

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 75/92
~~XXXXXX~~

199

DATE OF DECISION 24-8-92

Mr. E.J.Edwin Applicant (s)

Mr.K.S.Madhusoodanan Advocate for the Applicant (s)

Versus

Assistant Superintendent of Respondent (s)
Post Office, Cochin Sub-Division,
Edappilly, Cochin & 3 others.

Mrs.K.B.Subhagamani (R. 1-2) Advocate for the Respondent (s)

CORAM : Mr.D.Sreekumar (R.3)
Mr. Sajan Mannali (R.4)

The Hon'ble Mr. P.S.Habeeb Mohamed, Administrative Member

The Hon'ble Mr. N. Dharmadan, Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement? Yes
4. To be circulated to all Benches of the Tribunal? No

JUDGEMENT

MR.N. DHARMADAN, JUDICIAL MEMBER

Applicant, who commenced work as a substitute E.D. Packer under the 2nd respondent, Sub-Post Master, in the Sub-Post Office, Veli, Cochin, from 1980 and continued for a short period on a provisional basis, is aggrieved by the refusal of the department to regularise him in service and the selection of a regular E.D. Agent through Employment Exchange.

2. Applicant initially entered service under the 2nd respondent as a substitute E.D.Packer w.e.f. 9.6.1980 as per Annexure-A2. He had worked for various spells of short period from 1980 till date as shown in Annexure-A7. One Smt. Pauly selected as E.D. Packer on compassionate ground on the death of her husband, Shri Xavier, was promoted in Group D post as per Annexure-A3

2/-

dated 8.6.1991 and the applicant is now working in that vacant post. On 25.3.1991 the applicant submitted a request before the 1st respondent to regularise him in service taking into account his prior service. But by Annexure-A5 the request was rejected on 18.6.1991 on the ground that there is no vacancy of E.D.Packer at Veli Post Office. Later the 1st respondent sent a requisition to the 3rd respondent to send names for filling up of the vacancy of E.D.Packer regularly. Accordingly Annexure-A6 notification, which was published in Mathrubhumi daily dated 2.1.1992, was issued intimating the 'job vacancy' with the following terms and conditions:-

"KOCHI - To consider for the post of E.D.Packer liable to be regularised on a monthly pay of Rs.350/- in Veli - Kochi-1 Branch Post Office under the Asst. Superintendent of Post Office in Kochi Sub-Division, those candidates who are permanently residing within the delivery limit of Veli, Kochi-1 Post Office and passed IVth Standard having the age between 18 - 65 with the knowledge of cycling and who have registered before 5th December, 1977 and renewed upto date are requested to appear within 7th January at Ernakulam Divisional Employment Exchange with all original certificates and Registration Card."

3. The applicant is challenging Annexure-A5 and A6 in this application filed under Section 19 of the Administrative Tribunals Act, 1985. The main grounds urged by the learned counsel, Shri K.S.Madhusoodanan, are

- i) Non-regularisation of the applicant as E.D. packer counting his long service for more than a decade in the same post office, is illegal.
- ii) Refusal of the 3rd respondent to sponsor his name to the first respondent for consideration due to the 'cut off' date fixed in Annexure-A6 is arbitrary and illegal.

4. Separate replies had been filed by respondents 1 & 2, the 3rd respondent and 4th respondent. The department admits applicant's prior service from 1980, but it is stated that he is working as substitute. Hence his claim for regularisation as E.D.Packer is denied. However, from the statements in the reply and the facts submitted before us it is clear that "the applicant had worked as E.D.Packer, Veli, Cochin from 9.6.80 to 9.3.81 on provisional basis vide Memo No.EDP/SO/24 issued by the ASP, Cochin Sub-Division." It is further admitted that Smt. S. Pauly who was the incumbent of the post of E.D. Packer, Veli-Cochin was selected as Group-D w.e.f. 20.5.91 and that the applicant is continuing in that post. when it became vacant due to absorption of Smt. Pauly in the Group-D post in December 1991. So, admittedly the applicant has short spells for provisional service in the post office. He has no continuous service from 1980 on provisional basis till date as claimed by him for getting regularisation even if there is provision for regularisation of E.D. Agent in the post in which the employees are working for long periods.

5. An E.D. Agent working in a post on provisional basis cannot claim regularisation as of right. There is no specific provision for regularisation of such an E.D. Agent having prior service, in the Service Rules for Extra Departmental Staff (Posts & Telegraphs Extra-Departmental Agents (Conduct and Service) Rules, 1964. When a regular vacancy of E.D. Post arises the authorities can fill up the same by making regular selection following the "Method of Recruitment" under executive orders as given in Swamy's Compilation of Service Rules for E.D.Staff, 4th Ed. Page 57.

