

Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W. P. No.1665/2019

Shahina Masood & 09 others

Versus

Federal Ombudsman Secretariat for Protection Against Harassment at
Workplace & 2 others

Petitioners by : Ms Raheema Khan, Advocate.
Mr Awais Awan, Advocate.
Mr Osama Azeem Ch., Advocate.

Respondents by : Mr Muhammad Haider Imtiaz, Advocate.
Mr Mr Amir Wakeel Butt, Advocate.
Mr M. Fayyaz, Law Officer, OPF.
Mr M. Saif Ullah Gondal, Asstt. Attorney General.

Date of Hearing : 24-05-2019.

ATHAR MINALLAH, C.J.- Through this consolidated judgment, I will decide the instant petition along with the following petitions.-

- i.) W.P. No.4985/2018 [*Mudassir Sheikh, etc. v. The Ombudsman for Protection Against Harassment of Women at Workplace, etc.*]
- ii.) W.P. No.1101/2019 [*Mudassir Sheikh, etc. v. The Ombudsman for Protection Against Harassment of Women at Workplace, etc.*]

iii.) W.P. No.55/2019 [Mohammad Younus Dagha v. Federal Ombudsperson, etc.]

2. The brief facts in each petition necessary for adjudication are as follows.-

W.P. No.1665/2019

"Shahina Masood & 09 others v. Federal Ombudsman Secretariat for Protection Against Harassment at Workplace & 2 others"

The petitioners are employed and working in the Overseas Pakistanis Foundation Girls College F-8/2, Islamabad (*hereinafter referred to as the 'Foundation'*). Respondent no.2 i.e. Hamna Zahid, is holding the acting charge of the office of Principal, OPF Public School Kallar Syedan (*hereinafter referred to as the 'School'*). The latter, before transfer to the School, was working as a Junior Lecturer at the Foundation. Respondent no.2 filed a complaint before the learned Ombudsman, appointed under section 7 of the Protection Against Harassment of Women at Workplace Act 2010 (*hereinafter referred to as the 'Act of 2010'*). A plain reading of the complaint shows that the complainant seems to be aggrieved because of the conduct of the petitioners towards her. In the complaint there is no reference to any act which could be construed as falling within the ambit of the expression

'harassment' defined under clause (h) of section 2 of the Act of 2010. The learned Ombudsman had entertained the complaint and was proceeding with the matter till a restraint by this Court.

W.P. No.4985/2018

*"Mudassir Sheikh, etc. v. The Ombudsman for Protection
Against Harassment of Women at Workplace, etc"*

The petitioners are employees of Careem Network Pakistan (Pvt) Ltd (*hereinafter referred to as the '**Company**'*). The Company is, inter alia, engaged in the business of providing transport services through digital network and the use of Careem mobile and web applications and call centres. Respondent no.3, i.e. Ms Farah Naz, is a private person who had offered her services to the Company. She entered into a contractual relationship with the Company and the terms and conditions were mutually agreed between them. The dispute is regarding the terms and conditions of the contractual relationship. Respondent no.3 filed a complaint which was entertained by the learned Ombudsman and an interim order was also passed. Perusal of the complaint filed by respondent no.3 shows that it pertained to allegations which are in the nature of a breach of contract on the part of the Company.

There is no allegation which would bring the case of the complainant within the fold of the expression "harassment" as defined under the Act of 2010.

W.P. No.1101/2019

*"Mudassir Sheikh, etc. v. The Ombudsman for Protection
Against Harassment of Women at Workplace, etc"*

Through this petition the petitioners in W.P. No.4985/2018 have challenged order, dated 11-02-2019, passed by the learned Ombudsman whereby the latter has dismissed the application challenging jurisdiction to entertain the complaint filed by respondent no.3 in W.P. No.4985/2018. The reasons recorded by the learned Ombudsman for entertaining the complaint and assuming jurisdiction are as follows.-

*"It is apparent that the Act of 2010 is intended to cater to all genders and the definition of harassment includes causing interference with work performance or creating hostile environment whereas hostile environment requires finding of a general pattern of offensive conduct and not just sexually offensive conduct; given the evolving notion of gender justice and discrimination, if the intent of the legislature was otherwise, then the same would have been clear from the language used in the Act of 2010.
In order to meet the ends of justice and particularly where prestige and honour of individuals are at stake,*

such technicalities should be avoided in the best interest of justice.”

W.P. No.55/2019

“Mohammad Younus Dagha v. Federal Ombudsperson, etc.”

The petitioner is a civil servant and has challenged the jurisdiction of the learned Ombudsman to entertain the complaint, dated 24-09-2018, submitted by respondent no.2 who also happens to be a civil servant. Perusal of the complaint shows that it pertains to acts and omissions of the petitioner and some other officials regarding matters which fall within the realm of official functions and duties. There is no reference to an act or allegation which would bring the case of the petitioner within the ambit of the expression “harassment” as defined under section 2(h) of the Act of 2010.

