

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mrs. Justice Ayesha A. Malik
Mr. Justice Irfan Saadat Khan
Mr. Justice Shahid Bilal Hassan

CIVIL PETITION NO.1017 OF 2022

[Against judgment dated 28.01.2022 passed by the Federal Service Tribunal, Islamabad in Appeal No.620(R)CS/2018]

Chairman Pakistan Ordinance Factories,
POF Board, Wah Cantt.

...Petitioner(s)

Versus

Akhtar Tanveer and others

...Respondent(s)

For the Petitioner(s) : Mr. Haseeb Shakoor Paracha, ASC

For Respondent No.1 : Syed Qamar Hussain Sabzwari, ASC

Date of Hearing : 27.11.2024

JUDGMENT

AYESHA A. MALIK, J.- This Civil Petition is directed against judgment dated 28.01.2022 passed by the Federal Service Tribunal, Islamabad (**Tribunal**) whereby the appeal filed by the Respondent was allowed.

2. The Respondent, Akhtar Tanveer, sought Ex-Pakistan Leave with effect from 13.09.2010 to 30.07.2014 for study abroad in China. He was granted Ex-Pakistan leave on 22.09.2010 with the condition that he will serve the Petitioner for a period of five years. He applied for an extension in the Ex-Pakistan leave from 13.08.2014 to 31.12.2014 which he was granted and ultimately, he resumed work on 01.01.2015. He then sought Ex-Pakistan leave with effect from 06.05.2015 to 30.05.2015 and at the same time he applied for an extension of this leave from 01.06.2015 to 07.01.2015. In the meanwhile, he proceeded to China on 06.05.2015 without obtaining the Ex-Pakistan leave and without waiting for security clearance. Given that he left for China without Ex-Pakistan leave, he was issued a show cause notice and a charge sheet on 08.08.2015 to which he responded and ultimately, was found guilty of absenting himself from duty without any permission or sanction from the competent authority. Consequently, he was given major penalty of removal from service vide order dated 05.01.2018 against which he filed a

departmental appeal, which was rejected on 24.02.2018, against which he filed an appeal before the Tribunal wherein the Tribunal converted the major penalty of removal from service into compulsory retirement.

3. Pakistan Ordinance Factory through its Chairman is before the Court as the Petitioner, who is aggrieved by the findings of the Tribunal on the ground that the Respondent Akhtar Tanveer absented himself wilfully and left Pakistan without permission and without waiting for security clearance. Counsel for the Petitioner stated that the Petitioner proceeded with the matter in accordance with law and ultimately concluded that the Respondent was liable for major penalty of removal from service under Section 4(b)(iii) of the Efficiency and Discipline Rules, 1973 (**Rules**). He argued that it was the prerogative of the Petitioner to decide the quantum of punishment based on the gravity of the offence and that the Tribunal cannot simply amend the given punishment because it finds that the punishment awarded by the Petitioner was harsh. He states that discretion has to be exercised with utmost caution, care and circumspection and legally sustained reasons have to be recorded if the Tribunal is to amend the order of the competent authority. Counsel for the Respondent, on the other hand, defended his position by stating that he went abroad to study. He admits that he left for China without sanction or permission of the competent authority, however, that was due to the fact that he waited for some time to receive the NOC and since the permission was not being processed, he left in order to meet the deadlines for completion of his Ph.D. He, however, supports the impugned judgment by stating that a lot of effort and time was consumed into studying and that the Tribunal has merely given him the benefit of the same. It has also been brought on record that the parties have tried to amicably settle their dispute, however, they have not been able to come to any consensus, hence, the case is to be proceeded on merit.

4. The basic issue before us is the jurisdiction exercised by the Tribunal under Section 5 of the Service Tribunal Act, 1973 (**Act**) whereby it has amended the order of the competent authority by altering the punishment of removal from service into compulsory retirement for the following reasons:-

- i. that the appellant has completed Phd degree from a foreign university in China on his own expenses and as such he is

an asset for this country. However, due to the 5 years bond it is again mandatory for him to serve the organization. Though it is the right of the department i.e. POF Wah, to take stern action against the one who absented himself without due process, yet the appellant being an asset of this country, it is extremely harsh to award him major punishment of removal from service.

- ii. The department has also spent in terms of time and money on the appellant as study leave of 416 days was granted to him on which he has been receiving half average salary.

This Court has already held in the case of *Government of Khyber Pakhtunkhwa*¹ that the award of punishment is primarily the function of the competent authority, and the role of the Tribunal or Court is secondary unless the punishment is found to be unreasonable or contrary to the law. It was further held in the case of *Deputy Postmaster General*² that the Tribunal cannot reduce the punishment given by the department without providing reasons and without considering the record of the case. This Court has held in the case of *Usman Ghani*³ that it is the legal duty of the Tribunal to give reasons for amending the punishment and that there should be some discussion of the evidence on record before reducing or setting aside the penalty. It was also elaborated in *Commissioner Faisalabad Division*⁴ that the powers of the Tribunal to confirm, set aside, vary or modify orders appealed against are neither discretionary nor unbridled. Such powers have to be exercised cautiously, carefully and with circumspection where the order imposing the penalty is wholly perverse or ex facie so demonstrably disproportionate and excessive for the offence/misconduct, that to let it stand would be unfair, unjust and inequitable.

