

CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH, JAIPUR.

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Date of Decision : 28/05/04

OA 578/2002

Manesh Kumar Purohit, Pharmacist in CGHS, Jaipur.

... Applicant

Versus

1. Union of India through Secretary, Ministry of Health & Family Welfare, Nirman Bhawan, New Delhi.
2. Director General, CGHS, Nirman Bhawan, New Delhi.
3. Addl. Director, CGHS, Near Railway Station, Radha Krishan Hotel, Jaipur.

... Respondents

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HON'BLE MR.M.L.CHAUHAN, JUDICIAL MEMBER

HON'BLE MR.A.K.BHANDARI, ADMINISTRATIVE MEMBER

For the Applicant

... Mr.U.D.Sharma

For the Respondents

... Mr.Vijay Singh, proxy counsel
for Mr.Bhanwar Bagri

O R D E R

PER HON'BLE MR.A.K.BHANDARI

This OA u/s 19 of the Administrative Tribunals Act, 1985, has been filed to seek regularisation of service as Pharmacist. The exact prayer clause reads as under :

- i) by an appropriate order or direction the respondents may be directed to treat the appointment of applicant from its very inception on 29.1.87 or from 26.6.89 as regular on a permanent post of Pharmacist and he may be awarded all consequential benefits to which he is entitled as a regular appointee w.e.f. 29.1.87 or 26.6.89.
- ii) Or in the alternative, the respondents may be directed to regularise the service of the applicant on the post of Pharmacist w.e.f. the dates when the services of S/Sri Sanjeev Garg and Rajendra Gupta were regularised or from any appropriate date with all consequential benefits arising from the regularisation of his service as Pharmacist.
- iii) Any other appropriate order or direction which this Hon'ble Tribunal may deem just and proper in the facts and circumstances of this case may also kindly be passed in favour of the applicant.
- iv) The cost of this application may also be allowed to the applicant as he has been forced by the inaction of the respondents to approach this Hon'ble Tribunal for the redressal of his legitimate grievance of regularisation of his service."

2. Brief facts of the case as per application are that respondent department placed requisition with local Employment Exchange to make appointment for the post of Pharmacist. The applicant sponsored by Employment Exchange was interviewed by a high powered Selection Committee and having been selected he was given appointment on 29.1.87 by order annexed as Ann.A/1. There is no difference between the composition of this Selection Committee and the Selection Committee prescribed for making regular appointment, although this appointment was made on short term monthly wage basis. His appointment is also made against a general and permanent post available in the respondent department. Thus, on all accounts it was a regular appointment. The services of the applicant were extended from time to time and the last extension was given from 29.6.89 to 19.9.89 vide order annexed as Ann.A/2. Vide order dated 26.6.89 (Ann.A/3) the respondents converted this short term monthly wage basis appointment into ad hoc appointment. It was also indicated that the appointee shall be entitled to regular pay scale and other benefits of service as are admissible to employees appointed on regular basis on the respective posts and scale of pay. The artificial break in service, intentionally given by the respondents to escape legal complications, were also done away with by treating such days of break as leave to which they would be entitled at par with regular employees (Ann.A/4). Vide order dated 20.10.89 applicant's pay was fixed in regular pay scale of Rs.1350-2200 at Rs.1350/- showing the date of next increment. This would reveal that the appointment of the applicant was now regular in accordance with provisions of statutory recruitment rules but he was not given appointment on permanent basis and this was a grievance the redressal of which he was expecting from the respondents. However, respondent No.3 instead of regularising his services, issued an advertisement on 11.10.96 (Ann.A/6) inviting applications to fill four posts of Pharmacists, three of which were reserved for ST category and one for general candidate. Shocked by this as he was expecting that for the general category post he should have