But under the D.G. (P&T) letter No.43.4/77-Pen dated 18.5.79 a provisional appointment of E.D.Agent can also be made for short periods in the exigency of service, but it should be avoided as far as possible. The letter reads as follows:-

" It has come to the notice of this office that provisional appointments made to ED posts are being allowed to continue for indefinite periods and when regular appointments are made, the provisionally appointed persons do not readily hand over the charge. The following instructions are issued in this regard:-

- (i) As far as possible, provisional appointments should be avoided. Provisional appointments should not be made to fill the vacancies caused by the retirement of ED Agents. In such cases, the Appointing Authority should take action well in time before the retirement of the incumbent ED Agent, to select a suitable successor.
- (ii) Wherever possible, provisional appointments should be made only for specific periods. The appointed person should be given to understand that the appointment will be terminated on expiry of the specified period and that he will have no claim for regular appointment. Where a new post office is opened or where a new post is created or where an ED Agent dies while in service or resigns from his post and it is not possible to make regular appointment immediately, a provisional appointment should be made for a specific period. The offer for appointment should be in the form annexed (Annexure-A).
- (iii) Where an ED Agent is put off duty pending departmental or judicial proceedings against him and it is not possible to ascertain the period by which the departmental/judicial proceedings are likely to be finalised, a provisional appointment may be made, in the form annexed (Annexure-B). It should be made clear to the provisionally appointed person that if ever it is decided to reinstate the previous incumbent the provisional appointment will be terminated and that he shall have no claim to any appointment.

Even in cases where an appointment is made to fill the vacancy caused by the dismissal/removal of an ED Agent and the dismissed/removed employee has not exhausted all channels of appeal, the appointment should only be provisional. The offer for appointment should be in the form annexed.

2. Efforts should be made to give alternative employment to ED Agents who are appointed provisionally and subsequently discharged from service due to administrative reasons, if at the time of discharge they had put in not less than three years' service. In such cases their names should be included in the waiting list of ED Agents discharged from service, prescribed in DG P&T letter No.43-4/77-Pen dated 23.2.1979.

3. These instructions may be brought to the notice of all Appointing Authorities."

6. Normally regularisation in public services is to be made in accordance with the Rules and not through mere executive orders. A temporary or provisional employee's right for regularisation is very much limited. In fact the Supreme Court in State of U.P. and others vs. Kaushal Kishore Shukla, J.T. 1991 (1) SCC 108 held that a temporary Government servant has no right to continue and his service can be terminated in accordance with the provisions of rules or by way of punishment. But the Tribunals or Courts, having regard to the fact that the services of such temporary employees were utilised for a long period and that there are sanctioned post for accommodating them in service in regular manner, would direct regularisation of them in the interest of justice by framing certain schemes or other accepted formula or methods as has been done by the Supreme Court in Inderpal Yadav's case, 1985 (2) SCC 648. In Surinder Singh vs. Engineer-in-Chief, AIR 1986 SC 584, A.K.Jain vs. Union of India, 1987 Supply. SCC 497, Randhir Singh & Ors. vs. Board of School Education, Haryana & Ors., 1989 (2) Supply. SCC 301, Bhagwati Prasad vs. Delhi State Mineral Development Corporation, AIR 1990 SC 371, V.L. Chandra vs. All India Institute of Medical Sciences, 1990(3) SCC 39 and Jacob M. Puthenparambil vs. Kerala State Water Authority's case 1991 (1) SCC 31, the Supreme Court considered the right of casual and temporary employees for

regularisation held that they are entitled for regularisation in service if they satisfy the conditions for the same.

7. Recently the Supreme Court took a slightly different view in the matter of regularisation of the casual employees who used to come in the service otherwise than through Employment Exchange by some back door means and gain experience and prior service in Delhi Development Horticultural Employees Union vs. Delhi Administration, J.T. 1992 (1) SC 394. The Court held that by granting regularisation to such casual and provisional employees, who were not regularly selected through the proper channel of employment exchange, would cause injustice to those who register their names in the Employment Exchange and wait in the queue for long period for appointment. In other words, while denying employment to those persons, others who come to service due to fortuitous circumstances or favoured treatment may get both earlier employment and regularisation perpetually delaying or permanently debarring the chances of many candidates waiting before the Employment Exchange for job for years together after their registration. This Tribunal considered the issue in the light of the Supreme Court decision in K. Yesodharan vs. The Sub-Divisional Officer, Phones, Alapuzha & Others, O.A. 713/91 and held as follows:-

