

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Aziz-ur-Rehman

Mr. Justice Adnan-ul-Karim Memon

C.P No. D- 2413 of 2019

Ms. Shaheena NasreenPetitioner

Versus

Government of Sindh & 04 othersRespondents

Date of hearing: 12.04.2019

Date of order: 12.04.2019

Mr. Sanaullah Noor Ghouri, Advocate for the Petitioner.

ORDER

ADNAN-UL-KARIM MEMON, J:- Through the instant Petition, the Petitioner has impugned the order dated 08.03.2019 passed by Respondent-Sindh Employees' Social Security Institution ("**SESSI**"), whereby her claim for proforma promotion/up-gradation in BS-18 w.e.f. 13.03.2002, on the basis of Circular dated 27.02.1984 issued by the Government of Sindh, was declined.

2. The case of the Petitioner, in nutshell, is that on 30.11.1991, she was appointed as Medical Technologist in BPS-16, in SESSI, subsequently on 13.03.1997, the aforesaid post was upgraded in BPS-17, thereafter Petitioner moved an application to the Competent Authority for one premature increment, which was deferred vide letter dated 01.12.1997. Petitioner repeated her applications for the aforesaid purpose as well as for up-gradation/proforma promotion in BPS-18, but the same was declined by the Respondent-SESSI vide impugned order dated 08.3.2019. Petitioner has submitted that she is entitled for the

aforesaid benefits with effect from 13.3.2002, even after her retirement from service on 15.05.2018 on the premise that any official, who had served for 05 years in BPS-17 by way of up-gradation, with effect from 29.10.1997, was entitled for BPS-18 and BPS-19 on the basis of length of service on the up-graded post. In support of her claim, she has relied upon the office order dated 27.02.1984 issued by the Government of Sindh. Petitioner being aggrieved by and dissatisfied with the impugned order dated 08.3.2019 has filed the instant petition on 08.04.2019.

3. We queried from the learned counsel for the Petitioner as to how this Petition is maintainable against the person specific up-gradation/proforma promotion after retirement from service as per dicta laid down by the Hon'ble Supreme Court in the case of *Government of Pakistan and others Vs. Hameed Akhtar Niazi and others* [**PLD 2003 SC 110**]. Mr. Sanaullah Noor Ghouri, learned counsel for the Petitioner, in reply to the query, has argued that on 30.11.1991, the Petitioner was appointed as Medical Technologist [BPS-16], having acquired better qualification i.e. MSc in the discipline of Micro Biology and such post was subsequently upgraded in BPS-17 on 13.03.1997, the benefit of the same was accorded to the Petitioner on 29.10.1997; that she is entitled for the benefit of such up-gradation in BS-18 by way of proforma promotion as provided under Fundamental Rule-17 as well as under the Standing Order dated 27.02.1984 issued by the Government of Sindh. In support of his contention, he relied upon the Judgments reported as *Ali Azhar Khan Baloch & others v. Province of Sindh & others* [**2015 SCMR 456**] and *Regional Commissioner Income Tax, Northern Region, Islamabad and another vs. Syed Munawar Ali and others* [**2016 SCMR 859**]. He next argued that the Respondents have declined the request of the petitioner without assigning any

cogent reason, which is complete defiance of the Circular/Notification dated 27.02.1984 issued by the Government of Sindh; that the Petitioner had completed her 05 years' service in BPS-17 on the upgraded post, thus, she is entitled for the benefit of aforesaid Notification; that the Petitioner had also completed 12 years of service on 13.03.2014, as such she is further entitled for grant of profroma promotion in BPS-19 w.e.f. 13.03.2014 as per Notification dated 27.2.1984 as mentioned supra; that the Respondent-SESSI did not comply with the aforesaid Notification by not considering the promotion of the Petitioner in accordance with the dicta laid down by the Honorable Supreme Court in the case referred supra; that before the matter of Petitioner could have been proceeded for promotion as recommended by the SESSI on 9.3.2018 for approval, however, the matter got delayed and in the meantime Petitioner attained the age of superannuation on 15.05.2018 and finally the aforesaid recommendation was turned down vide order dated 08.03.2019 without valid reasons; that the Respondents took resort of the retirement of the Petitioner from service of SESSI and denied the promotion of the Petitioner on the ground of retirement of the Petitioner from service by ignoring the fact that the Petitioner is entitled for profarma promotion after her retirement as per her entitlement under the law. He lastly prayed for allowing the instant Petition.

