

**Central Administrative Tribunal
Principal Bench, New Delhi**

O.A. No.698 of 2020

Orders reserved on : 13.09.2021

Orders pronounced on : 30.09.2021

(Through Video Conferencing)

**Hon'ble Mr. A.K. Bishnoi, Member (A)
Hon'ble Mr. R.N. Singh, Member (J)**

Dr. Bhagyashree, aged – 28 years
Wife of Shri Gaurav,
Working as Medical Officer (Homeopathic) in ESIC
R/o 36/4, Ground Floor, Patel Nagar West,
Central Delhi, Delhi-11006.

... Applicant

(through Advocate: Shri Yogesh Sharma)

Versus

1. Employee State Insurance Corporation
Through its Director General,
Panchdeep Bhawan, CIG Road,
New Delhi – 110002.
2. The Director Medical,
Directorate Medical Delhi,
ESI Scheme Dispensary Complex,
Tilak Vihar, New Delhi-110018.

... Respondents

(through Advocate: Shri V.K. Singh)

O R D E R

Hon'ble Mr. R.N. Singh, Member (J):

In the present OA filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has challenged the advertisement dated 11.2.2020 (Annexure A/1) to the extent by which the respondents have invited





applications to fill up five posts of Medical Officer (Homeopathy) (hereinafter referred to as 'MO (H)') on contractual basis only to replace the applicant who has been working on one such post on contract basis w.e.f. 29.1.2018 on a fixed consolidated remuneration of Rs.50,000/- per month pursuant to her appointment in view of her selection.

The applicant has prayed for the following reliefs in the present OA:-

“8.

- (i) That the Hon'ble Tribunal may graciously be pleased to pass an order of quashing the order dated 11.2.2020 (Annex.A/1) only in respect of post of Medical Officer (Homeopathic) and consequently, pass an order directing the respondents to allow to work in the department to the post of Medical Officer (Homeopathic) till posts are filled up by regular employees and service of the applicant cannot be replaced by another contract employee.
- (ii) Any other relief which the Hon'ble Tribunal deem fit and proper may also be granted to the applicant along with the costs of litigation.”

“9. Interim relief:

Pending final disposal of the main OA, the Hon'ble Tribunal may graciously be pleased to pass an order of staying the impugned advertisement dt. 11.2.2020 in respect of post of Medical Officer (Homeopathic) and consequently, pass order restraining the respondents to terminate the services of the applicant's w.e.f. 12.3.2020 till the final disposal of the main OA.”



2. When the present OA came up for hearing on admission on 11.3.2020, the following orders were passed by the coordinate Bench:-

“Admit.

Notice.

We permit the selection, in pursuance of the impugned Advertisement dated 11.02.2020, to go on, but direct that the applicant shall not be replaced by another contractual Medical Officer (Homeopathic).

Post on 13.04.2020, along with O.A. No.566/2020.”

3. Pursuant to notice, the respondents have filed their reply and the applicant has filed the rejoinder.

4. It is not in dispute that pursuant to advertisement notice of the respondents in the year 2017, the applicant applied for the post of MO (H) and she participated in the selection process as initiated by the respondents and her name appeared at Serial No.7 with Roll No.H179 of the list of selected candidates of contractual MO (H) dated 1.12.2017 (Annexure M-3). The applicant was initially appointed in the said capacity for one year and the same was extended for another year and thereafter further extended for six weeks from 29.1.2020 to 11.3.2020 vide circular dated 24.1.2020 (Annexure A/3). In the meantime, the respondents have issued impugned advertisement dated 11.2.2020 (Annexure A/1)



inviting applications for filling up 17 posts of Medical Officer (Ayurvedic) and 5 posts of MO (H) on contractual basis with same remuneration of Rs.50,000/- per month. The said five posts of MO (H) are the same posts against one of which the applicant has been working since 24.1.2018 on contract basis. Learned counsel for the applicant has argued that the applicant was appointed against the regular sanctioned post and the posts are still continuing and the same have not been filed up by way of regular appointment and, therefore, the applicant is entitled to continue on such post till such posts are filled up on regular appointments or till work is available.

