

KHYBER PAKHTUNKHWA SERVICE TRIBUNAL, PESHAWAR

BEFORE: **KALIM ARSHAD KHAN ... CHAIRMAN**
AURANGZEB KHATTAK... MEMBER (Judicial)

Service Appeal No.7847/2021

Date of presentation of Appeal.....06.12.2021
Date of Hearing.....24.07.2024
Date of Decision.....24.07.2024

Shabir Ahmad S/O Bashir Ahmad, Driver (BPS-06) R/O Pordil Khan Kali Mardan Road, Charsadda and 16 others
.....(*Appellants*)

Versus

1. Government of Khyber Pakhtunkhwa, through **Secretary Health** Department, Civil Secretariat, Khyber Pakhtunkhwa Peshawar.
2. **The Secretary**, Government of Khyber Pakhtunkhwa Finance Department, Civil Secretariat, Peshawar.
3. **The Director General Health Services**, old FATA Secretariat, Warsak Road, Peshawar.
4. **The Accountant General**, Khyber Pakhtunkhwa Peshawar.....(*Respondents*)

Present:

Mr. Muhammad Madni, Advocate.....For the appellant
Mr. Muhammad Jan, District Attorney.....For respondents

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APPEAL UNDER SECTION 4 OF THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL ACT, 1974 READ WITH ALL ENABLING LAWS AND RULES, AGAINST THE INACTION OF THE RESPONDENTS BY NOT COUNTING THE CONTRACT SERVICE OF THE APPELLANT TOWARDS REGULAR SERVICE I.E. W.E.F INITIAL APPOINTMENT TILL 07.03.2018 FOR THE PURPOSE OF PAY PROTECTION AND AGAINST NOT TAKING ACTION ON THE DEPARTMENTAL APPEAL 09.08.2021 OF THE APPELLANT WITHIN THE STATUTORY PERIOD OF NINETY DAYS.



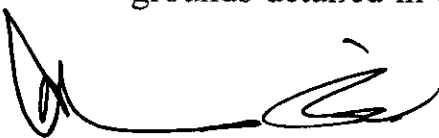
JUDGMENT

KALIM ARSHAD KHAN, CHAIRMAN: Appellant's case as reflected from the record, is that he was appointed as Driver on fixed pay in the project MNCH (Mother Neonatal Child Health) on 29.10.2010; that his services were regularized under Section-4 of the Khyber Pakhtunkhwa Employees (Regularization of Services) Act, 2018 vide notification dated 24.05.2019, w.e.f 07.03.2018 i.e. from the date of commencement of the Act; that consequent upon regularization of his services, the respondents prepared his service book but without entries of previous service; that it was on receipt of pay slip for the month of July, 2021, when date of entry was mentioned as 07.03.2018 instead of 2010; that feeling aggrieved, the appellant submitted departmental appeal on 09.08.2021 for counting of his contractual service, however no appellate order was passed on the departmental appeal within the statutory period, hence, the instant service appeal..

02. On receipt of the appeal and its admission to full hearing, the respondents were summoned. Respondents put appearance and contested the appeal by filing written reply raising therein numerous legal and factual objections. The defense setup was a total denial of the claim of the appellant.

03. We have heard learned counsel for the appellant and learned District Attorney for respondents.

04. The learned counsel for the appellant reiterated the facts and grounds detailed in the memo and grounds of the appeal while the

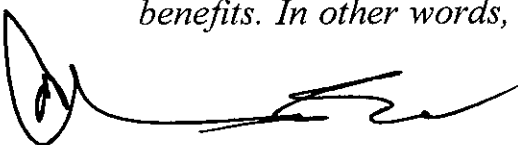


learned Deputy District Attorney controverted the same by supporting the impugned order(s).

05. Perusal of record reveals that appellant claims for counting of his contractual service towards regular service for the purpose of pay and pension. A larger bench of this Tribunal vide its judgment dated 09.07.2024 passed in Service Appeal No.355/2022 titled "Dil Afroz Vs. Government of Khyber Pakhtunkhwa" has held as under:

"7. Perusal of record reveals that services of the appellant were regularized vide order dated 24.09.2014 issued in compliance of Government of Khyber Pakhtunkhwa Regulation of Lady Health Worker Program and Employees (Regulation and Standardization) Act, 2014. Appellant had retired from service on 04.02.2021 upon attaining the age of superannuation vide order dated 11.02.2021 after rendering 8 years 6 months and 2 days service to the department. The respondent department had not counted contract period of service of the appellant towards her pension and related benefit rather denied the same vide order dated 22.10.2022, which, as per appellant is against the rules on the subject.

