

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No. D-3514 of 2014

Before: Muhammad Shafi Siddiqui, J
Zulfiqar Ahmad Khan, J

Miss Rashida Farnaz

Versus

Federation of Pakistan & others

Date	Order with signature of Judge
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For orders as to maintainability

Date of Hearing: 09.12.2019

Petitioner: Through Mr. Muhammad Iqbal Chaudhry
Advocate

Respondent No.1: Through Mr. Muhammad Nishat Warsi D.A.G

Respondent No.4: Through Mr. Altamash Arab Advocate

ORDER

Muhammad Shafi Siddiqui, J.- Petitioner has impugned the termination order dated 05.01.2013 on the ground that instead of termination simplicitor, the allegations which may constitute a stigma on her career, was an undesired statement, which formed part of termination order. It is the case of the petitioner that in case her performance was not up to the mark, resignation tendered initially on 05.4.2012 followed by another on 09.7.2012 should have been accepted. It is claimed that the petitioner was victimized on the imaginary ground of availing unnecessary leaves without prior approval. It is the case of the petitioner that the salary was deducted against the above leaves and thus no prejudice was caused to the respondents and hence the impugned termination is unlawful.

2. Respondent's Counsel on the other hand submitted that this petition is not maintainable under the law as the respondents' rules are non-statutory hence this petition is liable to be dismissed on this count alone. He relied upon the service rules that concerns with the probation and termination of the employee. Counsel submits employees on probation do not enjoy the rights as available to a normal/regular employee and hence petitioner cannot plead discrimination or claim indulgence as available to a normal/regular employee.

3. We have heard the learned Counsel and perused the material available on record.

4. This petition was filed in the year 2014 against the termination of the petitioner while the rules of service of the respondent were statutory as declared in terms of the judgment pronounced by the Hon'ble Supreme Court in the case of Shafique Ahmed Khan v. Nescom reported in PLD 2016 SC 377, operative part of which is reproduced as under:-

"13. ..It would rather be naïve and even myopic to equate the rules dealing with the matters of crucial importance having so wide a scope and area of efficacy with the instructions meant for internal management and thereby deprive them of their statutory status. We, thus, hold that the Rules made by the Authority under Sections 7, 9 and 15 of the Act cannot be confused or even compared with the Rules and Regulations framed under other enactments without the approval of the Federal Government. The argument that the judgments rendered earlier on the similar proposition could not be ignored by subsequent benches with the same number of Judges is no doubt correct but we don't think any of the judgments cited at the bar decided similar questions. The argument that approval of such rules by the Federal Government to give them statutory attire in view of Rule 14 of the Rules of Business is also a must, is misconceived because when the statute itself did not provide for the approval of the rules by the Federal Government, we cannot supply omission in the Act on the basis of Rule 14 of the Rules of Business. The argument that the judgments rendered in the cases of Rector National University of Science and Technology (NUST) Islamabad and others v. Driver Muhammad Akhtar and Muhammad Zubair and others v. Federation of Pakistan thr. Secretary M/o Defence and others (supra) holding the rules statutory are per incuriam

or sub silentio is not correct as they have been rendered after due consideration of the statute and the case law.”

5. Through an Ordinance No.1 of 2016 an amendment claimed to have been carried out in the National Command Authority Act, 2010 under section 15, which claims to have rendered the rules, instructions or orders already made or which may be made in respect of the employees of strategic Organizations of the Authority to be non-statutory unless approved by the Federal Government and published in Official Gazette of Pakistan. We are not in debate as to whether this amendment could lawfully dilute the effect of a judgment that rendered the rules statutory as it is no body's case, as for the purpose of present proceedings, it may conveniently be decided that at the relevant time when the action was taken against the petitioner in terms of the termination order, impugned in these proceedings, the rules were undisputedly statutory. Hence even if the amendment, carried out in terms of section 15 referred above, were in accordance with law, counsel concedes that alleged amendment could have been applied prospectively and the petitioner's case cannot be affected as it (amendment) had no retrospective effect. We, however, leave this argument of respondent open as to the effect of the amendment carried out in section 15 of the Act v of 2010 for consideration in appropriate case.

