

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR

Khyber Pakhtunkhwa
Service Tribunal

Diary No. 5576

Dated 25/5/2023

Service Appeal No.1664/2022

Muhammad Naeem Jan.....Appellant

V E R S U S

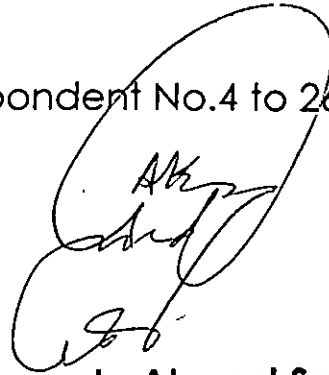
Govt. of KPK & others.....Respondents

I N D E X

S#	Description of Documents	Annex	Pages
1.	Parawise Comments		1-6
2.	Affidavit		7
3.	Copy of the Order/judgment dated 08.03.2023	"A"	8-22
4.	Wakalatnama		

Through

Respondent No.4 to 26



Akhuzada Ahmad Saeed

Advocate,
High Court Peshawar
Cell No.0333-2902529

Dated: 24.05.2023

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR

Service Appeal No.1664/2022

Muhammad Naeem Jan.....**Appellant**

V E R S U S

Govt. of KPK & others.....**Respondents**

JOINT PARAWISE COMMENTS ON BEHALF
OF THE RESPONDENTS NO.4 TO 26.

Respectfully Sheweth:

Preliminary Objections:

- a. That the appellant has got no cause of action to file the instant case.
- b. That the appellant has no locus standi to file the instant appeal.
- c. That the instant appeal is not maintainable in its present form.
- d. That the appeal IN hand is clearly time barred.
- e. That the appellant has concealed material facts from this Hon'ble Service Tribunal.
- f. That the instant appeal is barred by law.

- g. That the appellant is estopped by his own conduct to file the instant appeal.
- h. That the appellant does not fall within the definition of an aggrieved person.
- i. That filing of this appeal is futile exercise and wastage of precious time of this Hon'ble Service Tribunal, liable to be dismissed forthwith.
- j. That the instant appeal is bad for non-joinder and mis-joinder of necessary parties.

ON FACTS:

- 1. Para No.1 pertains to record. Hence needs no reply.
- 2. Para No.2 pertains to record. Hence needs no reply.
- 3. Para No.3 pertains to record, hence needs no reply.
- 4. Para No.4 is incorrect and misconceived, hence denied as the impugned notification dated 31.12.2012 had not been issued in accordance with KP (Regularization of Services) Act, 2009 as well as the judgment of Hon'ble Peshawar High

Court, Peshawar. **(Copy of the Order/judgment dated 08.03.2023 is attached as Annexure "A")**.

5. Para No.5 pertains to record, hence needs no reply.
6. Para No.6 pertains to record, hence needs no reply.
7. Para No.7 is incorrect, hence denied. The respondent No.3 has constituted proper committee to resolve the grievances of the appellants. The committee scrutinize/examined all observation in detail, and submit a comprehensive report in light of the rule 17 (2) of APT rule 1989, that **"Seniority in various cadres of civil servants appointed by initial retirement vis-à-vis those appointed otherwise shall be determined with reference to the dates of their regular appointment to a post in that cadre; provided that if two dates are the same, the person appointed otherwise shall rank senior to the person appointed by initial recruitment"**.

The said seniority list has rightly been issued to the extent of appellant keeping in view

findings of the inquiry report and the laws on the said matter .

The appellant has rightly been placed junior to the answering respondents in the seniority list, in accordance with the above-mentioned facts.

It is also pertinent to mention here that as per the law, the private respondents are entitled to be also placed senior in the seniority list from those who are infact junior from private respondents but they were wrongly placed senior from the private respondents.

8. Para No.8 pertains to record. However, the departmental appeal is badly time barred.
9. Para No.9 is incorrect, hence denied. The appellant does not come within the definition of aggrieved person.

GROUND S.

- A.** Para-A is incorrect, hence vehemently denied. the appellant has been placed at his proper place in the seniority list but in fact the private

respondents have been deprived from their proper position in the seniority list and as per the law are entitled to be placed at their proper places.