"..... we are of the view that (1) a casual mazdoor who was engaged either before or after 31.3.85 but absented from work for a period of more than six months at a stretch without any reasonable explanation for condoning the delay on the two grounds mentioned in Annexures VI and VII, is not entitled to be considered for re-engagement and regularisation, (ii) a casual mazdoor is eligible for casual mazdoor card only if he satisfies the three conditions prescribed in Annexure-V order dated 25.1.89 viz: (1) he was employed prior to 31.3.1985, (b) his name was

in the Muster Rolls, and (c) his absence for any spell does not exceed six months; (iii) an approved casual mazdoor whose name was already registered in the Employment Exchange, if satisfies the condition No.(1) above, on re-engagement would get preference over unapproved casual mazdoors, and his juniors and freshers, (iv) an unapproved casual mazdoor who satisfies condition No.(a) and (b) above would be eligible to be included in the list of such persons to be maintained by the department for their future re-engagement in their turn and regularisation as group-D employee provided they are registered with the Employment Exchange as indicated by the Supreme Court in the Delhi Development Horticulture Employees' case, it being understood that all approved mazdoors are above him."

8. In the instant case the applicant, though worked from 1980 as ED Packer, Annexure-A7 only shows that he was working as a substitute and nominee of regular incumbents during leave vacancies. His provisional service is confined to very short spell from 9.6.80 to 9.3.81 and from December 1991 when Smt. Pauly became a Group-D employee. From 17.1.92 the applicant is continuing in service on the basis of interim order. However, the applicant had registered his name in the office of the 3rd respondent on 4.8.78 and his registration number is 10309/78. Under these circumstances and facts though the applicant is not entitled to be regularised in service as ED Packer, his claim for consideration in the regular selection by the first respondent along with others deserves consideration. Hence the first contention that non-regularisation of the applicant by the 1st respondent is illegal fails and we reject the same.

9. Regarding the next submission, admittedly applicant's name was not sponsored by the 3rd respondent for consideration. The notification, Annexure-A6, fixed the 'cut-off' date as 5th December 1977. Only persons registered upto this date would be sent for consideration for regular selection by the 1st respondent. According to the applicant this is illegal. It would deprive the chance of the applicant to compete with others in the regular selection. It offends

his fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India.

10. The third respondent in the reply stated that in Annexure-A6 it was declared that the names of candidates who registered their names prior to 5.12.1977 alone would be forwarded to the 1st respondent. A fixing of the 'cut-off' date became necessary because of the large number of "registrants" ^{are} in the live register of Employment Exchange and the Government order.G.O.(Rt)1347/76/LBR dated 15.10.76 stipulates that names of nine candidates should be sponsored for one vacancy. Hence Shri Sreekumar, learned counsel for respondent No.3, submitted that the fixation of the cut-off date is legal and valid and that the application is to be rejected.

11. Learned counsel, Shri Sajan Mannali, appearing on behalf of the 4th respondent submitted that his client had registered in the Employment Exchange in the year 1971 and so far she did not get any employment through the Employment Exchange. But 4th respondent has no case that she is unemployed from 1971 and that she did not get any other job otherwise than through Employment Exchange. However, she also submitted that the application should be dismissed.

12. The applicant's rights to consider for the regular selection is protected by the repeated decisions of this Tribunal. Consistently we are taking the view that an ED Agent, who has some prior service as a provisional employee in the post for which regular selection is being made, is eligible to be considered in the regular selection notwithstanding the non-sponsoring of his name by the Employment Exchange. On this issue when a difference of opinion arose, the matter came up before the Full Bench

and in G.S.Parvathy vs. Sub-Divisional Inspector (Postal), Guruvayur Sub-Division, Guruvayur, O.A. 29/90. Full Bench categorically held that a working ED Agent is eligible to be considered in the regular selection and he/she is also entitled for some weightage for the prior service. The applicant in this case comes squarely within the dictum laid down by the Full Bench of this Tribunal and his limited relief of considering in the regular selection cannot be denied by the respondents 1 to 3.

13. Learned counsels M/s. Sajan Mannali and Sreekumar in one voice oppose the applicant's right for consideration in the regular selection relying on the 'cut-off' date stated in Annexure-A6. They argued that the 'cut-off' date was fixed in terms of the Government order for fixing nine candidates for one vacant post and it is reasonable. The 4th respondent who was waiting from 1971 after registration would be denied employment if the applicant, who gained entry and experience in the job through back door method, is allowed to participate in the selection overlooking the 'cut-off' date stated in Annexure-A6.

