

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM.

O. A. No. 29
~~EX-EX-EX~~

1990

DATE OF DECISION

11-4-91

G.S. Parvathy Applicant (s)

M/s O.V. Radhakrishnan & Radhamani Amma Advocate for the Applicant (s)

Versus

The Sub Divisional Inspector (Postal), Guruvayoor Sub Division, Guruvayoor 680101 and 2 others

Shri TPM Ibrahim Khan, AOGSC Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. N.V. Krishnan, 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

N. Dharmadan, JM

This application, filed under section 19 of the Administrative Tribunals Act 1985, is directed against the order of termination of the applicant under rule 6 of the P & T Extra Departmental Agents (Conduct & Service) Rules 1964 (Rules 1964 for short).

This order was passed on two grounds: viz. (1) there is no

provision in the Rules 1964 to give preference to a candidate having past experience and (2) as per the

.....

instructions on the subject the candidate who stood first in the merit list has to be selected and as the applicant not having been placed first in the merit list is not eligible to be appointed as Extra Departmental Stamp Vendor (EDSV for short).

2. Brief facts of the case are as follows: The applicant was initially appointed as ESSV at Guruvayoor East Post Office on a substitute arrangement with effect from 1-1-88 with the approval of the Postal Department. Later she was provisionally appointed as EDSV in the same Post held by the applicant. The applicant was found fit for appointment in the regular selection. Accordingly, she was appointed as regular EDSV in Guruvayoor East Post Office by order dated 10-1-89 issued by the first respondent. However, as per the orders of the Post Master General (PMG), the first respondent informed the applicant by letter dated 31-10-89 (Annexure A-3) that the PMG has ordered cancellation of her selection. The relevant portion is copied below:

"....After examining the selection file of EDSV, Guruvayoor East PO, the Postmaster General has ordered that the selection has not been made in accordance with PMG TVM letter No. Rectt. 11-1/85-II dated 12-8-87 and that there exists no provision to give preference to candidate having experience due to their provisional service which is an accidental factor. PMG has therefore ordered the cancellation of the selection.."

3. The applicant submitted a detailed representation, Annexure A-4 dated 4-11-89 which was considered and disposed of by Annexure A-5 proceedings dated 9-1-90 by the first respondent, wherein it is stated that the termination of the applicant would come into effect from 17-1-90. The first respondent arrived at this conclusion on the following grounds:

"....There is no provision in P & T Extra Departmental (Conduct and Service) Rules 1964 to give preference to candidates having experience. Hence your submission for giving preference in view of your earlier service cannot be acceded to.

Secondly as per the instructions on the subject, the candidate who stood first in the merit list has to be selected. As you are not the first in the merit list, you are not eligible for selection on that count also.

It is therefore, decided to terminate your services as ED Stamp Vendor, Guruvayoor East SO with effect from 17-1-90..."

3. As indicated above, the respondents mainly relied on two grounds for cancellation of the regular appointment of the applicant as EDSV. The first ground is based on departmental instructions. It is stated in the impugned/ memo itself that the selection has not been conducted in accordance with stipulations contained in the letter of PMG, Trivandrum bearing No. Rectt/11-1/85-II dated 12-8-87. This letter provides for an interview and selection on the basis of the percentage of marks of the candidates obtained in the matriculation/SSLC. Nothing is mentioned about the preference to a candidate having experience acquired on account of his provisional service which is,

b/

.....

to be considered as an accidental factor. This letter has been produced along with the application as Annexure A-6. The interview is intended "to assess the physical and general fitness of the candidates for performance of duties. Only such of those candidates who satisfy all the conditions should be called for the interview. As the interview is determining the fitness for the post, no marks will be assigned or weightage given for the interview". But the applicant submits that Annexure A-6 has been cancelled by the letter of Assistant Post Master General, dated 18-10-90, redrawing the guidelines to be complied with in the case of recruitment of ED Agents in the Postal Department. The relevant portion of the order reads as follows:

"....Recruitment of ED Agents in the department are governed by the instructions issued by the DG Posts from time to time. However, keeping in view the special circumstances obtaining in this circle certain deviations in the matter of age, educational qualifications and residential condition were ordered to be made by this office. Of late some of these revised instructions issued in this circle have been subjected to judicial scrutiny by the C.A.T. The entire issue has therefore been closely examined by the Chief Postmaster General. Accordingly, it has been decided to cancel all the Circle level instructions issued on the subject, with immediate effect. Hereafter, recruitment of ED Agents shall be made strictly in accordance with the instructions contained in DG P & T letter No.43-84/90 PNN dated 30th January 1981. A copy of the letter is enclosed....."

dy

...../

D.G.P & T letter No.43-84/90 PEM dated 30th January 1981 provides preference to candidates belonging to SC/ST backward classes and weaker sections in the society.

Hence the respondents contended that selection has not been made in accordance with PMG, Trivandrum letter No. Rectt.111-1/85-11 dated 12-8-87 cannot be sustained for that letter has been cancelled by subsequent letter dated 18-10-90.

4. The respondents also stated in the impugned order that 'there exists no provision to give preference to candidate having experience due to their provisional service which is an accidental factor'. The Director General (Posts), New Delhi in his letter dated 30-1-81 (DGP No.43-84/91 PEN) provides preference only to candidates belonging to SC/ST backward class and weaker section in the society. No other circular, letter or order has been brought to my notice to sustain the plea that a preferential treatment should be given to the working candidates on provisional basis in the same post. But there are decisions on this proposition. This Tribunal is consistently taking the view that provisional candidates working in the post should be considered for regular selection taking into account their experience acquired on account of the past services even if they are not sponsored by the Employment Exchange. So, it would be appropriate to examine the right of the applicant to get preferential treatment or weightage by virtue of her previous experience which she acquired while she was

working as EDSV on provisional basis in GVR East Post Office. It is true that it is only an accidental factor. But it is a factor to be considered while making regular selection. A person who got a chance to work in the post either whether on fortutious circumstances or otherwise should be given some consideration and weightage to the extent possible while the regular selection to the post is made, among other competing candidates particularly when there is no instruction or order prohibiting the same. The same Bench of the Central Administrative Tribunal, Ernakulam in OA:498/86⁶² (unreported) held as follows:

