

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Justice Qazi Faez Isa, C.J.

Justice Amin-ud-Din Khan

Justice Athar Minallah

CIVIL PETITION NO.848 OF 2022

*(Against the judgment dated 05.1.2022 of the
Federal Service Tribunal, Islamabad passed in
Appeal No.814(R)CS of 2019)*

Secretary, Ministry of Finance,
Finance Division, Government of Pakistan,
and others

... Petitioners

Versus

Muhammad Anwar

... Respondent

For the Petitioners: Rana Asadullah Khan,
Additional Attorney General

Respondent: In person

Date of hearing: 12.12.2023

ORDER

Athar Minallah, J. The Secretary, Ministry of Finance has challenged the judgment dated 06-12-2021 of the Federal Service Tribunal ('**Tribunal**') whereby the appeal filed by Muhammad Anwar ('**the respondent**') was allowed.

2 The respondent was appointed as Assistant Director (B-17) in the Central Directorate of National Savings ('**the Directorate**') on 15.5.1983. He was promoted to the post of Deputy Director (B-18) w.e.f. 30.1.2002 and subsequently as Director (BS-19) on 13.01.2010. Pursuant to disciplinary proceedings initiated against the respondent, a major penalty was imposed upon him vide order dated 01.4.2014. Before the major penalty was imposed, the respective posts of the Directorate in BS-09 to BS-20 were upgraded vide the Finance Division's office memorandum, dated 24.01.2013. However, it was explicitly stated in the memorandum that the posts were upgraded and it shall not be construed as automatic upgradation of the incumbents. The incumbents were to be

considered for promotion in accordance with the manner prescribed in this regard. The process was initiated and the case of the respondent was forwarded in May 2015 along with other eligible persons to the Central Selection Board for its consideration. However, the case of the respondent was withdrawn on the request of the Directorate. The appeal filed by the respondent against the imposition of a major penalty was allowed by the Tribunal vide judgment dated 10-10-2016. The judgment of the Tribunal was upheld by this Court on 19-03-2018. It is noted that the respondent retired from service upon attaining the age of superannuation on 15.5.2016. The latter filed a departmental appeal on 13.5.2016 followed by another on 29.7.2016. The respondent was informed vide letter dated 07.11.2016 that his representation/departmental appeal was rejected by the Finance Division in consultation with the Establishment Division. The respondent preferred an appeal before the Tribunal which was allowed vide the impugned judgment. The Tribunal has declared the respondent to have been 'qualified for promotion' from the date when others were promoted against the upgraded posts. The Tribunal has further directed that the respondent be considered for promotion under FR-17(1) for consequential financial benefits.

3. The learned Additional Attorney General has argued that the Tribunal was bereft of jurisdiction to declare the respondent to be 'qualified' for antedated promotion. He has further argued that in the circumstances the direction to consider the respondent for proforma promotion has become illusory. We have also heard the respondent who appeared in person and has submitted his contentions in writing.

4. The question that has arisen for our consideration is whether the Tribunal was competent and vested with jurisdiction to declare

the respondent 'qualified' for promotion and then simultaneously direct the competent authority to consider him for proforma promotion. The scheme prescribed under the law for promotion of a civil servant to a higher post is distinct from that of being considered for proforma promotion. Moreover, the conditions, qualifications and the prescribed process are also distinct. This also raises the question whether the Tribunal was competent to declare that the respondent was 'qualified' for promotion when the others were promoted because, by doing so, the factor of fitness also appears to have been determined which otherwise does not fall within its jurisdiction.

4. The respondent was admittedly a civil servant and, therefore, the terms and conditions of his service were governed under the Civil Servants Act, 1973 (**'the Act of 1973'**) and the rules made thereunder. The respective posts of the Directorate were upgraded. After upgradation all the posts were to be filled by adopting the mode of appointment through promotion to the higher post. The terms and conditions of service of a civil servant are as provided under the Act of 1973 and the rules made thereunder.¹ A civil servant possessing such minimum qualifications as have been prescribed becomes eligible for promotion to a higher post reserved under the rules for departmental promotion in the service or cadre to which the latter belongs.² The President, in exercise of powers conferred under section 25 of the Act of 1973, has made the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 (**'the Rules of 1973'**). Promotion to the posts in BS-2 to BS-18 and the equivalent are made on the recommendation of the appropriate departmental promotion committee while, in the case of BS-19 to BS-21 and the

