

18

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

O.A.No.2122/95

New Delhi this the 29th day of October, 1996.

HON'BLE SH. JUSTICE CHETTUR SANKARAN NAIR, CHAIRMAN
HON'BLE SH. R.K. AHOOJA, MEMBER(A)

Shri B.S. Agarwal,
Chief Administrative Officer/Construction,
Northern Railway,
Kashmere Gate,
Delhi-110 006.

Applicant

(through Sh. B.S. Mainee, advocate)

versus

Union of India and others through

1. Chairman/Railway Board,
Ministry of Railways,
Rafi Marg,
New Delhi.

2. Cabinet Secretary,
Government of India,
Rashtrapati Bhawan,
New Delhi.

Respondents

(through Sh. K.T.S. Tulsi, Senior Advocate
with Sh. O.P. Kashtriya, advocate)

The application having been heard on 11.10.96 the
Tribunal on delivered the following:

ORDER

Sh. R.K. Ahooja, Member(A)

The applicant is aggrieved by the impugned order (Annexure A-1) whereby a number of officers junior to him on the panel for appointment to the post of General Managers on Indian Railways have been granted such promotion ignoring the seniority of the applicant despite the fact they, as the applicant, had less than two years of service remaining before reaching the age of superannuation.

2. The case of the applicant in brief is that having been appointed to the Indian Railway Service of

ju

17

-2

Engineers(IRSE) on 5.10.1962, he was given regular promotions and was ultimately posted as Chief Administrative Officer/Construction, Northern Railway in the grade of Rs.7300-7600(RPS) in November, 1992. The applicant states that in accordance with the Scheme (Annexure A-3) dated 16.7.1986, he was considered by the Selection Committee for empanellment for the post of General Manager in the year 1994 and he was included in the panel (Annexure A-4) consisting of 32 officers. According to para 7.3 of the Scheme of 1986, only such of the empaneled officers would normally be appointed to posts of General Managers and equivalent as will be able to serve for atleast two years on such or higher post(s). Further there is a provision as per para 8(ii) as well as Explanation(1) thereto that there will be no undue predominance of any of the Railway Services amongst the holders of the posts of General Managers and equivalent and that holding of more than seven posts of General Managers and equivalent by officers belonging to any one Service would ordinarily be construed as undue predominance. The applicant submits that there were 3 vacancies of General Managers at the time when the panel (Annexure A-4) was formed. The name of the applicant being at Serial No.16, he was eligible for promotion since the officer at Serial No.2 had less than two years of service, officers at Serial No.4 to 8 were not eligible due to ceiling on their Service, officer at Serial No.9 was appointed as Financial Commissioner, officer at Serial No.10 was cleared only for the post of Principal, Staff College, officers at Serial No. 11 to 13 had less than two years of service and officer at Serial No.15 was declared fit only for Production

On

Unit/CORE. The applicant alleges that promotion orders were delayed by the respondents and ultimately a proposal for promoting 11 officers as General Manager was put up to the Appointment Committee of the Cabinet (ACC). In that list there were as many as 3 officers who were junior to the applicant in the panel. The applicant submits that he learnt that the only ground on which he had been ignored was that he had less than two years of service left before superannuation. On the other hand, some of the officers who were recommended had also less than two years of service which meant that the requirement of two years remaining service had been relaxed but the same relaxation was not extended to him which was discriminatory. In support of his contention and claim, the applicant cites the case of Sh. D.P.S. Ahuja Vs. Union of India (All India Service Law Journal 1992(1) CAT 51 and OA-184/95 decided by the Bombay Bench of this Tribunal. Since his representations to the Chairman and the Cabinet Secretary have not evoked a favourable response, the applicant now prays for Tribunal's direction to the respondents to promote him as General Manager with effect from the date from which his juniors on the panel have been promoted, with all consequential benefits.

3. The main ground taken by the respondents, in their reply is that the officers recommended for promotion, though they may not have had two years of service left before superannuation on the date of appointment, had nevertheless two years or more left on the date of occurrence of the vacancy for which they were considered which was not the

case with the applicant. The respondents state that as the posts of General manager are not included in any cadre of any service, no service or member thereof has any legal right to claim appointment against these posts. They point out that after the panel is prepared by the Selection Committee, the approval of ACC is required at two stages; first for approval of the select list and secondly for approval of specific postings from the Select List. As per the Scheme for appointment of General Manager, only such of the empanelled officers would normally be appointed as General Manager as will be able to serve atleast for two years in such or higher post. In the present case since finalisation and approval of the panel in the year 1994-1995 was delayed and most of the vacancies had already occurred by then, a decision was taken with the approval of the competent authority that the requisite period of two years for officers who were otherwise eligible, be counted from the date of occurrence of vacancy, falling to their turn. The applicant's case was also considered. The date of occurrence of vacancy falling in his turn was 31.10.95 and being due to superannuate on 31.10.1996, he was not considered eligible since he had less two years of service left to him. The respondents point out that there were two other officers, namely, S/Sh. A.S.P. Sinha and M.P. Kamal Raj who were also found ineligible for appointment on similar grounds which shows that there has been no discrimination against the applicant. The respondents, therefore, deny the allegations of the applicant and would submit that the reliefs asked for are not admissible.

