

# IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

## Constitutional Petition No.D-5638 of 2022

**Dr. Farzana Zulfiqar**

Petitioner: Through M/s Faizan Hussain Memon and Muhammad Saleem Khaskheli, advocates

Respondent No.1: Through Mr. Yasir Ahmed Shah, Assistant Attorney General

Respondent No.2: Through Mr. Abdul Jalil Zubedi, AAG alongwith Amjad Siraj Memon, VC JSMU, and Professor Nasir Saleem Saddal, Executive Director, NICH, Government of Sindh

Respondent No.4: Through Mr. Abdul Waheed Siyal, advocate

Applicants/interveners: Through Mr. Muhammad Naeem Memon, advocate

Date of hearing  
& Decision: 26.01.2023.

## ORDER

**ADNAN-UL-KARIM MEMON, J.** – Through the captioned petition, petitioner has called in question the recruitment process initiated by the respondent-Jinnah Sindh Medical University (JSMU) in terms of public advertisement dated 07.8.2022, inter alia, on the ground that the impugned advertisement inviting applications for the posts of Professor of Pediatric Medicine, Pediatric Surgery, Associate Professor of Pediatric Medicine, Pediatric Surgery, Anesthesiology, Radiology, Pathology, Pediatric Oncology, Pediatric Nephrology, Neonatology, Psychiatry and Assistant Professor of Pediatric Medicine, Pediatric Surgery, Anesthesiology, Radiology, Pathology, Pediatric Oncology, Pediatric Nephrology, Neonatology, Psychiatry is in violation of fundamental rights of the petitioner, in particular, Articles 4, 14, 18 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973; that the act of respondent-University tantamount to violation of the judgment of the Hon'ble Supreme Court dated 17.1.2019 reported as **2020 SCMR 1**; that initial recruitment against the posts of promotion, denies the legitimate avenues of

promotions to the deserving and meritorious officers of respondent No.3 / National Institute of Child Health (NICH). It is further averred that the impugned advertisement for initial recruitment is without jurisdiction, illegal, unlawful, arbitrary, mala fide, unconstitutional, ultra vires, the colorful exercise of authority, and against principles of natural justice more particularly the recruitment rules notified by the Ministry of Health vide Notification dated 09.3.1986 as the said post is required to be filled by way of promotion and initial recruitment based on 50% ratio; that the act of respondent No.4 in making appointments in respondent No.3, which shall revert to Federal Government in compliance of the Hon'ble Supreme Court judgment, will adversely affect the promotion prospects of the petitioner, which right cannot be denied arbitrarily and whimsically; that the action of respondent No.4 in floating the impugned advertisement, whereby appointments to the promotion posts will be made by way of initial recruitment, as such the same violates the Recruitment Rules 1986.

2. Respondent No.4 in contra has submitted that respondent No.4 is appointing its faculty to its pay role approved by the competent authority. The petitioner is neither an employee of respondent No.4 nor having eligibility for the post of Assistant Professor as per the requirements of HEC and as such, she has no locus-standi to challenge the said advertisement by filing the present petition; that the petitioner was recruited on contract basis for earthquake affected areas for one year as Medical Officer (BPS-17) on 26.12.2005 by devolved Ministry of Health, Government of Pakistan. She was transferred thereafter from PIMS Islamabad to NICH Karachi on 25.5.2006 before completing her one year as per her contract. Petitioner's contractual services were extended from year to year by the devolved Ministry of Health. Her service was regularized from 29.9.2011 by the Capital Administration & Development Division, Government of Pakistan; however, the petitioner succeeded to have promotion to BPS-18 by the Health Department, Government of Sindh with effect from 22.6.2021. It is asserted that after passing the judgment of the Hon'ble Supreme Court, the petitioner did not object to her promotion to BPS-18 from Provincial Government on 22.6.2021, and apart from this the petitioner has not passed M.Phil. Degree till said advertisement, therefore, petitioner is not eligible for the post of Assistant Professor (Pathology); that respondent No.4 with the approval of competent authority advertised for vacant posts to recover the loss of students and provide

the best possible medical facilities to the people of Pakistan who cannot afford private hospitals.

3. Upon hearing the learned counsel appearing for the parties and in the light of the respective contentions urged, the points that arise for our determination in this case are:

"(1) Whether the petitioner has any locus standi to maintain this constitution petition under Article 199 of the Constitution?

(2) If yes, whether the impugned advertisement dated 07.8.2022 issued by the respondent-University for appointment of Professor, Associate Professor, and Assistant Professor is illegal and unsustainable in law?"