- B. Para-B is incorrect, false, hence vehemently denied.
- C-D Para C & D are incorrect, hence denied. Detail reply has already been given in the preceding Paras.
- E. Para-E is incorrect, hence vehemently denied.
- F. Para-F needs no reply.
- G. Para No.G is incorrect, hence denied. The Appellant was treated in accordance with law and rules and has given right place in the seniority list.
- H. Para No.4 is incorrect, wrong and misconceived, hence denied.
- I. The private respondents also seek permission of this Hon'ble Tribunal to reply on other grounds at the time of arguments and produce any additional documents if required in support.

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR

Service Appeal No.1664/2022

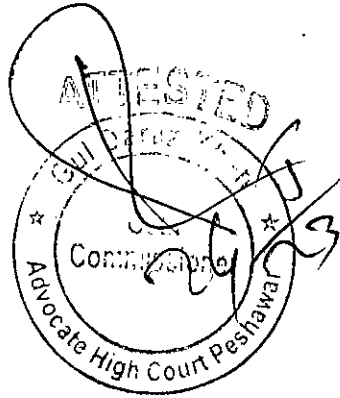
Muhammad Naeem Jan.....**Appellant**

VERSUS

Govt. of KPK & others.....**Respondents**

AFFIDAVIT

I, Khial Bahadar Son of Bahadar Khan, resident of Shati kor, Ghunda Khel, Post Office Mian Mandi, Tehsil Ghallani District Mohmand, (Respondent No.16), do hereby solemnly affirm and declare on oath that the contents of the accompanying **Comments/Reply** are true and correct to the best of my knowledge and belief and nothing has been concealed from this Hon'ble Court.



DEPONENT
CNIC No.21406-4748986-7

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BEFORE PESHAWAR HIGH COURT
PESHAWAR



Writ Petition No. 1281/2010.

1. Ahmad Shah
Instructor in D.P.E.
2. Irfanullah
Lecturer / Instructor
- ✓ 3. Sangeen Khan
Lecturer / Instructor
- ✓ 4. Abdul Qadoos
Lecturer / Instructor
5. Hayatullah
Lecturer / Instructor
6. Muhammad Ilyas
Lecturer / Instructor
7. Muhammad Ibrahim
Lecturer / Instructor
8. Ikhtiar Zada
Lecturer / Instructor

At GCMS Khar, Bajaur Agency

9. Engr. Rahmat Khan
Instructor in Electronics,
GTI Ekka Ghund.
10. Engr. Muhammad Iqbal
Instructor in Telecom,
GTI Ekka Ghund.
11. Sajid Ullah
Instructor in English,
GTI Sara,
Khyber Agency.

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EXAMINER
PESHAWAR HIGH COURT

FILED TODAY

Deputy Registrar

01 APR 2010

- 12. Muhammad Ilyas,
Instructor (Business Admn:)
GCMS Ghallani,
Mohmand Agency.
- 13. Shahid Alam
Instructor Computer Science
GCMS Ghallani,
Mohmand Agency.
- 14. Irfan Qadir
Instructor Computer Science
GCMS Ghallani,
Mohmand Agency.
- 15. Rehan ud Din
Instructor D.P.E.
GCMS Ghallani,
Mohmand Agency.
- 16. Altaf Hussain
Instructor Computer Science
GCMS Ghallani,
Mohmand Agency.
- 17. Khial Bahadur
Instructor Business Admn:
GCMS Ghallani,
Mohmand Agency.
- 18. Sajjad Ahmad
Instructor Computer Science
GCMS Ghallani,
Mohmand Agency.
- 19. Zeenat Shah
Instructor Business Admn:
GCMS Ghallani,
Mohmand Agency.
- 20. Asif Khan
Instructor Physics
GCMS Ghallani,
Mohmand Agency.

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Deputy Registrar
01 APR 2010

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21. Ifkhar Ali
Instructor Physics
GCMS Ghallani,
Mohmand Agency.
22. Muhammad Iqbal
Instructor Business Admn
GCMS Ghallani,
Mohmand Agency.
23. Sartaj Aziz
Instructor Business Admn
GCMS Ghallani,
Mohmand Agency.
24. Inam Khan
Librarian
GCMS Ghallani,
Mohmand Agency.

