

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA 321 and 322 of 2000

Wednesday this the 8th day of August, 2001.

CORAM

HON'BLE MR. A.M.SIVADAS, JUDICIAL MEMBER
HON'BLE MR. G.RAMAKRISHNAN, ADMINISTRATIVE MEMBER

OA No.321/2000

Asif Ibnu Barkhiya.A.
S/o Bithnat Mohamed
Radiographer
Community Health Centre
Androth Island, Residing at 'Aliyathara House',
Androth Island, U.T.of Lakshadweep. Applicant.

[By advocate Mr. Shafik M.A.]

Versus

1. Union of India represented by
The Secretary, Ministry of Home Affairs
North Block, New Delhi - 110 001.
2. The Administrator
U.T.of Lakshadweep
Kavaratti.
3. The Director of Medical and Health Services
U.T.of Lakshadweep, Kavaratti.
4. The District Employment Officer
District Employment Exchange, Kavaratti.
5. Dr.P.Kunhiseethikoya
Director of Medical and Health Services
U.T.of Lakshadweep,
Kavaratti. Respondents.

[By advocate Mr.S.Radhakrishnan for R1.4]

OA No.322/2000

Jabbar Khan.B.
S/o Late Yakhub, Kannichetta
Radiographer
Primary Health Centre, Kalpeni
Residing at 'Bithnat House'
Androth Island
U.T.of Lakshadweep. Appliant

[By advocate Mr.Shafik M.A.]

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1. Union of India, represented by
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Director of Medical and Health Services
U.T.of Lakshadweep, Kavaratti. Respondents

[By advcoate Mr.S.Radhakrishnan for R1-4]

The applications having been heard together on 8th August, 2001, the Tribunal on the same day delivered the following:

O R D E R

HON'BLE MR. A.M.SIVADAS, JUDICIAL MEMBER

As the question involved in both cases is identical, both cases were heard together and are disposed of by this common order.

2. Applicant in OA 321/2000 seeks to quash A-1, to declare that he is entitled to continue in service as per A-5 & A-6 as Radiographer on the basis of his initial selection and appointment and to direct the respondents to consider him as appointed to the post of Radiographer in relaxation of the Recruitment Rules and send the applicant for training if any required.
3. Applicant in OA 322/2000 seeks to quash A-1, to declare that he is entitled to continue in service as per A-4 & A-5 as Radiographer on the basis of his initial selection and appointment and to direct the respondents to consider him as appointed to the post of Radiographer in relaxation of the Recruitment Rules and send the applicant for training if any required.

4. Applicants in these OAs are working as Radiographers. They were initially appointed as Radiographers on adhoc basis. Subsequently they were offered temporary posting in regular post of Radiographer on adhoc basis. Thereafter the temporary service and appointment of the applicants was regularized with effect from the date of their initial joining. Probation for 2 years was declared on successful completion. 3rd respondent has issued A-1 the impugned orders terminating their services on expiry of one month from the date of service of the said orders. The action of the 3rd respondent in issuing A-1 even without complying with the basic principles of natural justice, much less the procedure prescribed under Article 311 of the Constitution of India is illegal and arbitrary. The services of the applicants have been regularized in the cadre and they are fitted against regular posts of Radiographer. They cannot be treated as on temporary service. Rule 5 (1) of the Temporary Services Rules will apply only those who are continuing in temporary service and not for persons who are already absorbed in regular service. No candidate is intimated about the requisite qualification of the post or the number of available posts/vacancies. Respondents are adopting double standard for accepting the qualification of the Radiographers. There are others working as Radiographers with almost the same qualifications as that of the applicants and some with lesser qualifications. The normal procedure followed is to relax the requisite qualification and to appoint available candidates since there is always the factor of specialized personnel refusing to work in remote areas. At the time of interview and appointment of the applicants by an interview board consisting

of the Senior Physician, the eye specialist, dental surgeon and the senior most radiographer, the sanction of the 2nd respondent was obtained by the board for relaxation of the requisite qualification. Applicants were not intimated about requisite qualification or about its relaxation till A-1 order was served on them. Respondents have no authority to terminate their services on the basis of Rule 5 (1) of CCS (Temporary Service) Rules.