3. The learned Counsel for the petitioners have argued that; the jurisdiction of the learned Ombudsman is confined to the expression “harassment” defined under section 2(h) of the Act of 2010; the learned Ombudsman in all these cases has assumed jurisdiction not vested in her; the learned Ombudsman has misinterpreted the provisions of the Act of 2010; the learned Ombudsman is empowered to exercise powers and perform functions which have been explicitly described under the Act of 2010.

4. The learned counsel for the respondent on the other hand have contended that; the scope of jurisdiction of the learned Ombudsman cannot be restricted on the basis of technicalities; reference has been made to a booklet titled '*Law and Rules relating to Protection Against Harassment at the Workplace*' in support of his contention that the jurisdiction of the learned Ombudsman is not confined to "harassment" as defined under section 2(h) of the Act of 2010; it has been printed on the back of the booklet that the "publication is reproduced under a project funded by the European Union and implemented by the International Labour Organization".

5. The learned Counsels have been heard and the record perused with their able assistance.

6. It is obvious from a plain reading of the complaints in all these petitions filed by the respondents that there is no reference or assertion to any allegation which may be construed as falling within the ambit of the expression "harassment" defined under section 2(h) of the Act of 2010. The reasoning recorded by the learned Ombudsman regarding the scope of jurisdiction vested in the said statutory public office explicitly shows that the provisions of the Act of 2010 have been grossly misinterpreted and misconstrued. During the course of arguments reliance was also placed on a booklet titled

'Laws and Rules relating to protection against harassment at the workplace' published by the office of the learned Ombudsman (hereinafter referred to as the 'Booklet'). It contains an introductory message of the Ombudsman and the relevant portion is reproduced as follows.-

"Harassment is not only of sexual nature – it can encompass any activity which is subversive on the basis of gender, race, language and appearance. Consequently it thwarts progression, promotes unequal treatment and results into underperforming petrified employees. We at FOSPAH aim to redefine attitudes of people through healthy work environment which is conducive to gender sensitivities, promote work ethics, foster respect and refrain from demeaning behavior.

A multi-pronged approach is essential to deal with this issue, so to provide a harassment and hostility free environment at the workplace. Our vision is to proactively stem out all forms of discrimination and provide an enabling environment to people of all genders, ethnicities and belief. I and my team are working to sensitize people on harassment issues and its dreadful consequences. Therefore, concerted efforts from the cross-section of the society are required to eliminate it once and for all. I pray that Allah helps us in triumphing this meritorious cause."

7. Besides the introductory message, the Booklet consists of primary and subordinate legislations' relating to the office of the

Ombudsman i.e the Act of 2010, the Federal Institutions Reforms Act 2013 (*hereinafter referred to as the 'Act of 2013'*) and the Protection Against Harassment of Women at Workplace (Filing and Disposal of Complaints) Rules, 2013. In the petitions in hand the petitioners have challenged the scope of jurisdiction of the learned Ombudsman i.e. whether the learned Ombudsman has correctly interpreted the provisions of the Act of 2010, particularly the expression "harassment" defined under section 2(h) of the Act of 2010.

8. The Act of 2010 was enacted and notified in the official gazette on 11-03-2010. Its preamble declares the object and purpose of the legislation as providing for the protection against harassment of women at the workplace. Section 2 defines various expressions. The expression "harassment" has been defined in clause (h) of section 2 of the Act of 2010 as follows.-

"harassment" means any unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment"

9. Likewise, the expression “workplace” is defined in clause (n) of section 2 ibid. The office of the Ombudsman has been established under section 7 of the Act of 2010. Sub section (2) of section 7 describes the qualifications and eligibility criteria for appointing a person against the post of Ombudsman. Section 8 provides for the procedure for conducting an inquiry into a complaint by the Ombudsman. The powers of the Ombudsman are stated under section 10. Section 11 describes the responsibilities of an employer and, inter alia, provides that the latter will ensure implementation of the provision of the Act of 2010, including but not limited to incorporating the Code of Conduct for Protection against Harassment at Workplace as a part of its management policy. The Schedule to the Act of 2010 prescribes the Code of Conduct for protection against harassment of Women at the Workplace. The explanation given under Clause (ii) of the Code of Conduct for Protection against Harassment of Women at Workplace is reproduced as follows.-

“Explanation:

There are three significant manifestations of harassment in the work environment:

(a) Abuse of authority

A demand by a person in authority, such as a supervisor, for sexual favors in order for the complainant to keep or obtain certain job benefits,

be it a wage increase, a promotion, training opportunity, a transfer or the job itself.