"..Even though the applicant has not specifically claimed that his right, if any, accrued in his favour on account of his service in the aforesaid Branch Post office as EDDA is also a matter which requires consideration by the 6th respondent; this Tribunal is consistently taking the view that such right of the candidates working in the post also deserves consideration by the authorities while regular selection are being made. The persons like the applicant who hold provisionally the post would also be considered giving weightage which it deserves in the matter of regular selection. This Bench in which one of us (N. Dharmadan) was a party in OAK 140/87 very recently considered the identical issue following an earlier decision in OA 574/89 held as follows:

"Identical question has come up for consideration before this Tribunal and we have taken the view that persons working on provisional/ad hoc basis in the same post office are entitled to preferential treatment when the regular selections are made to the post by the Postal Department. Recently we have held (same Bench in OA 574/89 as follows:

"This Tribunal has taken the view in similar cases that the existing incumbent holding a post for a considerable period

of service should also be considered for regular appointment along with other candidates and should not be excluded on the sole ground of not being sponsored by the Employment Exchange..."

This Tribunal also held in OA 360/86 as follows:

The identical question has come up for consideration before this Tribunal in TAK 62/87, TAK 763/87 and TA 204/87. In all these cases it was held that persons already working in the post office as ED Agents are entitled to preferential treatment under section 25H of the Industrial Disputes Act. If the eligibility conditions are satisfied and that even if they are not sponsored by the Employment Exchange they should also be considered along with candidates sponsored by the Employment Exchange and they should be given preferential treatment under section 25 H of the Industrial Disputes Act..."

On another occasion, this Bench again in OAK 397/88

(PN Balachandran Nair V. Sub Divisional Inspector (Postal)

Palai and another) in which one of us (Shri N.V.

Krishnan) was a party considered similar issue and observed as follows:

"...In view of the above, we direct the the respondents to consider the suitability of the applicant for appointment as E.D. Mail carrier by calling him for interview. The respondents shall appoint the person who is adjudged as more meritorious and more suitable. While considering the suitability of the applicant, the respondents should also give weightage to the fact that the applicant, has worked in the post for more than two years..."

According to me relevance of granting preference to a candidate in a selection arises or assumes importance only when two or more candidates who appear for selection stand on equal footing in almost every respect. It is true that Article 16(1)

of the Constitution ensures equality of opportunity to all citizens in matters relating to employment!.

But a careful and minute reading of Article 16 together with the provisions of Article 335 of the Constitution would make it clear that public services are maintained to carry on the administration and not confer benefits on the appointees, thereto. Hence importance should be given to efficiency of administration. The Supreme Court in the General Manager, Southern Railway V. Rangachari, AIR 1962 SC 36, held "the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency". If efficiency is the criterion there is nothing wrong in selecting a person who had gained some experience in service in the particular post for which selection is made. He should not normally be preferred when others equally placed even if the experience was gained by such reason due to accidental factor or fortutious circumstances in which he was appointed provisionally to the said post earlier. It cannot be presumed that such earlier appointment was obtained by him by influence or other extraneous considerations. Under these circumstances I feel there is ^{no} substance in the contentions of the respondents that the selection of the applicant has to be cancelled merely on the ground that the Rules 1964 does not give any provision for preference to candidates who had worked in the same post and acquired some experience in the work of the Post Office.

5. The second limb of the argument of the learned counsel for the respondents for sustaining the cancellation of appointment of the first in the merit list and that the instructions on the subject provides that the candidates who stood first in the selection is to be selected. The respondents have not established with reference to the records of the earlier selection that the applicant was not first person in the select list prepared for appointment. On the other hand it is admitted that the applicant was found fit for appointment by the first respondent in the selection already conducted by him. I feel that second ground is also devoid of any substance and cannot be accepted, on the facts and circumstances of the case. Accepting the case of the respondents that first in the merit list should be selected, I cannot go along with the respondents for they have not produced any departmental instructions or other materials insisting that a candidate who stands first in the merit list along should be selected.

It is to be remembered that merit of a candidate

alone should not be the sole criterion for selection to a particular post. The Supreme Court in *Pradeep Jain and other v. Union of India and others*, 1984 (3) SCC 654 explained the term 'merit' as follows: 'what is merit which must govern the process of selection ? It, undoubtedly consists of a high degree of intelligence coupled with a keen and incisive mind, sound knowledge of the basic subjects and infinite capacity for hard work but that is not enough; it also calls for a sense of social commitment and dedication to the cause of the poor! The other factors like physical fitness working knowledge and capacity considering the special aptitude to the particular point to which selection is made are also relevant factors. Thus selection to a post is done not merely on merits. A selection of a candidate to a post is always made on the subjective assessment of the all factors relevant for selection to a particular post including merit of the candidates appearing in the selection. In the instant case it can be presumed from the selection originally made that the applicant was found meritorious and best among other competing candidates appeared for selection for being placed

first among equals. The respondents have filed a counter affidavit, wherein it is stated as follows:

"....There is no dispute that the applicant satisfies all conditions for appointment to the post of Extra Departmental Stamp Vendor, Guruvayoor East Post Office. But at the same time, three other candidates sponsored by the Employment Exchange also satisfy these conditions. So, the applicant cannot claim appointment to the post on the grounds that she satisfies all the conditions for selection...."

7. From the above statement, also it is clear that the applicant having equal merit with that of other candidates was found best out of all other candidates by the first respondent in the selection and was appointed as EDSV, Guruvayoor East with effect from 10-1-89. But later Annexure A-3 memo dated 9-1-90 was issued on 10-1-90 by which the selection of the applicant as EDSV, Guruvayoor East Post Office has been cancelled with effect from 17-1-90.

