

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 1670 of 2015

Muhammad Muneer Malik, etc.

Vs

Allama Iqbal Open University, etc.

DATE OF HEARING: 16-2-2016.

PETITIONERS BY: Mr Muhammad Shoaib Shaheen, A.S.C.

RESPONDENTS BY: Hafiz S.A. Rehman, ASC, for the
respondent No. 1.
Sh. Ahsan Uddin, ASC, for the
respondent No. 4.

ATHAR MINALLAH, J.- The petitioners have invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "**Constitution**") assailing order dated 29-5-2015 and the decision of the Executive Council of the same date.

2. The facts, in brief, are that the petitioners no. 1 and 2 are holding the post of Senior Producer and Producer respectively in the Allama Iqbal Open University (hereinafter referred to as the "**University**"). The respondent no. 4, before her impugned appointment, had served the University for almost seventeen years on the post of 'Designer'. The University invited applications from eligible candidates for appointment on various posts described in the advertisements published in daily newspapers on 08-2-2015. The advertisement included the post of Deputy Director, Institute of Educational Technology (BPS-19) [hereinafter referred to as the "**Advertised Post**"]. The qualifications and experience prescribed for the Advertised Post were explicitly mentioned in the advertisement i.e. Master's Degree (at-least 2nd Class) and experience as follows:

"At least 12 years experience as Programme Manager/Controller of Programmes/Producer in Radio/Television or equivalent post in the audio-visual Centres of Education Department of other relevant organization."

3. The last date for submission of the applications was 25.2.2015. Twenty four applications were received, which were scrutinized on 24-03-2015 by the Eligibility/Scrutiny Committee. The Eligibility/Scrutiny Committee recommended eight candidates as eligible and 16 ineligible for the Advertised Post. The Vice Chancellor of the University gave

his approval on 30-3-2015. The respondent no. 4 was amongst the 16 ineligible candidates. The reasons for the ineligibility were recorded in the case of each candidate. The respondent no. 4 was declared ineligible because she was neither holding one of the posts specified in the advertisement, nor was the post of Designer, which she had held for seventeen years, equivalent to the specified posts. The latter filed an appeal under Section 31 of the Allama Iqbal Open University Act, 1974 (hereinafter referred to as the "**Act of 1974**") before the Chairman of the Executive Council/Selection Board. Pursuant to the order of the *competent authority* the case of the respondent no. 4 was referred back to the Eligibility/Scrutiny Committee with a direction to give her a personal hearing. The Eligibility/Scrutiny Committee, in its meeting held on 06-4-2015, afforded an opportunity of hearing to the respondent no. 4. On the basis of a letter issued by the former Director of the Institute of Educational Technology (hereinafter referred to as the "**IET**") of the University, a majority of the members gave a decision in favour of the respondent no. 4. The former Director of IET had certified in his letter that the respondent no. 4 had 'produced various TV programs and was assigned the task to produce programs for FM service too'. The majority members of the Eligibility/Scrutiny Committee, therefore, 'considered to equate the experience achieved by her while working as Designer with that of a Producer'. She was thus recommended to be declared as eligible for the Advertised Post. Interestingly, the current

Director of IET, who was also a Member of the Eligibility Committee, did not agree with the majority and recorded his dissenting note as follows:

- "(a) She is working as Designer (BPS-17) which cannot be equated with the position of Program Manager/Controller of Programs and Producer.*
- (b) As per I.E.T. archive not a single edited TV or Radio program is at her credit which was broadcasted or televised.*
- (c) She has ZERO contribution in Program Production in IET as Producer/Programme Controller etc."*

4. Pursuant to the recommendations made by the majority members of the Eligibility Committee, a revised list of nine eligible candidates was prepared which included the name of the respondent no. 4. The written examination was held on 08-4-2015. As per approved criterion, candidates were required to secure at least 50% marks in the written examination. Two candidates, including the respondent no. 4, got less than 50% marks in the written test and, therefore, they were not called for an interview. However, the Selection Board in its 114th meeting, held on 11-4-2015, considered the cases of the two candidates, including the respondent no. 4, and decided to relax the approved criteria. Consequently

the respondent no. 4 was called for the interview. The interviews were held on 11-4-2015. Pursuant to the completion of the selection process the respondent no. 4 was recommended by the Selection Committee for appointment against the Advertised Post, and the same was approved by the Executive Council. The respondent no. 4 was, therefore, appointed against the Advertised Post vide letter dated 29-5-2015.