De

4. The pleadings and arguments of the parties before us give rise to two issues which need to be considered. The first is whether the interpretation of para 7.3 of the Scheme A-3 dated 16.7.1996 adopted is correct. The second is whether the applicant has been discriminated in the matter of appointment to the post of General Manager.

5. As regards the question of interpretation, it would be profitable to reproduce para 7.3 of the Scheme:-

"Para 7.3 Only such of the empanelled officers would normally be appointed to posts of General Managers and equivalent as will be able to serve for at least two years on such or higher post(s).

In preparing a panel of names for consideration for appointments to the posts of General Managers and equivalent, the Selection Committee shall as far as may be practicable ensure that-

- (i) Equitable opportunities are available to the members of the various services listed in Appendix II, consistent with the experience and specific requirements of the vacancies in the posts of General Managers and equivalent for which the panel is being made :
- (ii) There is no undue predominance of any of the Railway Services listed in Appendix-II amongst the holders of the posts of General Managers and equivalent; and
- (iii) An officer of the appropriate service with adequate experience in the post of General Manager and equivalent would become available for consideration for appointment against a future vacancy in the corresponding functional post of Member of the Railway Board.

Provided, however, that in making recommendations in accordance with (i), (ii) and (iii) above, the Selection Committee shall, as far as may be practicable, ensure that the difference in batch years between the junior most officers of any two Services included in the panel, is not ordinarily more than two.

Explanation 1: For the purpose of (i) above, holding of more than 6 posts of General Managers and equivalent by officers belonging to any one service would ordinarily be construed as undue predominance.

Explanation 2: Batch for the purpose of this paragraph will mean persons recruited to any particular Service through the same competitive examination.

Explanation 3: The year to which any particular batch of a service belongs (viz. Batch year) will be determined by the earliest date on which any person selected for appointment to the Service through the same competitive examination, joins."

6. Shri Mainee, learned counsel for the applicant submits that the question of interpretation of Para 7.3 had come up before the Principal Bench in D.P.S. Ahuja (supra). The Tribunal had in para-15 of its order in D.P.S. Ahuja observed that they had requested the respondents to clarify if any criteria had been fixed for computing the period of two years left for service, since theoretically it could be either the date of vacancy or the date of sending the proposal for the approval of the A.C.C. or the date of receipt of approval of the A.C.C. or the date of issuing orders of appointment or the date of actually taking over charge of the higher post. However, the Tribunal did not get any clear reply to the clarification sought by it, though the

Senior Counsel for respondents observed that normally it should be the date of appointment. It was further observed " We have already reproduced above the relevant provisions of the scheme in para 7.3, according to which only such of the empanelled officers would normally be appointed as would be able to serve for at least two years on the higher post(s). This provision also shows that the period of two years referred to therein is for service and not for anything else. Service can be deemed to commence only from the date a person takes charge of the post." Since some juniors of the applicant in that case had been given promotion even though they had less than two years to serve on the post of General Manager, the application was allowed and the respondents were directed to consider the applicant for appointment to the post of General Manager and to allow him the Grade from the date his junior in the panel was appointed to such a post.

7. Shri Mainee further submitted that this interpretation, has also been adopted by the Bombay Bench of the Tribunal in O.A.No.184/95 decided on 23.8.1996 and the applicant therein one Sh. M.P. Kamal Raj who also figures at Serial No.13 in the same panel in which the present applicant is at Serial No. 16 was granted the relief on the ground of discrimination since his juniors, similarly placed with less than two years service on the date of appointment, had been given promotion. In short the contention is that para 7.3 of A-3 Scheme has to be read to mean two years service on the date of appointment.

De

and in case the respondents relax this "normal requirement" then all the persons on the panel have to be similarly treated without discrimination.