6. Insofar as the merits of the case are concerned, the petitioner was offered an appointment on 22.12.2010 on probation for a period of one year. In para-3 of the parawise comments under heading of "Report", the petitioner claims to have joined respondent, Atomic Energy Medical Centre on 07.1.2011. Her first extension took place on 04.4.2012 i.e. three months later on completion of first year of probation, allegedly for a period of 6 months. The second extension took place on 21.11.2012 for another period of six months w.e.f. 07.7.2012 to 06.1.2013. The probation thus, in terms of the above statistics

commenced on 07.1.2011 when she accepted the offer and not on 22.12.2010 when it was offered, which fact is not denied in terms of the pleadings. The first year of probation was completed on 06.1.2012. While there was a vacuum for extension for a period of three months as the first extension took place on 04.4.2012 which extension ended on 06.7.2012 followed by another extension of six months i.e. 07.7.2012 to 06.1.2013. The termination letter was issued on completion of two years probation. The two years probation ended on 06.1.2013 and by the termination, petitioner was informed of having completed probationary period and it was an unsuccessful attempt as far as regularization is concerned. She was informed that since she could not improve her performance and attitude towards the job hence her service was terminated. It was not the case of the petitioner that on account of completion of two years period, she ought to have been confirmed as a regular employee. The only contention as argued was that the termination was unlawful since it contains stigmatic observation which was not the requirement of rules. The petitioner is not a civil servant hence the Civil Servants (Appointment, Promotion & Transfer) Rules that deals with probation are not applicable. The service rules of the respondent that deals with the probation are available as annexure R-4 which are also not disputed.

7. Rule-1 of the probation provides that a regular employee appointed to any post in the strategic organization shall be for a period of year. Rule-2 of the probation provides that in the event of initial appointment, the employee who failed to show satisfactory performance and conduct during the probationary period, the Competent Authority may extend the period of probation for a maximum period of another year or dispense with his/her service without assigning any reason. Rule-3 provides that if no order is issued under clause c(2), on the expiry of the first year of probation, the same shall be taken to have been extended for another one year. Thus, she could have claimed her

extension of probation and not regularization, in the absence of an order, however order was passed after about three months but these facts will not materially affect the merit of the case.

8. The first extension order was passed after a delay of three months. Now if we apply Rule-3 of the probation Rules, the vacuum of three months would not take the petitioner anywhere. This vacuum was filled on 04.4.2012 when the probationary period was extended for another six months. These rules are dis-similar to Rule 21 of Civil Servants (Appointment, Promotion & Transfer) Rules, 1973 wherein she could have claimed regularization in the absence of an order for extension or otherwise. As against her termination, she filed an appeal which was pending before the competent authority. Petitioner filed earlier petition numbered as 220/2014 which claimed to have been disposed of directing the competent authority to consider and decide the appeal of the petitioner in accordance with law. The appeal was decided on 31.5.2014 by the competent authority and the Chairman of Pakistan Atomic Energy Commission regretted as it merits no consideration. The petitioner never challenged the order passed in appeal and filed this independent petition for another recourse despite availing the jurisdiction of appellate forum which decided the appeal of the petitioner. In presence of an order of the appellate and competent authority to decide the appeal, the filing of an independent petition for the same relief is not conceivable. No challenge is thrown as to the competence of the authority who decided the appeal of the petitioner. The cases, as cited, by the petitioner's Counsel are distinguishable on the count that those were in respect of Civil Servant to whom the Civil Servants (Appointment, Promotion & Transfer) Rules, 1973 is applicable. Although it was never required to assign a reason to terminate the employee on completion of probationary period, yet it was only an intimation to the petitioner as to a reason assigned for not regularizing her service. In case she is aggrieved of such remarks, which should not

have been attributed as claimed, in terms of service rules that deals with the probation and its termination as discussed above, she may pursue her remedy for any other alternate claim for this alleged stigmatic action as she may deem fit and proper. In case she does, it may be dealt with strictly in accordance with law by forum having jurisdiction.

9. The petition was dismissed by a short order dated 09.12.2019 and above are the reasons for the same.

Dated:

Judge

Judge