

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

O.A.1036/90

New Delhi, this the 16th December, 1994

Hon'ble Shri J.P. Sharma, Member (B)

Hon'ble Shri S.R. Adige, Member (A)

Smt. Pushpa Agrawal,
w/o Dr. K.G. Agrawal,
R/o C-30, South Extension Part I,
New Delhi.

... Applicant

By Advocate: Shri G.D. Gupta

Vs.

1. Union Public Service Commission,
through its Chairman,
Dholpur House, Shahjahan Road,
New Delhi.

2. The Secretary,
Union Public Service Commission,
Dholpur House, Shahjahan Road,
New Delhi.

3. The Deputy Secretary (Admn.)
Union Public Service Commission,
Dholpur House, Shahjahan Road,
New Delhi.

... Respondents

By Advocate: Shri Vijay K. Mehta

O R D E R

Hon'ble Shri J.P. Sharma, Member (J)

The applicant has been working as Mechanical Operator in the U.P.S.C. In the year 1976 she was subjected to disciplinary proceedings resulting withholding of next increment. On 30.5.78 she submitted her resignation from service. The next day she moved an application i.e. 31.5.78 withdrawing the letter of her resignation. However, Deputy Secretary accepted the resignation on 31.5.78 itself but the formal order was issued on 1.6.78.

...2.

The applicant therefore filed the writ petition before the High Court which came on transfer to the Principal Bench and registered as T.A.No.507/85. That transferred application was decided by the judgement dated 3.3.86 and the order accepting her resignation issued on 1.6.78 was quashed and direction of reinstatement with all consequential benefits was awarded. The applicant rejoined the service and her services was treated as continuous w.e.f. the date of her initial appointment i.e. 19.3.65 as if no resignation had taken place. When the applicant joined on 3.3.86 the proceedings of the 2 earlier DPCs were reviewed and the applicant was found fit for confirmation on the basis of Review DPC for June, 1979. She was therefore given substantive appointment as Mechanical Operator w.e.f. 1.7.75 by the order dated 12.12.88. Her seniority in the grade of Mechanical Operator was determined as per instructions on the subject and the applicant was placed senior to Kum. Indra Devi vide O.M. dated 5.5.89. The applicant was appointed to officiate as Technical Assistant(Hollerith) vide order dated 10.11.87 and she was accorded seniority in the grade w.e.f. 29.4.83 with effect from the date her junior was made senior as Technical Assistant(Hollerith). She was also given benefit of adhoc appointment to the post of T.A.(Holl) w.e.f. 3.3.86 to 31.7.86 by the order dated 30.6.86 and for the period from 1.8.86 to 30.11.86 vide order dated 14.8.86. Therefore, her provisional seniority was determined above Kum. Indra Devi in T.A.(Holl) w.e.f. 29.4.83.

2. The applicant, however, made a representation in June 1989 against the seniority list of Mechanical Operator(M.O.) issued on 5.5.89. In that representation she has pointed out that she was appointed alongwith Smt. Versha Malhotra, Shri P.S. Jain and Smt. Malti Duggal ~~and~~ ^{there is} a wide gap in her seniority and that of the others named above in the grade of T.A.(Holl). Her position under seniority list is shown at S.No. 48 while that of above named batchmate at S.No.20, 21 and 25 respectively. In this representation she has prayed that she should be confirmed as M.O. w.e.f. the date her above named batch mate were confirmed while she has been given confirmation from 1.7.75. After making the aforesaid representation, she filed this application in May, 1990 and she prayed for the grant of the reliefs quoted below:-

- (a) Allow this Original Application of the applicant with costs;
- (b) Issue appropriate direction or directions order or orders
 - i) quashing the Memo. dated 12.12.88 confirming the applicant as M.O. from 1.7.75 and the Memo. dated 22.8.89 rejecting the objections/ representations of the applicant against the seniority lists of M.Os. and T.As.(Holl);
 - ii) declaring the applicant entitled to be confirmed as M.O. w.e.f. the date from which her immediate junior had been confirmed as M.O. with all consequential benefits, such as seniority, etc. to which she would have been entitled had she not illegally been confirmed with effect from 1.7.75;

as on 1.6.78 the persons appointed substantively, ranked senior to the applicant by virtue of their substantive appointment in the grade of Mechanical Operator on the basis of Review DPC after joining the office w.e.f. 3.3.86. On the basis of DPC of June 1979 where one officer Kum. Indra Devi had been appointed substantively w.e.f. 1.7.75, the applicant has been given substantive capacity as M.D. w.e.f. that date and was ranked senior to Kum. Indra Devi. Thus, the applicant is not entitled to any confirmation or substantive appointment before that date. All benefits have been confirmed on the applicant w.e.f. 1.7.75.