5. Hence, the issue before us is the exercise of judicial discretion by the Tribunal while converting the major penalty of removal from service awarded to the Respondent to compulsory retirement. In the instant case, no explanation has been given as to what was *harsh* about the punishment, given that the department has set out its reasons in its order dated 05.01.2018 and 24.02.2018 which are self-explanatory. Furthermore, using the foreign education of the Respondent as a ground to amend the punishment given by the Petitioner is not legally sustainable. The charge against the Respondent was absence from duty. We note that absence from duty is a serious issue and in the event that leave is required adherence to

¹ *Government of Khyber Pakhtunkhwa v. Nargis Jamal* (2023 PLC (C.S.) 283) (Government of Khyber Pakhtunkhwa)

² *Deputy Postmaster General, Central Punjab, Lahore v. Habib Ahmad* (2021 SCMR 584) (Deputy Postmaster General)

³ *Usman Ghani v. The Chief Post Master, GPO Karachi* (2022 SCMR 745) (Usman Ghani)

⁴ *Commissioner, Faisalabad Division, Faisalabad v. Allah Bakhsh* (2020 SCMR 1418) (Commissioner Faisalabad Division)

the proper procedure of filing an application and obtaining the requisite permission before proceeding on leave is mandatory. Mere filing of an application for consideration is neither sufficient nor tantamount to permission. The applicant must wait for the reply of the competent authority who has the powers to deal with such matters, and the lack of a reply cannot be assumed as implied consent to leave nor does it justify leaving without permission. It was held in the case of *Tahira Waheed*⁵ that if a Government Officer leaves the department without getting sanctioned leave in his favour, he does so at his own risk and in such situation, the presumption would be that he is absent from duty. Wilful absence means unauthorized or deliberate absence from duty. It demonstrates intentional neglect of responsibilities and is reckless conduct. This Court has held that *habitual or wilful absence* involves an element of indiscipline which may sometime constitute gross misconduct⁶ and also ruled in the case of *Secretary Education*⁷ that on account of wilful absence from duty major penalty of dismissal from service can be imposed.

6. In this case, it is an admitted fact that the Respondent was absent from duty and the department has laid out sufficient reasons to show why they did not want the Respondent to continue with his service, considering that he wilfully absented himself, did not obtain clearance before traveling, and started looking for jobs after traveling abroad, all of which the Respondent was unable to sufficiently rebut. While due process has been observed and followed in the instant case, this Court has gone as far ahead as to hold that where the absence from duty is admitted, there is no need to hold regular inquiry⁸. Under the circumstances, we see no justifiable reason for the Tribunal to reduce the punishment from major penalty of *removal from service* into *compulsory retirement* on the pretext that the punishment was harsh given that the Respondent had studied abroad and was an asset for Pakistan. Hence, we find that the Tribunal has exceeded its jurisdiction by arbitrary exercise of discretion which is illegal and without lawful authority.

7. Judicial discretion must be exercised strictly within the confines of the law, being reasonable, fair, and justifiable. This Court has repeatedly declared the manner in which the Tribunal should

⁵ *Tahira Waheed v. Director, Federal Government Educational Institutions* (2003 SCMR 1090) (*Tahira Waheed*)

⁶ *Imtiaz Ahmed Lali v. Returning Officer* (PLD 2008 Supreme Court 355) (*Imtiaz Ahmed Lali*)

⁷ *Secretary Education v. Mustamir Khan* (2005 SCMR 17) (*Secretary Education*)

⁸ *Tasawar Hussain v. Deputy Commissioner District Jhelum* (2021 SCMR 1367) (*Tasawar Hussain*)

exercise discretion under Section 5 of the Act stressing on the principle that the Tribunal must give its reasons for reducing the punishment⁹. This Court has consistently held that where the penalties awarded by the competent departmental authorities are to be interfered with in exercise of the discretionary powers of the Tribunal, such discretion has to be exercised in a circumscribed, restricted and structured manner by giving legally sustainable reasoning which justifies the conclusions reached by it.

8. Judicial discretion must be exercised judiciously and transparently, based on established principles and sound reasoning. As Lord Woolf¹⁰ stated, discretion enables the court to achieve justice on a case-to-case basis while respecting the framework of legal rules¹¹. This balance enhances justice and will reduce litigation and the overturning of decisions by this Court, thus increasing predictability and certainty, both of which are crucial aspects in upholding the rule of law and maintaining public confidence in the legal system. This cohesive harmony is not possible if discretion is exercised arbitrarily, without adhering to settled principles in law as established by this Court and by ignoring principles of fairness, equity and adherence to law. We are of the opinion that the decision of the Petitioner, being legally and procedurally sound, does not suffer from any defects and misapplication of the law and is hereby restored.

9. In view of the above, this Civil Petition is converted into appeal and allowed, and the impugned judgment is set aside.

JUDGE

JUDGE

JUDGE

Islamabad
27th November, 2024
'Approved for Reporting'
Azmat/*

⁹ Divisional Superintendent, Postal Services v. Muhammad Arif Butt (2021 SCMR 1033) (Divisional Superintendent)

¹⁰ Lord Chief Justice of England and Wales from 2000 to 2005

¹¹ Access to Justice Report 1996 by the Lord Chief Justice of England and Wales