

**SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

Mr. Justice Gulzar Ahmed  
Mr. Justice Mushir Alam

**Civil Petition No.4725 of 2018**

[Against the judgment dated 17.10.2018, passed by the Federal Service Tribunal, Islamabad in Appeal No.1647(R)CS/2016]

***Pakistan Aeronautical Complex through its  
Chairman, Kamra & others.*** *...Petitioner (s)*

**VERSUS**

***Nazar ul Islam.*** *...Respondent(s)*

For the Petitioner (s)	: Mr. Khurram Saeed, Additional Attorney General Mr. M.S. Khattak, AOR Sqn. Ldr. Nadeem
For the Respondent(s)	: Mr. Muhammad Ramzan Khan, ASC
Date of Hearing	: 19.08.2019

**J U D G M E N T**

**GULZAR AHMED, J.**— Through the instant petition the petitioners have challenged judgment dated 17.10.2018 of the Federal Service Tribunal, Islamabad (**the Tribunal**) by which the Service Appeal of the respondent was allowed.

2. Facts, in brief, are that the respondent had joined the petitioner i.e. Pakistan Aeronautical Complex, Kamra, as Assistant Foreman (BS-14) on 03.04.1994 and was promoted as Foreman (BS-16) on 30.05.1998. In the meantime, Pakistan Aeronautical

Complex Board Ordinance, 2000 (**the Ordinance of 2000**), was promulgated. Section 7 with its clause (a) of the Ordinance of 2000, is as follows:

**"7. Investment of the Board with certain powers.**--- Notwithstanding anything contained in any law, regulation, rule, order, notification, agreement or other instrument for the time being applicable to any factory, or any officer or other employee appointed or engaged in, or in connection with, any factory, the Board may, in relation to such factory, officer or employee, exercise the following powers of the Federal Government or of any officer authorized for the purpose by the Federal Government, namely:-

(a) to determine the terms and conditions of service, recruitment, promotion, transfer, posting, dismissal, discharge, demotion and other disciplinary actions of all officers and other employees.

*Provided that the terms and conditions of service of any officer or other employee appointed or engaged before the commencement of this Ordinance shall not be varied to his disadvantage and that he shall not be dismissed or removed from service or reduced in rank by any authority subordinate to that by which he was appointed:*

*Provided further that the officers or employees appointed before the commencement of this Ordinance shall be given an option, after the service rules for the officers and employees of the Board have been made, to opt for the new service rules or to continue to be governed by their existing service rules; but once the option has been exercised by an officer or employee within the time fixed by the Board, it shall be final, and an officer or employee who does not exercise the option within the prescribed time shall be considered to have opted for the new rules:*

*Provided also that the promotion, demotion or other disciplinary action against an officer or employee on deputation or secondment shall be governed by the service rules applicable to him;"*

Pursuant to the Ordinance of 2000, PAC Board Employees (Service) Rules, 2002 (**the Service Rules of 2002**), were framed on 11.04.2005, which were published vide SRO No.312(1)/2005 on 14.04.2005. Rule 2(i) of the Service Rules of 2002, is as follows:

" 2. **Application.**---These rules shall apply to all the employees in the whole time employment of the Board, working in PAC, other than:---

(i) the employees appointed before the commencement of Pakistan Aeronautical Complex Board Ordinance No.XXVIII of 2000, and opted to continue to be governed by the Civil Servants Act, 1973."

Through Factory Routine Orders dated 07.09.2010, the petitioner extended an option to civilian employees under Section 7(a) of the Ordinance of 2000, in the following term:

***"Order No.7 Discipline – Extending the Option to Civilian Employees under section 7(a) of PAC Board Ordinance, 2000.***

16. *An option under Section 7(a) of PAC Board Ordinance is required immediately for the civilian officers and employees of MRF who are employed before the commencement of said Ordinance to opt for the new service rules i.e. PAC Board Employees (Service) Rules, 2002 or to be governed by their existing service rules i.e. Civil Servants Act, 1973."*

Through letter dated 08.09.2010, it was notified as follows:

"1. Reference is made to FRO's No.187 Order No.7 dated 7 September, 2010.

