

IN THE HIGH COURT OF SINDH, AT KARACHI

C.P No.D-562 of 2012

Present:

Mr. Justice Irfan Saadat Khan
Mr. Justice Adnan-ul-Karim Memon

Nabeela Ashfaq Petitioner

Versus

Federation of Pakistan and others Respondents

Date of hearing 05.03.2018

Mr. Faizan Hussain Memon, Advocate for the Petitioner.
Mr. Usman Tufail Shaikh, Advocate for Respondent Nos. 2 to 4.
Mr. Sahikh Liaquat Hussain, Assistant Attorney General.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- The Petitioner has sought the following relief:-

- i. Declare the Respondents to regularize the services of the Petitioners as Sr. Airhostess from the date of her initial appointment.***

2. Brief facts of the case as averred by the Petitioner are that she was appointed as Airhostess on contract basis vide appointment letter dated 19.09.1994 and since then she has been serving as Airhostess in the Respondent-Corporation (PIAC) and she was allowed PG-5 vide letter Dated 29.05.2008 but again on contract basis as Senior Airhostess, and was forced to work on unequal terms vis a vis her colleagues placed in the same category. The Petitioner aggrieved of such treatment filed the instant Petition. But, during pendency of the Petition the Respondent-PIAC relieved her from services, with effect from 31.12.2013. The

Petitioner has submitted that, by consent of the parties, this Court vide order dated 14.10.2016 allowed the Petitioner to amend memo of the Petition, which was done accordingly on 12.04.2017. The Petitioner has further submitted that she is entitled for regularization of her service without discrimination by the Respondent-PIAC.

3. Upon notice, the Respondents-PIAC filed para-wise comments and denied the allegations.

4. Mr. Faizan Hussain Memon, learned Counsel for the Petitioner has submitted that the Petitioner was appointed as Airhostess in the Respondent-Corporation (hereinafter referred to as PIAC) in year 1994 in a transparent manner against a permanent vacancy; that at the time of initial appointment, the Petitioner was led to believe by the Respondent-PIAC that her services would be regularized in due course of time; but instead of regularizing her services, the Respondent-PIAC continued to extend her contract period from time to time for a period of more than 20 years; that the aforesaid act of the Respondent-PIAC is arbitrary, mala fide, illegal and contrary to the law and policy. The Counsel for the Petitioner further averred that pursuant to the consistent regularization policy of the Respondent-PIAC the contract employees, including her colleagues, namely Sohail Ahmed were regularized against permanent posts, but, service of the Petitioner in spite of being fully qualified right from the time of her initial appointment and having unblemished service record for a long time without any complaint, was not regularized, which is discriminatory, arbitrary and whimsical act of the Respondent-PIAC which is not sustainable under the law. Learned counsel for

the Petitioner in support of his contention relied upon the case of Pakistan International Airline Corporation through Chairman & others Vs. Samina Masood and others (PLD 2005 SC 831). Having explained his case as above, he prayed for allowing the instant Petition.

5. Mr. Usman Tufail Shaikh, learned counsel for Respondents/PIAC raised the question of maintainability of the instant Petition and has contended that as per the resolution of the Board of Directors of the Respondent-PIAC passed in its 320th meeting held on 27.06.2009, the Petitioner did not meet the laid down criteria of age, therefore, she could not be considered for permanent absorption; that she had completed her contractual service, therefore, she was relieved on 31.12.2013; that there is no mala fide on the part of the Respondent-Corporation for non-regularization of her services; that the services of the Petitioner are governed by her contract employment and the Rules of PIAC as applicable to her, therefore she has no vested right to be considered for regularization. Learned counsel for the Respondent-PIAC in support of his contention relied upon the case of PIA Corporation Vs. Syed Suleman Alam Rizvi and others (2015 SCMR 1545), unreported Judgment dated 28.04.2015 passed in the case of Riaz Gul and others Vs. Federation of Pakistan & others (C.P. No. D-1168 of 2012. He relied upon extract from the minutes of 323rd meeting of PIA held on 14.01.2010 and argued that the Board accorded waiver of one year and three month in excess of 50 years of age for absorption of Mr. Sohail Mehmood as Deputy Manager. He lastly prayed for dismissal of the instant Petition.

6. Mr. Shaikh Liaquat Hussain, learned Assistant Attorney General has adopted the arguments of the learned counsel for Respondent-PIAC.

7. We have considered the contention of the learned counsel for the Petitioner and the learned counsel for the Respondent-PIAC as well as Learned Assistant Attorney General and have minutely gone through the material available on record.