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been appointed instead of inviting applications from open market, applicant made request and made representation dated 4.11.96 (Ann.A/7), but of no avail. Since his representation was ignored, he approached this Tribunal vide OA NO.16/97 claiming relief that respondents be directed to consider applicant for regular appointment on the post of Pharmacist and award him all consequential benefits from the date of his initial appointment. This Tribunal after due deliberation disposed of the OA vide order dated 17.1.97 (Ann.A/8) at the stage of admission with direction of the respondents to examine representation and take a decision thereon on merits within a period of three months from the date of receipt of a copy of the order. That Director General Health Services, New Delhi, vide order dated 7.5.97 (Ann.A/9) instructed respondent No.3 to follow the said judgement in toto and consider the case of the applicant against a general vacancy arising in future in accordance with prescribed recruitment rules and procedure waiving the pre condition of getting the name sponsored from Employment Exchange. Pursuant to this, respondent No.3 by his letter dated 19.5.97 (Ann.A/10) informed the applicant that no vacant post of general category was available and as soon as the same would be available, his case would be considered. That the applicant thereafter has been entertaining a bonafide expectation of consideration. In the meantime, respondent No.3 has regularised services of two Pharmacist namely S/Shri Sanjeev Garg and Rajendra Gupta. Sanjeev Garg's services have been regularised vide order dated 24.4.2001 (Ann.A/11) in compliance of Tribunal's order dated 17.1.2001 passed in OA 260/97. Thereafter, vide order dated 25.2.2002 (Ann.A/13) Sanjeev Garg's appointment has been regularised from the date of his initial appointment i.e. 9.9.85 ignoring the claim of the applicant even though he too had an order of the Tribunal in his favour. The other person, Shri Rajendra Gupta, was regularised as Pharmacist vide order dated 11.4.2002 (Ann.A/14), which is in compliance of Tribunal's order passed in OA 190/97 (Ann.A/15). Applicant submitted various representations (Ann.A/16 to A/18) right from 27.12.2000 but

respondents did not pay any attention, then he sent a notice for demand of justice dated 20.9.2002 (Ann.A/19) alleging discrimination in his case. Since no reply was received, a reminder was sent to the respondents vide letter dated 24.10.2002 (Ann.A/20). Therefore, this OA has been filed.

3. In the grounds, arbitrariness and illegality has been alleged because even though he has been appointed through a procedure exactly identical to the procedure for regular appointment, his initial appointment was on short term basis but has since been ordered to be on ad hoc basis and even increments are being given it being against a regular vacancy, but the respondents are not regularising his appointment even after unblemished and satisfactory service of 15 years. Such attitude has been adjudged as illegal in a catena of judgements of Supreme Court where it was held that appointment for such a long period cannot be termed as ad hoc in the eye of law and will have to be regularised. It is also illegal because in the meantime applicant has become overage and ineligible for any other government service. Respondents are in need of Pharmacists for various dispensaries and the question of non-availability of work and vacancy is not there. The action of the respondents in not regularising him is violative of orders of the Tribunal passed on 17.1.97. Their action is also discriminatory inasmuch as S/Shri Sanjeev Garg and Rajendra Gupta, who are similarly situated persons, have been regularised in their posts but not the applicant who also has a case and a direction of the Tribunal to back him. Non-consideration of his representations and notice rendered respondents' action arbitrary and capricious because they are ignoring the legitimate rights of employee.

4. Respondents have submitted a copious reply giving brief history of the case which is not different from what has been stated by the applicant. They have, however, contended that merely because his

initial appointment was made through Employment Exchange it cannot be called a regular appointment because the posts of Pharmacists at CGHS are to be filled according to recruitment rules while applying orders related to reservation of SC/ST & OBC and after due application of roster rule. Since no vacancy of general category was available, the service of applicant was not regularised and the same was communicated to the applicant vide letter dated 19.5.97 (Ann.A/3). Also that reservation in recruitment has been worked out on the basis of post based roster prescribed vide OM No.36012/2/96-Estt.(Res) dated 2.7.97 for filing 23 posts of Pharmacists. Upto S.No.19 the roster was verified by the Liason Officer on 8.7.2000 and in his report he informed under letter dated 7.1.2000 that there is short fall of five posts of OBC and one of SC. Therefore, respondent No.3 "may fill up the posts keeping in view the instructions issued by DOP/T and also keeping in view that reservation should not exceed 50%". Photo-copies of the roster and above letter are placed at Ann.R/1 & R/2 respectively. That two other Pharmacists namely S/Shri Sanjeev Garg and Rajendra Gupta were regularised in light of this roster. Four posts were vacant at that time and out of these, short fall of reserved candidates i.e. five OBC and one SC carry foward in the roster and keeping in view of 50% ceiling of reserved vacancies as pointed out by the Liason Officer, two ad hoc candidates according to their seniority from the date of initial joining have been considered for regularisation. That both were regularised after disposal of their OAs in the Tribunal. It is also stated that both S/Shri Sanjeev Garg and Rajendra Gupta joined service prior to the applicant's joining on 29.1.87 and that no junior to the applicant has been regularised so far. Therefore, no illegality has been committed. That the Tribunal's order dated 17.1.97 was complied with when the applicant was informed the correct position and circumstances under which he could not be regularised. He was informed that "no posts of general candidates is available under CGHS, Jaipur. As soon as the post of the general category will be available your case will be considered".