¹ Section 3 of the Act of 1973

² Section 9 of the Act of 1973

equivalent, on the recommendations of the selection boards.³ The respective competent authorities designated under the Rules of 1973 may approve the promotion of an officer or officials from the date on which the recommendation of the central selection board has been made.⁴ Sub rule 2 of rule 7 A of the Rules of 1973 provides that notwithstanding the provisions of FR 17(1), an officer or an official who expires or superannuates after the recommendations of the central selection board and before the issuing of the notification shall stand exempted from assumption of the charge of the higher post subject to a certificate given by the Principle Accounting Officer or officer so authorized to the effect that the officer or official has expired or has superannuated. The promotion to the post is, therefore, one of the modes prescribed for appointment against a higher post. The posts have been broadly divided into two categories i.e. selection and non-selection posts for the purposes of promotion. In case of a selection post the promotion is made on the basis of selection on merit while in case of a non selection post the criteria prescribed under the Act of 1973 is seniority cum fitness. Section 9 provides that in order to be eligible for promotion a civil servant must possess such minimum qualifications as may be prescribed. As provided under rule 7 of the Rules of 1973, promotion to a post in pay scales 2 to 18 are made pursuant to recommendations of the Departmental Promotion Committee and in case of a selection post, i.e pay scale 19 to 21, the competent authority to consider and recommend promotion is the Selection Board. A cumulative reading of the provisions of the Act of 1973 and the Rules of 1973 clearly shows the scheme whereby a civil servant is promoted to a higher grade. The minimum qualifications and length of service for the purposes of eligibility are prescribed,

³ Rule 7 of the Rules of 1973

⁴ Rule 7-A of the Rules of 1973

specific forums have been explicitly designated under the law to consider and recommend an eligible civil servant to the competent authority for the purposes of promotion to a higher post. The latter than considers the recommendations and takes a decision accordingly. It is implicit from the scheme provided under the Act of 1973 read with the Rules of 1973, that promotion to a higher post is confined to a civil servant who has not retired or superannuated after attaining the age of superannuation. The scheme does not contemplate for a civil servant to be considered for promotion after retirement or having attained the age of superannuation. Even the eligible civil servants are evaluated by competent forums which have been explicitly designated for this purpose under the law. The recommendations of such designated forums are placed before the competent authority. The latter does not perform ministerial functions but has to apply an independent mind while considering the recommendations made by the designated forum. This Court, in Mian Abdul Malik's case⁵, has held that the question of eligibility relates to the terms and conditions of service and their applicability to the civil servant concerned. Fitness introduces an element of subjective evaluation on the basis of objective criteria where substitution of an opinion of the competent authority is not possible by the Service Tribunal or a Court. The question of evaluating the fitness or suitability for promotion has always been within the exclusive jurisdiction of the competent authority and it is not shared by the Service Tribunal or a Court exercising supervisory jurisdiction in respect of eligibility and qualification. The Tribunal nor a Court can substitute an opinion formed by the competent forum after undertaking careful evaluation. As a corollary, no civil servant can be declared as 'qualified' or fit for promotion except in the manner

⁵ Mian Abdul Malik v. Dr. Sabir Zameer Siddiqui and others (1991 SCMR 1129)

prescribed under the law and discussed above. Moreover, the Tribunal is not competent to substitute the opinions formed by the competent forums after careful evaluation. Even in the case of a civil servant who has not retired and continues to be in service, it is settled law that promotion is neither a vested right nor could it be claimed with retrospective effect.⁶ As is obvious from the Act of 1973 and the Rules of 1973, what a civil servant may claim as of right under the law was that the latter should be considered when the cases for promotion are taken up. The civil servant could not call upon a Tribunal or court to direct the department to fill the promotion post forthwith or on a particular date nor to keep it vacant or under consideration.⁷ The question of promotion rests exclusively within the jurisdiction of the competent authority and it cannot be ordinarily interfered with by a court or a Tribunal, except when the competent authority has acted in violation of the law, in excess of jurisdiction, without jurisdiction or in colourable exercise of powers conferred upon the latter.⁸ The determination of the question of fitness, being a subjective evaluation on the basis of objective criteria, also falls within the exclusive domain of the competent authority and the same falls outside the jurisdiction of the Tribunal or the Court.⁹ The competent authority is empowered to make rules for promotion and a civil servant has no vested right in relation to the rule which determine the eligibility, criteria and set out other conditions and also to change or alter the rules already governing the civil servant. This Court has already held that the rules which prescribe the qualification or criteria for promotion to the next higher scale may be changed because it is the prerogative of the executive authority,