2. *It is requested that the civilian officers/employees who are employed before the commencement of PAC Board i.e. 20 July, 2000 working under your command may please be advised to submit their option by 15<sup>th</sup> September, 2010, to Civil Personnel Section. In case they do not exercise the option within the prescribed time, shall be considered to have opted for the new service rules."*

Through further Factory Routine Orders dated 09.09.2010 the terminal date for submission of the option was again fixed to be 15.09.2010. Through the Standardization of Recruitment Rules for Appointment, Promotion and Transfer for PAC Employees at PAC Kamra (**the Rules of 2012**), published vide Gazette Notification dated 14.03.2012, the method, qualifications and other conditions were laid down for appointment, promotion and transfer to the posts in respect of Aircraft Rebuild Factory, Mirage Rebuild Factory, Avionics Production Factory, Avionics Production Factory JF-17, Aircraft Manufacturing Factory, Aircraft Manufacturing Factory JF-17 and PAC Hospital Pakistan Aeronautical Complex, Kamra. Rule 3 (Conditions for Promotion) of this notification provides that *'as defined by the appointing authority, the promotion to posts in column 2 in BPS-11 & above shall be made by selection on merit subject to qualifying the Departmental Promotional Examination ...'*

On 16.12.2013, examinations for promotion from the posts of BS-16 to that of BS-17 were held under the Rules of 2012, according to the criteria laid down therein. The respondent, who was working as FM appeared in this examination and obtained 73.8 marks while petitioner No.3, who was also working as FM obtained 91.6 marks. Pursuant to result of this examination, vide Office Order dated 25.03.2014, petitioner No.3 was promoted as Assistant Works Manager (Tech) in BS-17 against an existing establishment vacancy w.e.f. 09.01.2014. The respondent being aggrieved of the appointment order of petitioner No.3, filed a departmental representation which was not responded to, therefore, the respondent filed Service Appeal before the Tribunal and the same was contested by the petitioners by filing written statement. After hearing learned counsel for the parties, the impugned judgment was passed by the Tribunal allowing the Service Appeal of the respondent.

3. The learned Additional Attorney General for Pakistan has contended that the respondent was admittedly a Civilian employee of the Factory prior to the issuance of Ordinance of 2000, but as required by Section 7 (a) of the Ordinance of 2000 and the subsequent Office Orders dated 07.09.2010, 08.09.2010 and 09.09.2010, the respondent was required to opt for the new rules to be made under the Ordinance of 2000 or to continue to be governed by their existing service rules, within the time fixed by the Board. He contended that the time fixed by the Board was till 15.09.2010 and by this date the respondent had not submitted option and thus was deemed to be governed by the rules made

under the Ordinance of 2000. He contended that the option letter dated 21.09.2010 filed by the respondent in the first place was out of time and secondly it was not available in the record of petitioner No.1, and thus, was a fake letter. He further contended that once the respondent had appeared in the examination for promotion from the post of BS-16 to that of BS-17 under the Rules of 2012 , he is estopped from alleging that he is not governed by the Ordinance of 2000. He has further contended that the respondent has been enjoying the allowances payable to the employees of the petitioner factory, as fixed by the Board in terms of the Ordinance of 2000. The learned Additional Attorney General has relied upon an unreported judgment of 3-Member Bench of this Court dated 03.05.2017 passed in C.P.No.350 of 2016 [**Tahir Nadeem v. Chairman, Pakistan Aeronautical Complex Board, PAC Kamra & others**].

4. On the other hand, learned ASC for the respondent has contended that the respondent has exercised option in terms of the Office Orders and that there was extension in time for submission of option on account of Eid and thus the letter of option dated 21.09.2010 submitted by the respondent was within time and that the respondent's service was to be governed by the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 (**the Rules of 1973**), as per Notification published in the Gazette of Pakistan dated 15.03.1990. He has further contended that the promotion case of the respondent from BS-16 to that of BS-17 was required to be considered under the Rules of 1990 on the principal of seniority cum fitness and there was no need for the respondent

to appear in the examination for the purpose of such promotion. As regard the allowances being drawn by the respondent, the learned ASC contended that it was the pay of the post of the respondent which is protected under the Ordinance of 2000. In this regard he has made reference to Section 17 of the Civil Servants Act, 1973. He has also relied upon judgment of the Tribunal dated 26.01.2016 passed in Appeal No.480(P)CS/2015 **[Zafar Ali v. Chairman, PAC Board, Kamra & others]**.

