

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P. No.4634 of 2016

Mst. Saima Malik

Versus

Ministry of Capital Administration and Development and another

Date of Hearing: 07.06.2017

Petitioner by: M/s Muhammad Aftab Alam Rana, and
Hafiz Mazhar Maikan, Advocates,

Respondents by: Mr. Afnan Karim Kundi, Additional
Attorney-General, and Ms. Sitwat
Jahangir, Assistant Attorney-General along
with Mr. Masood ul Hameed Malik, Deputy
Director (Legal) CADD.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Mst. Saima Malik, is aggrieved by the inaction on the part of respondent No.1 (Ministry of Capital Administration and Development) as well as respondent No.2 (the Director General, Federal Directorate of Education) to implement the notification dated 08.02.2013, issued by respondent No.1 regularizing the services of several daily wages employees, including the petitioner. By virtue of the said notification, the petitioner was regularized “with immediate effect subject to availability of posts”. The said notification was issued after the Sub-Committee of the Cabinet on Regularization of Contract/Daily Wages Employees in the Ministries / Divisions / Attached Departments / Autonomous / Organizations, etc. (“Cabinet Sub-Committee”) in its meeting dated 06.09.2012, approved the regularization of the services of 356 daily wages employees of various Educational Institutions under the Federal Directorate of Education, Islamabad. In the list of the employees approved for regularization, the petitioner’s name appears at Sr. No.297. All the regularized employees were to be on probation as prescribed under Rule 6 of the Civil Servants Act, 1973.

2. The facts essential for the disposal of this petition are that on 12.10.2010, the petitioner was employed against the post of a Trained Graduate Teacher (BS-16) on daily wages basis at the Islamabad Model School No.1. The petitioner’s name along with

several other daily wages employees of various educational institutions under the Federal Directorate of Education were sent to the Cabinet Sub-Committee to be considered for regularization. As mentioned above, the Cabinet Sub-Committee in its meeting dated 06.09.2012, approved the regularization of the services of the petitioner and 355 other daily wages employees. The Establishment Division, vide letter dated 07.11.2012, conveyed the said approval to respondent No.1. Thereafter, vide notification dated 08.02.2013, issued by respondent No.1, the decision to regularize the services of daily wages employees, including the petitioner, was notified. Vide letter dated 19.02.2013, addressed by the Headmistress of the Islamabad Model School No.1 to respondent No.2, it was recommended that the petitioner be placed in the said school on regular basis against a vacant post of a Trained Graduate Teacher (BS-16). In the said letter, it was mentioned that the petitioner's contractual employment was due to expire on 22.02.2013. It was also mentioned that the petitioner's performance as a teacher had "always remained commendable". Having received no plausible response, the petitioner filed Writ Petition No.2087/2013 before this Court, which petition was disposed of through order dated 17.05.2013 in the following terms:-

"The petitioner is working as trained graduate Teacher. Her services have been regularized under the orders of Cabinet Sub-Committee. Consequent to the same, she submitted her joining report; however for the last three months, neither notification regarding joining has been issued nor she has been paid salary. Learned counsel for the petitioner states that in this respect petitioner's representation is pending with the respondents and if a direction is issued to the respondents to decide the representation expeditiously preferably within a fortnight, the petitioner would be satisfied.

2. Order accordingly.

3. Writ petition stands disposed of with all C.Ms."

3. It appears that on 08.11.2016, the petitioner was afforded an opportunity of personal hearing by respondent No.2 in compliance with the said order of this Court. Vide letter dated 18.11.2016, respondent No.2 informed the petitioner that she was never appointed through a regular channel and that she had

been engaged on “school need basis, remuneration through student fund”. Furthermore, the petitioner was informed that her case for regularization was considered by the committee under the Chairmanship of Mr. Haseeb Athar, and that on 31.03.2016, the said committee had recommended that the petitioner was not eligible for regularization of her services on permanent basis because she being a daily wage employee did not fulfill the criteria laid down in Establishment Division’s Office Memorandum dated 29.08.2008. On 17.12.2016, the petitioner filed the instant writ petition praying for the following relief:-

“In view of the above, it is most respectfully prayed that an appropriate writ may kindly be issued in favour of the petitioner, the respondents may graciously be directed to implement the Notification dated 08.02.2013 and post the petitioner against permanent available post, it is further prayed that the pay and other benefits may also be awarded to the petitioner as regular employee w.e.f. her regularization.”

