

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

C.P No.D-2187 of 2015

Dr. Asha BaiPetitioner

Versus

The Chairman Karachi Port Trust & othersRespondents

Date of hearing: 20.04.2018 & 09.05.2018

Mr. Abdul Khursheed Khan, Advocate for the Petitioner.

Mr. Bashir Ahmed, Advocate for Respondent No. 1 to 4.

Mr. Jaffar Hussain, Advocate for the Respondent No.5.

JUDGMENT

ADNAN-UL-KARIM MEMON, J: - Through the instant Petition, the Petitioner has sought direction to the Respondents to consider her for appointment as Lady Medical Officer in BS-17 on permanent basis.

2. Brief facts of the case are that Petitioner was appointed as Lady Medical Officer in BS-17 in the Respondent-Board at fixed remuneration for a period of six months on temporary basis vide letter dated 12.08.2010. Petitioner has submitted that she performed her duties assigned to her with keen interest and

devotion without any complaint therefore; she may be regularized in the service. Petitioner contended that after continuous devoted and successful performance, the Respondent-Board threatened the Petitioner to accept employment on leave vacancy basis or face termination from the contract/temporary employment. Petitioner further contended that she deserved regularization of her service, in this regard she applied for confirmation of her employment vide letters dated 30.10.2012, 21.05.2013, 19.09.2013, 31.10.2013 and 01.11.2013. Petitioner has submitted that the Respondent-Board has regularized the services of the Respondent No.5, who was temporary employee and junior to the Petitioner. Petitioner has submitted that the Respondent-Board has appointed their nearest and dearest on regular basis and the Petitioner has been ignored in violation of Article 25 of the Constitution. Petitioner has further asserted that the Respondent-Board having observed that the Petitioner was being employed for the last four years or so on, without any break in her services and payment of her emoluments, perks and perquisites/benefits of employment for all the legal purposes; might ask for bringing her to regular status, framed a new strategy to create insecurity and confusion by way of introducing a leave vacancy policy for certain period till regular incumbent joins the duty, but she has been neglected, by the arbitrary, unilateral acts of the Respondents. Petitioner has submitted that the Respondent-Board has relieved her from duty on 23rd April 2015. Petitioner being aggrieved and dissatisfied with the discriminatory attitude on the part of the Respondents No.1 to 4 has filed the instant petition on 22.04.2015.

3. Upon notice, Respondents filed comments and denied the allegations leveled against them.

4. Mr. Abdul Khursheed Khan, learned counsel for the Petitioner has contended that the Petitioner was eligible for permanent absorption as Lady Medical Officer; that it is consistent practice of the Respondent-Board to hire persons on contract basis and thereafter regularize them; that the contractual employees cannot be subjected to discriminatory treatment; that Petitioner is entitled for similar treatment in respect of regularization under which her similarly placed junior has been regularized vide office order dated 1.6.2011, though she was on leave vacancy; that Petitioner joined on 12.08.2010, Ms. Sumaya/Respondent No.5 joined on 27.09.2010, but the Respondent-Board accommodated her and issued permanent appointment letter on 01.06.2011 against the vacant post; that the Petitioner have the right to be appointed on permanent basis, but the Respondents appointed junior doctor and ignored the Petitioner; that the Petitioner have the right to be considered on permanent basis but the Respondents did not consider and did not issue any reply; that Respondent-Board deliberately and intentionally avoided not to consider her application, request and appeal and have ignored the Petitioner and have not fulfilled the legal requirements on merits. He lastly prayed for allowing the instant Petition.

5. Mr. Bashir Ahmed learned counsel for Respondent No. 1 to 4 has raised the question of maintainability of the instant Petition and argued that the matter involves factual controversy, which requires evidence. Besides, no fundamental / vested right of the Petitioner is violated; that Petitioner will be considered for regularization in service on occurrence of a vacancy subject to merit along with others; that the vacant post will be filled through competitive process; that Petitioner was working against leave vacancy purely on temporary basis; that she has performed and completed her last tenure from 01.04.2015 to 23.04.2015 and thereafter she is no more in the service of the Respondent-KDLB; that the Petitioner had no lien against any vacant / regular post; that as per merit list the Respondent No.5 was on top of the list therefore she was confirmed in service; that Petitioner instead of devoting herself towards her duties has been pressurizing the Respondent-KDLB to make her permanent employee of the Respondent-KDLB; that Petitioner passed MBBS Degree from Chandka Medical College Larkana and was trained in the Hospital at Larkana; that the Respondent 5's performance was better than the Petitioner and on the basis of performance she was regularized in KDLB service; that Petitioner being a temporary employee cannot be regularized; that Respondent-KDLB is small organization working as regulatory body and have only two dispensaries with the OPD services. He lastly prayed for dismissal of the instant Petition. Learned counsel for the Respondent-KDLB has placed reliance on the cases of Muhammad Zaffar Vs. Mushtaq Ahmed and 3 others (2018 PLC (C.S.) 279, Muhammad Anayet