4. We have heard learned counsel for the Petitioner and perused the material available on record.

5. The foremost questions which require our decision are as under:-

i) Whether up-gradation is distinct from the expression promotion?

ii) Whether up-gradation is restricted to the post and not with the Person occupying it?

iii) Whether the benefit of up-gradation can be allowed, when the petitioner has retired from service in the year 2018?

iv) Whether the petitioner is entitled for proforma promotion after retirement?

6. To answer the first and second proposition, in our view for up-gradation of post, the following conditions are pre-requisite:-

i) Firstly up gradation is restricted to the post and not with the person occupying it.

ii) Secondly up gradation of posts does not mean automatic up gradation of the incumbents of these posts as well, in fact the appointment against the upgraded post is required to be made in the manner prescribed in the Recruitment Rules for that particular post.

iii) Thirdly up-gradation cannot be made to benefit a particular individual.

7. To justify up-gradation, the Department needs restructuring, reform or to meet the exigency of service in public interest, in the absence of the aforesaid pre-conditions, up-gradation is not permissible under the law. Our view is supported by the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of *Ali Azhar Khan Baloch & others v. Province of Sindh & others* [2015 SCMR 456].

8. Much emphasis has been laid on Fundamental Rule 17(1); it is expedient to have a glance on Fundamental Rule 17(1). An excerpt of the same is as under: -

“FR-17(1) subject to any exceptions specifically made in these rules and to the provisions of sub rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post and shall cease to draw them as soon as he ceases to discharge those duties: Provided that the appointing authority may, if satisfied that a 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, direct that such civil servant shall be paid the arrears of pay and allowances of such higher post through proforma promotion or up-gradation arising from the antedated fixation of his seniority.”

9. To appreciate and elaborate further on the aforesaid proposition, it is necessary to have a glance on the relevant portion of Notification dated 27.02.1984 which provides as under:-

(a) Where posts have been upgraded from B-16 to B-17 purely by revision of pay scale without any change in the nature of duties and responsibilities and without any condition of higher academic qualifications, the service in B-16 may be reckoned in B-17 for the purpose of promotion to B-18 and above.

10. We have noticed that Petitioner's post i.e. Medical Technologist was upgraded from BPS-16 to BPS-17 on the basis of Order dated 13.03.1997 issued by Government of Sindh, Finance Department, which explicitly show that the incumbent possesses the qualification of BSc. in Medical Technology or Chemistry or Bio Chemistry or Physiology or Organic Chemistry or Microbiology or Pharmacy or Zoology or MSc. in any subject with a rider that all fresh appointments in BPS-17 will be subject to the conditions that the incumbent possesses the degree of BSc. (Honors) in relevant subject or pharmacy or MSc. in the relevant subject as per the recruitment rules, whereas the Notification dated 27.02.1984, prima-facie, shows that where the posts have been upgraded from BS-16 to Bs-17 purely by revision of pay scale without any change in the nature of duties and responsibilities and without any condition of higher academic qualifications, the service in BPS-16 may be reckoned in BPS-17 for the purpose of promotion in BPS-18 and above.

11. In view of the foregoing, we have to see whether the Petitioner possesses minimum length of service to BPS-18 i.e. 05 years in BS-17 and 12 years in BS-18 and above for promotion in BS-19. In our view, up-gradation is not a promotion in stricto-sensu, therefore, upgraded post from BS-16 to BS-17 does not mean that the incumbent should be promoted in BPS-18 without length of service

as discussed supra. Since the Petitioner was not promoted in BPS-17, therefore, she cannot claim promotion in BPS-18 as a matter of right for the simple reason that her post was upgraded in BPS-17 which is not promotion and for promotion in BPS-18 the incumbent has to serve 05 years in BPS-17 which is not in the case of Petitioner. We are fortified with the decision rendered by the Hon'ble Supreme Court in the case of *Regional Commissioner Income Tax, Northern Region, Islamabad and another vs. Syed Munawar Ali and others* [2016 SCMR 859], the Hon'ble Supreme Court has held in paragraphs-6&7 as under:-

“6. We have heard the learned Counsel for the parties and have perused the record. The expression "upgradation" is distinct, from the expression "Promotion", which is not defined either in the Civil Servants Act or the Rules framed thereunder, and is restricted to the post (office) and not with the person occupying it. The upgradation cannot be made to benefit a particular individual in term of promoting him to a higher post and further providing him with the avenues of lateral appointment or transfer or posting. In order to justify the upgradation, the Government is required to establish that the department needs re-structuring, reform or to meet the exigency of service in the public interest. In the absence of these pre-conditions, upgradation is not permissible.