4. The applicant has also filed the rejoinder reiterating the same facts averred in the application. The applicant also has filed M.P. 82/91 where 28 respondents were impleaded as respondents from 4 to 31 but none of them have come to contest this application.

5. We heard the learned counsel for the parties and also perused the records and the personal file of the applicant. It is evident from the file

that proceedings under Rule 16 of the CCS (CCA)

Rules, 1965 was initiated in 1974 for disobedience of orders of her superior officers and having acted in a manner unbecoming of a government servant and she was imposed a penalty of withholding of one increment with cumulative effect. In late 1975, proceedings under Rule 14 were initiated against her. Again in 1976 disciplinary proceedings under Rule 16 were initiated against her and she was warned.

2. The applicant, however, made a representation in June 1989 against the seniority list of Mechanical Operator(M.O.) issued on 5.5.89. In that representation she has pointed out that she was appointed alongwith Smt. Versha Malhotra, Shri P.S. Jain and Smt. Malti Duggel ^{there is} and/ a wide gap in her seniority and that of the others named above in the grade of T.A.(Holl). Her position under seniority list is shown at S.No. 48 while that of above named batchmate at S.No.20, 21 and 25 respectively. In this representation she has prayed that she should be confirmed as M.O. w.e.f. the date her above named batch mate were confirmed while she has been given confirmation from 1.7.75. After making the aforesaid representation, she filed this application in May, 1990 and she prayed for the grant of the reliefs quoted below:-

- (a) Allow this Original Application of the applicant with costs;
- (b) Issue appropriate direction or directions order or orders
 - i) quashing the Memo. dated 12.12.88 confirming the applicant as M.O. from 1.7.75 and the Memo. dated 22.8.89 rejecting the objections/ representations of the applicant against the seniority lists of M.Os. and T.As.(Holl);
 - ii) declaring the applicant entitled to be confirmed as M.O. w.e.f. the date from which her immediate junior had been confirmed as M.O. with all consequential benefits, such as seniority, etc. to which she would have been entitled had she not illegally been confirmed with effect from 1.7.75;

iii) also declaring the applicant entitled to have been promoted to the post of T.A.(Holl) after assigning her due seniority in the post of M.D. w.e.f. the date from which her immediate junior had been promoted as T.A.(Holl) with all consequential benefits, such as, arrears of pay and allowances, seniority, further promotions, if any, to which she would have been entitled had she been treated to have been promoted as T.A.(Holl) from her due date;

(c) Issue such other direction or directions, order or orders as may be deemed fit and proper to meet the ends of justice.

3. The respondents filed the reply and opposed the grant of the reliefs on the ground of delay, laches as well as limitation. It is stated that 31 M.Ds. were confirmed in the grade by the recommendation of the DPC held in 1974 and 1977. When the applicant resigned from service and was relieved on 1.6.78, 2 DPCs were held as stated above for substantive appointment to the grade of M.C. On the basis of the assessment of her record, the applicant was not found fit for substantive appointment in the grade of M.C. by the aforesaid two DPCs. Another DPC was held in December 1977 where two more officers were recommended for substantive appointment but at that time the applicant could not be considered and therefore a Review DPC was held in November 1988 so as to include her in the zone of consideration. But the Review DPC found ^{her} unfit for the substantive appointment. In accordance with O.M. No.9/11/55-RPS dated 22.12.59,

as on 1.6.78 the persons appointed substantively, ranked senior to the applicant by virtue of their substantive appointment in the grade of Mechanical Operator on the basis of Review DPC after joining the office w.e.f. 3.3.86. On the basis of DPC of June 1979 where one officer Kum. Indra Devi had been appointed substantively w.e.f. 1.7.75, the applicant has been given substantive capacity as M.D. w.e.f. that date and was ranked senior to Kum. Indra Devi. Thus, the applicant is not entitled to any confirmation or substantive appointment before that date. All benefits have been confirmed on the applicant w.e.f. 1.7.75.