4. The respondent-University invited applications for recruitment on the regular / contract basis for various vacant positions in BS-19, 20, and 21 on the premise that JSMU since the years 2015, 2017, and 2020 announced their own created posts not of NICH as portrayed by the petitioner. Furthermore, there is no violation of recruitment rules as stated by the petitioner that adversely affects her promotion, besides, if there is no appointment made, the public at large will suffer if these appointments are not made in time as there are only a few professors who are conducting OPD to meet the emergency cases, therefore, the recruitment process has been initiated by JSMU on its accord and not for the post of NICH. That the recruitment process needs to be allowed in the best interest of justice.

5. Disputes relating to selection and appointment invariably involve the question as to who can challenge such process, when, and on what ground(s)? Considerable arguments are advanced by the counsel appearing for the parties on the subject questions.

6. The sum and substance of the arguments advanced by learned AAG are that a person who is not aggrieved by the action complained cannot maintain the writ petition. He submits that the Rules as exist at present do not clothe the petitioner with a right to seek promotion to the cadre of Assistant professor and it cannot in any manner affect the rights of the petitioner as she is not entitled to claim any right in the post until and unless she became eligible and qualifies for that subject post. He next submitted that no one can ask for the issuance of the

writ of mandamus without a legal right. He emphasized that the law laid down is to the effect that there must be a judicially enforceable right as well as a legally protected one before a person suffering a legal grievance can ask for a mandamus. He next submitted this Court will in its discretion deny a stranger the extraordinary remedy save in very special circumstances. Learned AAG asserted that in the recruitment process, the petitioner cannot be allowed to seek redressal at any stage, no matter how legitimate the reason could be, because the recruitment process has to be completed well within time and even this Court has no jurisdiction to halt the process as the same has been initiated due to exigency in service. He, therefore, prayed for the dismissal of the instant petition.

7. Mr. Faizan Hussain Memon learned counsel for the petitioner has controverted the arguments of learned AAG with the narration that the petitioner in the present case cannot be said to be a stranger nor can it be said that she is not the aggrieved person as her right to be considered for promotion is a vested right that cannot be denied on the touchstone of the analogy put forward by the respondents, the reason for this is of manifold because she has called in question the recruitment process initiated by the respondent-JSMU on the ground that the aforesaid facts very clearly indicate that the petitioner is the aggrieved person as asserted.

8. It is the well-settled position of law that merely applying for joining the recruitment process in response to an advertisement does not create any vested right to claim the job. Apparently, before finalizing a fit candidate by the competent authority or Selection Board, the testimonials and antecedents of each candidate are required to be considered under the prescribed benchmarks but to maintain a level playing field and evenhanded competition amongst all candidates, the qualification and competency in all fairness have to be considered and adjudged, under the qualification notified through the recruitment rules, to apply through the advertisement, the settled terms and conditions cannot be disregarded.

9. We are of the considered view that the contentions of the petitioner are not appealable because the selection committee as constituted by the respondent-JSMU was only required to make recommendations of eligible candidates for the subject posts to the competent authority for the appointment, however, if the

Committee does not find require a number of eligible candidates, the procedure does not require them to cancel such process or to halt at the wish and will of the proposed candidate who is not eligible for the subject post; and in the present case, petitioner has obtained a restraining order to halt the recruitment process without any cause; even otherwise, this Court cannot sit in judgment over the wisdom of competent authority of the respondent-University and/or the Government of Sindh in the choice of the person to be appointed as long as the person chosen possesses prescribed qualification and is otherwise, eligible for appointment.

10. Since the recruitment process is on the verge of completion as intimated by the respondent-University for the reason that they have called the candidates for interview and the final recommendation is to take effect shortly to the competent authority for the appointment.

11. In the wake of the above discussion, we do not find any justification to interfere in the recruitment process initiated by respondent-JSMU, for the positions of Professor, Associate Professor, and Assistant Professor as no material has been placed on record to take a contrary view; even no malafide on the part of respondent-JSMU has been proven. We accordingly dismiss the present petition with no order as to costs. Pending applications, also stand disposed of. However, the aforesaid appointments shall be subject to the final decision of the Hon'ble Supreme Court in the aforesaid proceedings, and in this regard, the Vice Chancellor of the JSMU has undertaken to take back the decision of appointments if any in JSMU, if the judgment to be passed by the Hon'ble Supreme Court in review petition goes against them.

12. These are the reason for our short order dated 26.01.2023 whereby we dismissed the petition.

**JUDGE**

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