4. Learned counsel for the petitioner after narrating the facts leading to the filing of the instant petition submitted that the petitioner had been treated most unfairly by the respondents; that the notification dated 08.02.2013, issued by respondent No.1, whereby the petitioner’s services were regularized had not been withdrawn or rescinded at any material stage; that since the said notification was still holding the field, it was obligatory upon the respondents to post the petitioner on regular basis; that the Headmistress of the School where the petitioner had been employed had also recommended to respondent No.2 that the petitioner should be placed on regular basis against a vacant post of a Trained Graduate Teacher; that the respondents should not have referred the petitioner’s case for regularization to the committee chaired by Mr. Haseeb Athar, because the petitioner had already stood regularized on the basis of notification dated 08.02.2013.

5. Learned counsel for the petitioner further submitted that persons whose services had been regularized through notification dated 08.02.2013, and were therefore similarly placed as the petitioner, had been posted as regular employees by the respondents; that Ms. Safia Bano, whose name appears at

Sr. No.303 of the said notification dated 08.02.2013, was also a daily wage Trained Graduate Teacher, was posted as a regular employee pursuant to the order dated 08.11.2016, passed by the Hon'ble Supreme Court in criminal original petition No.82/2016; that in the said order, it was observed by the Hon'ble Supreme Court that the respondents had carried out discrimination by regularizing the services of some of the employees listed in the said notification dated 08.02.2013, and not others; that the position taken by respondent No.2 that the petitioner had not been appointed through a regular channel is an afterthought and shows the respondents are adamant not to implement its own notification dated 08.02.2013. Learned counsel prayed for the writ petition to be allowed.

6. On the other hand, the learned Additional Attorney-General ("A.A-G.") submitted that the Cabinet Sub-Committee, in its meeting dated 06.09.2012, had recommended the petitioner's services in BPS-16 to be regularized subject to the availability of posts; that the said decision of the Cabinet Sub-Committee was void and *coram-non-judice* inasmuch as the regularization policy dated 29.08.2008 duly approved by the Federal Government/Federal Cabinet, was only with respect to employees working on contract or daily wage basis against posts in BPS-01 to BPS-15 in the Federal Ministries/ Divisions/ Attached Departments/ Subordinate Offices/Autonomous/ Semi-Autonomous Bodies/Corporations; that since the petitioner was seeking the regularization of her services in BPS-16, the matter was not within the jurisdictional domain of the Cabinet Sub-Committee; that no vested right was created in favour of an employee whose services were regularized by the Cabinet Sub-Committee by transgressing the parameters set out in the regularization policy dated 29.08.2008; and that under the said regularization policy, employees working on contract basis against posts in BPS-16 and above could not be regularized by the Cabinet Sub-Committee.

7. Furthermore, it was submitted that the said regularization policy was approved by the Federal Cabinet on 04.06.2008, and

was circulated by the Establishment Division (Cabinet Secretariat) vide office memorandum dated 29.08.2008; that at no material stage, was any amendment made to the said regularization policy by the Federal Government/Federal Cabinet; that the Cabinet Sub-Committee could not, without the approval of the Federal Cabinet, amend the said regularization policy; and that any amendment in the said regularization policy not made or approved by the Federal Cabinet was void and of no legal consequence. The learned A.A-G. stressed that he was making the said submissions with full responsibility and on specific instructions from the Federal Government / Establishment Division (Cabinet Division). It was prayed that the writ petition be dismissed.

8. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of this petition have been set out in sufficient detail in paragraphs 2 to 3 above, and need not be recapitulated.