5. Shri Sharma, learned counsel for the applicant has placed reliance on the Order/Judgment dated 12.8.2016 of coordinate Bench of this Tribunal in OA 2149/2016 (**Ms. Shikha Jain and others vs. Union of India and another**) passed by this Tribunal after considering the Order/Judgement dated 03.11.2014 of the Hon'ble High Court of Delhi in Writ Petition (Civil) No.1741/2014 (**Narinder Singh Ahuja and others vs. The Secretary, Ministry of Health and Family Welfare and others**). Shri Sharma has further argued that in view of settled principles of law that casual employee(s)/contract employee(s)/daily wager(s) cannot be replaced by another casual employee(s)/contract employee(s)/daily wager(s). As no regular appointment(s)



has/have been made by the respondents and the applicant has been working to the entire satisfaction of the respondents since the date of her initial appointment, i.e., w.e.f. 29.1.2018, the impugned advertisement is bad in law. In this regard, he has placed reliance upon the law laid by the Hon'ble Apex Court in the case of **State of Haryana and another vs. Piara Singh and another**, reported in (1992) 4 SCC 118.

6. *Per contra*, with the assistance of the reply affidavit filed on behalf of the respondents, Shri Singh, learned counsel appearing for the respondents, has argued that the applicant was appointed absolutely on contract basis neither on regular/permanent vacancy nor against the regular/permanent vacancy. He has further added that on assessment of requirement of the services of such doctors, the competent authority has decided to reduce the Homeopathic units/seats (from 11 seats to 5 seats) and to increase the Ayurvedic units/seats (from 11 seats to 17 seats) for optimal utilization of the AYUSH services (total AYUSH units remaining the same as 22 earlier) as per Ayush policy framed in this regard and therefore, the impugned advertisement dated 11.2.2020 has been issued by the respondents. He has further argued that there is no vacant post in as much as against the requirement of five Homeopathic Physicians on contract basis under the respondents already six are continuing in view of



the interim order(s) passed by this Tribunal in other cases and also some interim order passed by the Hon'ble High Court. He has also argued that there is no seniority maintained in respect of the contract Homeopathic Physicians. In the facts and circumstances, learned counsel for the respondents has submitted that the applicant grievances are misconceived and the OA deserves to be dismissed by this Tribunal.

7. In rejoinder, the learned counsel for the applicant has submitted that even in absence of any recognized seniority list in respect of Homeopathic Doctors working on contract basis, there is no reason or justification not to consider the continuance of the applicant's services keeping in view her position in the select panel dated 1.7.2017. Shri Sharma has further submitted that though the applicant's name appears at serial No.7, however, her services have not been continued and the services of one of such doctors whose name appears at serial No.11 in the same select panel, below her name, has been continuing. In this regard, learned counsel of the applicant has placed reliance on Office Order No.185 of 2018 (M) dated 09.02.2018. He has further submitted that in view of law settled by the Hon'ble Apex Court in ***Central Welfare Board and others vs. Anjali Bepari and others***, reported in 1996 (5) SLR 195, the respondents are obliged to continue the applicant as MO (H) and if at all an occasion arises for her



disengagement, the same should be by following the law/principle of 'last-come-first-go' basis, i.e., the junior-most incumbent has to go out first. He has also placed reliance upon the judgment of the Hon'ble Apex Court in ***Inder Pal Yadav and others etc. Vs. Union of India and others etc.***, reported in 1985 SCR (3) 837 : 1985 SCC (2) 648.

8. *Per contra*, Shri Singh, learned counsel appearing for the respondents, has placed reliance upon the judgment of the Hon'ble Supreme Court dated 6.12.2007 in Appeal (Civil) No.5732/2007 in the matter of ***Divisional Manager, Aravali Golf vs. Chander Hass & another*** and further on the law laid down by the Hon'ble High Court of Delhi vide Order/Judgment dated 6.3.2017 in Writ Petition (Civil) No.1958/2017 in the matter ***Anil Lamba & others vs. Govt. Of NCT and others***,

9. We have heard the learned counsels for the parties at length. We have also perused the pleadings on record.

10. It is not in dispute that the applicant participated in the selection process for the post of MO (H) under the respondents in the year 2017 and on being selected as such was appointed/posted w.e.f. 29.1.2018. The Memorandum dated 3.1.2018 (Annexure A/2) qua the offer of appointment provided various conditions, including that the appointee will not be granted claim or right for regular appointment in



ESIC. The condition No.3 of the said Memorandum dated 3.1.2018 reads as under:-

“3. The appointment is purely on contract basis for a period of one year extendable for further one year on the basis of monthly performance report or till the regular incumbent joins whichever is earlier. The appointment can be terminated on the receipt of unsatisfactory report given by the Controlling Authority and approved by Competent Authority.”