5. The learned counsel appearing on behalf of the petitioners has contended that; the appointment of the respondent no. 4 is in violation of the principle of transparency and the Statutes, 1978 (General Conditions of Service) (hereinafter referred to as "**Statutes**") ; the respondent no. 4 was not eligible for being considered against the Advertised Post; the eligibility criteria was described in the advertisement, dated 08-2-2015, and the same could not have been subsequently altered or modified; the eligibility criteria was changed so as to accommodate the respondent no. 4; the respondent no. 4 had failed to qualify the written test, however, the approved criteria was relaxed and altered so as to benefit the petitioner; the petitioners were eligible candidates and their rights have been infringed due to the non-transparent manner leading to the appointment of the respondent no. 4; the appointment of the respondent no. 4 is in violation of the fundamental rights vested in the petitioners under Articles 4, 9, 18, 25 and 27 of

the Constitution; the impugned orders are against the principles of natural justice, fair play and equity.

6. The learned counsel appearing on behalf of the University has contended that; no departure was made from the eligibility criteria expressly mentioned in the advertisement; the Selection Board consisted of senior officers of the University, and it was within the scope of their power and functions to determine the equivalence of the experience of the respondent no. 4 with that of the Programme Manager/Controller of Programmes/Producer in Radio/ Television etc. The respondent no. 4 was afforded a personal hearing pursuant to the acceptance of her appeal, and the Selection Board in its meeting held on 06-4-2015 declared her experience to be equivalent to that of a *Producer* and thus recommended her to be eligible; there was no malafide nor the same has been alleged; the Court cannot substitute the opinion of the Selection Committee; Courts should exercise restraint in academic matters. Reliance has been placed on the cases of "*Mehmoona Noureen Versus Chancellor, Fatima Jinnah Women University, Rawalpindi*" [2011 CLC 230], "*Muhammad Sadiq and others Versus University of Sindh and others*" [PLD 1996 S.C. 182], "*Sanchit Bansal and another Versus Joint Admission Board (JAB) and others*" [2012 SCMR 1841] and "*Dr Mir Azam Jan Versus Dr Muhammad Shahzad and others*" [2008 SCMR 960].

7. The learned counsel appearing on behalf of the respondent no. 4 vehemently argued that; the latter was eligible and had the required experience, and hence the appointment was in accordance with the law; the petition is not maintainable as the service Regulations of the University are non-statutory; no favouritism or nepotism was shown towards the respondent No. 4; the respondent No. 4 was declared eligible after her appeal was accepted by the *competent authority*; the questions raised involve disputed questions of fact and the same cannot be resolved by this Court while exercising powers under Article 199 of the Constitution.

8. The learned counsels have been heard and the record perused with their able assistance.

9. There is no cavil to the proposition that Courts exercise utmost restraint in matters relating to the academic affairs of educational institutions. It is also settled law that in academic matters the opinion of the *competent authority* is not amenable to judicial review. However, in the instant case the petitioners had responded to the advertisement dated 08-2-2015 and had participated in the process of selection for the Advertised Post. The grievance of the petitioners does not relate to any academic matter of the University. Their grievance stems from the alleged violation of the principles of transparency and fairness in the selection process conducted for the appointment made against the Advertised Post. It is

the case of the petitioners that the selection of respondent no. 4 was in violation of the criterion or qualifications prescribed in the Statutes. The questions which need consideration are:

- (i) *Whether the conditions relating to experience prescribed in the Statutes and expressly mentioned in the advertisement were violated and subsequently altered, which led to the appointment of respondent no. 4.*
- (ii) *If so, what consequences would flow from such an appointment?*
- (iii) *Whether the rights of the petitioners have been infringed.*

10. The University has been established and incorporated under section 3 of the Act of 1974. Section 2(o) defines 'Statutes' as meaning the Statutes made under the Act of 1974. The statutes are framed under section 24, and sub section 2 thereof prescribes the procedure. The Statutes of 1978 have, therefore, been framed under section 24 of the Act of 1974. Statute 4(2) has declared all posts in BPS 17 and above to fall in Category 'A' and the procedure for filling such posts through direct recruitment is prescribed in statute 5. Pay, qualifications and experience in respect of each post has been prescribed, and for the posts in IET have been enumerated in 'C. Servicing (i)' of the Statutes. The

Advertised Post is at serial no. 2 and column no. 3 of the table, inter alia, mentions the prescribed experience. The said prescribed experience was also published in the advertisement. The experience, having been prescribed under the Statutes, cannot be altered or changed unless amended through the prescribed procedure. It may be noted that the experience prescribed for the post of Senior Designer at serial no. 5 is not in relation to a post but rather requires professional design experience related to print production. There is, therefore, a distinction between the experience of holding a particular post such as Programme Manager and the experience of production of TV or radio programmes.