9. The Federal Cabinet in its meeting dated 04.06.2008 took the following decision:-

“The Cabinet decided, in principle, to regularize all contract employees in BS 1 to 15 and equivalent. A Committee comprising Ministers for Labour & Manpower, Finance, Law & Justice and Deputy Chairman Planning Commission would work out the modalities of regularization of these employees. The Committee would also review the contracts of persons appointed in higher positions in Government/public sector entities and finalize its recommendations within a week.”
(Emphasis added)

10. In pursuance of the said decision of the Federal Cabinet, the Establishment Division (Cabinet Secretariat) issued the following Office Memorandum dated 29.08.2008:-

<i>Immediate</i>	
GOVERNMENT OF PAKISTAN CABINET SECRETARIAT ESTABLISHMENT DIVISION	

No.10/30/2008-R-II	Islamabad, the 29 th August, 2008
<u>OFFICE MEMORANDUM</u>	
Subject:	<u>REGULARIZATION OF BS-1 TO BS-15 CONTRACT EMPLOYEES – CABINET DECISION CASE NO.76/10/2008, DATED 4-6-2008</u>
<i>The undersigned is directed to state that the Federal Cabinet has decided that all those employees who were working on</i>	

contract basis against posts in BS-1 to BS-15 in the Federal Ministries/Divisions/ Attached Department /Subordinate Offices/Autonomous / Semi-Autonomous Bodies /Corporations and were appointed up to 03.06.2008 may be regularized. The decision of the Cabinet will also apply to the contract employees working in FATA.

2. *The eligibility criteria for regularization of the contract employees may be as under:-*

Eligibility Criteria:

a) *All those employees who are working on contract basis against posts in BPS-1 to 15 in Federal Ministries/Divisions/attached Departments/ Subordinate Offices / Autonomous / Semi-Autonomous Bodies / Corporations and were appointed prior to the decision of Cabinet, dated 4-6-2008 (viz upto 3-6-2008) may be regularized.*

b) *Those who are working against tenure posts project posts or daily wages; or those who are being paid from contingent or defence budget are not eligible for regularization.*

Date of Regularization:

Date of regularization for all contract employees, after completion of all formalities, will be 01 July, 2008.

Seniority:

Those who are regularized will reckon their seniority from the date of their regularization i.e. 01 July, 2008. As far their inter-se seniority, it will be determined with reference to their age, as laid down in the existing instructions of the Government contained in the Seniority Rules.

Age Relaxation:

While regularizing the contract employees, age relaxation will be given to them by the Competent Authority as per existing rules.

Provincial Quotas:

During the process of regularization, the Provincial Quota may be adhered to as far as possible. In case the Provincial Quota exceeds as a result of regularization of contract employees, the excess in the Provincial Quota will be adjusted gradually in subsequent recruitment.

Qualification:

Qualification prescribed for a post will be strictly followed. In case a person is not eligible for the post he is holding on contract basis due to lack of qualification, he will be regularized against a lower post for which he possesses the required qualification.

3. *Ministries/Divisions are requested to take immediate action towards regularization of the contract appointments in-respect of contract employees working in the Ministries/Divisions/ Subordinate Offices/ Attached Departments/Autonomous/Semi-Autonomous Bodies/ Corporations under their Administrative control for compliance of the above Cabinet decision.*

-Sd-

*(Muhammad Aftab Mahmud)
Joint Secretary
Ph:9206840*

*Secretary/Additional Secretary In-charge,
Ministries/Divisions,
Islamabad/Rawalpindi.*

11. The office memorandum dated 29.08.2008, which contained the regularization policy had not been amended at any material stage by the Federal Cabinet so as to authorize the Cabinet Sub-Committee to regularize the services of contractual or daily wages employees in BPS-16 and above.

12. It appears that the Cabinet Sub-Committee, in its meeting dated 29.06.2011 noticed that 201 officers of the Capital Administration and Development Division, and 380 officers of the Ministry of Health were working on contract basis for more than one year, and after the devolution of the Ministries to the Provinces on 30.06.2011, the fate of such officers was at stake. In the said meeting, the Cabinet Sub-Committee decided that all the officers who had been appointed on contract basis, and who had completed one year of their contractual employment, or 03 spells of 89 days by 30.04.2011, in the Capital Administration and Development Division and the Ministry of Health shall be regularized with effect from 29.06.2011, pending approval of the Federal Cabinet as a special case. On 29.06.2011, a summary was submitted by the Establishment Division to the Hon'ble Prime Minister proposing that *"all the contract officers who have completed one year of contract or 03 spells of 89 days upto 30.04.2011, of the Ministry of Health, Special Education and Social Welfare/NCCWD/NTD under CAD Division and Ministry of Women Development may be regularized w.e.f. today the 29th of June, 2011, pending approval of the Cabinet as a special case in view of the devolution of these Ministries to the provinces and their requisitions shall be withdrawn by the Ministries/Divisions concerned from the Federal Public Service Commission (F.P.S.C), if not already done"*. The Prime Minister on 30.06.2011, approved the said proposal. The argument of the learned Deputy Attorney-General that since the Federal Cabinet has not, at any stage, decided to regularize contract employees in BPS-16 and above, the Cabinet Sub-Committee could not regularize contract employees in BPS-16 and above, appears to be correct.