8. The learned counsel for the applicant cited before us the decisions of the Calcutta Bench of this Tribunal reported in Suparna Mukerji V. Union of India, (1989) 9 ATC 37, the Patna Bench reported in Vikram Kumar V. Union of India, (1990) 14 ATC 367, and the decision in AIR 1989 BOM 213. Relying on these decisions, the learned counsel for the applicant contended that the cancellation of the selection of

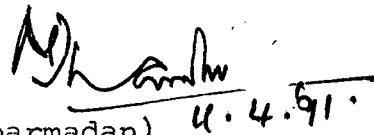
the applicant on the ground of the complaint regarding the lack of merit should not be upheld when the complaint emanated from an unsuccessful candidate.

Recently, the Patna Bench of the Central Administrative Tribunal, dealing with a similar case held in Ganesh Parsad Singh V. Union of India, (1991) 15 ATC 20, that when the representation is submitted by one of the unsuccessful candidates, unless there be a patent illegality in respect of the appointment, it is not proper to cancell the appointment to appoint another person in his place. When the competent authority has, after assessment of comparative merits of the candidates made selection, it is totally unfair on the part of the higher authority to cancell the selection and the appointment. The relevant portion of the judgment reads as Given below :

"...Assuming that as the Head of the circle the second respondent has the authority to call for the file and examine the same, when a representation is submitted by one of the unsuccessful candidates unless there be a patent illegality in respect of the appointment it is not proper that the appointment is cancelled and another person is appointed. What is urged in the reply is only that the second respondent was satisfied that the fifth respondent secured higher marks in the matriculation examination and has more landed property than the applicant. when the competent authority has after assessment of the comparative merits of the candidate made selection, and the selected candidates has been appointed it is totally uhfair on the part of the higher authorities to make an assessment of his own in respect of the comparative merits of the candidates and set at naught the selection and the appointment. In any event before doing so justice demands the affording of opportunity to the persons whose appointments is affected, especially when it is done on purely factual premises...."

12. This Tribunal has also taken the view that a regular and valid selection made after following all statutory procedural formalities would not be nullified at the instance of a defeated candidate unless there is gross injustice or grave irregularity or illegality in the selection (See judgment of C.A.T. Ernakulam in OA 610/89). None of such circumstances was pointed out by the respondents for cancelling the selection and appointment of the applicant. Moreover the second ground has not been included in the impugned memo as a ground for cancellation so as to enable the applicant to give her reply. Hence, I am not impressed by the arguments of the learned counsel for the respondents. The grounds raised in this case are not serious enough to vitiate the selection appointment of the applicant.

10. Having considered the matter in detail, I am of the view that the impugned orders cancelling the appointment of the applicant as EDSV, Guruvayoor East Post Office are unsupportable and liable to be quashed. Accordingly, I do so. In the result, the application is allowed. There will be no order as to costs.


(N. Dharmadan) 4.4.91
Judicial Member

Shri NV Krishnan, Administrative Member

11 I regret my inability to agree with the conclusions reached by my learned brother.

12 I shall first begin by considering in some detail the selection of the applicant made by the first respondent on 6.1.89. The original records produced by the respondents show that the Employment Exchange sponsored 5 names for consideration for appointment as ED Stamp Vendor. Interview notices were issued to four candidates. No notice was issued to the 5th candidate as he had not passed the SSLC. For our purpose, the following limited particulars at the time of selection taken from the tabular statement prepared by the first respondent (viz. the Sub Divisional Inspector, Guruvayur, the selecting authority) about the remaining 4 candidates will be sufficient.

Sl No.	Name	Whether SC or ST	Marks obtained in SSLC
1	PC Rajeev	No	210
2	Rukmini K	No	221
3	M Krishna Das (Complainant)	SC	210
4	GS Parvathi (Applicant)	No	210

The note recorded by the Sub Divisional Inspector, Guruvayur on 6.1.89 regarding the selection is reproduced below. The Annex A2 order of appointment was issued thereafter.

" Selection of EDSV, Guruvayur East

Though 5 candidates were sponsored by the Employment Exchange, Shri Ravi, PA, Pookkothil house, (PO) Guruvayur was not called for the interview held

on 16.12.88, as he has not passed SSLC. All the other candidates have passed SSLC and they were called for interview on 16.12.88. Among them, Smt Rugmini K has got the highest marks in SSLC i.e., 221. All the other candidates have got 210 marks each.

However, Smt GS Parvathy, D/o GS Subramaniya Iyer, Gurunivas, South Nada, Guruvayur, has worked as EDSV, GVR East for the following period and she fulfills all other candidates required for the post.

12.3.85 to 20.10.85	- 229 days
1.1.88 to 15.12.88	- 350 days

Hence Smt GS Parvathy was given preference over other candidates in accordance with S.P. Trichur letter No.87/14 dt.3.1.89 (filed below). Therefore, Smt GS Parvathy was selected for the post."

13 The letter dated 3.1.89 referred to in the above note is from the Superintendent of Post Offices, Trichur to the first respondent and reads as follows:

" Request received from Smt GS Parvathi acting EDSV, Guruvayur East is forwarded herewith. If the application is genuine and she is having a minimum service of 240 days in a year, she may be given preference in the recruitment, provided all other necessary conditions for the post are fulfilled (87/Rlgs. dated 1.7.88)."

The portion within brackets is written in a different main ink. Its significance is not clear, though the direction is specific.

14 It is clear that all the four candidates were eligible for consideration and had passed the SSLC. Therefore, one candidate had to be chosen by eliminating three others for reasons connected with the educational qualification. Therefore, the person with highest marks, namely, Smt Nandini could have been selected.