(b) Creating a hostile environment

Any unwelcome sexual advance, request for sexual favors or other verbal or physical conduct of a sexual nature, which interferes with an individual's work performance or creates an intimidating, hostile, abusive or offensive work environment. The typical "hostile environment" claim, in general, requires finding of a pattern of offensive conduct, however, in cases where the harassment is particularly severe, such as in cases involving physical contact, a single offensive incident will constitute a violation.

(c) Retaliation

The refusal to grant a sexual favor can result in retaliation, which may include limiting the employee's options for future promotions or training, distorting the evaluation reports, generating gossip against the employee or other ways of limiting access to his/her rights. Such behavior is also a part of the harassment."

10. When the provisions of the Act of 2010 are read as a whole, it unambiguously shows that the public office of the Ombudsman has been established with a specific object and purpose i.e to protect women against harassment as defined *ibid* and not merely harassment at workplace as understood in its ordinary dictionary meaning. When the definition of a particular expression

has been given in a statute then its ordinary dictionary meaning becomes irrelevant nor can it be considered. The legislature is not expected to use an expression in a statute unnecessarily. If an enactment has defined an expression then it has to be construed by confining the interpretation solely to the language used therein. The purpose of a definition clause is to give certainty to the expression defined. The definition may either be extensive or restricted and exhaustive. It is extensive when the phrase 'includes' is used and exhaustive when it explicitly states what an expression 'means'. The expression harassment has been defined in section 2(h) of the Act of 2010 which has been reproduced above. The definition is exhaustive and not extensive. It explicitly refers to various phrases such as "unwelcome sexual advance", "request for sexual favours", "physical conduct of a sexual nature", "sexually demeaning attitudes". The later portion of the definition i.e "other verbal or written communications causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the attempt to punish the complainant for refusal to comply with such a request' cannot be read in isolation. It inevitably has a nexus with the nature of acts referred to in the earlier part of the exhaustive definition. The act, conduct or attitude essentially has to be sexual in nature to be covered under the definition of 'harassment' for the purposes of the Act of 2010. As an adjective, the expression sexual is

related to 'the instincts, physiological processes and with physical attraction or intimate physical contact between two individuals'. It is, therefore, obvious that a gesture made towards another person with the intention of gaining sexual gratification would fall within the definition of 'harassment' in the context of the Act of 2010. For physical conduct to attract the consequences described in the Act of 2010 it has to be of a sexual nature. The legislature, through unambiguous language, has defined the expression 'harassment' and its exhaustive meaning has been confined to acts, advances, requests, attitudes, conduct etc which are of a sexual nature. Depending on the facts and circumstances, harassment for the purposes of the Act of 2010 can be of different forms, verbal, non verbal or physical. The most crucial ingredient for determining jurisdiction of the Ombudsman is that the conduct, attitude or act etc complained of must be of sexual nature and the other factors mentioned in section 2(h) are also in existence. The legislature has obviously not intended to extend the scope of the Act of 2010 to the expression 'harassment' as it is understood in its ordinary sense explained in the dictionaries.

11. A plain reading of order, dated 11-02-2019, impugned in W.P. No.1101/2019 shows that the learned Ombudsman has not properly appreciated the language of section 2(h) of the Act of 2010,

wherein the expression 'harassment' has been defined. The introductory remarks of the learned Ombudsman in the Booklet further affirms that the expression 'harassment' has been grossly misinterpreted by extending the meaning beyond the definition contained in section 2(h) of the Act of 2010. The office of Ombudsman is a creation of the Act of 2010 and thus its jurisdiction and powers are confined to the express language used by the legislature. The introductory remarks of the learned Ombudsman in the Booklet are misleading and in violation of the legislative intent in enacting the Act of 2010. In all the cases in hand, the acts, attitudes, conduct or gestures were not of a sexual nature and, therefore, did not fall within the jurisdiction of the learned Ombudsman. The complaints in all these cases could not have been entertained by the learned Ombudsman because the alleged acts, conduct or attitudes were not sexual in nature. This Court expects that the learned Ombudsman appointed under the Act of 2010, while entertaining complaints, will have regard to the definition of the expression 'harassment' expressly included in section 2(h) of the Act of 2010.

12. For the reasons discussed above, the petitions at hand are allowed and the proceedings before the learned Ombudsman purportedly entertained under the Act of 2010 are declared as illegal, without lawful authority and jurisdiction. Consequently, all orders

passed in these proceedings are a nullity in the eyes of the law. Needless to mention that the complainants will be at liberty to approach the competent forums for seeking remedies. The Registrar of the office of the Ombudsman is directed to remove the introductory message of the learned Ombudsman from the Booklet because it is misleading and contrary to the Act of 2010.

(CHIEF JUSTICE)

Luqman Khan/*