13. The approval made by the Prime Minister on 30.06.2011 to the proposal made in Establishment Division's summary dated 29.06.2011, cannot be termed as an amendment in the office memorandum dated 29.08.2008. An amendment in the said office memorandum could only be made by the Federal Cabinet and none other. The learned counsel for the petitioner was not able to convince me on whether the initial regularization policy dated 29.08.2008 had been amended by the Federal Cabinet so as to authorize the Cabinet Sub-Committee to regularize the services of employees in BPS-16 and above. Therefore, it is safe to hold that the office memorandum dated 29.08.2008 was not amended by the Federal Cabinet at any stage. After holding so, the question that crops up in the mind as to whether the Cabinet Sub-Committee had the power or authority or jurisdiction to regularize the services of contractual employees or daily wagers in BPS-16 and above. The powers and jurisdiction of the Cabinet Sub-Committee were circumscribed by the decision dated 04.06.2008 of the Federal Cabinet. Since the Federal Cabinet had not given the authority to the Cabinet Sub-Committee to regularize the services of contractual employees or daily wagers in BPS-16 and above, the decision of the Cabinet Sub-Committee to regularize the contractual services of such employees would be in excess of jurisdiction. Now, what would be the fate of over a thousand such employees whose services have not just been regularized by the Cabinet Sub-Committee, but notifications qua their regularization have also been issued by the relevant Ministries. Such employees (i.e. employees in BPS-16 and above) are still working as regular employees. None of such employees are parties to this petition. It is for the Executive to take a policy decision regarding the fate of all those contractual and daily wages employees in BPS-16 and above, whose services were regularized by the Cabinet Sub-Committee, and notifications regarding their regularization were issued by the relevant Ministries/Divisions, and are working as regular employees. The petitioner is one of over a thousand employees, whose services have been regularized by the Cabinet Sub-Committee and a

notification qua her regularization has been issued by respondent No.1 on 08.02.2013, but is being prevented by the respondents from working as a regular employee. After the said notification dated 08.02.2013 was issued, the petitioner is said to have completed her probation period, and as per the medical board's report dated 07.09.2013, she was found to be fit to discharge her duties.

14. The petitioner is not seeking the regularization of her services, but wants to be posted against the vacant post of Trained Graduate Teacher (BPS-16) having already been regularized through notification dated 08.02.2013, issued by respondent No.1. As mentioned above, the said notification was issued after the Establishment Division's letter dated 07.11.2012, whereby respondent No.1 informed that the Cabinet Sub-Committee had regularized the petitioner's services. Even though, the position taken on behalf of the respondents is that the Cabinet Sub-Committee had no jurisdiction to regularize the services of an employee in BPS-16 and above, the said notification dated 08.02.2013 has not been withdrawn or rescinded by the respondents at any material stage. The learned A.A-G confirmed that more than a thousand employees in BPS-16 and above were regularized by the Cabinet Sub-Committee, and that such employees are presently working as regular employees in various Ministries, Divisions, Attached Departments, Autonomous Bodies, Organizations etc. I am of the view that the Government cannot take a paradoxical position by letting scores of employees in BPS-16 and above, (who were regularized pursuant to the decisions of the Cabinet Sub-Committee) to continue to work as regular employees, and question the regularization of employees like the petitioner whose services were, in the same very manner, regularized by the Cabinet Sub-Committee. The petitioner is similarly placed as the employees in BPS-16 and above whose services were regularized by the Cabinet Sub-Committee and thereafter, such employees continued to perform their functions as regular employees. The learned A.A-G did not attempt to bring about any

classification between the class of employees who having been regularized by the Cabinet Sub-Committee were appointed against regular posts and continue to work as such, and those like the petitioner who having been regularized by the Cabinet Sub-Committee had not been appointed against regular posts. The petitioner being similarly placed and similarly circumstanced as the employees in BPS-16 and above, who are working as regular employees after being regularized by the Cabinet Sub-Committee, cannot be treated with a different yardstick. It is well settled that reasonable classification must be based on an intelligible differentia, which distinguishes individuals or one group of persons from another group in a particular set of circumstances. Reasonable classification must be found on reasonable basis and must have rational nexus to the object sought to be achieved by such classification.