7. The aforesaid definition of the expression "upgradation" clearly manifests that it cannot be construed as promotion, but can be granted through a policy. In fact, this Court in the judgment titled as *Ali Azhar Khan Baloch v. Province of Sindh* (2015 SCMR 456) and an unreported judgment of this Court passed in the case of *Chief Commissioner Inland Revenue and another v. Muhammad Afzal Khan* (Civil Appeal No.992 of 2014) has held that the issue relating to upgradation of civil servants can be decided by a High Court in exercise of its constitutional jurisdiction and bar contained under Article 212(3) of the Constitution would not be attracted. The policy of upgradation, notified by the Government, in no way, amends the terms and conditions of service of the civil servant or the Civil Servants Act and or the Rules framed thereunder. The Service Tribunals have no jurisdiction to entertain any appeal involving the issue of upgradation, as it does not form part of the terms and conditions of service of the civil servants. The question in hand has already been answered by the aforesaid two judgments of this Court.”

12. We have noticed that Respondent-Department has declined the request of the Petitioner vide office order dated 08.03.2019 for the reason that the matter should not be decided against the orders/judgments of the superior courts, already imposed ban on personal up-gradation. An excerpt of the same is as under:-

“OFFICE ORDER:

In pursuance of the decision taken by the Governing Body, SESSI in its 149th meeting held on 12.02.2019, the request of Ms. Shaheena Nasreen, Ex-Medical Technologist, KVSS SITE Hospital for grant

of promotion/up-gradation in BS-18 in person is declined.

**Sd/-
(AMBREEN KAMIL)
DIRECTOR ADMINISTRATION (MEDICAL)
FOR COMMISSIONER**

13. The grounds agitated by the Petitioner in the instant Petition that the up-gradation of the Petitioner is permissible as per Notification dated 27.02.1984. We do not agree with the assertion of the learned counsel for the Petitioner for the reasons alluded in the preceding paragraph.

14. We have noticed that the Finance Department, Government of Sindh vide `Office Memorandum` dated 05.08.2014 has made it clear that one premature increment on up-gradation of posts as on promotion which would be applicable in all cases of up-gradation taken place from 28th January, 2002 onward and would take effect from the actual date of up-gradation of each post. An excerpt of the same is reproduced herein below:-

**No.FD(SR-I)3(17)/2013
Government of Sindh
Finance Department
Karachi dated the 5th August, 2014**

OFFICE MEMORANDUM

**Subject: GRANT OF PRE-MATURE INCREMENT
ON UPGRADATION**

In pursuance of Finance Division (Regulation Wing), Government of Pakistan's Office Memorandum No.F.No.11(4)R-2/2011-1153/2013,dated 31.02.2013, and Judgment dated 28.01.2002 passed by Honorable Supreme Court's Judgment in Appeal No.637 of 1998, Government of Sindh has been pleased to grant one pre-mature increment on up-gradation of posts as on promotion which would be applicable in all cases of up-gradation taken place from 28th January, 2002 onward and would take effect from the actual date of up-gradation of each post.

The said pre-mature increment on up-gradation shall be recommended within the budgetary allocation for the current financial year 2014-15 by the respective departments and no supplementary/additional funds would be given on this account.

This department's letter of even number dated 25th July, 2014, is hereby cancelled/withdrawn.

**Secretary to Government of
Sindh**

15. In light of the above facts and circumstances of the case and for the reasons alluded herein above, we are not convinced with the assertion of Petitioner that she is entitled for up-gradation/proforma promotion in BS-18 after her retirement from service on 15.05.2018 in the light of dicta laid down by the Hon'ble Supreme Court in the case of *Government of Pakistan and others Vs. Hameed Akhtar Niazi and others* [PLD 2003 SC 110] as discussed supra.

16. In view of the above, this Petition being misconceived is hereby dismissed in limine alongwith pending Application[s].

JUDGE

JUDGE

Nadir/-