_____ Petitioners

VERSUS

1. Government of NWFP
Through Additional Chief Secretary,
Peshawar (FATA).
2. Directorate of Technical Education (FATA)
Through It's Director
FATA Secretariat, Warsak Road, Peshawar.
3. Secretary
Industries Commerce, Mineral Development, Labour &
Technical Education Department, Govt. NWFP, Peshawar.
4. Director Technical Education & Man Power Training
NWFP Peshawar.

_____ Respondents

WRIT PETITION UNDER ARTICLE 199 OF THE CONSTITUTION
OF ISLAMIC REPUBLIC OF PAKISTAN, 1973.

Respectfully Sheweth,

Short facts giving rise to the present Writ Petition, are as under:

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JUDGMENT SHEET
PESHAWAR HIGH COURT PESHAWAR
JUDICIAL DEPARTMENT.

W.P. No. 1289 of Year 2010

JUDGMENT

Date of hearing: 8-3-2012

Appellant: (M. Ahmad Chah etc) by Mr. Rochal Arain, Adv

Respondent: (Govt NWFP) by Mr. Niaz Ali DAS, Adv
Mr. Mubshir Alam Director & Respondents.

MIAN FASIFUL MULK. I. Petitioners, through

instant petition, seek the indulgence of this Court by issuing directions to respondents to treat the petitioners as regularized employees under the NWFP Employees (Regularization of Services) Act, 2009. The petitioners in connected Writ Petitions No. 1145/2010, 1252/2010, 2639/2010, 1870/2011, 2592/2011, 3244/2011, 3285/2011 and 43/2012, have also similar grievances against the respondents, therefore, we propose to dispose of all the writ petitions through this common judgment in W.P. No.1289/2010.

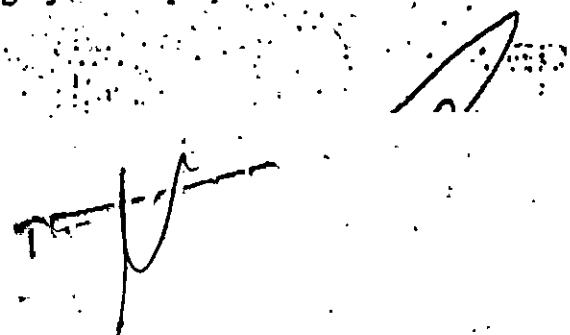
2. In these petitions the common point of law involved is whether petitioners' appointment on various posts in the respondents' department in pursuance to the advertisement made in the newspapers was on contract basis so as to attract the provisions of Section 3 of

NWFP (Regularization of Services) Act, 2009 for their regularization or not.

3. To understand the position, we would take into account the advertisement made in the press, the appointment orders of petitioners, their salary slips and relevant provisions of the Act, 2009 but before that we may give here a brief resume of the facts and circumstances leading to filing of instant petitions.

4. The Director Technical Education & Man Power Training Peshawar (respondent No.4) advertised certain posts of Instructors, Junior Instructors, Librarians etc. in BPS 14, 15 and 17 lying vacant in various Government Colleges of Management Sciences Ghalani, Khar Bajaur, Parachinar, Miranshah and Government Technical Institutes Bara, Yakka Ghund, Sadda Miranshah and Ghaljai on contract basis for one year extendable to a further period. Petitioners having requisite qualification for the respective posts applied for appointment.

5. A Recruitment Committee was constituted comprising of Deputy Secretary (P&D), Deputy Secretary (Admn), Director Technical Education, NWFP and Deputy Director Technical Education FATA assisted by subject specialists/experts. Merit list of the candidates for each category was prepared and submitted for



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approval of Governor, which was accordingly approved and petitioners were issued the appointment orders.

6. On completion of one year term, the contract was extended from time to time without any break till the year 2009, when the NWFP (Regularization of Services) Act, 2009 was promulgated where under the employees appointed on adhoc or contract basis by the Government were given the status of regular employees. Petitioners represented against before respondent No.1 for their regularization but the same was denied to them on the ground that they were not appointed on contract basis rather their appointment was on fixed pay against the project posts, hence they were not qualifying the conditions as contained in the Act *ibid*.