5. Respondents resist the OA contending that as per the Recruitment Rules framed for the post of Radiographer and notified by the Administrator, the educational qualifications prescribed are (i) Pass in P.D.C. with Physics and Chemistry group and (ii) Successful completion of Diploma in Radiography from a recognized institution. One of the applicants has not passed PDC with Physics and Chemistry and both the applicants have got one year certificate course in Radiography instead of diploma as envisaged in the Recruitment Rules and as such they are not qualified to hold the post as per the Recruitment Rules in force. The applicants were appointed on temporary and adhoc basis. Their adhoc appointments were regularized. This does not entitle them to become permanent Radiographers in the Medical Department. An employee even without completion of probation period and without making him permanent or granting confirmation by a separate order cannot claim that his service has been regularized and Rule 5(1) of CCS (Temporary Service) Rules is not applicable to him. No orders have been issued by the competent authority declaring the satisfactory completion of probation by the applicants. The rules envisage that

confirmation of the probationer after completion of the period of probation is not automatic but is to be followed by formal orders. On verification of the certificates it was found that the applicants are not having the required qualification of Diploma to hold the posts of Radiographer as per the existing Recruitment Rules. The then Director of Medical and Health Services had not obtained any relaxation orders from the competent authority relaxing the educational qualification.

6. Learned counsel appearing for the applicants argued that A-1 is bad in law in the light of the orders regularizing the adhoc appointment of the applicants since A-1 is issued under Sub Rule 1 of Rule 5 of CCS (Temporary Service) Rules, 1965. A-6 in OA 321 of 2000 and A-5 in OA 322 of 2000 are dated 2nd of August, 1995. The said orders say that the Director is pleased to regularize the adhoc appointment of the applicants as Radiographers in Community Health Centre, Amini and Primary Health Centre, Kalpeni with effect from the date of their joining in respective posts and that they will be on probation for a period of two years from the date of their regular appointment.

7. Learned counsel appearing for the official respondents vehemently argued that these two orders will not confer the status of permanency or confirmation as far as the applicants are concerned. In support of this stand he drew our attention to the ruling of this Bench of the Tribunal in OA 1230/96 wherein relying on the ruling in B.N.Nagarajan and others Vs. State of Karnataka and others (1979) 4 SCC 507 it has been held that it is clear that "A regularized employee is not a permanent or confirmed employee".

8. It is also to be noted that in these orders it is stated that the applicants will be on probation for a period of 2 years. It is so stated only as consequential to the fact that there it is stated that they have been regularized. If the regularization does not amount to holding a permanent or confirmed post by the applicants then a consequential statement will not have much impact. That apart, what is the position on this aspect is laid down in Wasim Beg Vs. State of U.P. and others (1998) 3 SCC 321. From the same it is clear that a temporary/adhoc employee and a probationer and confirmed employee are different and a person who is appointed as temporary and adhoc cannot be equated to a probationer. The question of completion of probation arises only when one is appointed as a probationer. That being the position, on the strength of these 2 orders the applicants cannot say that they have become permanent or confirmed employees. Thus the position is that their appointment is covered by A-4 in OA 321/2000 and A-3 in OA 322/2000. As per these orders, they are appointed only on temporary and adhoc basis. When appointment is on temporary basis as borne out by A-4 in OA 321/2000 and A-3 in OA 322/2000, the provisions of Central Civil Services (Temporary Service) Rules, 1965 will apply to the applicants. So the challenge against A-1 on the basis that they are permanent or confirmed employees and the contention that an order like A-1 cannot be issued cannot be accepted.