It is also on record that the respondents were still having the requirement of engaging five MO (H) on contract basis while issuing the impugned Advertisement. They have been continuing six MO (H) on contract basis on the date when the matter was heard and reserved for orders. Of course, the learned counsel for the respondents has argued that though the requirement has been only for five persons, however, they are continuing six persons keeping in view the interim order(s) of this Tribunal as well as of the Hon'ble High Court. The list of selected candidates dated 1.12.2017 (Annexure M-3) referred to hereinabove reflects the name of the applicant at serial No.7 and her name is reflected at serial No.3 of the Office Order No.185 of 2018 (M) dated 09.02.2018, referred to and brought on record by the learned counsel for the respondents.

11. In para 3 of ***Anjali Bepari*** case (supra), the Hon'ble Supreme Court has held as under:-



“3. Calling this order in question, this SLP has been filed. It is not in dispute that the project is being wound up in a phased manner and the services of the employees are being dispensed accordingly. It is stated by the learned counsel for the petitioners that no junior to the respondent was allowed to continue in the said project. It is stated that there are other projects being operated similarly, but the persons engaged therein also are continuing on temporary basis and are senior to the respondent. Therefore, she cannot be regularised in any other scheme. In view of the above stand, we direct the petitioners to continue the respondent in any other temporary scheme but keeping in mind the overall seniority of all the persons; the dispensing with the services should be on last-come-first-go basis, i.e., the juniormost incumbent has to go out first. As and when vacancies would arise, such persons whose services have been dispensed with will be taken back without following the practice of requisitioning the names of candidates from the employment exchange. They would be regularised only when regular posts are available and in accordance with the order of seniority.”

In ***Inder Pal Yadav*** case (supra), the Hon’ble Apex Court has ruled as under:-

“To avoid violation of [Art. 14](#), the scientific and equitable way if implementing the scheme is for the Railway administration to prepare, a list of project casual labour with reference to each division of each railway and then start absorbing those with the longest service. If in the process any adjustments are necessary, the same must be done. In giving this direction, we are considerably influenced by the statutory recognition of a principle well known in industrial jurisprudence that the men with longest service shall have priority over those who have joined later on. In other words, the principle of last come first go or to reverse it first come last go as enunciated in Sec. 25G of the Industrial Disputes Act, 1947 has been accepted. We direct accordingly.”



In the case of **Ms. Shikha Jain** (supra), the coordinate Bench of this Tribunal has considered the Order/Judgment dated 3.11.2014 in **Narinder Singh Ahuja** (supra) of the Hon'ble High Court of Delhi, paras 6 to 12 thereof read as under:-

“6. The applicants in the present OA prayed for continuation of their contracts, and also for directions for regularization of their services against regular posts. The learned counsel for the applicants in support of his contention that the applicants' services cannot be replaced by another set of contractual employees, even in the guise of out-sourcing, placed reliance on a decision of the Hon'ble High Court of Delhi in WP(C) No.1741/2014 dated 03.11.2014 (Annexure A4). The relevant paragraphs of the said decision, read as under:

“15. In the opinion of this Court, since the respondents nowhere dispute that there is need for the performance of the work that the petitioners were discharging all along and there is also no dispute that the project and funding (for the project) would continue till 2017, the decision to discontinue the petitioners' engagement is based only on the policy to outsource the contractual employment to a third party. The petitioners are not insisting on regularization, given the nature of the employment or engagement, which is project based. However apart from the decision to “outsource” engagement of contract employment to a third agency, there is no rationale to discontinue the petitioners' contracts. The justification that the employees engaged through the contractor are paid lower wages is arbitrary, because the “outsourced” or outsourcing agency would have to be paid its service charges. The lower wages paid, therefore, is, in effect, because of the charges/fees paid to the contractor/outsourced agency. The facts



of this case clearly reveal that even though the work is to be performed by contractual employees, the reason for discontinuance of the petitioners' employment is not their replacement with regular appointees, but instead, with another set of contractual employees. The state/respondents cannot, in the circumstances of this case, say that discontinuance of such employment cannot be gone into by the Court because the petitioners were aware that their contracts ended.

