

a

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA 3156/2003

New Delhi this the 31st day of August, 2004

**Hon'ble Mr. Justice V.S. Aggarwal, Chairman
Hon'ble Mr. S. A. Singh, Member (A)**

Vinod Kumar Kesri,
S/O Shri Dwarka Prasad Kesri,
Working as Peon, Group 'D' at
Office of Director General of Audit
Post and Telecommunications, Govt. of
India, Delhi-110054.

.... Applicant

(By Advocate Shri H.P. Chakravorty with
Shri S.K. Arya)

VERSUS

1. Union of India through its
Director General of Audit Post and
Telecommunications, Govt. of India,
Sham Nath Marg, Delhi-110054
2. The Secretary, Department of Personnel
and Training, Govt. of India, North Block,
New Delhi.

.. Respondents

(By Advocate Shri Sanjeev Kumar proxy
for Shri Rajiv Shakdhar)

ORDER

Hon'ble Shri S.A. Singh, Member (A)

The applicant, who is visually handicapped, is working as a Peon in the office of the Director General of Audit Post and Telecommunications- Respondent No.1. w.e.f. 1.7.1987.

2. Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995(hereinafter referred to as the Disability Act, 1995) provides that Government shall appoint in every establishment such percentage of
- de

vacancies not less than 3 % for persons or class of persons with disability of which 1 % each shall be reserved for persons suffering from:-

- (i) blindness or low vision;
- (ii) hearing impairment;
- (iii) locomotor disability or cerebral palsy, in the posts identified for each disability.

For implementing this Act, respondent No.2 issued O.M. dated 20.11.1989 providing reservation for the physically handicapped in the posts filled by promotion.

3. The grievance of the applicant is that despite issuance of this OM and the directions contained in respondent No.2's OM dated 18.2.1997 earmarking certain points in the roster for reservation for the physically handicapped persons, which was later modified vide O.M. dated 4.7.1997 and copies forwarded to all the Ministries and Departments to ensure that the reservation policy of the Government as spelt out in the instructions issued by the Department in the above OMs are strictly implemented by them in the Organisation under their control, the respondents have failed to implement these directions in the case of the applicant and he has been denied promotion to the next grade.

4. An attempt has been made to retire the applicant w.e.f. 11.8.2000 which was quashed and set aside by the Court of Chief Commissioner for persons with disabilities and the applicant was reinstated. When he was not considered for promotion, the applicant approached the Tribunal in OA 2063/2002 which was disposed of by the Tribunal's vide its order dated 7.8.2002 with liberty to make a detailed representation supported by relevant rules and instructions on the subject issued by the Govt. of India under the provisions of the Disability Act, 1995 from time to time. If the applicant makes such a representation, respondents would consider and dispose of it by issuing a reasoned and speaking order. The applicant contends that even though he made a representation, the respondents have not passed any such order and in fact asked him to supply the rules and regulations of recruitment and promotion applicable in his case.

de

5. For implementing the policy for reservation for persons with disability during recruitment and promotion, according to the applicant, posts in clerical cadre have been identified for visually handicapped persons and respondent No.1 has not followed these instructions. Hence leaving the applicant with no other choice but to approach the Tribunal through the present OA. Moreover, respondent No.2 in his OM dated 18.2.1997 regarding reservation for physically handicapped persons has inserted the following sub-clause:

" In the cases where the percentage of posts filled by Direct Recruitment is 75% or more, no reservation will be provided for any category including the Physically Handicapped while filling up the posts by promotion"

thereby denying reservation for persons with disability during promotion, which is against the objectives of the disability Act, 1995.

6. Applicant urges that he was entitled for the first point in the post of LDC in the scale of Rs. 260-400/950-1500/3050- 4590 at least after July 1997 on the basis of OM dated 20.11.1989 read with OMs dated 18.2.1997 and 4.7.1997 because he is entitled for promotion under 1 % physical handicapped quota for blind persons.

7. Applicant pleaded that he has a fundamental right to be considered for promotion to the higher grade under Articles 14 and 16 of the Constitution of India and also as held by the Apex Court in a Constitution Bench in *Ajit Singh II's case Vs. State of Punjab* (1999(7) SCC 363). Accordingly, he prays that sub-clause (ii) of OM dated 18.2.1997 (Annexure A-2) may be quashed and set aside and the respondents be directed to consider him for promotion and ACP with arrears of pay.