9. The impugned order A-1 says that it is found that the applicants are not possessed of the qualifications prescribed as per the Recruitment Rules and, therefore, they are not qualified to hold the posts of Radiographer as per the Recruitment Rules in force. According to the respondents, as per the Recruitment Rules, the educational and other qualifications prescribed as borne out by R-1 are (i) Pass in PDC with Physics and Chemistry group and (ii) Successful completion of Diploma in Radiography from a recognized institution. From R4(b) it is seen that applicant in OA 322/2000 has passed Pre-Degree with commerce subjects and basic mathematics. So he is not possessed of the academic qualification prescribed as per the Recruitment Rules. As far as the qualification of Diploma in Radiography from a recognized institution is concerned, officials respondents say that applicants do not possess that qualification and what they are possessed of is only a certificate. From the second relief sought in the OA it is clear that the applicants' qualifications cannot be considered as equivalent to the qualification prescribed as per the Recruitment Rules with regard to the Diploma in Radiography, for, they say that the respondents may be directed to consider them as appointed to the post of Radiographer in relaxation of the Recruitment Rules. If they do possess the qualification prescribed as per the Recruitment Rules there is no necessity for seeking relaxation. To put in other words, applicants are practically admitting that they are not possessed of the qualification prescribed as per the Recruitment Rules.

10. Learned counsel appearing for the applicants argued that there are persons with lesser qualification continuing as Radiographers under the Lakshadweep Administration. Learned counsel appearing for the official respondents submitted that there can be persons working as Radiographers with the qualification that was prescribed at the time of their recruitment which may be less than the qualification prescribed as per the existing Recruitment Rules.

11. The applicants have a case that relaxation with regard to, the qualification was obtained when they were appointed. Respondents have categorically denied this aspect. The official respondents also say that with regard to others who have lesser qualification than the applicants, relaxation has been granted to them.

12. In District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and another Vs. M.Tripura Sundari Devi (1990) 3 SCC 655 it has been held thus:

"It has been brought to our notice during the course of the arguments that the original selection was made by mistake on the presumption that the respondent had satisfied the qualification requirements as stated in the advertisement, without scrutinising the certificates copies of which were sent with her application. The Selection Committee presumed that all those who had applied in response to the advertisement must have had the requisite qualifications needed for the posts. However, the order appointing the respondent had made it clear that the respondent should come along with the original certificates. When the respondent approached the appellants with the originals of the certificates which were scrutinised, it was found that in fact she was short of the qualifications. It is in these circumstances, that she was not allowed to join the service. It cannot, therefore, be said

that the appellants had selected the respondent with the knowledge that she was underqualified. According to us, there is a good deal of force in this contention. It is common knowledge that sometimes either by mistake or otherwise the notes put up before the Selection Committee contain erroneous data prepared by the office, and sometimes the Selection Committee proceeds on the basis that all those who appear before it, are otherwise qualified. However, the second stage at which the documents are scrutinised is when the higher authorities go through them at the time the candidate concerned approaches them for resuming (sic assuming) duties along with the original certificates. It is at that stage that the mistake was discovered in the present case and the respondent was not permitted to resume her duties. We see nothing wrong in this action.

The observation of the Tribunal that there were no other candidates available with better marks is, in the circumstances, a half truth because assuming that she had better marks among those who had applied, it seems that no one with second class had applied or the applications only of the third class candidates were considered. If so, they were the applications of those third class candidates who, had applied and not of all those who would have applied had the advertisement given an indication that those with a third class degree could also apply.

It must further be realized by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this act".

13. In State of M.P. and another Vs. Dharam Bir (1998) 6

SCC 165 it has been held thus:

"The plea that the Court should have a 'human approach' and should not disturb a person who has already been working on this post for more than a decade also cannot be accepted as the courts are hardly swayed by emotional appeals. In dispensing justice to the litigating parties, the courts not only go into the merits of the respective cases, they also try to balance the equities so as to do complete justice between them. Thus the courts always maintain a human approach. In the instant case also, this approach has

not been departed from. We are fully conscious that the respondent had worked on the post in question for quite a long time but it was only in adhoc capacity. We are equally conscious that a selected candidate who also possesses necessary educational qualification is available. In this situation, if the respondent is allowed to continue on this post merely on the basis of his concept of 'human approach', it would be at the cost of a duly selected candidate who would be deprived of employment for which he had striven and had ultimately cleared the selection. In fact, it is the 'human approach' which requires us to prefer the selected candidate over a person who does not possess even the requisite qualification. The courts as also the tribunal have no power to override the mandatory provisions of the Rules on sympathetic consideration that a person, though not possessing the essential educational qualifications should be allowed to continue on the post merely on the basis of his experience. Such an order would amount to altering or amending the statutory provisions made by the Government under Article 309 of the Constitution.