7. We have heard learned counsel for the parties and have also gone through the record appended with these petitions.

8. A look at the advertisement at Annexure:A would disclose that the posts were on contract basis. The appointment orders issued to petitioners would reveal that though their appointments were made on fixed pay but Para-2 of the terms and conditions contained in the said appointment letters was to the effect that, "their period of selection was for one year or till the creation

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Petitioner's High Court

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of regular posts/arrival of NIYFP Public Service Commission nominee which ever is earlier."

From the above, no doubt remains that although appointment of petitioners was on fixed pay but the posts on which petitioners were appointed were not temporary posts rather regular one liable to be filled through regular appointment.

9. Except the bald allegation of respondents that petitioners were project employees and daily wages, nothing has been brought on record to show that their appointments were made on the posts meant for a Project. Annexure E at Page-43 is the Summary for Governor. According to it, the Governor was pleased to upgrade the existing five Government Commercial Training Institutes in FATA to the level of College of Management Sciences so as to offer Bachelor's degree in Business Administration and Information Technology to the students. For the purpose, Schedule for New Expenditure (SNE) was prepared to recruit the regular staff and forwarded to SAFRON Division for sanction. It further reveals that recruitment of staff being a lengthy process, it was proposed that for the purpose of starting the classes staff may be recruited on contract basis till appointment of regular staff and their salaries may be paid from GP. From the above summary, which is duly

Signature
Director
Public Service Commission

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approved by the Governor, it is very much evident that neither the posts to be filled in were temporary nor the same were meant for any Project except that their salaries were to be paid from ADP.

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10. A similar question had arisen before the august Supreme Court of Pakistan in the case of Ali Akbar vs. The Government of NWFP (C.P. No.462-P of 2006) decided on 05.05.2009, wherein it was held as under:-

The petitioner's appointment by office order dated 04.02.1985 was as Research Officer in BPS-16 and according to Para-7 of the said order, it was a stop gap arrangement and on ad-hoc basis till the regular appointee. The petitioner's appointment order mentions three different terms as regard his status, namely, "on temporary basis", "stop gap arrangement" and "one ad-hoc basis". However, Para-7 of the order mentions his appointment on ad-hoc basis to continue till the post is filled up through regular appointment. It follows that the post to which the petitioner was appointed was not a temporary post but a regular post liable to be filled through regular appointment. The

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order of appointment also does not mention anywhere that the post in question was a temporary one. Furthermore, the petitioner's appointment in a particular pay scale as Assistant Research Officer in the Directorate of Agriculture Research establishes that the petitioner's appointment was on ad-hoc basis on a regular post in the Directorate. By the same office order, the petitioner was posted against a vacancy in the Project Research on the Cultivation of Edible Mushroom in Pakistan. The order, therefore, had made a clear distinction against the petitioner's appointment and posting, whereas he was appointed in the Directorate of Agriculture Research, he was posted in a project against vacancy. It is, therefore, wrong to say that the petitioner was a project employee and termination of his service on that score cannot be maintained."

11. The objection of respondents that petitioners were appointed against project posts in view of the advertisement and summary to Governor is not sustainable.

12. As per Section 3 of the NWFP (Regularization of Services) Act, 2009, all employees appointed on contract or ad-hoc basis and holding that post on 31st December, 2008 or till the commencement of this Act shall be deemed to have been validly appointed on regular basis, having the same qualification and experience for a regular post. Under Section 2(b), the word "employee" means an adhoc or a contract employee appointed by Government on adhoc or contract basis or second shift/night shift but does not include the employees of project post or appointed on work charge basis or who are paid out of contingencies.

13. Admittedly, the posts were advertised on contract basis and petitioners were appointed on the posts having requisite qualification after going through the process of test and interview conducted by a Recruitment Committee. There is no mention in the appointment order that petitioners' appointment is against the project posts except that their appointment was made on fixed pay as against the terms of advertisement wherein the posts were clearly mentioned to be on contract basis. The salary slips of petitioners also indicate that though they were being paid fixed pay but their post is clearly written to be "contract" post. The

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petitioners also draw their salaries from the AGPR. The other objection of the Department that the petitioners were appointed on fixed pay, hence their services could not be regularized is, therefore, also nothing but a trick played by the respondents in the appointment orders to avoid monetary benefits of the posts to which the petitioners under the law were entitled to get. The term "fixed pay" has not been defined in service laws. As stated above, the petitioners' appointments were made in pursuance to the advertisement published in the press against the posts on contract basis and it can, therefore, be safely inferred that status of petitioners' was that of contract employees regardless of the words "fixed pay" used in their appointment letters.