16. For the above reasons, this court is of opinion that the CAT erred in law, in holding that the petitioners could not complain against the discontinuance of their contractual employment. Accordingly, a direction is issued to the respondents to continue the petitioners in contractual employment on annual renewal basis, till the currency of the RNTCP scheme/project in 2017. An appropriate consequential order shall be issued by the respondents within eight weeks from today.

17. The impugned order of the CAT is accordingly set aside; the writ petition is allowed in terms of the above directions.”

7. The learned counsel for the respondents submits that the applicants are supported by the bilateral/multilateral agencies and have completed more than three years of service with NACO on contractual basis and in view of the instructions of the Government dated 29.12.2015 and the minutes of the meeting of the Screening Committee of Secretaries, to disengage the services of the Consultants engaged from bilateral partners and multilateral organizations, who have completed three years in the Ministry and since the applicants had completed more than three years in NACO, their contract was extended only upto 30.06.2016. It is further submitted that NACO is in the process of hiring the support staff through the Domestic Budgetary Support through an outsourced agency.



8. The learned counsel for the respondents, in support of their claim, relied upon by the Hon'ble Apex Court's Judgement in **B.C.Mylarappa Alias Dr. Chikkamylarappa v. Dr. Venktasubbaiah and Others**, (2008) 14 SCC 306.

9. Admittedly, it is not the case of the respondents that there is no work available after 30.06.2016. On the other hand, it is specifically stated that they will hire the support staff through an outsourced agency. That means that the respondents are intending to replace the applicants, who are working on contract basis, for the last few years, with another set of contract employees, may be, through outsourced agencies. The said action of replacing one set of contract employees with another set of contract employees is clearly against to the settled principles of law. Even the aforesaid decision of the Hon'ble High Court is to the same effect.

10. However, in so far as the prayer for direction for framing of a Scheme and for regularization of the services of the applicants against the existing vacancies, if any, is concerned, this Tribunal cannot issue any directions in view of the constitution bench decision of the Hon'ble Apex Court in **Secretary, State of Karnataka & Others v. Uma Devi** (3) & Others, (2006) 4 SCC 1.

11. In **B.C.Mylarappa Alias Dr. Chikkamylarappa v. Dr. Venktasubbaiah and Others**, (2008) 14 SCC 306, on which the learned counsel for the respondents placed reliance, the facts are different and hence, will have no application to the present case.

12. In the circumstances and for the aforesaid reasons the OA is partly allowed and accordingly, the respondents are directed to continue the applicants on the same terms and conditions as long as there is work or till the vacancies are filled up on regular basis. No order as to costs.”

12. From the Orders/Judgments referred to and relied upon by the learned counsel for the applicant precisely noted



hereinabove, it is evident that in the matter of casual/contractual/daily wage employees, such employees are required to be continued till the posts against which they have been engaged are filled up by way of regular selection and till the such work against which they have been engaged exists. They are further not required to be replaced by another set of casual/contractual/daily wage employees and if at all because of requirement of such employees is found reduced, the principle of 'last-come-first-go', i.e., junior-most incumbent has to go first, is to be resorted to. Of course, the employer is within its jurisdiction to see the suitability as well. In the present case, the documents referred to by the applicant and/or by the respondents clearly indicate that the applicant has been at serial no.7 in the select panel of the offer of appointment to the post of MO (H). There is not any dispute that junior of the applicant in such select panel has been continuing. It is also not the case of the respondents that during her such employment, the applicant has become unsuitable for the post in question.

13. We have also perused the judgments referred to by the learned counsel for the respondents. Paras 13 to 16 of the judgment of the Hon'ble Supreme Court in the case of ***Divisional Manager, Aravali Golf*** (supra) read as under:-



“13. Learned counsel for the appellants submitted that there is no post of tractor driver, and therefore, there is no question of regularizing the respondents in the said post. It is not disputed that there is no sanctioned post of tractor driver in the appellant’s establishment. Learned counsel for the respondents has also not been able to show that there are any sanctioned posts of tractor driver.