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That during this entire period applicant could have tried for regular appointment in some other department. Therefore, he cannot raise the issue of legitimate expectation. It was also clarified to him in order dated 26.6.89 (Ann.A/3) that he will continue to be treated as adhoc appointee and this will not create any right in his favour for being brought on regular establishment. It is also stated that the applicant is making much hue and cry about the advertisement dated 11.10.96, which was never acted upon, and this is being done only to misguide and get sympathy of the Tribunal. The allegation of not replying to representations including notice for demand of justice is denied by saying that on receipt of the notice the matter was scrutinised and was under process in consultation with higher authorities when the OA was filed. It is also stated that answering respondents are keen to consider the case of the applicant but the same can only be done according to rules and only when a general category vacancy becomes available. Therefore, there is no arbitrariness in their action. Since no junior has been appointed, the applicant cannot plead discrimination against himself and admittedly both S/Shri Sanjeev Garg and Rajendra Gupta are senior to applicant as per their dates of initial joining.

5. The applicant has submitted a very exhaustive rejoinder and has tried to re-interpret the situation in his favour. It is alleged that the respondents have not worked out the roster for reservation properly and as per rules inasmuch as reservation for OBC was made for the first time by OM dated 13.9.90 by which 27% of vacancies to be filled by direct recruitment were reserved for OBC and as per para-2(5) thereof this reservation was required to take effect from 7.8.90 (Ann.A/21). Therefore, as per this order reservation for OBC was required to be maintained in respect of vacancies which were to be filled only w.e.f. 7.8.90 and not prior to this date. Since initial appointment of the applicant was made on 29.1.87, no vacancy/post can be reserved prior to 7.8.90 for OBC thereby giving retrospective effect to this order. That

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in the cadre of 23 Pharmacists 3 SC and 1 ST slots should have been kept for these categories prior to 7.8.90 and no slot can be reserved for OBC in this roster. Thus, in case the roster had been properly prepared, clearcut post was available for general category against which applicant was entitled to be regularised w.e.f. the date of his initial appointment i.e. 29.1.87. Subsequently, respondents relied on OM dated 2.7.97. This also does not indicate that it will be operative even prior to 7.8.90. In light of these, the roster annexed by respondents as Ann.R/1 is wrong and illegal. Regarding advise given by Liaison Officer, it is stated that even this advise has been misconstrued by the respondents inasmuch as no recruitment comprising of general and reserved category candidates has taken place when ceiling of 15% on reservation of SC/ST to be complied. That this provision only indicates that in case of mixed recruitment, the reserved category candidates should not be recruited in excess of 50% of the total number of vacancies in a year. That in the case of applicant no mixed recruitment had taken place and as such this principle is not applicable. Respondents have admitted that four posts were available and there was shortfall of six reserved posts, five for OBC and one for SC. However, as stated above, five posts could not have been kept for OBC and as such only shortfall of one post of SC could have been taken into consideration in terms of Director General of Health Services, instructions dated 08.03.2001 and the OBC quota should have been filled from future vacancies. Therefore, while regularising the services of S/Shri Sanjeev Garg and Rajendra Gupta they could have regularised the services of applicant from the date of his initial appointment. The above letter of Director General of Health Services is annexed as Annexure A-22.