8. Shri K.T.S. Tulsi, learned Senior Counsel for respondents on the other hand submits that the Allahabad Bench of this Tribunal in OA-1698/95 in its order dt. 29.09.1995 also went into the same question. Para-30 of its judgement is quoted as follows:-

"30. It has been pleaded that according to the applicant since the orders are finally issued in July, 1994, the candidate whose 56th birth date falls in June should be eliminated. It has been pleaded in the counter-affidavit that extending this perverse logic the decision would be that had the orders for appointment been issued four days later all those including the applicant whose 56th birth date falls in July should be eliminated. The word 'normally' used in para 7.3 has not to be interpreted in a pedantic manner but in a pragmatic manner. The requirement of residual service of two years has to be from a firm date such as concurrence (occurrence - sic) of vacancy to which the candidate is pin-pointed and date of submission of proposal and not a flexible date on which the approval is finally received."

9. Shri Tulsi argued that the action taken by the respondents in appointing such officers as General Manager on the basis that they had two years or more residual service available on the date of occurrence of the vacancy has been upheld by the Allahabad Bench of the Tribunal. He further submitted that the Principal Bench in the case of D.P.S. Ahuja and the Bombay Bench in case of M.P. Kamal Raj went into only the question of discrimination and did not decide the question of

on

interpretation of paragraph 7.3. In the present case there is no question of discrimination as no officer had been appointed as General Manager who did not have two years residual service on the date of occurrence of the vacancy for which he was considered. Therefore, the applicant in the present O.A. cannot allege discrimination on the interpretation of the principle enunciated regarding counting of residual service from the date of occurrence of vacancy rather than from the date of appointment. He further submitted that in the face of Allahabad Bench judgement, it was in any case not open to the Bombay Bench to give a different interpretation and if it felt that it did not agree with the opinion of a co-ordinate Bench then the proper course would have been to refer the case to a Full Bench of the Tribunal. In this context, he cited the case of Assistant Collector of Estate Duty, Madras Vs. Devaki Ammal (1995 Suppl.2) SCC 39) in which case the Supreme Court held that when one Division Bench of the High Court holds a provision to be constitutional, another Division Bench of the same High Court cannot declare it as unconstitutional and in case of disagreement, the latter Bench for the said reason can refer to the Chief Justice for constituting a Larger Bench for decision. Similarly in case of Commissioner of Sales Tax, J&K & Ors. versus Pine Chemicals Ltd. & Ors. (1995 (1) SCC 58), the Supreme Court held that the decision of the Bench is to be binding subsequently to a co-ordinate Bench. Shri Tulsi strenuously argued that it is open to the Government to vary its administrative instructions in the larger interest of its employees. Thus a decision was taken to make the occurrence of vacancy the critical point

in time for the purposes of para 7.3. This was for a good and rational reason since otherwise a large number of officers would have been barred from appointment due to delay that could occur in the decision making process. The Allahabad Bench had upheld this decision in respect of an earlier panel. Government had, therefore, gone ahead with this interpretation and it was only right that in case there was a difference of opinion as between two different co-ordinate Benches, the matter should have been settled by obtaining the verdict of the Full Bench. For the same reason he urged that in the present case also, if we should view the action of the respondent with disfavour, the proper course would be to constitute a larger Bench to pronounce on the question of interpretation of para 7.3.

10. We have carefully considered the points raised by Shri Tulsi but are unable to agree with either of his contentions. Firstly we do not find that there is a conflict between the judgements of the Principal Bench and Bombay Bench of this Tribunal on the one hand and that of Allahabad Bench on the other.

11. The issues before the Allahabad Bench and the Bombay Bench were different. The plea raised before the Allahabad Bench in OA-1698/94 was that the orders of appointment of Respondents No.3 & 4 therein should be quashed as on the date of their appointment they had less than two years of service. The Additional Solicitor General on behalf of Respondents No.1 & 2 had submitted that respondents No.3 & 4 had more than two years service left on the dates when the approval to the panel was

De

received and also when the proposal for their appointment to the post of General Manager was processed. The Division Bench observed that the requirement of residual service on two years had to be from a firm date such as occurrence of vacancy to which the candidate is pinpointed and date of submission of proposal and not a flexible date on which the approval is finally received. When the proposal in respect of Respondents No.3 & 4 was sent, they had more than two years residual service. Allahabad Bench thus held that the actual date of approval of appointment need not be the material and the firm date from which the residual service has to be counted. On the other hand, the issue before the Principal Bench and the Bombay Bench was one of discrimination, and it was held that if relaxation had been given in respect of some of the officers of the condition of residual service of two years from the date of appointment, then this relaxation had to be applied uniformly to all other officers also. On that basis, the relief sought for by the applicants in these O.As. had been granted. The orders of the Allahabad Bench and Bombay Bench if read carefully, would show no difference or dichotomy in their approach. What Allahabad Bench laid down was that the applicant's residual service should be from a firm date and what Bombay Bench decided was that once relaxation is granted to the requirement of two years residual service, it should be made equally applicable. The Allahabad judgement does not as Shri Tulsi would have us believe, allow the respondents to interpret Para 7.3 as they will and choose a 'firm' date as they would. Such a date has to be determined and made known. We go so far as to say that it has to have some rational and objective