If preference is to be given to such caste, Shri Krishna Das, the SC candidate (who incidentally is the person

on whose complaint the Postmaster General made enquiries into the selection, as is seen from the departmental record) should have been selected in accordance with the DGP&T letter No.43-246/77-PEN dated 8th March, 78 (page-62 of Swamy's Compilation of Service Rules for ED staff in the Postal Department 4th Edition, corrected upto October 1989, referred to as Compilation hereafter). That circular directs that candidates belonging to SC/ST with even the minimum prescribed educational qualifications (6th standard in the present case) should be given preference over candidates belonging to other communities even if the latter are more qualified, provided that the candidates belonging to SC/ST are otherwise eligible for the post. Neither of these two candidates was selected by the first respondent. Instead, admittedly, by giving weightage to previous experience as directed by the Superintendent of Post Offices, Trichur, the applicant was selected and appointed. There are, admittedly, no other instructions directing that weightage be given to experience gained by providing appointment.

15. Therefore, the basic question for consideration is whether experience gained by a person on ED job as a result of his provisional appointment thereto by the Department can be given any weightage at all when selection takes place for regular appointment and his case, alongwith that of others, is taken up for consideration.

16 My learned brother has referred to a number of decisions earlier rendered by the Tribunal - ~~to some~~ of which I was also a party - directing that service rendered on an ED post on a provisional basis should be given weightage. In one case there was also a direction that such preference will have to be given under Section 25 H of the Industrial Disputes Act, ID Act, for short. On a careful and anxious reconsideration of this issue, I am of the view that those decisions require reconsideration as all of them have been rendered, without ~~without~~ considering one important aspect to be referred to shortly.

17 This Bench has consistently held the view that holding an a provisional appointee ~~xxx~~/ED Post is also entitled to be considered when selection for regular appointment to that post takes place, even if his name is not sponsored by the Employment Exchange. Consideration of his candidature is not required by any provision of ~~as~~ will be shown separately, the ID Act, but is needed only on grounds of natural justice because he should not be ousted from that post, without giving him an opportunity to establish his ~~for selection~~ claims alongwith other rival candidates sponsored by the employment exchange.

18. However, I am of the view that while considering the merits of such candidate no weightage whatsoever, should be given to the experience gained as a result of his provisional appointment. The Postmaster General, Kerala has remarked as shown in Annexure 3, that no

provision exists in the rules to give preference to any candidate having experience due to his provisional service, which is an accidental factor. He has not elaborated upon the inequity of giving weightage for this accidental factor. In my view, this objection is sound and valid for three reasons.

Firstly, the provisional appointment is made by the Sub Divisional Inspector or other competent local authority by picking any person he chooses at his will. It is a random appointment at best, but it could as well be that he chooses his favourite for provisional appointment. No opportunity is given at this stage to the other eligible persons for consideration for such appointment. This accidental factor will confer an unjust, ~~xxx~~ unintended and undue advantage on a candidate if the experience gained on that basis is given any weightage.

Secondly, while assessing a candidate's qualifications, considerations can be given to only those qualifications arising from his birth or inheritance or own efforts. Thus, considerations can be given for belonging to SC/ST by birth or for possessing an inherited or acquired house to locate the post office or for studying upto a particular standard. The experience gained on a provisional basis is does not fall in this category. At its very root, an opportunity to work thrust upon the candidate after denying it to others - or at any rate, not ~~exactly~~ ^{extending} it to others - who had the necessary qualifications.

Thirdly, giving such weightage will invariably reduce the regular selection to an almost empty formality, for, in every such selection, the selecting authority - who could very well be the same Sub Divisional Inspector who had earlier appointed one of the candidates on a provisional basis - may accord an overriding preference to the previous experience gained by such a candidate and select him on a regular basis. Provisional appointment will, thus, in effect, predetermine the course of selection and there will be no effective selection at all. In other words, grant of any such preference will effectively defeat the very purpose of an open selection and will deprive other candidates of a reasonable chance of competing for selection.

19 The system can ^{not} be faulted on this account because it was never contemplated that such service should be given any weightage. Further, the appointment is intended to last for a very short time, as made clear in the instructions in DG P&T's letter dated 18.5.79 at page 64 and 65 of the Compilation. Therefore, no harm is done if any person is picked up at random or even arbitrarily or even if he be a favourite - for such appointment, to the exclusion of others, particularly because the post has to be filled up urgently.

20 In the circumstance, I am of the view that if weightage is given in these circumstances, it will amount to giving a favoured treatment to the fortunate one who

has such experience and ~~xxxxxxxx~~ discriminating, against others, who, for no fault of their own, were not considered at all for provisional appointment. This important implication is not considered in any of the earlier decisions, referred to in my learned brother's judgment.

21 Hence, if this Tribunal gives its approval for granting such weightage, it will unwittingly be a party to an improper selection, which does serious injustice to all persons except the fortunate one, who acquired experience after being appointed provisionally. Hence, I am of the view that no preference can be given on this ground.

22 I may also add a few observations about the scope and nature of selection. In regard to the method of recruitment for ED Posts, consolidated instructions are contained in the DG P&T letter No.43-84/80 PEN dated 30.1.81 (page 57 to 76 of the Compilation). Essentially, there are only four eligibility conditions viz. age, educational qualifications, income and ownership of property, and residence. The very nature of these eligibility conditions, eliminate the subjective element in selection - or at any rate greatly minimize it. There is no provisions for an interview, where the subjective element dominates. The selecting authority, however, interviews the person only for the purpose of adjudging (e.g, see he is not blind or deaf) his physical fitness and not for making any assessment of his merit. It is not necessary for me to go into any further details in this regard - as this issue is not

directly involved in this case - except to state it as my view that, as a matter of policy, the scope of taking decision on subjective considerations has deliberately been reduced to the barest minimum, mainly to avoid malpractices at the field level or avoid complaints in regard thereto.