8. On the issue of maintainability of the instant Petition, the basic question, requires our determination, whether or not a writ could be issued against the Respondent-PIAC under Article 199 of the Constitution? The similar issue of maintainability was raised before this Court in the case of Syed Muhammad Shoaib & others Vs. M/s Hadeed Welfare Trust & another, (2017 PLC (CS) 1020). This Court, after hearing the parties, discarded the said objection of maintainability of Petitions, our view was affirmed by the Honorable Supreme Court of Pakistan in Civil Petitions No.121-K of 2017 and 122-K of 2017 by M/s Hadeed Welfare Trust & another Vs. Syed Muhammad Shoaib & others respectively wherein the Honorable Supreme Court has maintained the Judgment dated 15.12.2016 passed by this Court against M/s Hadeed Welfare. It is relevant to note that the Government is a regulator and dispenser of special services and it has power to create the jobs, issue licenses, fix quotas, grant leases, enter into contracts and provide variety of utility services and basic amenities to the people. Such entire entrepreneurial activities are at times carried out through the companies created under the statutes or under the Companies Ordinance, 1984. The test to determine

whether such company is a "person" amenable to judicial review has been generally classified by the Courts as the "Functional Test". If the functions of these companies/institutions have an element of public authority or if they are performing as public or statutory duties and carrying out transactions for the benefit of the public at large and not for the private gain or benefit, then their action will be amenable to judicial review. The Honorable Supreme Court in the case of Abdul Wahab and others Vs. HBL and others (2013 SCMR 1383), held that two factors are the most relevant i.e. the extent of financial interest of the State/Federation in an institution and the dominance in the controlling affairs thereof. And in the case of Salahuddin Vs. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244), the Honorable Supreme Court laid down similar test to assess whether a body or authority is a person within a meaning of Article 199 of the Constitution. The aforesaid view was further affirmed in Aitcheson College, Lahore through Principal Vs. Muhammad Zubair (PLD 2002 SC 326). The Honorable Supreme Court in the case of Pakistan International Airlines Vs. Tanweer-ur-Rehman (PLD 2010 SC 676), reiterating the earlier view, the Honorable Supreme Court laid down a similar three pronged test.

9. The Respondent-PIAC is a statutory body, established under the Pakistan International Airlines Corporation Act 1956, now converted into a company vide Pakistan International Airline Corporation (Conversion) Act, 2016. As per the profile of Pakistan International Air Lines Company, it is a State Enterprise. The Government owns the majority of shares. The Managing Director of the Company is a nominee of the Government of Pakistan and has

been delegated with the such powers by the Board of Directors as are necessary to effectively conduct the business of the Company. In view of the above background and status of the Respondent-PIAC, the same can ordinarily be regarded as a 'Person' performing functions in connection with the affairs of the Federation under Article 199 (1) (a) (ii) read with Article 199 (5) of the Constitution, thus, the High Court has an entry point to exercise judicial powers in the subject affairs of Respondent-PIAC under the Constitution. Our view is supported by the decision rendered by the Honorable Supreme Court in the case of Ramna Pipe and General Mills (Pvt.) Ltd Vs. Sui Northern Gas Pipe 6 Lines (Pvt.) Ltd. (2004 SCMR 1274). The aforesaid view was further affirmed in the cases of Pakistan Defence Housing Authority & others Vs. Lt. Col. Syed Jawaid Ahmed (2013 SCMR 1707), Pir Imran Sajid and others Vs. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others (2015 SCMR 1257).

10. So far as the issue of non-statutory rules of the service of Respondent-PIAC is concerned, we seek guidance from the Judgment rendered by the Hon'ble supreme Court of Pakistan in the case of PIA Corporation Vs. Syed Suleman Alam Rizvi (2015 SCMR 1545). Much emphasis has been laid on the point of law that when the matters pertaining to the terms and conditions of service of the Employees of a Respondent-PIAC, Constitutional jurisdiction of this Court cannot be invoked, on the premise that the terms and conditions of employees of the Respondent-PIAC are not governed by any statutory rules and the relationship between the Respondent-PIAC and its employees is that of "Master and servant". The same principle has been reiterated in the case of

Pakistan International Airline Corporation Vs. Aziz-ur Rehman Chaudhary and others (2016 SCMR 14). There is no cavil to the aforesaid proposition set forth by the Honorable Supreme Court of Pakistan, regarding non-statutory rules of service of the Respondent-PIAC. The lis before us in which an important question has arisen whether present matter pertain to the enforcement of non-statutory rules of service of Respondent-PIAC?