Dr

relationship with the purpose and content of the provision. If the purpose and objective of para 7.3 is that there should be some continuity at the decision and policy making levels, and being a matter of public interest, this is the public policy, then an interpretation which would patently defeat this public policy would be clearly erroneous and bereft of any rationality. The date of occurrence of a vacancy is a guideline for the Government to ensure that this date should determine all advance planning and action so that selections are made in good time and public purpose is served by ensuring that crucial posts do not remain fallow and unfilled even for a day. The respondents cannot deflect their failure, to do so at the expense of public interest, by filling up posts at a later date by the stratagem of appointing officers who may have even a year's service or less, at the time of appointment. We are in respectful agreement with the Allahabad Bench in O.A. No. 1698/95 that there should be a firm date but would add that the plain language of para 7.3 allows for no other interpretation but that this firm date should be the date of appointment. Any other date would be a relaxation of this Rule and such action would open the case to an allegation of discrimination in terms of D.P.S. Ahuja and M.P. Kamal Raj (supra).

12. The contention of Shri Tulsi before us is that the Government decided, in accordance with the decision of the Allahabad Bench, to have a firm date, namely, the date of occurrence of vacancy and that this principle has been applied equally to all the persons. Initially Shri Tulsi contended that the Tribunal could

come to a conclusion that the firm date namely the date of occurrence of vacancy may not be the correct interpretation of para 7.3 and if it so concludes then keeping in view the Allahabad Bench decision, the matter can be referred to a Larger Bench. However, the ratio of the Bombay Bench could not be applied in the present case since there was no discrimination in respect of the applicant. We find this argument fallacious. As we have concluded, Para 7.3 requires no interpretation since it speaks of the persons to be appointed who 'will be able to serve for atleast two years'. If any other criteria is fixed such as date of occurrence of vacancy or date of making a proposal to the Appointment Committee of the Cabinet then there is a relaxation involved of para 7.3 and in that the question of discrimination becomes relevant. Once the requirement of ability to serve for at least two years is relaxed then the respondents cannot import another criteria such as date of occurrence of vacancy without amending this guideline. Patently the present applicant has not been given benefit of this relaxation since the respondents chose to relax the provisions in a certain manner beneficial to some and detrimental to others.

13. The mischief of the relaxation made by respondents No.1 & 2 can be easily seen. It is claimed that the persons who have been appointed had more than two years residual service left on the date of occurrence of vacancy for which they have been considered. On the other hand it is alleged by the applicant and not denied by the respondents that some of those who have been appointed on the basis of date of occurrence of vacancy

could not have been appointed on that date because of the rule of predominance as the number of officers belonging to their particular service had already then reached the ceiling. It is in fact the efflux of time in their case resulting in the superannuation of some officers of their service which has removed the bar of predominance and made them eligible for appointment. Two things have thus happened in their favour through the action of the respondents; firstly they have been given the benefit of consideration of the date of vacancy which fell to them, and this in itself seems like a lottery and another that from being ineligible they have become eligible in terms of the rule of predominance. Thus if the vacancies had been filled up on the date that these had occurred many of the officers now promoted would not have been eligible. On the other hand the applicant who was earlier eligible has been made ineligible by the efflux of time. Thus the respondents No.1 and 2 have, therefore, not only determined the extent and nature of relaxation in an arbitrary, irrational and whimsical manner but have gone further and applied it in a manner patently to favour some and to discriminate against others.

14. In the light of the above discussions we conclude that the applicant was entitled to the benefit of relaxation of the requirement of para 7.3 regarding residual service since juniors similarly situated had been granted this benefit. He is, therefore, entitled to the relief sought for. We, therefore, allow the application with the direction that the applicant will be deemed to have been appointed as General Manager with

retrospective effect from the date his junior on the panel was appointed and he will be entitled to all the consequential benefits. We observe that the applicant is due to superannuate on 31.10.96 and it may not be possible to actually arrange his posting for the remaining period. Even so the first respondent will ensure that the necessary notification regarding his notional promotion are issued within a period of one month and his retiral benefits are granted on that basis.

15. In the circumstances, there will be no order as to costs.

Dated, 29th October, 1996.

~~R. K. Ahuja~~
(R.K. Ahuja)
Member(A)

~~Chettur Sankaran Nair~~
(Chettur Sankaran Nair(J))
Chairman

/vv/