23 Having said that, I would like to examine the provisions in the Rules/Instructions regarding educational qualifications, as this has a bearing on the instant case. The educational qualifications in respect of ED Sub Postmaster, Branch Postmaster and Delivery Agents is 8th standard with a preference to Matriculation or its equivalent. In respect of ED Stamp Vendors, the educational qualification is 6th standard, preference being given to 8th standard. The examination system itself normally recognises merit by declaring that a candidate has passed with distinction or in first class, second class etc. Alternately, merit in respect of an educational qualification can be on the basis of the total marks secured. Therefore, if 4 persons, as in the present case, have the same qualifications - namely they have passed the Matriculation examination - the selecting authority would be fully justified to consider the person passing in the highest class as the most meritorious candidate. If more than one such person has passed in the same class, the person who has secured the highest marks will be identified as the

most meritorious person. However, if two candidates are absolutely equal in all respects - except for ^{provisional} previous experience which only one of them has - the selecting authority will not be justified in according any preference to such experience, because that experience was acquired on the basis of an arbitrary selection and is accidental and fortuitous. In such a case, the selection will have to be decided on a draw of lots, where both candidates have equal chances. Therefore, in the instant case, the choice should not on the only basis of his experience on his provisional appointment have fallen on the applicant and the cancellation of his selection is perfectly justified.

24 I may now refer to some of the decisions cited by my learned brother, and certain other issues.

25 A reference has been made to the decision of the Hon'ble Supreme Court in 1984 (3) SCC 654 wherein the term 'merit' has been explained in the context of that case relating to admissions in the Medical College. I have only to observe that there is nothing inconsistent with this pronouncement if, in a simple case like that of an ED Agent, merit of candidates who have passed the same examination is reckoned on the basis of the total marks secured in that examination.

26 The applicant's counsel contended that the selection cannot be set aside on the basis of the complaint from an unsuccessful candidate alleging that the selected candidate lacks merits. I am unable to appreciate the logic behind this argument. For, only the unselected

candidate knows what happened at the time of selection. If he, therefore, makes a complaint, it has to be taken seriously and enquired into. If on such enquiry, it is found that the selection has been done improperly resulting in injustice, the Head of Department can initiate action to set aside the selection, after due notice to the selected candidate. In fact, it is on the basis of applications from defeated candidates that this Tribunal has given relief to many applicants. Therefore, it cannot be stated that the Head of Department does not have such power when similar complaints are filed.

27 My learned brother has mentioned that the applicant in this connection relies on the judgment of the Patna Bench of the Tribunal (1990) 14 ATC-367 (Pat.). in Vikram Kumar Vs. Union of India. In that case, it was held, in circumstances similar to the present case, that after appointment as an ED Agent, neither the Director nor the Superintendent of Post Offices has power to cancel the appointment arbitrarily, without having recourse to the relevant provisions of law. In this connection reliance was placed on the judgment of the High Court of Kerala in PV Madhavan Nambiar Vs. DV Radhakrishnan 1990(1) SLR 757. That was a case where the appointment of the respondent as ED Stamp Vendor was, on a subsequent instruction of the higher departmental authorities, cancelled under Rule 6 of the ED Agents (Conduct & Service) Rules, (Rules, for short) on the ground that the prescribed test was not conducted at the time of his selection and that he is also a near relation of another departmental

official in the same office. That rule was as follows:

"The services of an employee who has not already rendered more than three years continuous service from the date of his appointment shall be liable to termination by the appointing authority at any times without notice for generally unsatisfactory work, or on any administrative ground unconnected with his conduct."

The High Court of Kerala quashed this action and held as follows:

"Rule 6 contemplates termination of service of an employee who has not already rendered more than three years' continuous service which pre-supposes that the appointment has been made properly appointed. Hence, we have no hesitation in taking the view that the termination of service on any administrative ground contemplated by rule 6 is a ground or reason that arises after the appointment and not on grounds that have arisen before or in regard to the appointment, termination cannot be done under rule 6".

28. It is necessary to point out that the judgment of the Kerala High Court in Madhavan Nambiar's case supra cannot now be pressed into service because Rule 6 now stands amended and reads as follows:

" 6. Termination of Services:

The service of an employee who has not already rendered more than three years's continuous service from the date of his appointment shall be liable to termination by the appointing authority at any time without notice."

The most important point to note about Rule 6 is that the powers granted thereunder can be exercised only within three years from the appointment of the employee and not thereafter. It is something like discharge of a probationer. The subsequent amendment of Rule 6 notwithstanding, it is clear that recourse can be had to this rule, if the services of the appointee are to be discharged as in the case of a probationer for unsatisfactory work or for any

administrative ground not connected with the appointee's conduct. After three years, the Department will have to resort to disciplinary proceedings under Rule 8 if the employee's conduct is unsatisfactory. If, however, only an administrative ground exists, not connected with the conduct of the employee after his appointment, nothing can be done after three years, because, obviously, he cannot be proceeded against under Rule 8 in such circumstances and therefore his services can never be terminated except, perhaps, when the post itself is abolished.

29 As Rule 6 has since been amended, as pointed out above, it is not necessary to examine the judgment in Madhavan Nambiar's case in detail, except to state that a totally different view could have been taken about Rule 6 as it existed earlier. There is no justification for the presumption made in that judgment that the appointment has been made properly without any irregularity and therefore, administrative ground should have arisen only after appointment. For, there is no such explicit restriction in the rule. Secondly, if the rule is interpreted narrowly in this manner, the Department would have no remedy against a candidate who was wrongly selected, - not because of any mistake committed by him but because of some mistake committed by the Department - For, while his service cannot be terminated under Rule 6 in view of that judgment, he cannot be proceeded against under Rule 8

for, there is no allegation against him. This could not have been intended at all. Therefore, I am of the view that both under the earlier Rule 6 as well as under that rule as it now stands, the services of a ED Agent can be terminated on any administrative ground not connected with his conduct, irrespective of whether the ground arose before or after his appointment. Action can, however, be taken only after giving him a reasonable opportunity of being heard, except when the termination is/

Like the discharge
of a probationer.