11. To answer the aforesaid proposition of law, in the present matter, Petitioner is seeking declaration to the effect that her services may be regularized from the date of her initial appointment and not enforcement of service rules of the Respondent-PIAC. We are of the considered view that the regularization of the employees is not part of the terms and conditions of service of the employees but, it depends upon the length of service, held by the Honorable Supreme Court of Pakistan in the unreported case of Pakistan State Oil Company (Civil Petitions No.409-K to 414-K of 2017) as under: -

“As regards the question that the respondents were not the employees of the petitioner but the contractor, suffice it to say that it is a normal practice on behalf of such industries to create a pretence and on that pretence to outsource the employment of the posts which are permanent in nature and it is on the record that the respondents have been in service starting from as far back as 1984. This all seems to be a sham or pretence and therefore it being not a case of any disputed fact and no evidence was required to be recorded. Moreover, we have seen from the order under challenged that in such like cases where the orders have been passed by the Labour Tribunals, the employees, even those who were under the contractors’ alleged employment, have been regularized by the petitioner. And thus keeping in view the rule of parity and equity, all the respondents even if considered to be the employees of the contractor, which is not correct, they having been performing duties of permanent nature should have been regularized. However, at this stage, we would

like to observe that the employment of the respondents shall be regularized with effect from the date when they approached the learned High Court through the Constitution petition but for their pensionary benefit and other long terms benefits, if any, available under the law, they would be entitled from the date when they have joined the service of the petitioner. All the petitions are accordingly dismissed.”

12. In the light of aforesaid Judgments passed by the Honorable Supreme Court, the objection about the maintainability of the instant Petition has no force and is accordingly rejected.

13. On merits, we hereby proceed to determine the controversy between the parties with respect to the regularization of service of the Petitioner in Respondent-PIAC.

14. Record reflects that she was appointed as an Airhostess on contract basis vide appointment letter dated 19.09.1994 and since then she has been serving as an Airhostess in the Respondent-PIAC and she was allowed PG-5 vide letter Dated 29.05.2008 but again on contract basis as Senior Airhostess, and was forced to work on unequal terms vis a vis her colleagues were placed in the same category. Record further reflects that the colleagues of the Petitioner continued to serve initially in the Respondent-PIAC on contract basis and were permanently absorbed pursuant to the policy decision made in the 35th ELT Meeting held on 17.08.2006, more particularly, the Respondent-Corporation has granted waiver in age to one Sohail Mehmood vide resolution dated 14.01.2010 and Petitioner was non-suited on the same premise. Record shows that Petitioner's suitability was checked by the Board of Respondent-PIAC in the light of said

policy decision and cleared her for renewal of the contract, enabling her to be eligible for the permanent absorption in the service but the Petitioner was not provided option to exercise the permanent absorption on the premise that she at that time was more than 50 years old. Later, in pursuance of the decision taken in the 343rd meeting of the PIA Board of Director's dated 25.10.2012, employees were offered to exercise option for the permanent absorption and again Petitioner was not considered on the same grounds. This objection would be of no legal effect as it would be hit by the prohibition contained under Article 25 of the Constitution. Under Article 5 of the Constitution, it is the imperative obligation of the functionaries of the State to abide by the Constitution and the law, because it has been held inviolable obligation of every citizen, wherever he may be and of every other person for the time being within Pakistan. The beneficial policy decision of the Respondent-PIAC, denying the fruit of the same to the pensioner, who is at the verge of retirement and giving the same benefits to the other class of employees of the Respondent-PIAC is discriminatory and violative of Article 25 of the Constitution. In this regard reliance could be placed on the dicta laid down by the Honorable Supreme Court in the case of I.A. Sharwani and 14 others Vs. Government of Pakistan through Secretary Finance Division, Islamabad and others (1991 SCMR 1041). The larger Bench of the five members of the Honorable Supreme Court made exhaustive scrutiny with respect to granting of the pensionary benefits to a class of the retired employees of the Executive Branch, who had retired within a particular period, while the same was denied to another class of employees similarly placed, who had retired in another period. The Petitioner has been

given discriminatory treatment for no plausible reason whatsoever by non-regularizing her services in the Respondent-PIAC. Accordingly, while following the principle of the law enunciated in I.A. Sherwani's case (ibid), and in view of the peculiar facts and circumstances of the present case while invoking the jurisdiction conferred upon this Court under Article 199 of the Constitution, we hereby declare the impugned action/orders of the Respondents No.1 and 2 to be in violation of the strict and prohibitory command contained in Article 25 of the Constitution, because the Petitioner has been treated with sheer discrimination, which cannot be approved on any premise whatsoever. In this view of the matter, Prima facie the decision taken by the Respondent-PIAC, in the above referred policy ignoring the Petitioner for regularization of her service on account of her age is outrageous, erroneous and is of no legal effect.