14. Since there is no sanctioned post of tractor driver against which the respondents could be regularized as tractor driver, the direction of the First Appellate Court and the learned Single Judge to create the post of tractor driver and regularizing the services of the respondents against the said newly created posts was in our opinion completely beyond their jurisdiction.

15. The Court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the Court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organization. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the Courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and First Appellate Court to create the posts of tractor driver and regularize the services of the respondents against the said posts cannot be sustained and are hereby set aside.

16. Consequently, this appeal is allowed and the judgment and order of the High Court as well as that of the First Appellate Court are set aside and the judgment of the Trial Court is upheld. The suit is dismissed. No costs.”

The aforesaid clearly indicates that the issue before their Lordships of the Hon’ble Supreme Court was entirely different, i.e., prayer for regularisation that too in absence of post and whether the Court can direct for creation of post or not. In this



background, we are of the considered view that the reliance of the respondents on the above judgment of the Hon'ble Apex Court is of no help to them. So far as the judgment of the Hon'ble High Court of Delhi in the case of **Anil Lamba** (supra) is concerned, we may refer to para 8 thereof which reads as under:-

“8. A reference to para 22 above in the case of National Fertilizers Ltd. (supra) makes it abundantly clear that the advertisement which should be issued for inviting applications from eligible candidates has to be a proper advertisement and an advertisement in the prescribed manner. In my opinion, appropriate advertisement or advertisement in the prescribed manner necessarily means that advertisement issued for seeking appointment is advertisement for employment in permanent tenure and not an advertisement which seeks appointments to temporary posts or for temporary period in permanent posts or appointments are to be only contractual appointments. Para 22 above in the case of National Fertilizers Ltd. (supra) specifically notes that regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner, and prescribed manner necessarily has to mean that the posts have to be advertised as permanent tenure posts for being filled up, inasmuch as, otherwise multitude of people who would otherwise be eligible to apply, may prefer to skip the employment process thinking that it is only for a temporary period or a contractual period since posts are not for permanent employment. Para 22 above in the case of National Fertilizers Ltd. (supra) makes it clear that appointments made without issuing requisite advertisement would violate the guarantee under Articles 14 and 16 of the Constitution of India.”

Here in this case as well, the Hon'ble High Court of Delhi has placed reliance on the law laid down by the Hon'ble Apex



Court in **Piara Singh** (supra) and the Hon'ble High Court granted the relief to the petitioner therein that the petitioner cannot be replaced by similarly situated employees except of course that in case there are legally valid reasons for not continuing the petitioners in their contractual services such as misconduct or other valid reasons as per law.

14. It is pertinent to record that while passing the interim order dated 11.3.2020, this Tribunal has permitted the selection, in pursuance of the impugned Advertisement dated 11.02.2020 to go on, but has directed that the respondents not to replace the applicant by another contractual MO (H). Meaning thereby that in view of law laid down by the Hon'ble Apex Court as well as by the Hon'ble High Court of Delhi, precisely noted hereinabove, the respondents are not entitled to replace the applicant by another contractual MO (H) and/or to disengage in preference to anyone who has been junior in the select panel in the seniority list and/or in the select panel prepared by the respondents.

15. We may record that no other issue has been raised and/or ground has been urged by the learned counsels for the parties.

16. In the aforesaid facts and discussions, the present OA is allowed with direction to the respondents not to replace the applicant by another contractual MO (H) being junior in view



of the select list prepared so by the respondents or by a junior in the select panel prepared by the respondents. The respondents are further directed to accord all the benefits to the present applicant as well as accorded to any of her junior in terms of the select list prepared by them and referred to by us hereinabove, except the back wages. The respondents are also directed to pass an appropriate order in this regard as expeditiously as possible and in any case within a period of four weeks of receipt of a copy of this Order.

17. The present OA is allowed in above terms. There shall be no order as to costs.

(R.N. Singh)
Member (A)

(A.K. Bishnoi)
Member (J)

/ravi/