⁶ *Abid Hussain Shirazai v. Secretary Ministry of Industries and Production*, (2005 SCMR 1742)

⁷ *Muhammad Yousaf v. Chairman Railway Board* (1999 SCMR 1559)

⁸ *Muhammad Iqbal and others v. Executive District Officer (Revenue) Lodhran and others* (2007 SCMR 682)

⁹ *Muhammad Anis and others v. Abdul Haseeb and others* (PLD 1994 SC 539), *Dr. Ahmed Salman Waris v. Dr. Naeem Akhter and others* (PLD 1997 SC 382)

except when it can be shown they are either person specific or based on mala fide.¹⁰

5. A civil servant who has retired after attaining the age of superannuation cannot claim to be considered for promotion to a higher post. After superannuation the civil servant may, however, claim a right to be considered for pensionary benefits in accordance with the policy or a scheme adopted by the competent authority. The proviso to FR 17(1) of the Fundamental Rules empowered the appointing authority to direct that a civil servant shall be paid the arrears of pay and allowances of a higher post through proforma promotion if satisfied that the civil servant who was entitled to be promoted from a particular date was, for no fault of his own, wrongfully prevented from rendering service to the Federation in the higher post. The benefit is obviously intended to compensate a civil servant for being deprived of a right to be considered for no fault on the latter's part. The scheme for considering a claim regarding the proforma promotion is distinct from that of promotion of a civil servant to a higher post. It is noted that the aforementioned proviso was omitted vide SRO No.965(I)/2022 dated 20.05.2022. The Finance Division, vide Office Memorandum dated 20-05-2022 has, inter alia, provided that cases of retired civil servants could be placed before the relevant forums if there existed specific orders of judicial forums. Moreover, according to the guidelines, cases received before 20-05-2022 could also be entertained.

5. The Tribunal has been established under the Service Tribunals Act, 1973, having exclusive jurisdiction in respect of matters relating to the terms and conditions of the service of civil servants, including disciplinary matters. Section 5 describes the

¹⁰ Dr. Alyas Qadeer Tahir v. Secretary Ministry of Education (2014 SCMR 997)

powers of the Tribunal and provides that it may confirm, set aside, vary or modify the order appealed against. The Tribunal is, therefore, not competent nor vested to alter, vary or in any manner modify the scheme of promotion to a higher post explicitly prescribed under the Act of 1973 and the Rules of 1973. It is settled law that if the law requires a particular thing to be done in a particular manner it has to be done accordingly, otherwise it would not be in compliance with the legislative intent.¹¹ The Tribunal was not vested with jurisdiction to evaluate the eligibility and fitness of a civil servant for promotion to a higher post by disregarding the scheme and competent designated forums provided under the Act of 1973 read with the Rules of 1973. The Tribunal had thus transgressed its jurisdiction by declaring the respondent to be 'qualified' for promotion from the date others were promoted. The Tribunal also fell in error by pre-empting the process required to be adopted by the designated forum for determining the eligibility and entitlement of the respondent for the purposes of proforma promotion. The Tribunal was justified to the extent of the direction to the competent authority to consider the respondent for proforma promotion because this Court, while dismissing the petition assailing the Tribunal's judgment dated 10-10-2016, had observed in its order dated 19-03-2018 that the respondent had been exonerated on the ground of defective enquiry as well as merits. It was further observed that the charge was in the nature of alleged negligence and not misconduct.

5. For the above reasons, we convert this petition into an appeal and it is allowed to the extent of declaring the respondent as qualified for promotion when the others were promoted. Consequently, the impugned judgment of the Tribunal, dated

¹¹ Zia ur Rehman v. Syed Ahmed Hussain and others (2014 SCMR 1015)

06.12.2021, is set-aside to this extent. Nonetheless, if the direction regarding considering the respondent for proforma promotion has not been complied with then we expect that the needful will be done at the earliest.

Chief Justice

Judge

Judge

Announced in open Court on _____
at Islamabad

Judge.

'NOT APPROVED FOR REPORTING'

*Aamir Sh. /Rameen Moin LC**