Gondal Vs. The Director General National Commission and another Vs. Ambreen Ansari and another (2015 PLC (C.S) 1398), Trustees of the Port of Karachi Vs. Saqib Samdani (2012 SCMR 64), Muhammad Zaman & others Vs. Government of Pakistan and others (2017 SCMR 571) and Pakistan Defence Officers Housing Authority Vs. Mrs. Itrat Sajjad Khan and others.

6. Mr. Jaffar Hussain, learned counsel for the Respondent No.5 has adopted the argument of the Respondent No 1 to 4.

7. We have heard learned counsel for the parties and perused the material available on record.

8. In the first place, we would like to examine the issue of maintainability of the instant Petition under Article 199 of the Constitution.

09. The profile of the Karachi Dock Labour Board reveals that it is a statutory body established under Karachi Dock Labour Workers (Regulation of Employment) Scheme, 1973 and is a Public Sector statutory entity. In view of the above background and status of KDLB, the same can 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. In the given circumstances, the Hon'ble Supreme Court of Pakistan in the case of Pakistan Defence Officers Housing Authority Vs. Lt. Col. Jawed Ahmed (2013 SCMR 1707) has laid down that an aggrieved person can invoke Constitutional Jurisdiction of this

Court against a public authority. The Petitioner is seeking regularization in the organization i.e. KDLB. The same principle is also enunciated in the case of Muhammad Rafi and others Vs. Federation of Pakistan & others (2016 SCMR 2146). The Hon'ble Supreme Court has already held that Constitutional Petition is maintainable against an organization. We therefore are of the view that this petition is maintainable and can be heard and decided on merits.

10. Having decided on the maintainability of the instant Petition, questions, which have been agitated, could be reduced to the following:-

- (i) Whether the services of the petitioner as Lady Medical Officer in KDLB can be regularized?**
- (ii) Whether the benefit of confirmation had been given to the Respondent. No. 5 and denying to the petitioner, who is senior from a particular date and giving the same to the other class of employees of KDLB is discriminatory and violative of Article 25 of the Constitution?.**

11. We have perused the statement dated 5.5.2018 filed by the Respondent No.4, which reveals the vacancy position as under:-

“(i) That in compliance of the orders dated 20.04.2018 passed in the above petition, a report containing the information required by this Court is submitted as Annexure ‘A’

(ii) That Karachi Dock Labour Board was established vide Notification S.R.O. 1693(1)/73 dated 03.12.1973 issued by the then Ministry of Political Affairs and communications (Communication Division) in pursuance of the powers vested in the Federal Government under Section 3 of The Dock Workers (Regulation of Employment) Act 1974. The Scheme is known as Karachi Dock Workers (Regulation of Employment) Scheme, 1973.

3. ***That the Board constituted under the said SRO dated 03.12.1973, has the power under Clause 7(2) of the said scheme to make rules, consistent with the ordinance and the scheme for giving effect to the provisions of the scheme. KDLB has framed Service Rules under the said provision. The rules are, therefore not statutory.***

4. ***That the above may please be taken on record.***"

12. The summary attached with the aforesaid statement explicitly shows the vacancy position of Medical officers as follows:-

SUMMARY OF MEDICAL OFFICERS FOR THE PERIOD 2010-2016

No of Medical Officers appointed	Dr. Summaya w.e.f 27.03.2010 (On leave Vacancy) Dr. Asha w.e.f. 16.08.2010 (On Leave Vacancy)
No of Medical Officers confirmed	Dr. Summaya w.e.f 01.06.2011 In place of Dr. Shumaila Gulab on her resignation
No of Medical Officers retired	Dr. Gulshan Mustafa w.e.f 09.06.2015 Dr. Hasnain J. Bantwala w.e.f. 26.06.2015
Total working strength of doctors on 31.12.2016		13 Medical Officers

Brief.

In 2000 KDLB has strength of Dock Workers about 6000 and Administrative Staff strength was 285. Due to atomization in cargo handing the requirement of workers was considerably reduced. The Government banned the registration of dock workers till strength is rationalized to 1700 dock workers as prescribed by the Board, and Board has rationalized the Administrative staff strength to 159. Doctors strength ws 16 in year 2000 including Chief Medical Officer. The dock workers strength since 2000 have been reduced to 2761, accordingly strength of dependents also reduced from 46000 to 22000.