6. It is further stated that S/Shri Sanjeev Garg and Rajendra Gupta were then given benefit of ACP Scheme w.e.f. 09.08.1999 vide orders dated 25.02.2002 and 07.01.2003 (Annexures A-23 and A-24 respectively),

to which applicant is also entitled consequent to regularisation in service. The same principle should have been followed in his case also. That by not treating the applicant at par with S/Shri Sanjeev Garg and Rajendra Gupta, the respondents have not applied the same criteria in case of applicant which is clear case of discrimination and simply because no junior has been regularised does not mean the applicant has no legitimate right for claiming regularisation and consequential benefits of ACP. Denying the contention that applicant is ignoring the fact that he is serving on ad hoc basis, it is stated that respondents have illegally kept applicant on ad hoc basis even though his appointment was made on regular basis right from the initial date. The contention that applicant never tried for any other job is challenged as irrelevant. While quoting Supreme Court's observation in Rudra Kumar Sain vs. Union of India, 2000 SCC (L&S) 1055, in which difference between ad hoc and stop-gap arrangement has been explained at length, it is averred that by all accounts the appointment of applicant initially on monthly wage basis and thereafter as ad hoc, continuously for 16 years since 29.01.1987 cannot be said to be ad hoc any more inasmuch as he was appointed as per provisions of Recruitment Rules through Employment Exchange as already admitted by the respondents. As such, the respondents cannot be allowed to treat the applicant as ad hoc or stop gap any more. Reverting back to the roster (Annexure R/1) attention is drawn to entry at Sl. No.16 where name of one Rakesh Gupta has been shown and stated that no such person has been in service under respondents. That this is amply proved when order No.CGHS/JPR/3-22/97/Adm. dated 22/23.10.97 is seen, by which pay in respect of Group-C employees has been fixed in revised pay scale and in the category of Pharmacists, the name of Rakesh Gupta has not been mentioned. Similarly in the seniority list of Pharmacists under CGHS Jaipur dated 01.01.2003 (Annexure A-26), the name of Rakesh Gupta does not appear anywhere. Thus the roster produced by the respondents is wrong and the correct position which emerges is that in the cadre of 23 posts three clear vacancies

are still available even after regularising the services of S/s Sanjeev Garg and Rajendra Gupta. Thus, vacant post of general category is clearly available against which the applicant can be regularised w.e.f. 29.01.1987, as done in other two cases. On the basis of above, arbitrariness and illegality as also discrimination are reiterated in the matter of dealing of the case of applicant by the respondents and it is therefore, prayed that the OA may be allowed with all consequential benefits.

7. Parties were heard at length. In view of the fact that learned counsel for the respondents was unable to satisfy us about objections raised by the applicant regarding application of roster under the reservation policy as per documents Ann.R/1 & R/2, he was asked to call the officer concerned who is conversant with operation of the roster in the office of respondent No.3. As per his explanation and the pleadings by the applicant in his rejoinder, It is found that :

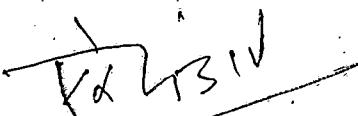
- i) The reservation to OBC could not be given prior to 7.8.90 and the same could be applied only for the vacancies to be filled by direct recruitment after the crucial date 7.8.90. As such no roster point can be reserved for OBC in respect to appointment made prior to this date, as this would have the effect of giving retrospective operation to the reservation of OBC, which would be illegal. To this extent, the respondents have not prepared the roster properly.
- ii) Therefore, in cadre of 23 Pharmacists only four posts could be kept reserved namely three for SC and one for ST prior to 7.8.90. Thus, clearcut posts were available for general category against which applicant was entitled to be regularised w.e.f. 29.1.87.

iii) The advise given by Liaison Officer that reservation should not exceed 50% has also been misconstrued inasmuch as no recruitment of general and reserved category candidates has taken place where ceiling of 50% can be applied. Therefore, the roster annexed by respondents as Ann.R/I appears to be wrong to that extent.

iv) Respondents have admitted that four posts were available and there was short fall of six reserved posts, five of OBC and one of SC. However, as already stated above, five posts of OBC could not have been filled as a result of which only short fall of one post of SC remained. Therefore, while regularising the services of S/Shri Sanjeev Garg and Rajendra Gupta the services of applicant could also have been regularised from the date of his initial appointment i.e. 29.1.87.

v) In view of the above, applicant would also become entitled to the consequential benefits as have been given to S/Shri Sanjeev Garg and Rajendra Gupta after their regularisation i.e. the benefit of ACP. The same of course would be made effective from the date when it became due to the applicant.

8. Thus, the OA stands allowed in above terms with no order as to costs.


(A.K. BHANDARI)

MEMBER (A)


(M.L. CHAUHAN)

MEMBER (J)