30 A reference has been made by my learned brother to the judgment of the Patna Bench in 1991(15) ATC-20 Ganesh Prasad Singh Vs. Union of India for the proposition that, unless there is a patent illegality in respect of the appointment, it will not be proper for the Head of the Department to cancel the appointment made by a subordinate authority and appoint another person in his place. That judgment is distinguishable, because no notice was given before termination. That apart, it does not hold that the Head of Department has no power at all to take action to terminate the services of a candidate regularly appointed. It restricts the exercise of such ~~unconstitutional~~ power to

a case where there is patent illegality. In my considered view, giving weightage to previous services rendered in a provisional capacity is a patent illegality and requires corrective action.

31 For the aforesaid reasons, I am of the view that nothing prevents the Head of a Circle from examining the file relating to the appointment of a candidate, even on the basis of a complaint received from an unselected and defeated candidate. In appropriate cases, such authority can issue instructions for the cancellation of such appointment, after following the proper procedure. In fact, even without receiving a complaint, the Regional Directors of Postal Services are expected to carry out scrutiny of 10 per cent of appointments made to ED Posts at the time of inspection and also ensure that 10 per cent of the appointments made in respect of each Sub Division are scrutinised vide DG P&T's Memo dated 4.11.80 at page 56 of the Compilation under Rule 27. Though the purpose of such scrutiny is not stated, obviously, it is to ensure rigid compliance with the rules and instructions in regard to recruitment and to re-open cases where they have been flouted.

32 In the present application, the applicant has also prayed in para 8(3) to direct the respondents to give him preferential right to appointment in terms Section 25 H of the ID Act. This question of preference under Section 25 H of the ID Act has been considered in at least two of the earlier decisions referred to

by my learned brother viz, TAK 62/87 and OA 360/86.

The question is whether, notwithstanding my conclusion that experience gained as a provisional agent cannot be given any weightage at the time of regular selection, a person who has such experience is not entitled to preference under Section 25 H of the ID Act ? There are many aspects to the claim for preference under Section 25 H of the ID Act, which can be gone into in an appropriate case. In so far as this case is concerned, this claim has to be rejected because the right under Section 25 H of the ID Act accrues only to a retrenched workman. There is no dispute that on the date of selection, the applicant was continuing on the same post on a provisional basis by virtue of the Annexure A1 order of provisional appointment. Therefore, no preference could have been given to her under Section 25 H of the ID Act for regular selection.

33 For the aforesaid detailed reasons, I express my inability to agree with the conclusions reached by my learned brother. In my view, the application deserves to be dismissed.

34 As this is not only a expression of disagreement with the decision reached by my learned brother, but also with certain earlier decisions of Division Benches that (i) previous experience gained as a provisional ED Agent should be given weightage and (ii) that a person having

such experience should be given preference under Sec.25 H of the I.D. Act, I am of the view that this case may be referred to the Hon'ble Chairman Central Administrative Tribunal for having these disputed issues decided by a larger Bench.


11.4.91
(N.V. Krishnan)
Member (A)

35. In view of the difference of opinion between ~~one~~ us and also as ~~one~~ of us (Shri N.V. Krishnan) has doubted the correctness of the earlier decisions of this Tribunal that previous experience gained by a candidate due to his working as provisional E.D. Agent should be considered by giving it due weightage in the regular selection and that person having such experience should also be given preference under Sec.25 H of the I.D. Act, we direct the Registry to place this case before the Hon'ble Chairman under Section 26 of the Administrative Tribunals Act 1985 for appropriate direction to have the issue decided by a larger Bench. Copies of judgment be served on the parties before such an action is taken.


11.4.91
(N. DHARMA DHAN)
Member (J)


11.4.91
(N.V. KRISHNAN)
Member (A)

11-04-1991

(29 pages)
ganga

Order of the Bench

36. By the order dated 11.4.91, this case was forwarded to the Hon'ble Chairman of the Central Administrative Tribunal for referring the matter to a larger Bench over the difference of opinion between us. Accordingly, the Larger Bench heard the matter and pronounced the judgment on 8.11.91. The questions referred to the Larger Bench have been answered as follows:

- (1) Weightage should be given to a provisional E.D. Agent for his experience at the time of regular selection, but it is made clear that previous experience will not be the only decisive factor for selection. It is to be taken into account alongwith the other relevant factors.
- (2) A person having gained experience as a provisional E.D. Agent isnot entitled to the preference under Section 25-H of the Act for appointment as a regular incumbent.

37. In the light of the law declared by the Larger Bench in this case, the impugned orders are unsustainable and liable to be quashed. We do so. No order as to costs.

38. Copy of the judgment of the Larger Bench is also attached herewith for reference.

N. Dharmadan
12.12.91

(N. DHARMADAN)
JUDICIAL MEMBER

V. Krishnan
12.12.91

(N. V. KRISHNAN)
ADMINISTRATIVE MEMBER

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Date: 8th November, 1991.

CORAM

THE HON'BLE DR JUSTICE DAVID ANNOUSSAMY, VICE CHAIRMAN
THE HON'BLE MR SP MUKERJI, VICE CHAIRMAN
THE HON'BLE MR G SREEDHARAN NAIR, VICE CHAIRMAN

Original Application No.29/90

GS Parvathy - Applicant

M/s OV Radhakrishnan,
K Radhamani Amma & - Counsel for the applicant
N Nagares

V.

Sub Divisional Inspector - Respondents
(Postal), Guruvayur Sub
Division, Guruvayur-
680 101 & 2 others

Mr V Ajith Narayanan, - Counsel for the respondents
ACGSC

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

JUDGMENT

DAVID ANNOUSSAMY, J.

This Bench has been constituted by the Hon'ble Chairman for deciding the points referred by the Hon'ble Members of the Division Bench, who heard the case ~~Members~~ in their judgment dated 11.4.1991. Those points are as follows:

- (1) Whether previous experience gained by a candidate due to his working as provisional E.D. Agent should be considered by giving it due weightage in the regular selection?
- (2) Whether a person having gained such an experience should also be given preference under Section 25 H of the Industrial Disputes Act in the regular selection?