14. Argument is attractive. But the fundamental principle is that 'cut-off' date fixed by an administrative authority for a selection proceeds should not arbitrarily cut at the root of the fundamental right of a candidate for a mere consideration of his merits in the regular selection. In a country where lakhs and lakhs of people are unemployed and clamoring for job, a denial of mere consideration for a job would amount to violation of his guaranteed fundamental rights under Articles 14 & 16 of the Constitution of India. The Supreme Court in Nakaras case, AIR 1983 SC 130 observed as follows:-

"34. To some extent this approach will find support in the judgment in *Minerva Mills Ltd. v. Union of India*, (1981) 1 SCR 206 : (AIR 1980 SC 1789) speaking for the majority, Chandrachud, C.J. observed as under:

'This is not mere semantic. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice - social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved.'

At a later stage it was observed that the fundamental rights are not an end in themselves but are the means to an end, the end is specified in Part IV. Bhagwati, J. in his minority judgment after extracting a portion of the speech of the then Prime Minister Jawahar Lal Nehru, while participating in a discussion on the Constitution (First Amendment) Bill, observed that the Directive principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and every-one, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the fundamental rights. It, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other."

15. In that case after a careful consideration of all aspects the Court held that fixing a 'cut-off' date in an arbitrary manner and thereby dividing pensioners "vertically dividing the pensioners between those who retired prior to the specified date and those who retire subsequent. that date" is arbitrary. The Court observed "we find no justification for arbitrarily selecting the criteria for eligibility for the benefits of the scheme dividing the pensioners all of whom would be retirees but falling on one or the other side of the specified date." The equal treatment guaranteed to the citizens under the provisions

of Articles 14 & 16 for selection would be wholly violated if any classification based on such fixation of date is effected. It would be unprincipled and arbitrary. Justice Chinnappa Reddy in Prabhakara Rao vs. State of A.P., AIR 1986 SC 210 followed Nakara's case and held "If the choice of the date is made, burdensome to some of those, the wrong done to whom is sought to be rectified by law, it would certainly be open to the court to examine the choice of the date to find out whether it has resulted any discrimination." In another case, R.L. Marwaha vs. Union of India, 1987(4) SCC 31, the Supreme Court reiterated that in fixing a date for grant of benefit the authority should be careful and satisfied that it has nexus with the object sought to be achieved in this behalf.

16. The Supreme Court in Sushama Sharma vs. State of Rajasthan, AIR 1985 SC 1367 considering the fixation and choice of date 25.6.75 under Section 3 of the Rajasthan University Teachers and Officers (Supp. Conditions of Service) Act 1974 held that the particular date was chosen "because of emergency, reliance was placed on certain communications from the Vice-Chancellor". The Court also justified the fixation on the ground that the primary object of fixation was to provide for absorption and regularisation of temporary lecturers of long standing in the University of Rajasthan. The objective was to fix some tenure to make temporary teachers eligible for screening and absorption. This did not arbitrarily eliminate persons who sought new employment under these circumstances. On the facts this case is distinguishable and it would not help the respondents.

17. Recently the Supreme Court in two of the cases viz. State of Bihar vs. Ramjee Prasad, AIR 1990 SC 1300 and Krishena Kumar vs. Union of India, AIR 1990 SC 1782 dealt with the same issue. In the former case a Division Bench consisting of two judges held:-

".... On a perusal of advertisements issued from 1974 to 1980 it becomes obvious that normally the cut-off date was fixed one or one and a half months after the date of advertisement. It was, therefore, not the uniform practice of the State Government to fix the cut-off date for eligibility purposes as 30th of June of the relevant year as was assumed by the High Court. Once it was found that the High Court was based its decision on an erroneous assumption of fact the decision could not be allowed to stand."

On this basis considering the facts and circumstances of that case the Supreme Court reversed the decision of the Patna High Court because there is a deviation from the usual practice. The Court on the other hand was not considering squarely the main point of power and jurisdiction of the administrative authority in fixing a 'cut-off' date in connection with the employment opportunity as an object to be achieved as is being considered in the instant case.

