-regulation (4), which provided for the period of limitation, that was taken into account by the Court. However, with respect, Regulation 87 had much more to it than that. It is also to be noted that, structurally, the regulation was rather similar to the first category of statutory provisions noted in paras 5 and 6 herein above. It allowed for the appeal to be "withheld" if filed beyond the period of limitation, but allowed the appellant to show reasonable cause for the delay in filing the appeal. However, additionally, it had another provision relating to limitation. This was contained in the second proviso to sub-regulation (6). As provided therein, if

(inter alia) the only ground for “withholding” the appeal was that it was beyond time, then it could be resubmitted within one month of the appellant being informed, and if resubmitted then it could not be “withheld”. In other words, Regulation 87 provided for two layers of relief to an appellant whose appeal was time-barred. Firstly, he could show reasonable cause for the delay. Secondly, even if he could not (or did not) and his appeal was on that account “withheld”, he could resubmit it within one month of being so informed. If he did so then the appeal proceeded to a hearing on the merits. It will be noted that while the statutory provisions in relation to the first category noted in paras 5 and 6 above provide for the former relief (reasonable cause) they do not provide the latter sort of relief to a time-barred appeal or representation. Thus, the position under Regulation 87 was much more favorable to the appellant employee than the rule that applies in relation to the Federation and the Punjab.

9. With respect, these aspects of Regulation 87 were not considered at all by the learned Bench that decided the *PIAC* case. They appear to have missed the attention of the Court. In our view, had the whole of the regulation been kept in mind, then perhaps the decision on limitation could have been otherwise. In any case, the rather broad observation made (emphasized above) may have been avoided. In our respectful view, *prima facie* a case can even be made out that on the point of limitation the decision was *per incuriam*. (We may note that the matter was decided against the employee on the merits, so the final outcome would not have been affected.)

10. The next case that requires consideration is *State Bank of Pakistan v. Khyber Zaman and others* 2004 SCMR 1426, 2004 PLC (CS) 1213 (“the *State Bank* case”). Decided by a learned three-Member Bench, leave petitions against a judgment of the Federal Service Tribunal were converted into appeals and allowed. As presently relevant, it was observed as follows (pg. 1436):

"12. It is well entrenched legal proposition that wherein appeal before departmental authority is time-barred, the appeal before the Service Tribunal would be incompetent. In this regard reference can be made to cases titled *Anwarul Haq v. Federation of Pakistan* 1995 SCMR 1505, *Chairman, PIAC v. Nasim Malik* PLD 1990 SC 951."

It will be seen that the *PIAC* case was relied upon without, with respect, appreciating that perhaps it did not fully take into account the provision there involved (i.e., Regulation 87). The other case relied upon, *Anwarul Haq v. Federation of Pakistan* 1995 SCMR 1505 ("the *Anwarul Haq* case"), was a leave refusing order of a learned three-Member Bench. On the point of limitation reliance was placed on the *PIAC* case, and it was held as follows (pg. 1510): "when an appeal before the departmental authority was time-barred, the appeal before the Tribunal was also incompetent on that account".

11. The next case is *Anwar Muhammad v. General Manager, Pakistan Railways and another* 1995 SCMR 950 ("the *Anwar Muhammad* case"), an appeal from a decision of the Federal Service Tribunal, and heard by a learned three-Member Bench. (The author of the judgment was Ajmal Mian, J. (as he then was).) No reference was made to the *PIAC* case and the point of limitation was decided in the following terms (pg. 952; emphasis supplied):

"4. Since the representation dated 15-5-1984 was incompetent and so also the order passed thereon by the Divisional Superintendent, it was open to the General Manager to have dismissed the appellant's above representation dated 8-1-1991 on the ground of limitation but *since no objection was raised in respect of the limitation and the same was decided on merits, the General Manager in fact impliedly condoned the delay. In this view of the matter, the Tribunal should have decided the appellant's service appeal on merits.* We would, therefore, allow the above appeal with no order as to costs and would remand the case to the Tribunal to decide the above service appeal on merits after notice to the parties."