8. *The only question for determination before this bench is whether a civil servant whose service was on contract/fixed basis, followed by regularization without completion of 10 years qualifying service could be entitled for pension or pensionary benefits. In other words, whether his/her contract service could be*



counted for calculating his/her qualifying service of 10 years or not?

9. It is admitted fact that appellant rendered continuous temporary service and length of her service was more than five years. Supreme Court of Pakistan in the Judgment reported in PLD 2016 SC 534 in such a situation has held as under:

"It is not disputed that the respondent rendered continuous temporary service and that his length of service was continuous and for more than five years. However, the question that needs to be answered is whether he was working in a "temporary establishment" or not. "Temporary establishment" has not been defined in the CSR, the Fundamental and Supplementary Rules issued by the Government of Pakistan, the ESTA Code or the Compendium of Pension Rules and Orders. In this context Article 369 of the CSR mentions temporary establishment but only explains what it is not and thus is not very helpful. Therefore, as mentioned earlier in the opinion, as per the settled rules of interpretation, the dictionary meaning of the words has to be resorted to. The Concise Oxford Dictionary (6th Ed.) has defined "temporary" as "lasting, meant to last, only for a time", and establishment" as an "organized body of mean maintained for a purpose". Chambers 21st Century Dictionary defines "temporary" as "lasting, acting or used, etc. for a limited period of time only", and "establishment" as "a public or government institution". Oxford Advanced Learner's



Dictionary of Current English (7th Ed.) defines "temporary" as "lasting or intended to last or be used only for a short time; not permanent" and "establishment" as "an organization, a large institution..." In light of the above dictionary meanings, "temporary establishment" can be said to mean an organization or institution which is not permanent, rather effective for a certain period only. Admittedly the respondent was serving in Pakistan Locomotive Factory Risalpur, Pakistan Railways, which does not in any way fall within the meaning and purview of "temporary establishment". Thus, the respondent could not rely upon Article 371-A of the CSR. Besides, if hypothetically speaking Pakistan Locomotive Factory Risalpur was a temporary establishment even then the respondent would not be able to take the benefit of Article 371-A (supra) as he otherwise does not qualify for pensionary benefits having not been subsequently taken into permanent employment, which is sine qua non for the grant thereof.

8. Adverting to the law laid down in the case of Mir Ahmad Khan (supra) wherein it was held: - "Admittedly the appellant put in more than ten years' temporary service before his services were terminated, he was, therefore, entitled to pensionary benefits under Regulation 371-(i) of Civil Service Regulations."

In light of the discussion in paragraph No.6, the judgment delivered in Mir Ahmad Khan's case (supra) is declared to be per incuriam."



10. Appellant's claim for counting period of contractual/temporary service was refused by the respondent on the ground of not having required qualifying 10-years of regular service. Rule 4.4 of pension Rules 1963 refers to 10-years qualifying service for pension which read as:

Complete years of qualifying service	Scale of pension ex-pressed as fraction of average emoluments	Maximum limit of pension per annum
10	10/50	2500
11	11/50	2800
12	12/50	3100
13	13/50	3400
14	14/50	3700
15	15/50	4000
16	16/50	4300
17	17/50	4600
18	18/50	4900
19	19/50	5200
20	20/50	5500
21	21/50	5800
22	22/50	6100
23	23/50	6400
24	24/50	6700
25 and over	25/50	7000

"After a qualifying service of not less than 10 years, full Superannuation, retiring, invalid or compensation pension may be granted not exceeding the maximum limits prescribed below."