8. The OA has been contested by the respondents on the ground that in order to implement the reservation orders for physically handicapped persons, an Expert Committee was set up by the Ministry of Welfare to identify the jobs which can be performed by various categories of physically handicapped persons without loss of productivity. The Committee submitted its report on identification of jobs in 1986. The

12

Govt. of India issued orders for providing reservation to physically handicapped persons vide O.Ms dated 13.3.1981 and 3.12.1992, with the proviso:

"4. Where a Department considers that it is not possible to provide for the physically handicapped to the extent of the reservations in view of the nature of duties expected to be performed by the employees in any particular Department, that Department could be partly or fully exempted from the reservation orders. The grant of such exemption shall be decided by an Inter-Departmental Committee to be set up by the Department of Social Welfare, on which the Department of Social Welfare, Department of Personnel and AR, Department of Health and the Administrative Department concerned would be represented".

Further the reservation for the physically handicapped persons in Group 'C' and 'D' in posts filled by promotion has been introduced by OM dated 20.11.1989 subject to the following conditions:

"The applicability of the reservation, will, however, be limited to the promotions being made to those posts that are identified as being capable of being filled/held by the appropriate category of physically handicapped".

Accordingly, the physically handicapped persons are appointed/promoted only against posts which are identified as suitable for them.

9. The applicant is a Peon working with respondent No.1 and the next avenue for promotion is as Audit Clerk, which admittedly has not been identified as one of the posts suitable for persons with visual disability, hence he could not be promoted. The applicant also could not be considered for grant of financial upgradation under the ACP as condition No. 6 of OM dated 9.8.1999 (Annexure R-4) issued by respondent No. 2 makes it clear that that scheme can only be extended to those persons who fulfil the normal promotional norms. The applicant, therefore, could not be considered for financial upgradation under the scheme.

10. The respondents stated that the applicant was initially appointed as a Packer on ad hoc basis against the post identified for visually handicapped in the Ministry of

de

13

Food and Civil Supplies (Department of Civil Supplies) in 1981 and was working against a supernumerary post in surplus cell.. Subsequently, he was appointed as a Peon (Group'D') under respondent No.1 on his transfer from the strength of Central (Surplus Staff) Cell even though the post had not been identified for visually handicapped persons. Respondent No.1 protested against the posting of the applicant but they were forced to accept his appointment as the order from the surplus cell were of mandatory nature.

11. The applicant was retired from service on medical grounds with the entitlement of pensionary benefits in public interest after he was declared unfit by Dr.Ram Manohar Lohia Hospital to the type work he was required to do. However, was reinstated in compliance with directions of the Tribunal issued in OA 1797/2001 on 7.8.2001. The applicant's made a representation in compliance with Tribunals's order in OA 2063/2002 dated 7.8.2003 but did not support it by relevant rules and instructions and the provisions with the Disability Act, 1995 as per directions of the Tribunal under which he can be considered for promotion to LDC.

12. So far as the contention of the applicant for providing reservation in promotion when the element of direct recruitment is 75% or more, the respondents pleaded that as the interest of persons with disability is taken care of in the direct recruitment quota reservation has not been provided. Hence an exception cannot be made in the case of the applicant or physically disabled person..

13. We have heard the learned counsel for the parties and have gone through the records.

14. First we take up the issue of non provision of reservation for physically disabled persons in cases where percentage of direct recruitment is 75 % or more. We find that sub-clause (ii) of of Para 1 of OM dated 18.2.1997 lays down the procedure/provisions in case of promotion. It is seen that reservation has been provided for physically handicapped persons in promotion as long as direct recruitment is less than 75 %. The reason for not providing reservation in case direct recruitment

de

is 75 % or more is that no reservation is provided for any categories, including physically handicapped persons and as such we see nothing obnoxious in the stipulation. In view of this the claim of the applicant for promotion to the next grade of LDC on the basis of reservation for physically handicapped against roster point has no basis.