In *Muhammad Jan Marwat and another v. Nazir Muhammad and others* 1997 SCMR 287, where a learned three-Member Bench refused leave to appeal against an order of the NWFP Service Tribunal, the passage of the impugned order where reliance was

placed on the *Anwar Muhammad* case was referred to with approval.

12. In *Sui Northern Gas Pipelines Ltd. v. Murawat Hussain* 2004 SCMR 527, where none of the earlier case law (up to that time) appears to have been cited, the employer's appeal was dismissed by a learned two-Member Bench. For the employer it was argued that since the respondent's departmental appeal was barred by time, the appeal before the (Federal) Service Tribunal was not competent. It was however conceded that the departmental appeal was not "disposed of by any order in writing holding the same as barred by time" (pg. 530). It was held that in such circumstances "the question of condonation or otherwise in filing departmental appeal would not arise" but that in any case, the said appeal "would have been a fit case for condonation of delay" (*ibid*).

13. We next need to consider two cases, in which the later decision was a review of the earlier. The first decision, *NED University of Engineering and Technology v. Ashfaq Hussain Shah* (2006 SCMR 453) was of a learned two-Member Bench, against a decision of the Sindh Service Tribunal. The leave petition was converted into an appeal and allowed. On the point of limitation reliance was placed on the *PIAC* case and the *State Bank* case, and it was held as follows (pg. 455): "We do find substance and merit in the contentions raised by the petitioners that the Service Tribunal could have taken note of the fact that the appeal before the departmental authority was time-barred, therefore, his appeal before the Tribunal was incompetent and time-barred". The unsuccessful employee filed a review petition, which was decided also by a learned two-Member Bench; the decision is reported as *Ashfaq Hussain Shah v. NED University of Engineering and Technology and others* (2007 SCMR 73). On the point of limitation, a different view was now taken. As regards the *State Bank* case, it was held that the observations regarding limitation "being obiter dicta cannot be said to have a binding weight on the decision of the case as the same being an observation... which was neither

necessary for decision of case nor was related to the material facts in issue" (pg. 78). The *Anwarul Haq* case was also considered, and it was held as regards limitation that "there was nothing on record in the cited case nor any plea raised nor any decision was needed for the disposal of the controversy" (pg. 79). Finally, the *PIAC* case was considered at some length (pp. 79-80). It was quite obviously distinguished though in a manner that, with respect, is not easily discernable. On the other hand, the *Anwar Muhammad* case was cited with approval (pg. 81). Ultimately, the review was allowed and the University's petition was dismissed.

14. In *Muhammad Aslam v. WAPDA and others* 2007 SCMR 513 ("the *Muhammad Aslam* case"), a learned three-Member Bench refused leave to appeal by judgment dated 23.11.2006. The employee's departmental appeal had been dismissed, and it was observed that "the presumption would be that it has been rejected both on limitation as well as on merits" (pg. 514). We may respectfully note that this observation appears to be inconsistent with what was held in the *Anwar Muhammad* case where, as is clear from the passage extracted above, a decision on the merits by the departmental authority without touching upon limitation was taken to mean that the delay had been condoned. In the cited case now being considered, the relevant passage from the judgment of the Tribunal in which the *PIAC* case was relied upon was referred to with approval. Reference was also made to the *State Bank* case. Interestingly reference was also made with approval to *NED University of Engineering and Technology v. Ashfaq Hussain Shah* (2006 SCMR 453). It was perhaps not brought to the attention of the learned Bench that this decision had already been set aside in review, as noted above (the judgment in review being dated 07.03.2006). The case being considered in this para was cited with approval and applied in *Irshad Muhammad Shah v. HESCO and another* (2011 SCMR 1717), where a learned two-Member Bench refused leave to appeal.