11. Appellant placed her reliance for counting her contractual temporary service towards regular service for the purpose of pay and

pension relying upon rule 2.3 and judgment of this Tribunal in service appeal No.6573/2021 and 1471/2021. This Tribunal granted relief of counting of contractual temporary service towards regular keeping in view judgment of Supreme Court reported in Mr. Ahmad Khan case reported 1997 SCMR 1477 followed by judgments of Worthy Peshawar High Court which was an earlier view of the Supreme Court but recently Supreme Court in Judgment 2021 SCMR 1546 had decided the matter relating to pension and pension benefits and counting of contractual period of service toward regular service for the purpose of pension and pensionary benefits which is reads as:

"In case, an employee had served a government department for the duration of the period qualifying him to receive pension, the period spent as a contractual employee may be added to his regular qualifying service only and only for the purpose of calculating his pension and for no other purpose. The provisions of Article 371-A of Civil Service Regulations (C.S.R.) started with a non obstante clause which meant that the said Article did not relate to the question entitlement or eligibility to receive pension. It was clearly and obviously restricted to counting the period of a minimum of five years which had been rendered by a temporary contractual employee to be taken into account with the object of calculating the quantum of his pension and not more. The non-obstante clause in Article 371-A of C.S.R. did not allow those who did not fulfill the requisite conditions for qualifying for pension to bypass such conditions and add up regular and

contractual periods of employment for the purpose of meeting the eligibility criterion of ten years of service. Such an interpretation would create absurd situations and would render other provisions and Articles of C.S.R. redundant, unnecessary and surplus. Therefore, Article 371 of C.S.R. did not allow Government Servants rendering temporary service in a temporary establishment for more than 5 years to entitled for grant of pension rather Such period could he counted towards calculation of pension only if otherwise entitled to pension by meeting the criteria of qualifying service."

So, the Hon'ble Supreme Court in explicit terms has held that without completion of 10 years qualifying service, the services rendered by a civil servant on contract/fixed pay could not be counted for pensionary benefits. It was also rules that a civil servant has to complete 10-years regular qualifying service for pension and thereafter, his services whatever it may be, on contract or daily wages or fixed pay, shall be counted for determination of pensionary benefits but without completion of 10-years qualifying service, the service of a civil servant rendered on contract or fixed pay could not be added to the service after regularization to complete qualifying 10-year regular service

12. Supreme Court defined word 'count' as mentioned in Article 371-A of CSR of which pension Rule 2.3 is the ditto copy. So we will have to see both the rule 2.3 of the Pension Rules 1963 and 371-A of C.S.R by keeping them in juxtaposition as there is no difference in both the sub-conditions/sections which areas under:

i. "Government servants borne on temporary establishment who have rendered more than five years continuous temporary service shall count such service for the purpose of pension or gratuity" and

ii. temporary and officiating service followed by confirmation shall also count for pension or gratuity.

13. The august Supreme Court of Pakistan in judgment reported in 2021 SCMR 1546 make reference to para 6 of PLD 2016 SC 534 wherein words count occurring in both the condition mentioned in 371-A C.S.R was defined which read as:

"It important to note that Article 371-A presupposes that such a government servant, whether falling under clause (i) or (ii), is otherwise entitled to pension (or gratuity, as the case may be). In other words, Article 371-A cannot be used as a tool to bypass the conditions for qualifying service of pensionary benefits, and such government servant has to fulfill the minimum number of years for grant of pension. This is due to the use of the word "count" as opposed to "qualify" or "eligible", as rightly argued by the learned counsel for the appellant. As per the settled rules of interpretation, when a word has not been defined in the statute, the ordinary dictionary meaning is to be looked at. Chambers 21st Dictionary defines "count" as "to find the total amount of(items), by adding up item by item; to include". Oxford Advanced Learner's Dictionary of Current English (7th Ed.) defines "count" as "to calculate the total number, of people, things, etc. in a particular group; in include sb/sth when you calculate a total; to consider sb/sth in a particular way; to be considered in a particular way". Thus in light of the above, service rendered for more than five years as contemplated by Article 371-A would only be



Service Appeal No.7847/2021 titled "Shabir Ahmad & others versus Government of Khyber Pakhtunkhwa through Secretary Health Department Khyber Pakhtunkhwa, Peshawar and others", decided on 24.07.2024 by Division Bench comprising of Mr. Kalim Arshad Khan, Chairman, and Mr. Aurangzeb Khattak, Member Judicial, Khyber Pakhtunkhwa Service Tribunal, Peshawar.