"Experience" gained by the respondent on account of his working on the post in question for over a decade cannot be equated with educational qualifications required to be possessed by a candidate as a condition of eligibility for promotion to higher posts. If the Government, in exercise of its executive power, has created certain posts, it is for it to prescribe the mode of appointment or the qualifications which have to be possessed by the candidates before they are appointed on those posts. The qualifications would naturally vary with the nature of posts or the service created by the Government.

The post in question is the post of Principal of the Industrial Training Institute. The Government has prescribed a Degree or Diploma in Engineering as the essential qualification for this post. No one who does not possess this qualification can be appointed on this post. the educational qualification has a direct nexus with the nature of the post. The Principal may also have an occasion to take classes and teach the students. A person who does not hold either a Degree or Diploma in Engineering cannot possibly teach the students of the Industrial Training Institute the technicalities of the subject of Engineering and its various branches.

The respondent having worked in an adhoc capacity on the post of Principal might have gained some administrative experience but the same cannot be treated as equivalent to his knowledge in the field of Engineering. A compounder, sitting for a considerably long time with a doctor practising in modern medicine, may have gained some experience by observing the medicine prescribed by the doctor for various diseases or ailments but that does not mean that he, by that process, acquires knowledge of the human anatomy or

physiology or the principles of pharmacology or the field of action of any particular medicine or its side effects. The compounder cannot, merely on the basis of experience, claim a post meant exclusively for persons having MBBS or other higher degrees in medicine or surgery. The plea of experience, therefore, must fail. Moreover, this would amount to a relaxation of the Rule relating to educational qualification. Power to relax the Rule vests exclusively in the Governor as provided by Rule 21. This power cannot be usurped by the court or the tribunal."

14. In Nazira Begum Lashkar & Ors. Vs. State of Assam and Ors. 2001(2) SLJ 328 a three member Bench of the Apex Court has held that "Since the appointments to the posts are governed by a set of statutory rules, and the prescribed procedure therein had not been followed and on the other hand appointments have been made indiscriminately, immediately after posts were allotted to different Districts at the behest of some unseen hands, such appointments would not confer any right on the appointee nor such appointee can claim even any equitable relief from any Court."

15. In Ashwani Kumar and others Vs. State of Bihar and others (1997) 2 SCC 1 it has been held that as the appointments had been made illegally, contrary to all recognized recruitment procedures and were highly arbitrary, they were not binding on the State. It was further held that the initial appointments having been made contrary to statutory rules, continuance of such appointees must be held to be totally unauthorized and no right would accrue to the incumbents on that score. It was still further held that it cannot be said that the principles of natural justice was violated or an opportunity was not given to the employees concerned to have their say in the matter before their appointments were recalled and terminated.

16. Here it is case where the appointments have been made contrary to the Recruitment Rules and that being so, appointments are only held to be totally unauthorized and no right would accrue to the applicants.

17. Accordingly both the OAs are dismissed.
Dated 8th August, 2001.

Sd/-
(G.RAMAKRISHNAN)
ADMINISTRATIVE MEMBER

Sd/-
(A.M.SIVADAS)
JUDICIAL MEMBER

aa.

Annexures referred to in this order:

A-1 in OA No.321 & 322 of 2000:

True copy of the order F.No.5/4/97-DMHS dated 1.3.2000 issued by 3rd respondent.

A-5 in OA 321/2000 and A-4 in OA 322/2000.

True copy of the order F.No.5/27/94-DMHS/5031 dated 13.9.94 issued by the 3rd respondent.

A-6 in OA 321/2000 and A-5 in OA 322/2000.

True copy of the order F.No.5/27/94-DMHS/4316 dated 2.8.95 issued on behalf of the 3rd respondent.

A-4 in OA 321/2000 and A-3 in OA 322/2000;

True copy of the order F.No.5/27/94-DMHS dated 2.9.94 issued by the 3rd respondent.

R-1 in both OAs True copy of Notification F.No.5/21/88-DMHS dated 27.1.90 issued by the 2nd respondent.

R1(b) in OA 322/2000

True copy of Pre-Degree Mark List dated 22.6.87 issued by the University of Calicut to the applicant.