15. In view of the forgoing, we are further fortified by the decision rendered by the Honorable Supreme Court of Pakistan in the case of Pakistan International Airline Corporation through Chairman & others Vs. Samina Masood and others (PLD 2005 SC 831), which reads as follows:-

“What we are practically confronted with is proved, rather admitted situation, that cabin crew consisting of male stewards and female Air Hostesses are in one and the same group performing exactly the same duties. Though belonging to the same category yet being differently treated is not a distinction based on intelligible differentia but clearly is a distinction based on sex. In the same functional group, performing exactly the same duties and belonging to same pay group, the retirement age of Air Hostesses being fixed differently is nothing but a discrimination resorted to far the only reason that they are females. What the learned counsel for the Petitioner called an intelligible differentia is nothing but a differentia

based on sex, glaringly offending the provisions of Article 25(2) of the constitution. we believe, nothing could be a discrimination based on sex better than what we have found in the present case where people similarly placed exactly in the same group are discriminated only for being females. Both the High Courts have rightly discussed the principle involved and have rightly accepted the stance of the respondents.

19. It would not be out place to mention that one Miss Shirin Dokht a senior Purser in the PIA had challenged the vires of Regulation 25 before Karachi High Court through a writ petition which was accepted and the provisions of Regulation 25 were declared ultra vires the Constitution in Miss Shirin Dokht v. government of Pakistan 1995 PLC (C.S) 251. This judgment was challenged by PIA before this Court in Civil Appeal No. 484 of 1994 and civil Appeal No. 234 of 1995 which were withdrawn by the department on 05.3.1996 entering into compromise with Miss Shirin Dokht. It was undertaken though the offer dated 30.11.1995 that in view of the Sindh High Court decision aforesaid dated 30.11.1995 that in view of the Sindh High Court decision aforesaid there will be no discrimination on the basis of sex against Miss Shirin Dokht and that the age of retirement for both, male and female cabin crew shall be the same, subject of course, to medical fitness as per PIAC standard where after Miss Shirin Dokht was to be offered a ground job in the same pay group.

20. No doubt in the aforesaid writ petition the relief was given to Miss Shirin Dokht but at the same time Regulation 25 was declared to be ultra vires the Constitution. The status of res in the aforesaid writ petition was the retirement as such of all female cabin crew being ultra vires the Constitution apart from the subjective interest of Miss. Shirin Dokht was concerned, it can be treated as judgment in personam but so far as the vires of Regulation 25 are concerned, the adjudication was conclusive objectively and, hence was judgment in rem. The point involved stands elaborately discussed by this Court in Pir Bakhsh v. Chirman Allotment Committee PLD 1987 SC 145. We hold without having two opinions that the judgment in case of Miss Shirin Dokht qua the vires of Regulation 25 was a judgment in rem appeal against which was withdrawn by PIA before this Court. We do believe that the question of law settled up to the High Court in that case could be varied by this Curt in some other case but, in view of the circumstances discussed above, we do not propose to hold differently.

21. Consequently, the appeals in hand are hereby dismissed and leave to appeal is refused in Civil

Petition No. 3332 of 2003 on merits as well as on the ground of non-maintainability. While directing that there shall be no discrimination between the retiring age of female and male cabin crew belonging to the same group, we may remark that if any member of the cabin crew at certain age does not physically fulfill the requirements of the department concerning flying duties, they may after medical examination, be entrusted any other duties/ground duties in the same pay group.”

16. From what has been discussed above, we have reached the conclusion that submissions of the Respondent-PIAC are misconceived and are not well founded. The regularization of the employees is not part of the terms and conditions of the service of the employees but, it depends upon the length of the service. Therefore, it is on the above principle that Petitioner has approached this Court for regularization of her services, when she has no other legal remedy for enforcement of her fundamental rights particularly those enshrined under Article 9 and 25 of the Constitution of the Islamic Republic of Pakistan 1973. Reference can also be made to the decision given in the case of Khawaja Muhammad Asif Vs. Federation of Pakistan & others (2013 SCMR 1205).

17. We therefore are of the considered view that particularly the Respondent-PIAC cannot adopt a policy of its own wish and will to make fresh appointments against the posts already held by the Petitioner, who was appointed after going through a transparent procedure. Secondly, record shows that during the entire service of the Petitioner nothing adverse in terms of her qualification and character and/or inefficiency in the subject field was ever observed by the Competent Authority of the Respondent-PIAC. Thirdly, Petitioner served the Respondent-PIAC for almost 20 years, which is more than sufficient time to acquire expertise in the respective

field. Therefore, to consider someone other than the Petitioner for regular job is unjustified and against the principles of natural justice and equity.

18. In the light of above the facts and circumstances of the case, the instant Petition is disposed of in the terms whereby the Competent Authority of the Respondent-PIAC is directed to consider the case of the Petitioner without any discrimination for regularization of her service in accordance with law, within a period of two months from the date of receipt of this Judgment.

19. The Petition stands disposed of in the above terms along with the listed application(s).

JUDGE

JUDGE

Karachi

Dated:- 07.03.2018.