added, included, or taken into account for the purposes of pensionary benefits, and not make such government servant qualify for pension per se. This interpretation is bolstered by logic, reason and common sense. If we were to accept the reasoning of the learned Service Tribunal in the impugned judgment and the arguments of the learned counsel for the respondents, it would create a bizarre and anomalous situation, where a government servant who has rendered temporary service in a temporary establishment for, let us say, seven years, would be entitled to pensionary benefits, and on the other hand, a government servant rendering services as a regular employee for fifteen years would not (yet) have completed the requisite number of years to qualify for grant of pension. It is absurd, ludicrous and inconceivable that a government servant, who is in regular employment, would become entitled to pension after serving the minimum years of qualifying service as prescribed by the law, whereas while interpreting Article 371-A, a government servant who has served as a temporary employee could be given preference over a regular employee, and after a minimum service of only five years would automatically become entitled to pension. Holding so would be against the object and spirit of the concept of pension which has been discussed by this Court in Regarding pensionary benefits of the Judges of Superior Courts from the date of their respective retirements, irrespective of their length of service as Judges (PLD 2013 SC 829) as follows:-

"...pension is not the bounty from the State/employer to the servant/ employee, but it is fashioned on the premise and the resolution that the employee serves his employer in the days of his ability and capacity

and during the former's debility, the latter compensates him for the services so rendered.

Therefore, the right to pension has to be earned and for the accomplishment thereof, the condition of length of service is most relevant and purposive."

(Emphasis supplied)

Thus, we are not inclined to interpret Article 371-A in such a way so as to render the provisions stipulation minimum years for grant of pensionary benefits superfluous and redundant. So it is held that interpretation of 371-A CSR equally applicable to rule 2.3 of the pension Rules 1963 as there is no difference even of, in both the sections.

14. *Worthy Peshawar High Court in its judgment handed down in writ petition No. 4790-P/2022 and W.P No. 289-M/2021 by following above referred verdict of Supreme court given 2021 SCMR 1546 has held that 10 years qualifying regular service is condition pre-requisite for counting five years contractual period of continuous service for calculating the pension and pensionary benefits. Appellant was paid by the Federal Government contingency fund while serving on contract/temporary basis and not from Provincial Consolidated Fund from which she claim her pension because eligibility for pension had three conditions, one out of three is "a civil servant must be paid by the provincial consolidated fund." Provincial Consolidated fund provided under of Article 118(i) of the Constitution of Islamic Republic of Pakistan, 1973.*



15. *So in our humble view, service rendered on contract basis followed by regularization could only be counted for pensionary benefits provided that a civil servant has completed qualifying ten years of regular service independently. Therefore, contention of the appellant for counting of her contractual/temporary service towards regular service for pension and pensionary benefits is not tenable and misconceived, because of less than ten years regular service. Supreme court had delivered judgment in Mir Ahmad case reported as 1997 SCMR 1477 wherein a civil servant posted on temporary/contractual service who rendered it for more than five years was counted towards his/her regular service. This judgment was declared as per incuriam of judgments mentioned above, which was basis of all the judgment delivered either by the this or by the Worthy High Court. So same will not be cited as precedent in other cases and confined to the case in which same was delivered. Judgment of this Tribunal also per incuriam in all of the above referred appeals/judgment.*

14. *For what has been discussed above, we are unison to dismiss the appeal having no force in it. Cost shall follow the event. Consign."*

07. *The above referred case and the case of the appellant, are the same. The difference is that the appellant of the mentioned appeal was regularized vide order dated 24.09.2014 issued in compliance of Government of Khyber Pakhtunkhwa Regulation of Lady Health Worker Program and Employees (Regulation and*

Service Appeal No.7847/2021 titled "Shabir Ahmad & others versus Government of Khyber Pakhtunkhwa through Secretary Health Department Khyber Pakhtunkhwa, Peshawar and others", decided on 24.07.2024 by Division Bench comprising of Mr. Kalim Arshad Khan, Chairman, and Mr. Aurangzeb Khattak, Member Judicial, Khyber Pakhtunkhwa Service Tribunal, Peshawar.

Standardization) Act, 2014 and the appellant's services were regularized under Section-4 of the Khyber Pakhtunkhwa Employees (Regularization of Services) Act, 2018 issued vide Notification dated 24.05.2019. However, both, being the employees of the same department, have claimed for counting their contractual period as regular service for the purpose of pay and pension.

08. In view of the above situation, instant service appeal is dismissed with costs. Consign.

11. *Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 24th day of July, 2024.*



KALIM ARSHAD KHAN
Chairman



AURANGZEB KHATTAK
Member (Judicial)

Mutazem Shah