11. The relevant portion relating to experience, expressly stated in the advertisement dated 08-2-2015, and highlighted above, is a verbatim reproduction of the prescribed experience for the Advertised Post under the Statutes. A bare perusal shows that 12 years' experience as Programme Manager/Controller of Programmes/Producer in Radio/Television is the requirement. It is obvious that the prescribed experience has a nexus with specified posts or designations and not with the experience in the field of production. The second limb of the clause i.e. 'or equivalent post in the audio-visual centres of Education Department or other relevant organizations' is also in relation to the specified posts and not mere experience in production. It is not the case of the University that the post of 'Designer' held by the respondent no. 4 in the University was equivalent to

the post of Programme Manager/ Controller of Programmes/Producer in Radio/Television. Minutes of the meeting, dated 06-04-2015, of the Eligibility/Scrutiny Committee shows that the latter did not declare the post of Designer as equivalent to the posts specified in the advertisement. Instead, on the basis of a letter of the former Director of IET the majority members of the Committee equated the 'experience achieved by her while working as a Designer with that of a Producer'. If this interpretation is accepted, then on the same analogy if a person appointed as and holding any post e.g. an Upper Division Clerk could have shown that while holding the said post he or she had produced programmes for TV or Radio and also fulfilled other prescribed conditions, then that would have been sufficient for being eligible to be considered for the appointment against the Advertised Post. Such an interpretation would be reading into the prescribed criterion, particularly relating to experience, something not provided therein. I am afraid that this would be a gross misinterpretation of the prescribed condition relating to experience required for the Advertised Post. This is exactly how the majority members of the Eligibility/Scrutiny Committee have interpreted the experience clause. They have not declared the post of 'Designer' in the University as equivalent to the post of Programme Manager, Controller of Programmes or Producer but have equated the experience of the respondent no. 4 while working as a 'Designer' with that of a Producer, and that too solely on the basis of a letter issued by the former

Director of IET. Interestingly, the person holding the post of Director of IET at the time of the selection process also happened to be a Member of the Eligibility/Scrutiny Committee. His dissenting note, as recorded in the minutes of the meeting, has been reproduced above. He had unequivocally contradicted the contents of the letter written by the former Director i.e. his predecessor in office. The majority members of the Eligibility/Scrutiny Committee, despite the unambiguous dissenting note, declared the respondent no. 4 as eligible in clear violation of the conditions relating to experience prescribed under the Statutes and mentioned in the advertisement. The determination made by the majority of the members in the case of declaring the respondent no. 4 as eligible was thus illegal and without lawful authority.

12. It is settled law that public authorities, while making appointments, have a duty to ensure utmost transparency and a level playing field for all the candidates. Fairness, transparency, access and keeping the processes for appointments free from bias and arbitrary decisions are the essential factors for ensuring merit based appointments on the one hand and safeguarding the rights of all the eligible candidates on the other. A non transparent process of selection is not sustainable in law. The object of inviting applications from candidates through advertisements published in daily newspapers is to make certain that all the eligible interested candidates may have an opportunity to

compete for the appointment through a fair and transparent selection process. Transparency entails principles of equal opportunity in order to guarantee that the appointment is made on merit and of the most capable and qualified person. Persons eligible in terms of the prescribed criterion, qualification and conditions relating to experience have a right to be given fair consideration through a transparent process. Transparency is the key to ensuring a merit based selection and wide advertisement of the criterion and qualifications determining the eligibility of candidates is a pre condition. The criterion, qualifications and conditions of eligibility expressly mentioned in the advertisement cannot be altered after the last date fixed for submission of applications. Material deviation from the advertised criterion or qualifications renders the selection process non transparent. It tantamounts to making appointments without inviting applications through advertisement, thus depriving other similarly placed deserving and eligible persons from applying. The employer also cannot ensure that the most capable person is selected on merit in such circumstances. The august Supreme Court has consistently observed and held that a non transparent selection process for making appointments is in violation of the fundamental right guaranteed under Article 18 of the Constitution. It has been observed and held in "*Government of NWFP through Secretary NWFP Forest Department Peshawar and others versus Muhammad Tufail Khan*" [2004 PLC (CS) 892] as follows;

"The Courts are duty bound to uphold the Constitutional mandate and to keep up the salutary principle of rule of law. In order to uphold these principles it has been stated time and again by the superior Courts that all the appointments are to be made after due publicity in a transparent manner after inviting applications through press from all those who are eligible, deserving and desirous."