As far as the first point is concerned, the learned counsel for the applicant argued that it is now well settled law that experience should be given weightage in the process of selection and that such a proposition emanates from a number of decisions of this Tribunal. The learned counsel for the respondents brought to our notice the objection formulated by the Hon'ble Member Mr. N.V.Krishnan that if previous experience was taken into account that will render the process of selection illusory and provisional appointment will predetermine the course of selection, and that such a provisional appointment, which may be accidental or fortuitous, should not thus be made to stand for ever.

Experience is undoubtedly a valuable qualification. A person having experience need not be initiated to the work, he is immediately a full performer. The value of experience is recognised in the time-scale of pay; one becomes entitled to move every year to higher pay on account of the experience gained by him. Experience also has been held to be a substitute for educational qualifications prescribed, in a number of decisions.

One can easily come across the mention "previous experience required" or "previous experience desirable" in advertisements to posts. Previous experience is universally recognised as a valuable qualification. Various Benches of this Tribunal have in ^a catena of decisions held that previous experience should be given due weightage in the process of selection.

In this connection it is also worth referring to Rule 11(2) of Section II - Method of Recruitment- in Swamy's Compilation of Service Rules for E.D. Staff in P. & T. Department, herein-after referred to as the Rules, which reads as follows:

" 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 D.G., P.&T., Letter No.43-4-/77-Pen., dated 23.2.1979. "

This clearly shows that the Department considers that the experience gained by the provisional appointee is quite valuable and that thereby he acquires a right for appointment after three years of service. ~~Those whose experience falls short of three years and who cannot therefore claim the benefit of the above quoted rule are certainly entitled at least to weightage being given to the extent of the experience acquired.~~

(Signature)

The objection that the provisional appointment may be accidental or fortuitous does not carry much weight. Now, it is the practice of the Department to make provisional appointments as well through the process of selection, after calling a list of candidates from the employment exchange. Even otherwise, a provisional appointment is made only after satisfying whether the appointee fulfills the conditions of age, educational qualification, income and ownership of property and residence. [Further, for the reason that the appointment is accidental or fortuitous, the experience gained does not become less valuable. We are only concerned by the value of the experience gained and not by the manner in which the first appointment took place, unless of course the initial appointment was obtained by way of fraud.] Fraus omnia corruptit is the legal maxim, meaning that fraud will vitiate everything. In case of fraud the previous appointment will be put an end to sooner or later and such appointment, which would be void ab initio, would not be the source of experience acceptable in law.

The apprehension that a provisional appointment may become automatically, on account of the weightage given to experience, permanent appointment is not justified, if the exact import to be given to the weightage for previous experience is well understood. Weightage means only that some consideration has to be given to experience as an additional qualification. Previous experience is not to be the sole decisive factor in making selection. Only if it reduces to naught the other qualifications, /the apprehension expressed that all provisional appointments would get practically converted into regular appointments would

be justified. If experience is considered only as a qualification among others, a candidate with previous experience would be selected only all other things being equal, which will not occur always. It is also worth noting that there are other preferential categories referred to in Rule 6 of the Rules. [It is for the selecting authority to assign its due place to each factor to and/determine their relative importance while making selection. If a system of marks is allotted, previous experience will have to be allotted some percentage of marks along with other factors found to be relevant. The weightage to be given to previous experience will also depend on the quantum of experience. We are therefore of the firm view that weightage should be given to previous experience and that such experience shall be taken into account along with other relevant factors but will not operate as a sole decisive factor in the process of selection.]

The next point is, whether a person having gained previous experience due to his working as provisional agent should be given preference under Section 25 H of the ~~I.D. Act~~ at the time of regular selection. The contention of the learned counsel for the applicant is that the word 'retrenchment' has a wide meaning under the Act, that the said Act applies to the applicant and that therefore the applicant should be given preference for appointment under Section 25H

5

of the Act. The answer of the learned counsel for the respondents is that Section 25 H cannot be applied in the case of a provisional agent seeking regular appointment.

For the purpose of examining the relative merits of the rival contentions, it would be useful to have present in mind the definition of the word 'retrenchment' in the Act, as it stands amended now. It reads as follows:

" 2. Definitions:- In this Act, unless there is anything repugnant in the subject or context--

.....

(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of a disciplinary action, but does not include--

- (a) voluntary retirement of the workman; or
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or
- (c) termination of the service of a workman on the ground of continued ill-health. "

Clause (bb) is quite relevant in respect of provisional E.D. Agents. The orders of appointment are usually to be.

27

issued in the form indicated in Annexures (A) or (B) appended to Clause 11 of the Rules. In Annexure (A) there is a stipulation that the provisional appointment will be terminated when regular appointment is made. In Annexure (B) there is a stipulation that the provisional appointment is tenable till the disciplinary proceedings against 'X' are finally disposed of. When any one of these stipulations or any other valid stipulation regarding the termination of the contract is incorporated in the order of appointment the termination of service will not amount to retrenchment on account of the exception clause (bb) and Section 25 (H) of the I.D. Act will not come into play at all.

If the order of appointment does not contain any one of those stipulations, a question would arise whether a provisional E.D. Agent would be entitled to the benefit of Section 25 H of the Act. In this connection it is necessary to examine closely that Section 25 H of the Act which reads as follows:

" Re-employment of retrenched workmen - Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen who offer themselves for re-employment shall have preference over other persons. "

The application of the Section implies two operations:

- 1) retrenchment, 2) re-employment against a vacancy arising subsequently.

✓

First a person should have been retrenched, that is to say, his services ~~should~~ have been terminated. But in the case of provisional E.D. Agent being replaced by a regular one, the process of selection takes place prior to termination. The provisional E.D. Agent also competes in the process of selection and thereby till a selection is made and the service of the provisional E.D. Agent is not terminated, there is no retrenchment. Therefore he cannot claim the benefit of Section 25H at the time of selection.