15. In the notification dated 08.02.2013 issued by respondent No.1, the petitioner's name appears at Sr. No.297, whereas Ms. Safia Bano's name appears at Sr. No.303. Both were Trained Graduate Teachers employed on daily wages basis in educational institutions under the control of the Federal Directorate of Education, Islamabad. By virtue of the said notification, both these ladies were "*regularized with immediate effect subject to availability of posts*". Apparently, just like the petitioner, Safia Bano had also not been appointed by the respondents against a regular post after her services had been regularized through the said notification. Safia Bano was one of the petitioners in Constitution Petition No.58/2011, filed before the Hon'ble Supreme Court seeking the regularization of her services. On 11.10.2011, the said Constitution Petition was disposed of by the Hon'ble Supreme Court on the following statement of the learned Deputy Attorney-General:-

"Government of Pakistan is ready to examine the cases of the petitioners in view of the criteria laid down in the judgment passed by this Court in Constitution Petition No.48/2007 etc."

16. Since Safia Bano had not been regularized after the disposal of Constitution Petition No.58/2011, she filed Criminal

Original Petition No.82/2016, before the Hon'ble Supreme Court. The said petition was disposed of by the Hon'ble Supreme Court vide order dated 08.11.2016, with the directions to the respondents to regularize Safia Bano's services. Perusal of the said order dated 08.11.2016 shows that the learned Deputy Attorney-General had stated before the Hon'ble Supreme Court that the services of the petitioner (Safia Bano) along with other employees were regularized by the respondents through notification dated 08.02.2013. In the said order, the Hon'ble Supreme Court observed that "*regularization of some daily wage employees and denial of the same to other similarly placed employees is a cause for discrimination*". It appears that even after the said order dated 08.11.2016, the respondents did not regularize Safia Bano's services. Consequently, she filed Criminal Original Petition No.9/2017, which was disposed of on 05.04.2017, after the learned Deputy Attorney-General placed before the Hon'ble Supreme Court office order dated 03.07.2017 by virtue whereof Safia Bano's services stood regularized.

17. The learned A.A-G. and the learned counsel for the respondents did not come up with anything which would distinguish the petitioner's case from that of Ms. Safia Bano. Therefore, the respondents could not discriminate between the two. The State should have the good sense of acting strictly in accordance with Article 25 of the Constitution, and eliminate all forms of discrimination, unless they are based on reasonable classification which in turn is to be based on intelligible differentia.

18. Learned counsel for the respondents submitted that the petitioner's case had also been referred to the regularization committee chaired by Mr. Haseeb Athar, but the petitioner's case could not be entertained because the said committee could not regularize the contractual or daily wagers' services of the employees in BPS-16 and above. Vide notification dated 02.04.2015 issued by the Cabinet Division (Government of Pakistan) a committee had been constituted to examine the cases of regularization of contracts/contingents/daily wages

employees which were under adjudication in various judicial *fora* and had been referred to the Federal Government for consideration as per the guidelines issued in the office memorandum dated 29.08.2008. This is the committee chaired by Mr. Haseeb Athar. The appellant's case could be referred to the said committee since its terms of reference do not include the consideration of regularization of employees in BPS-16 and above. This is because under the office memorandum dated 29.08.2008, the eligibility criteria for regularization of contractual employees was that they should have been working on a contract basis against posts in BPS-01 to 15. The committee constituted through notification dated 02.04.2015, had not been given an authority to review the decisions taken by the Cabinet Sub-Committee to regularize contractual/daily wages employees.

19. In view of the above, I am inclined to grant the petitioner the same relief as was granted to Mst. Safia Bano, who I find to be similarly placed as the petitioner. Consequently, this writ petition is allowed, and the respondents are directed to implement the notification dated 08.02.2013, (which still holds the field) and post the petitioner against a permanent available post. Just like in the case of Mst. Safia Bano, the petitioner's services shall stand regularized with effect from the date of the passing of the judgment. There shall be no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

Approved for Reporting

Ahtesham Majid

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