13. The august Supreme Court, in the above judgment, reaffirmed the principles and law earlier enunciated regarding observing transparency in making appointments and reference in this regard was made to "*Abdul Jabbar Memon and others (Human Right Case No.104(i) to (iv)*" [1996 SCMR 1349], "*Munawar Khan versus Niaz Muhammad and 07 others*" [1993 SCMR 1287], "*Mushtaq Ahmed Moral and others versus The Honourable Lahore High court, Lahore*" [1997 SCMR 1043], "*Obaid Ullah and another versus Habib Ullah and others*" [PLD 1997 SC 835] and "*Abdur Rashid versus Riazuddin and others*" [1995 SCMR 999].

14. It is, therefore, axiomatic that the eligibility criterion and conditions, once unambiguously mentioned in an advertisement published in the Press, cannot be ignored,

altered or deviated from during the selection process, particularly after the deadline for the submission of applications has expired. Appointments made in violation of the principles of transparency and fairness are illegal and not sustainable in law.

15. In the instant case the criterion/conditions relating to experience mentioned in the advertisement had been deviated from and materially altered by the Eligibility/Selection Committee in the case of the respondent no. 4. The post of 'Designer' in the University, held by the respondent no. 4, is admittedly not equivalent to the post of a Programme Manager, Controller of Programmes or Producer, nor was the experience achieved by producing programmes for TV or Radio relevant for being eligible. Moreover, the person holding the post of Director IET at the relevant time had unequivocally recorded in the Minutes of the meeting of the Eligibility Committee that not a single edited programme, as per the archives of the IET, was to the credit of the respondent no. 4, and that the latter had 'zero contribution in programme production in IET as Producer/Programme Controller etc'.

16. In the light of the above discussion, the decision of the Eligibility/Scrutiny Committee, in its meeting dated 06-4-2015, to the extent of declaring the respondent no. 4 as an eligible candidate for the Advertised Post was in violation of the conditions prescribed under the Statutes as well as the

principle of transparency. The said decision was, therefore, without lawful authority and void ab-initio. It is settled law that when the basic order is without lawful authority then any superstructure built on it would have to fall automatically. Reliance is placed on "*Maulana Atta ur Rehman versus Al-Hajj Sardar Umar Farooq and others*" [PLD 2008 SC 663], "*Rehmat Ullah and others versus Saleh Khan and others*" [2007 SCMR 729], "*Muhammad Akram and others versus Member, Board of Revenue and another*" [2007 SCMR 289], "*Punjab Workers Welfare Board, Government of Punjab and Human Resources Department, Lahore versus Meher Din*" [2007 SCMR 13], "*Executive District Officer (Education), Rawalpindi versus Muhammad Younas*" [2007 SCMR 1835], "*Muhammad Sabir Khan versus Rahim Bakhsh and 16 others*" [PLD 2002 S.C. 303].

17. The instant petition is consequently allowed. The decision of the Eligibility/Scrutiny Committee, dated 06-4-2015, to the extent of the respondent no 4 and all subsequent orders/steps taken pursuant thereto, particularly approval granted by the Executive Committee and the impugned appointment of the respondent no. 4 vide order dated 29-05-2015 are declared illegal, without lawful authority or jurisdiction, being in violation of the Statutes and the principle of transparency. The appointment letter, dated 29-5-2015, is accordingly set aside. The University may proceed with the process relating to the Advertised Post for selecting the most capable person from amongst the eligible

candidates on the basis of merit. This Court expects that the University shall make the appointment having regard to the criterion/conditions prescribed under the Statutes, as explicitly mentioned in the advertisement dated 08-02-2015

(ATHAR MINALLAH)
JUDGE

Announced in the Open Court On 18-03-2016.

JUDGE

Approved for reporting.

Tanveer Ahmed.