4. The applicant has also filed the rejoinder reiterating the same facts averred in the application. The applicant also has filed M.P. 82/91 where 28 respondents were impleaded as respondents from 4 to 31 but none of them have come to contest this application.

5. We heard the learned counsel for the parties and also perused the records and the personal file of the applicant. It is evident from the file that proceedings under Rule 16 of the CCS (CCA) Rules, 1965 was initiated in 1974 for disobedience of orders of her superior officers and having acted in a manner unbecoming of a government servant and she was imposed a penalty of withholding of one increment with cumulative effect. In late 1975, proceedings under Rule 14 were initiated against her. Again in 1976 disciplinary proceedings under Rule 16 were initiated against her and she was warned.

...6.

le

In December 1976 again a memo. under Rule 16 was issued and she was imposed a penalty of withholding of one increment for a period of one year. Again in 1978, a disciplinary proceedings were initiated under Rule 16 of the rules and there has been another complaint also against her.

6. Regarding outturn of the applicant as M.O. and her performance she was conveyed adverse remarks for the period ending 31.12.65 that her work and behaviour has not been satisfactory. She was also informed to give a better account of herself and ensure that there is no repetition of such remarks in her confidential reports in future(R-6). She was again conveyed adverse remarks by the memo. dated 3.3.69 for the year ending 31.12.68 that she has to improve her attendance and work. Again by a memo. dated 2.9.76 she was again conveyed adverse remarks for the yearing 1975 that she is extremely indisciplined and insubordinate to all her superiors and is a source of great disturbance to the whole D.P. Branch. Further her performance in punching work is very poor either due to her carelessness or on account of her poor pick-up in punching work procedures and her performance in other allied clerical work has also been very poor. In her punching for N.D.A./December 1975 examination, her punching mistakes have gone upto the extent of 25% resulting into sheer wastage of ICL cards.

She has been judged as undependable and unreliable for any type of work technical and non-technical. In short, it appears that she has been given adverse remarks for the year 1965, 1968 and 1975 and she has also been served with memo. of chargesheets and in some cases punishment have been awarded in the year 1974, 1976 and 1977. On 30.5.78 she tendered her resignation which was accepted on 31.5.78 and conveyed to her on 1.6.78 but as she has withdrawn the resignation on 31.5.78 as a result of decision in T.A.No.507/85 by the order dated 3.6.86. The acceptance of her resignation has been quashed and she has been deemed to be in service. In view of this there is no entry of annual remarks in the annual confidential roll of the applicant for this period as she rejoined the office on 3.3.86. The offer of appointment made to her by the memo. dated 12.3.65^{is} available in the departmental file. She was appointed on probation for a period of 2 years which period may be extended at the discretion of the appointing authority. She accepted the terms of appointment. The appointment was made purely temporary and not to confer any title to permanent employment. This offer of appointment goes to show that though the applicant was placed on probation for a period of 2 years, yet it was a temporary appointment and was not in substantive nature. A temporary appointee acquires quasi permanency after 3 years of service and has to be made a member of the service on the availability of a substantive post. Merely

because she was declared quasi-permanent will not ipso facto make her appointment to substantive post. Though there is nothing on record that the probation period at any time extended yet there is no document available which goes to show that she has successfully completed the period of probation. In such a situation the practice in the department has been of absorbing the temporary employees by making them regular after confirmation. The respondents in their reply clearly stated that two Departmental Promotion Committee one held in 1974 and the other in March 1977 considered the confirmation of the temporary Mechanical Operators and the applicant was found unfit for confirmation by the DPC. Those found fit by the DPC were confirmed in their appointment and has stolen a march over the applicant. In the first DPC of 1974, 13 persons were junior to the applicant and in the DPC held in March, 1977, 8 more persons junior to the applicant were confirmed. The applicant therefore rightly was superceded. It is rule of service jurisprudence that a person who is confirmed in its turn ranks senior to those who are confirmed subsequently. Para 3 and 4 of O.M. of 22.12.59 makes it clear that permanent officers of each grade shall be ranked senior to persons who are officiating in the grade and where persons recruited initially on temporary basis are confirmed subsequently in any order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit. In view of the circumstances, the action of the respondents in not confirming the applicant along with juniors referred to by the applicant in her application cannot be found fault with. Though the confirmation