5. We have considered the submissions of the learned counsel for the parties and have gone through the record of the case. The admitted fact is that the respondent was employed with petitioner No.1, prior to the promulgation of the Ordinance of 2000. By virtue of Section 7(a) of the Ordinance of 2000, the respondent was required to give option of his terms and conditions of service being governed by new rules to be framed under the Ordinance of 2000 or by the Rules of 1973 and no such option was offered by the respondent, which option he was required to submit to the petitioner latest by 15.09.2010. It was also clarified in the Office Orders dated 08.09.2010 and 09.09.2010 that the option has to be submitted by 15.09.2010 and on not doing so, the employee will be considered to have opted for the new rules. The learned ASC for the respondent has contended that time for submission of option was extended owing to Eid but he was unable to show us from the record any Office Order of the petitioner or any document whereby such time was extended beyond 15.09.2010. The submission of option on 21.09.2010, as asserted by the respondent, could not be considered to be an option that

was offered by the respondent in terms of the Ordinance of 2000. Thus, the respondent apparently was to be governed by the rules made under the Ordinance of 2000. The respondent in para 5 of the memo of appeal before the Tribunal has taken the following stand:

*" 5) That in the year 2012, Rule has been again amended by which the eligibility criteria of promotion to the post of Assistant Works Manager (Tech) BS-17 was changed and varied to his disadvantage. After exercise of his option, any subsequent change in criteria would only be applicable to the employee of the Board and not to the appellant being a civil servant. Hence the appellant is entitled for promotion in BS-17 on the basis of seniority cum fitness under the Civil Servants Act, 1973 rules, irrespective of test, interview or qualification/quantification introduced in Rules, 2012."*

5. Though the learned ASC for the respondent has asserted that the Rules of 2012, by which the eligibility criteria for promotion to the post of Assistant Works Manager (Tech) BS-17 was changed and varied to his disadvantage, but the very Rules were not challenged by him in his Service Appeal, rather it was asserted that the respondent has to be governed by the Rules of 1973. Such assertion of the learned ASC for the respondent, apparently was not well founded for the reason that in the first place he has not given an option stating that he shall continue to be governed by the Rules of 1973 and secondly, he himself has participated in the departmental promotion examination, as prescribed by the Rules of 2012 and when he failed to obtain the highest marks, as required for promotion, he started raising grievance against the said Rules. Once the respondent appeared in the departmental promotion examination held under the Rules of 2012, it could not be asserted that he is not governed by the said Rules and that he was not required to obtain highest marks in the departmental promotion examination. The respondent cannot

be allowed to blow hot and cold in the same breath. The very fact, as is apparent from the record, is that there was no option given by the respondent being governed by the Rules of 1973 and in the absence of such option, the whole case of the respondent falls to the ground; inasmuch as, he himself opted to appear in the departmental promotion examination held under the Rules of 2012 thus, conceding that he was governed by the Rules made under the Ordinance of 2000. The Tribunal has altogether failed to consider this aspect of the matter so also the applicable law while passing the impugned judgment.

6. As regard to the unreported case cited before us, a 3-Member Bench of this Court in para 5 of the said Judgment held as follows:

*"5. The promotion order, in this case, was passed in the year 2014. The Recruitment Rules pertaining to the Petitioner and the Respondent No.3 qua promotion were issued on 14.03.2012, which were obviously applicable at that point of time. In terms of the said Rules, promotion was determined on the basis of "seniority-cum-fitness" and "merit". The Departmental Promotion Examination was conducted in which the Petitioner and Respondent No.3, inter alia, participated. The Petitioner thereby accepted the application of the said Rules. On the basis of the result of the said Examination and other relevant factors the Competent Authority found Respondent No.3 entitled to be promoted. As per the report of the Departmental Promotion Examination, the Petitioner secured less marks than the Respondent No.3 who has better educational qualification and better Annual Confidential Reports (ACRs). Then the promotion of Respondent No.3 in preference to the Petitioner appears to be on merit and in accordance with the rules."*

So far as the judgment of the Tribunal, relied upon by the learned ASC for the respondent is concerned, the same is distinguishable from the facts and circumstances of the case in hand.

7. In view of what has been discussed above, we are of the considered view that the impugned Judgment of the Tribunal is not sustainable in law and is liable to be set aside.



8. Above are the reasons of our short order of even date whereby this petition was converted into appeal and allowed by setting aside the impugned judgment dated 17.10.2018.

**JUDGE**

Bench-II  
ISLAMABAD  
19.08.2019  
APPROVED FOR REPORTING  
*\*Hashmi\**

**JUDGE**