Keeping in view the reduction in workers strength, present strength of 12 doctors is over strength. Hence the Board is not in a position to announce any vacancy of doctor. KDLB is running only OPD and inpatients requiring hospitalization are referred to panel hospitals i.e. Liaquat National Hospital and Dr. Ziauddin Hospital.

***Personal & Admin Officer
KDLB***

13. In the present matter Petitioner has taken the plea of discrimination on the premise that the services of the Respondent

No.5 had been regularized on 25.05.2011 whereas she has been ignored being senior to the Respondent No.5.

14. To address the first proposition regarding regularization of service of the Petitioner, we seek guidance from the reported case of M/s Hadeed Welfare Trust & another Vs. Syed Muhammad Shoaib & others rendered by the Honorable Supreme Court of Pakistan in Civil Petitions No.121-K and 122-K of 2017, wherein the Honorable Supreme Court has maintained the Judgment dated 15.12.2016 passed by this Court against M/s Hadeed Welfare Trust (A subsidiary of Pakistan Steel Mills) reported in 2017, PLC (C.S.) 1020, whereby the contract employees of Pakistan Steel Cadet College were regularized as under: -

“3. The other pretext for not regularizing the respondents was that the office memo dated 29.8.2008, issued by the respondent No.26 (Federation of Pakistan), which required regularization of the service of the employees of the Federal Ministries/Divisions/ Attached Departments, Subordinate offices, Autonomous, Semi-Autonomous Bodies/Corporations, was for the benefit of employees in BS-1 to BS-15, and is not applicable to the present respondents, however, in so pleading the present petitioners have ignored the minutes of the meeting of the Cabinet Committee dated 07.2.2011 and minutes of the meeting of the Cabinet sub-committee on regularization, inter alia, of contract employees in Ministries/Divisions/Attached Department / Autonomous Bodies/Organizations held on 13.3.2013, relevant paragraphs whereof, for the ease of reference are reproduced

MINISTRY OF PRODUCTION

236. The representative of the Ministry of Production/Secretary Pakistan Steel Mills informed the Cabinet Sub-Committee that there are certain contract/daily wages employees in the

Cadet College and other educational institutions of the Steel Mills at Karachi who have served for more than one year and whose services are required to be regularized.

DECISION

237. The Cabinet Sub-Committee discussed and directed that the services of all the contract/daily wages employees (teaching and nonteaching staff) of the Cadet College and other educational institutions of Pakistan Steel Mills Karachi, who have served for more than one year should

4. As can be seen from the forgoing, the above decision is not restricted to any scale or grade, and no such restriction can be read therein by any stretch of imagination and is therefore equally applicable to the employees of all grade and scales including the present respondents, who were thus rightly granted such relief through the impugned judgment. We therefore do not find any lacuna in the impugned judgment justifying our interference in the matter, the petitions are therefore dismissed.”

15. On the issue of the regularization in service, our view is further strengthened by the Judgment of this Court dated 01.6.2017 passed in the Constitution Petitions No.D-3199, D-4605 and D-5079 of 2013, D-509, D-2034, and D-1091 of 2014 respectively (2017 PLC CS), whereby Pakistan State Oil Company was directed to regularize the services of third party contractor/“outsourced employees”. The said Judgment was assailed before the Honorable Supreme Court of Pakistan in Civil Petitions No.409-K to 414-K of 2017, which maintained the same and held 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 pensionery 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."

16. From what has been discussed above, we have reached to the conclusion that submissions of the Respondent-KDLB are misconceived and are not well founded. The regularization of the service of the Petitioner is based upon her length of service she has worked for the Respondent-KDLB since 12.08.2010 and it is on the above principle that the Petitioner has approached this Court for regularization of her service under Article 9 and 25 of the Constitution of the Islamic Republic of Pakistan. We are fortified by the observation made by the Hon'ble Supreme Court of Pakistan in the case of Khawaja Muhammad Asif Vs. Federation of Pakistan & others (2013 SCMR 1205).

17. It is asserted by the Petitioner that she was earlier on temporary basis for a period of 6 months as per terms and conditions set forth in the contract appointment letter dated 12.08.2010. As per record, the contract continued till the Petitioner services were dispensed with from the month of April 2015. Record shows that performance of the Petitioner in the Respondent-KDLB has not been called in question throughout her service period by the Respondent-KDLB.