is most an inglorious uncertainty but a temporary employee unless he is given substantive appointment on the availability of posts cannot without the favourable recommendation of the DPC can be confirmed in service. In fact confirmation may be taken as permanency in service with a lien on a post, for a temporary employee there may be no lien on a post and the moment the appointment is made substantive, under the rules applicable to such appointee, he gets a lien on the post and a consequent berth in the seniority list. The contention of the learned counsel is that confirmation in service is not material for being brought on the seniority list and he has quoted at length the Constitution Bench Judgement of Direct Recruitment Class II Engineers' Association Vs. State of Maharashtra (1990) 2 SCC 715. The Hon'ble Supreme Court considered the Constitution Bench judgement in the case of A.N. Sehgal & ors Vs. Raje Ram Sheoran and others reported in (1933) 24 ATC 559. The Hon'ble Supreme Court held that promotee on officiating vacancy or on ex cadre post not member of the service till appointed substantively to a cadre post, service rendered prior membership to be treated as fortuitous only which could not be counted for seniority. This position holds good even if employee has been allowed to complete probation period during fortuitous promotion. It is therefore held that where statutory rules link seniority with confirmation, seniority cannot be fixed according to length of service. The Hon'ble Supreme Court

was seized of the matter with reference to rule 5(2), 8(11) and 11(4) of the Haryana Service of Engineers, Class I, PWD (R.B. Branch) Rules, 1960. In that a promotee Executive Engineer continuous to retain his lien on a post as Class II officer till he is appointed substantively to Class I service. Though that was a case where interse seniority of Direct Recruit to the service and that of the promotee from Class II officer to Class I was in issue for that ratio equally good in the present case inasmuch as the G.M. 1959 which was the rule extant at that time for determining seniority ^{and} links seniority with confirmation. A contention of the learned counsel for the applicant therefore that her full length of service since 1965 be counted in the grade of M.O. as well as in the further promotional post of T.A. (Holl) cannot be accepted. When a temporary employee has not been made substantive in the appointment because of her unsatisfactory performance on the post such an employee cannot equate with those who have been judged and their performance was commended. There is no discrimination in this regard. The learned counsel for the applicant could not show that how the applicant could have been confirmed with her batch mate of 1965 when since her joining the service she has been given adverse remarks in her ACR for the years 1965, 1968 and 1975 and disciplinary departmental proceedings were also drawn against her in the years 1975, 1976 and 1977.

7. It is established rule that if the service record of particular year is not available of an employee, such employee being out of service for number of years and subsequently by an order of the court such an employee is held to be continuous in service then the future career prospects of such an employee can only be judged on the basis of the remarks the employee has earned for the period when in active service prior to earlier disengagement either by resignation, removal or termination of service. The record of the applicant therefore of the period earlier to 1978 is of such a nature which cannot give her benefit as she has claimed confirmation alongwith her batch mate of 1965.

8. In fact in this application the applicant has not prayed for any revision to her seniority either in the grade of M.O. But she has claimed only the confirmation as M.O. from the date from which her immediate juniors have been confirmed and on the basis of that confirmation she should be given birth in the seniority list alongwith her batch mate. We have already reached the conclusion that the applicant could not have been confirmed alongwith her batchmate and the respondents have rightly considered her confirmed w.e.f. 1.7.75 in the grade of M.O. On the basis of this confirmation, she has been given promotion as Technical Assistant (Holl) and this promotion can also be not antedated as prayed by her with respect to her batchmate who joined alongwith her as M.O. in 1965. There is another reason also that the

applicant cannot be considered for promotion to Technical Assistant (Holl) because of her adverse service record till the date she resigned from the service w.e.f. 31.5.78 though ultimately she has withdrawn the resignation which has been upheld by the Tribunal in its judgement referred to above dated 3.3.86.

9. The contention of the learned counsel for the applicant therefore that the applicant should be granted promotion as M.O. (Holl) on the basis of continuous length of service from the date of her initial appointment cannot be accepted. The applicant was substantively appointed only w.e.f. 1.7.75 and the respondents have considered her further promotion on that basis giving her benefit of next below rule vis-a-vis Kum. Indra Devi who was considered in the DPC of 1979. That was the earliest occasion when the applicant could have been considered for substantive appointment after her resignation was withdrawn by her upheld by the Tribunal, as said above and her ACR were perused by the DPC.

10. The application is therefore totally devoid and of merit is dismissed leaving the parties to bear their own cost.

S.R. Adige
(S.R. ADIGE)
Member (A)

J.P. Sharma
(J.P. SHARMA)
Member (J)