14. The respondents, during the course of proceedings in these writ petitions, sought time on so many occasions that the Government has in principles decided to regularize the petitioners by proposing legislation to cater therefore, and even copy of a bill contending to be placed before the Parliament, was also produced but till to-date nothing has been done.

15. The respondents while inviting the attention of this Court to Para-3 of Appointment letters, contended that as the petitioners have accepted the terms and

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conditions of their appointment, wherein it is categorically mentioned that petitioners will not be considered for regularization at any stage, at any time, being employees on fixed pay, therefore, the principle of estoppel would attract to their cases. We have not been impressed by the arguments on two counts; one that there can be no estoppel against Statute and second that an employee at the time of appointment has little choice to enforce any condition of his choice on the employer. In the case of Ikrām Bari and 524 others vs. National Bank of Pakistan through President and another (2005 SCMR 100) it has been held by their lordships in the following words:-

"It is difficult to countenance the approach of the Bank that the temporary Godown staff and the daily wages employees should be continued to be governed on disgraceful terms and conditions of service for an indefinite period. In view of section 24-A of the General Clauses Act 1897, the National Bank was required to act reasonably, fairly and justly. An employee being jobless and in fear of being shown the door had no option but to accept and continue with the appointment on whatever conditions it was offered by the Bank. In the case of Pakistan v. Public at Large PLD 1987 SC 304, it was contended before the

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2023/07/20 10:00 AM

Shariat Appellate Bench of this Court that the provisions of law impugned therein amounted to a contract between the Government and the civil servant and thus they involved his consent. It was observed that in fact it is not in the nature of a free consent between the agents. On one hand, State power was projected in the form of a Statute and on the other, the civil servant had no choice of a bargain on those provisions when joining the service. He could not get it changed. In *Habibullah v. Government of the Punjab and 5 others* PLD 1980 Lah. 37, it was held that the employer being placed in a position of authority and strength could always coerce employees to waive their legal protection and accept contractual terms at the pains of losing his job.

15. We may observe here that firstly the respondents utilized the word "fixed pay" in their appointment letters purely as a means of evading their statutory obligations in terms of the service laws and also to save money by denying them the opportunity of pension/provident fund benefits etc, although their appointments were made in accordance with the prescribed method of recruitment and through a duly constituted Recruitment Committee and secondly, when

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 JUDGE
 District Court

the right of their regularization accrued in view of the promulgation of the Act, 2009, they denied them such benefit and came up with lame excuses before this Court that they were project employees, daily wages and payee out of contingency. The petitioners, as is evident from the record, are neither project employees, nor daily wages nor receiving salary from contingency but were contract employees on regular posts and after promulgation of NWFP (Regularization of Services) Act, 2009, have now assumed the status of regular employees of the Department. The acts of respondents being reprehensible, amounts to exploitation of petitioners at their own expense and are, therefore, liable to be declared as illegal and in excess of lawful jurisdiction.

16. We, therefore, issue writ in favour of petitioners and against the respondents to the effect that petitioners shall be deemed to be regular and permanent employees of respondents' No.1 and 2 Department within the meaning of NWFP (Regularization of Services) Act, 2009 and the.

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EXAMINER
Post Office, Khandwa

respondents are directed to issue notification of their regularization within a period of one month.

Announced
08.03.2012

Sd/- Mir Fakhruddin Khan
Sd/- Mir Fakhruddin Khan

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for issue

[Signature]
Sd/- Mir Fakhruddin Khan
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Examiner
Peshawar High Court Peshawar
Authorized Under Article 87 of
the Constitution of Pakistan

14-3-12

12170
Date of Presentation 10-3-12
No of Pages 16 Pages
Copying fee
Urgent fee
Total 30.00
Date of Preparation 14-3-12
Date Given For 14-3-12
Date of Delivery 14-3-12
Received by *[Signature]*

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