18. Record reflects that the terms and conditions of service of the Petitioner was changed from temporary appointment against leave vacancy position which could not be done. The objection of the Respondent No.4 that Petitioner was working against leave vacancy would be of no legal effect as it would be hit by the prohibition contained in Article 25 of the Constitution as junior of the Petitioner under the similar circumstances, had been confirmed by the Respondent-KDLB vide minutes sheet dated 25.05.2011. Under Article 5 of the Constitution it is an imperative obligation of the functionaries of the State to abide by the Constitution and the law.

19. We are of the view that the Respondent-KDLB cannot act whimsically while making fresh appointments against the posts already held by the Petitioner, who was appointed in a transparent manner and nothing adverse in terms of her qualification and character and/or inefficiency in the subject field was observed by

the Competent Authority of the Respondent-KDLB during entire period of her service.

20. We have noted that the Petitioner served the Respondent-KDLB for a period of 5 years. The said period of service is more than sufficient to acquire expertise in the respective field. Therefore, considering others while ignoring the Petitioner is unjustified and against the principles of natural justice and equity.

21. We have gone through the Office Memorandum dated 11th May, 2017 issued by the Government of Pakistan, Cabinet Secretariat, Establishment Division and excerpt of the same is reproduced herein below: -

**Government of Pakistan Cabinet secretariat Establishment
Division No.F-53/1/2008-SP Islamabad the 11th May, 2017**

OFFICE MEMORANDUM

Subject:- Amendment in the Recruitment Policy/Mechanism to Ensure Merit Based Recruitment in the Ministries/Divisions/Subordinate Offices/Autonomous/ Semi-Autonomous Bodies/ Corporations/Companies/Authorities The undersigned is directed to state that the Federal Cabinet in its meeting held on 12th April, 2017 has accorded approval of the subject amendment to be inserted as para 1(e) in the Recruitment Policy/Mechanism issued vide this Division's O.M. No.531/2008-SP dated 16th January, 2015 as under: - "(e) Appointment on Regular Basis of Contract/ Contingent/ Paid/ Daily Wages/Project Employees For the purpose of appointment on regular basis of Contract/Contingent/Paid/Daily Wages/Project employees the following criteria shall be observed: - (i) All Contract/Contingent/Paid/Daily Wages/Project employees who have rendered a minimum of one year of service in continuity, as on 1.1.2017 (hereinafter referred to as eligible employees) may apply for appointment on regular basis in the manner prescribed hereinafter provided that the condition of continuity shall not be applicable in case of person(s) employed on daily wages who have completed at least 365 days service. (ii) For initial appointment to posts in BS-16

and above, the employees shall apply direct to FPSC against relevant/suitable vacancies as and when arising for which they are eligible. (iii) For initial appointment to posts in BS-1 to BS-15, the eligible employees may apply as per criteria given vide this Division's O.M. No.531/2008-SP dated 16.1.2015 and 3.3.2015 shall be adopted. (iv) The eligible employees shall be awarded extra marks in interview at the rate of one (01) mark for each year of service rendered upto a maximum of five (05) marks, on the recommendation of the respective selection authorities. (v) The period served as Contract, /Contingent/Paid/Daily Wages/Project employees shall be excluded for the purpose of determination of upper age limit in addition to relaxation of upper age limit as per existing rules. (vi) Qualifications prescribed for a post shall be strictly followed in case a person does not possess the prescribed qualifications/experience for the post he/she is applying for he/she shall not be considered for the same. (vii) The employees must be in good mental and bodily health and free from any physical defect likely to interfere with the discharge of his duties unless appointed against disability quota. (viii) The advantage of para 1(e) is a one-time dispensation for all Contract/Contingent/Paid/Daily Wages/Project employees for their eligibility to regular appointment. 2. This Division's O.M. of even number dated 16th January, 2015 is modified to the above extent. All Ministries/Divisions are requested to take further action accordingly. (Atiq Hussain Khokhar) Director General Tel:051-9103482 All Ministries/Divisions Rawalpindi/Islamabad”

22. The above Memorandum dated 11th May, 2017 is issued in pursuance of the decision of the Cabinet Sub-Committee for regularization, wherein the Federal Government has directed the Ministries/Divisions/Sub-ordinate Offices/Autonomous/Semi Autonomous Bodies/Corporations/Companies/Authorities to regularize all the Contract employees, who have rendered a minimum of one year of service in continuity, as on 01.01.2017.

23. We are of the view that this is a policy decision of the Cabinet Division on the issue of the regularization of the service of the certain employees working in the Federal Government or its entities. Petitioner has served in Respondent-KDLB for more than

five years and she is entitled to be regularized. In principle, the Petitioner is fully entitled to the benefits contained in the aforesaid Office Memorandum, as it is applicable to the employees of the Federal Government and its entities, because she is in continuous service of the Respondent-KDLB for a long time and has been paid salary as well. We are of the considered view that regularization of service is not an initial appointment but it is a confirmation of an existing employment.