15. Now we take up the question of right of the applicant for consideration for promotion in his turn against non reserved vacancies. It is established law that the applicant has a fundamental right for consideration for promotion as any other employee in his turn. The respondents contend that promotion can only be granted against identified posts for physically handicapped person. The respondents rely upon OM dated 20.11.1989 stating that this OM lists the posts suitable for employment for persons with physical disability. However, in the case of the applicant the promotional post is Audit Clerk and this post has not been listed as a post to which persons with visual disability can be promoted. Further no reservations are to be provided for any categories including physically handicapped when the percentage of direct recruitment is 75 % or more. We have to see whether the fundamental right of the applicant to be considered for promotion on his own turn will be curtailed because of his disability. For answering this question, we look to sub-clause (2) of Section 47 of the Disability Act, 1995 which reads as under:

"(2) No promotion shall be denied to a person merely on the ground of his disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any as may be specified in such notification, exempt any establishment from the provisions of this section".

This Section is very clear that promotion cannot be denied merely on the ground of Disability. In case an establishment is unable to appoint persons with disability it will have to seek exemption from the provisions of this section through a notification.

2

16. It is not the case of the respondents that their establishment has been exempted from the provisions of this section. In fact, they have placed on record C&G letter dated 8.3.1996 which deals with the subject of reservation of jobs for physically handicapped persons in Group 'C' and 'D' posts applicable to their organization. Respondent No.1 has not been exempted from this section. In view of the law laid down in sub-rule 2 of Rule 47 of the Disability Act, 1995, the respondents have to consider the case of the applicant for promotion along with his juniors, if the applicant is otherwise eligible. He cannot be denied promotion merely on the ground of disability.

17. OM dated 28.2.1986, annexed as annexure R 1 by the respondents, deals with the question of reservation of jobs for physically handicapped persons in Group 'C' and 'D' posts and stipulates that :

"The list of jobs/identified by the Committee is by no means exhaustive and Ministries/Departments etc, may have to further supplement this".

It is thus clear that to give effect to the aims and objectives of persons with Disabilities Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the respondents are required to make all reasonable efforts to accommodate persons with disability by supplementing to the jobs identified or considered suitable for reservations for physically disabled person. They cannot limit the right to be considered for promotion to only identified jobs. They will have to provide a suitable avenue for promotion for persons with disability by supplementing the jobs identified by the Committee or find within the non identified categories some assignment that the applicant can perform.

18. On the question of grant of ACP benefits, the respondents have urged that condition No 6 of the ACP for grant of financial upgradation does not make the applicant eligible as he does not fulfil the normal promotion norms. Condition No.6 of the ACP reads as under:

" Fulfilment of normal promotion norms (benchmark, departmental examination, seniority-cum-fitness in the case of Group 'D' employees etc.) for grant of financial upgradations, performance of such duties as are entrusted to the employees together with retention of old designations, financial upgradations as personal to the incumbent for the stated

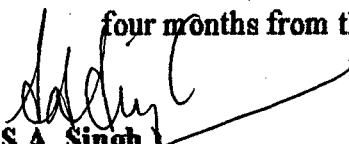
16


purposes and restriction of the ACP Scheme for financial and certain other benefits (House Building Advance, allotment of Government accommodation, advances, etc.) only without conferring any privileges related to higher status (e.g., invitation to ceremonial functions, deputation to higher posts, etc.) shall be ensured for grant of benefits under the ACP Scheme".

A plain reading of condition No.6 makes clear that for becoming eligible for ACP benefits the normal condition of bench mark, departmental examination and seniority-cum-fitness are to be taken into consideration. There is no mention of physical disability being a bar. In fact if ACP Scheme is read along with sub clause (2) of Section 47 of the Disability Act, 1995 wherein it has been stated that no promotion shall be denied to a person merely on the ground of his disability then it is clear that physical disability, by itself, cannot come in the way for consideration for granting of benefits under ACP Scheme.

19. In view of the foregoing, we dispose of this OA with the following directions:

- (i) The applicant is to be considered as per rules, for promotion to the post of LDC on the date when his juniors have been promoted by identifying suitable post for the purpose either within the department or elsewhere;
- (ii) The applicant is eligible for grant of benefit of financial upgradation under the ACP as per rules and norms without taking into consideration the question of visual disability.
- (iii) The above exercise shall be complied with by the respondents within a period of four months from the date of receipt of a copy of this order.


(S.A. Singh)
Member (A)


(V.S. Aggarwal)
Chairman

sk