18. In Krishena Kumar's case a constitution bench of the Supreme Court was considering the question of exercise of option given to the P.F. by the employees with reference to the 'cut-off' date and after distinguishing Nakara's case held as follows:-

"31. The next argument of the petitioners is that the option given to the P.F. employees to switch over to the pension scheme with effect from a specified cut-off date is bad as violative of Art. 14 of the Constitution for the same reasons

for which in Nakara the notification were read down. We have extracted the 12th option letter. This argument is fallacious in view of the fact that while in case of pension retirees who are alive the Government has a continuing obligation and if one is affected by dearness the others may also be similarly affected. In case of P.F. retirees each one's rights having finally crystallised on the date of retirement and receipt of P.F. benefits and there being no continuing obligation thereafter they could not be treated at par with the living pensioners. How the corpus after retirement of a P.F. retiree was affected or benefitted by prices and interest rise was not kept any track of by the Railways. It appears in each of the cases of option the specified date bore a definite nexus to the objects sought to be achieved by giving of the option. Option once exercised was told to have been final. Options were exercisable vice versa. It is clarified by Mr. Kapil Sibal that the specified date has been fixed in relation to the reason for giving the option and only the employees who retired after the specified date and before and after the date of notification were made eligible. This submission appears to have been substantiated by what has been stated by the successive Pay Commission. It would also appear that corresponding concomitant benefits were also granted to the Provident Fund holders. There was, therefore, no discrimination and the question of striking down or reading down Cl.3.1 of the 12th option does not arise."

19. The constitution bench in Krishena Kumar's case on the facts came to the conclusion that there is no discrimination on account of the 'cut-off' date and dismissed the petitions and special leave. Hence this case also does not held the respondents to support their proposition that the fixation of 'cut-off' date in Annexure-A6 is legal and reasonable to be sustained. This Tribunal, in more than one case, has been taking the view that fixing a 'cut-off' date without any uniform formula or principle having^{the} effect of prejudicially affecting the rights of persons working in the Post Office should be discouraged, see judgments in O.A.K.394/88 and O.A.478/91.

20. In the instant case the applicant as also the 4th respondent have registered in the Employment Exchange and both are aspirants for the regular post of ED Packer,

but the name of the applicant was not included in the list of candidates sponsored by the 3rd respondent on account of the 'cut-off' date in Annexure-A6 notification. But it is admitted that the applicant is serving in the Post Office from 1980 and for short period out of the total service he was working as a provisional employee. Hence his right to be considered for the selection is well protected and cannot be affected detrimentally by the 'cut-off' date fixed by the 3rd respondent. Notwithstanding the failure of the 3rd respondent to sponsor his name the 1st respondent is obliged to include his name along with others in the light of Full Bench decision of this Tribunal in O.A.29/90, the applicant is entitled to be considered in the regular selection.

21. The effect of 'cut-off' date fixed in Annexure-A6 will have to be examined in the background and the rights of the applicant to participate in the regular selection. Since the applicant has an indefensible right to be considered in the regular selection on account of his prior service as ED Packer in the same post office, any attempt on the part of the respondents to curtail this right would be arbitrary and unreasonable. Administrative procedure must be just ^{and} ~~and~~ consistent with the fundamental rights of the citizen. It must not be "anything arbitrary, freakish or bizarre". Administrative actions must be reasonable, nonarbitrary and nondiscriminative.

22. It may be true that at the time when the 3rd respondent fixed the date in Annexure-A6, he may not be aware of the rights of the applicant, but the fixation of any 'cut-off' date in this behalf regarding the selection

of ED Agents in the Post Office in which the applicant worked can only be subject to the rights of the applicant to participate in the regular selection because on account of his prior service in that post office a right had accrued in his favour and that cannot be taken away or denied in a light manner. Under these circumstances, having regard to the facts and circumstances either the 3rd respondent should have rectified this mistake or the first respondent ought to have included him also in the list of persons for consideration in the regular selection before completing the selection process. Since that has not been done we have only to quash Annexure-A6 to the extent it prevents the applicant from including him also among the candidates for regular selection as ED Packer in Veli Post Office, Kochi-1.

23. In the light of the foregoing discussions we are satisfied that the applicant has a right to be considered for the selection to the post of ED Packer, Veli Post Office, Kochi-1, along with the 4th respondent and others sponsored by the 3rd respondent. We hold so. We also quash Annexures-A5 & A6 to the extent they stand in the way of consideration of the applicant's right and better claim in the regular selection.

24. In the result the application is allowed to the extent indicated above.

25. There will be no order as to costs.


(N.DHARMADAN)
JUDICIAL MEMBER


(P.S.HABEEB MOHAMED)
ADMINISTRATIVE MEMBER