The learned counsel for the applicant would place reliance on the judgment of the Supreme Court in PUNJAB LAND DEVL. & RECLAMATION CORPON. LTD. v. PRESIDING OFFICER, LABOUR COURT (1990 (3) S.C.C.682 at 718) and contend that under Sections 25 FF and 25 FFF of the Act there is a fiction through which a workan is deemed to be retrenched and that a similar fiction exists in this case when it is proposed to proceed to have a selection to replace the provisional appointment by a regular appointment. Sections 25 FF and 25 FFF stipulate respectively that in case of transfer ~~or~~ closing down of undertakings, the concerned workman would be entitled to compensation as per the provisions of Section 25 F of the Act as if the workman had been ^{in these cases} retrenched. The fiction of retrenchment/^{is} created by the statute, but the Tribunal cannot create such

8

list of cases decided by the Labour Court

~~That is to say, when a transfer or closure of an undertaking is made~~

~~is a fiction.~~ Further, when a provisional appointment is ~~made~~ being replaced by a regular appointment, there is not even a remote resemblance with transfer or closure of undertakings. ~~worse for the applicant is that~~ What is, in the very decision relied upon by the learned counsel for the applicant, it was held as follows:

" For the purpose of harmonious construction, it can be seen that the definitions contained in Section 2 are subject to there being anything repugnant in the subject or context. In view of this, it is clear that the extended meaning given to the term 'retrenchment' under ~~clause (oo)~~ of Section 2 is also subject to the context and the subject matter.

... In our view, the principle of harmonious construction implies that in a case where there is a genuine transfer of an undertaking or genuine closure of an undertaking as contemplated in the aforesaid sections, it would be inconsistent to read into the provisions a right given to workman " deemed to be retrenched" a right to claim re-employment as provided in Section 25 H. In such cases, as specifically provided in the relevant sections the workmen concerned would only be entitled to notice and compensation in accordance with Section 25 F. It is significant that in a case of transfer of an undertaking or closure of an undertaking in accordance with the aforesaid provisions, the benefit specifically given to the workmen is "as if the workmen had been retrenched" and this benefit is restricted to notice and compensation in accordance with the provisions of Section 25 F. "

DR

Therefore, as per that decision even if there is a deemed termination identical to those contemplated in Sections 25 FF and 25 FFF, the applicant would not have the benefit of Section 25 H.

The second condition for the application of Section 25 H is re-employment against a vacancy emerging subsequently to the termination. This may happen in rare cases when a post becomes really vacant for one reason or other and an agent previously retrenched within the meaning of the Act and fulfilling the conditions prescribed by the I.D. Act and the Rules offers himself for re-employment. But in the course of ~~replacing~~ a provisional appointment by a regular one through the process of selection prescribed therefor, there is practically no vacancy, the appointment of a new incumbent being coeval with the termination of the provisional E.D. Agent. Therefore, Section 25 H is not attracted in such a case.

The learned counsel for the applicant would contend that the post will become vacant instanti, that is to say at the very moment of termination of his service, and the post thus rendered vacant should be filled up by himself. He placed for this purpose reliance in the Judgment of the Supreme Court in PUNJAB LAND DEVEL. & RECLAMATIONCORPON. LTD. v. PRESIDING OFFICER, LABOUR COURT (referred to supra). The passage relied on reads as follows:

" Similarly, it is submitted, Section 25-H which deals with re-employment of retrenched workmen, can also have no application whatsoever, to a case of termination simpliciter

because of the fact that the employee whose services have been terminated, would have been holding a post which eo instanti would become vacant as a result of the termination of his services and under Section 25-H he would have a right to be reinstated against the very post from which his services have been terminated, rendering the provision itself an absurdity. "

First this passage is not a dictum of the Court. It is a submission of the counsel. Secondly, that passage is much against the contention of the applicant, since it declares that the fact of analysing the situation in the manner desired by the applicant would amount to an absurdity, which therefore cannot be accepted.

The learned counsel for the applicant then placed reliance on Rule 78 of the Industrial Disputes (Central) Rules, 1957, which, according to him, will fortify his case. But, we do not find anything in that Rule in support of the contention of the applicant. The main provision of the Rule 78 reads as follows:

" Re-employment of retrenched workmen

(1) At least ten days before the date on which vacancies are to be filled, the employer shall arrange for the display on a notice board in a conspicuous place in the premises of the industrial establishment details of those vacancies and shall give intimation of those vacancies by registered post to every one of all the retrenched workmen eligible to be considered therefor, to the address given by him at the time of retrenchment or at any time thereafter. "

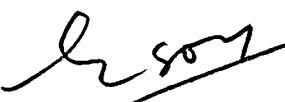
25

This is rather against the contention of the applicant, since the rule contemplates a time gap of ten days between the publicity given to the vacancy and the fact of appointment, whereas the applicant wants the vacancy created by his termination being filled up instantaneously by himself.

To sum up this point, when there is a stipulation as the one contemplated in Clause (bb) of Section 2(oo) of the I.D. Act, there is no retrenchment and Section 25 H of the I.D. Act does not come into play at all. In other cases that section will not be attracted when a provisional appointment is giving place to a permanent appointment.

In the result, the answer to the reference is as follows:

- (1) Weightage should be given to a provisional E.D. Agent for his experience at the time of regular selection, but it is made clear that previous experience will not be the only decisive factor for selection. It is to be taken into account along with the other relevant factors.
- (2) A person having gained experience as a provisional E.D. Agent is not entitled to the preference under Section 25-H of the Act for appointment as a regular incumbent.


(SREEDHARAN NAIR)
Vice-Chairman


(S.P. MUKERJI)
Vice-Chairman


(DAVID ANNOUSSAMY)
Vice-Chairman

(8th Nov. 1991)