24. In our view the case of the Petitioner is fully covered by the Judgment rendered in the case of Pir Imran Sajid and others Vs. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others (2015 SCMR 1257), the case of Abdul Ghafoor and others Vs. The President of National Bank of Pakistan and others (2018 SCMR 157) and (2018 SCMR 325). We are further fortified on the similar principle by the case law decided by the learned five Members' Bench of the Hon'ble Supreme Court in the case of Government of Khyber Pakhtunkhwa and others Vs. Adnanullah and others (2016 SCMR 1375), wherein the Hon'ble Supreme Court has held at paragraph 31 as under:-

“The record further reveals that the Respondents were appointed on contract basis and were in employment/service for several years and Projects on which they were appointed have also been taken on the regular Budget of the Government, therefore, their status as Project employees has ended once their services were transferred to the different attached Government Departments, in terms of Section 3 of the Act. The Government of KPK was also obliged to treat the Respondents at par, as it cannot adopt a policy of cherry picking to regularize the employees of certain Projects while 14 terminating the services of other similarly placed employees.”

25. Record reflects that the benefit of confirmation had been given to the Respondent. No. 5 and denying to the Petitioner, prima facie she is senior from a particular date and giving the same to the other class of employees of KDLB is discriminatory and violative of Article 25 of the Constitution.

26. In this regard while placing reliance 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 learned five members Bench of Honorable Supreme Court made exhaustive scrutiny of with respect to granting of pensionary benefits to a class of retired employees of 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.

27. The Petitioner has been given highly discriminatory treatment for no plausible reason whatsoever by not regularizing her service. Accordingly, while following the principle of 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 official Respondents No.1 to 4 to be in violation of 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.

28. In this view of the matter, the decision taken by the Respondent-KDLB by declining to consider the case of the Petitioner for regularization is found to be erroneous and of no legal effect.

29. Reverting to the plea taken by the learned counsel for the Respondent-KDLB that Karachi Dock Labour Board Service Rules of 1977 are not statutory, therefore this Petition is not maintainable. So far as issue of non-statutory rules of service of Respondent-KDLB 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), however much emphasis has been laid on the point of law that when the matters pertaining to the terms and conditions of service of Employees of a Respondents-KDLB, Constitution jurisdiction of this Court cannot be invoked, on the premise that the terms and conditions of employees of the Respondents/KDLB are not governed by any statutory rules and the relationship between the Respondent-KDLB and its employees is that of Master and servant. 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-KDLB.

30. 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 Respondent-KDLB. We are of the considered view that the regularization of the employees is not part of terms and conditions of service of the employees but, it depends upon the length of service as 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) .

31. The second plea taken by the Respondent-KDLB that Petitioner was appointed against leave vacancy. Upon perusal of record and the minutes sheet dated 06.08.2010 issued by Chief Medical Officer of Respondent-KDLB clearly reflects that Petitioner was recommended for temporary appointment as Lady Medical Officer and not on leave vacancy at the initial stage, consequently the Respondent-KDLB issued letter No. KDLB/350 dated 12th August 2010, whereby the Petitioner was appointed as Lady Medical Officer in BPS-17 purely on temporary basis for a period of 6 months. Record further reflects that the Petitioner and Respondent No.5 continued to serve the Respondent-KDLB on temporary basis. Per Petitioner, she served the Respondent-KDLB upto 23rd April 2015, however she has refuted the claim of the Respondent-KDLB that Respondent No.5 is experienced to the Petitioner by referring an affidavit in rejoinder filed by her at paragraph 3(b) and paragraph 4 that the Petitioner was appointed against the vacant post and experienced.

32. In the light of facts and circumstances of the case discussed above and decisions rendered by the Honorable Supreme Court in the aforesaid cases, the instant Petition is hereby disposed of with directions to the Chairman/Competent Authority of the Respondent-KDLB to take a fresh decision so far as the matter of the Petitioner is concerned for regularization of her service, without discrimination, in accordance with law and dicta laid down by the Hon'ble Supreme Court of Pakistan in the cases referred to hereinabove. The Chairman/Competent Authority of Respondent-KDLB is directed to complete the entire exercise within a period of two months from the date of receipt of this Judgment.

33. Petition stands disposed of along with the listed application in the above terms.

Karachi.
Dated:-

JUDGE

JUDGE

Shafi Muhammad P.A