15. In *Zia ur Rehman v. Divisional Superintendent, Postal Services, Abbottabad and others* (2009 SCMR 1121), a learned three-Member Bench refused leave to appeal against a decision of the Federal Service Tribunal. One point taken was that since the employee's departmental appeal was time barred, the appeal before the Service Tribunal was not maintainable. This point was upheld, and the *PIAC* case and the *Muhammad Aslam* case were referred to with approval. The case being considered in this para (and the *Muhammad Aslam* case) were cited with approval in *Sajid Hussain v. Secretary, Ministry of Railways and others* (2012 SCMR 195), where a learned two-Member Bench dismissed the employee's appeal.

16. Reference may also be made to two leave refusing orders made within one day of each other by the same learned three-Member Bench. These are *Sohail Butt v. Deputy Inspector General of Police and others* 2011 PLC (CS) 846 (decided on 20.05.2009) and *Raja Khan v. Manager (Operation) Faisalabad Electric Supply Company (WAPDA) and others* 2011 PLC (CS) 856 (decided on 21.05.2009). In both it was observed that where the departmental appeal was time-barred the appeal before the Service Tribunal would not be competent. Reliance was placed, inter alia, on the *PIAC* case, the *Anwarul Haq* case and the *State Bank* case in the first cited case (pg. 850), and the *PIAC* case and the *Muhammad Aslam* case in the second cited case (pg. 861).

17. Finally, reference may be made to *Muhammad Asif Chatha and others v. Chief Secretary, Government of Punjab and others* (2015 SCMR 165) where the appeals were dismissed by a learned two-Member Bench. It was observed, while relying, inter alia, on *NED University of Engineering and Technology v. Ashfaq Hussain Shah* (2006 SCMR 453) that "[it] is by now a well-settled principle of law that if a departmental representation is barred by time, then without disclosing any sufficient reason for delay, no subsequent, order of disposal of such incompetent representation could create fresh cause of action and that the appeal filed by the civil servant

before the Tribunal would be incompetent" (pg. 171). With respect, it was not brought to the attention of the learned Bench that the judgment relied upon had been set aside in review, as already noted above.

18. We have gone through the case law in some detail not only because the learned Tribunal did so in the impugned order but also to satisfy ourselves whether it is possible for us to decide the point in issue with certainty and confidence. We must conclude, both respectfully and regretfully, that it is not possible to do so. As the above review indicates, the position is far from satisfactory. The state of the law can only be regarded as unsettled. In none of the cases cited does there appear to be any consideration of the actual terms of the relevant statutory provisions, extracted in paras 5 and 6 herein above. Even a judgment clearly regarded as basic, i.e., the *PIAC* case, did not fully take into account all aspects of the provision there involved (Regulation 87) and, *prima facie*, could even be regarded as *per incuriam*. There are also, in our respectful view, certain contradictory strands in the various observations made in the case law, e.g., as noted in para 14 above. In such a situation, for us to decide this appeal while sitting as a two-Member Bench would not be appropriate and, if anything, may add (if only inadvertently) to the prevailing uncertainty in the law. As noted above the point in issue (as identified in para 4 above) is of importance and general application. It continues to arise in leave petitions and appeals in service matters filed and/or pending in this Court. It should also be kept in mind that the issue at hand has certain other ramifications that may also need to be considered. These arise, *inter alia*, by the statutory provision (to be found in both federal and provincial law) that an appeal to the service tribunal may be filed if the departmental appeal/representation remains pending beyond the stipulated period.

19. Accordingly, there is clearly a need, somewhat urgent, for the law to be settled and made certain. This, in our view, can only

happen if the matter is considered by a Larger Bench. Therefore, the Office may place this appeal before the Hon'ble Chief Justice for such orders as are deemed appropriate.

Judge

Judge

Announced in open Court on 17.10.2019 at Islamabad.

Judge

Approved for reporting