

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Aziz-ur-Rehman

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No.D-1952 of 2014

Petitioners

Syed Ali Ammaar Jafrey

& others through:

Syed Shoa-un-Nabi, Advocate

Respondents No.1 & 2

Federation of Pakistan

Through:

Mr. Muhammad Nishat Warsi,
DAG

Respondents No.3 & 4

Pakistan Telecommunication

Company & another through:

Mr. Abdul Moiz Jafferi Advocate
Mr. Haroon-ur-Rehman Khan
Manager Legal

Date of hearing:

23.04.2019

Date of Decision:

02.05.2019

J U D G M E N T

Adnan-ul-Karim Memon, J. Through this petition, Petitioners

have sought following relief(s): -

1. To declare the performance Appraisal of Transferred Employees, by the respondents under non-statutory Performance Management System (PMS), as unlawful, illegal, unconstitutional, without jurisdiction and against the principles of natural justice and suspend the operation and all subsequent actions taken against the transferred employees based on PMS, which has been enforced upon them with malafides and to their detriment.

2. To direct the respondent No.3 & 4 to apply Civil Servant Act, 1973, Civil Servant (appointment, promotion and transfer) Rules 1973, Civil Servants (Efficiency & Disciplinary) Rules 1973, Pay, Pension and Gratuity Rules, Leave Rules 1980 which are applicable to the Civil Servants of Federal Government in the matter of petitioners.

3. To direct the Respondent No.3 & 4 to refer disciplinary matters of the Transferred Employees including petitioners to the authorities competent to take action and decide the same as per Civil Servant Act 1973 and Civil Servant (Efficiency & Disciplinary) Rules 1973 and not otherwise.

4. To direct the respondents to incorporate in the salaries of "Transferred Employees" all financial increases given by the Federal Government to its employees being governed under Civil Servant Act 1973 which have been grabbed since 2006, including Revised Pay Scales of 2011, enhanced rates of House Requisition, Medial Allowance, and Conveyance Allowance etc. etc. from the dates of their admissibility.

5. To direct the Respondent No.3 & 4 to settle the pensionary benefits of Petitioner No.12 in accordance with law applicable to the petitioner instead of regulations.

2. The brief facts of the case as per pleadings of the parties are that the petitioners are retired and serving employees of Pakistan Telecommunication Company Ltd., who started their career with the Pakistan Telephone and Telegraph Department (T&T) on different posts. As per petitioners on the formation of Pakistan Telecommunication Corporation (PTC) Vide Pakistan Telecommunication Corporation Act, 1991, they were transferred to the newly formed PTC. Thereafter, on the promulgation of Pakistan Telecommunication Re-organization and Telegraph Act, 1996 (hereinafter referred as "the Act, 1996"), the PTC system was further divided into four units namely Pakistan Telecommunication Employees Trust (PTET), Frequency Allocation Board (FAB), National Telecommunication Corporation (NTC) and Pakistan Telecommunication Company Ltd. (PTCL). The employees of PTC were transferred to the newly constituted entities. The petitioners were transferred to PTCL. The basic grievances raised by them are that they being "Transferred Employees" of the T&T department, their terms and conditions of service are fully protected, both under section 9 of the Pakistan Telecommunication Corporation Act, 1991 as well as under sections 35 and 36 of the Act, 1996, on account of which they are entitled to revised pay scales and increases in pension and other emoluments made from time to time by the Federal Government under the civil servant Act, 1973 and rules framed thereunder. Petitioners in support of their contentions relied upon the decision rendered by the Honorable Supreme Court in C.Ps. Nos. 565 to 568/2014 etc., in favour of transferred employees by holding as under:-

"13. From the reading of the Act of 1991 and thereafter of the Act of 1996, it is abundantly clear that the employees of T&T Department were transferred to the Corporation with the terms and conditions of their service similar to the one they were enjoying before such transfer. It is not in dispute before us that the employees of T&T Department, whose case is before us, were transferred to the Corporation and they

enjoyed the same terms and conditions of service as were applicable to them as employees of T&T Department. Under the terms and conditions of service, such employees were also entitled to payment of pension on their retirement. On 2nd April, 1994, the Corporation executed a Trust Deed establishing Pakistan Telecommunication Corporation Employees' Pension Fund. Para 2 of which read as follows:-

"All departmental employees transferred to the Corporation as defined in section 9 of the Pakistan Telecommunication Corporation Act, 1991 shall be entitled to benefits as defined under the Federal Government Pension Rules as applicable to such employees before the formation of PTC."(Emphasis Added)

Per Petitioners, the Respondents No.3 and 4, on 06.3.2014 and 11.3.2014, without lawful authority and sheer abuse of powers, have issued directives that all decisions related to employees such as promotions, career planning, rewards and placement etc. will be taken on the basis of Performance Management System (PMS) and as such they have increased salaries of employees with effect from 01.4.2014 under "Company Policy" by altering the terms and conditions of service of the "Transferred Employees" adversely, whereas Performance Evaluation Reports / Annual Confidential Reports of "Transferred Employees" are very much part of their service terms and conditions and must be evaluated under Civil Servants Act, 1973 and Rules framed thereunder. It is their assertion that the method of writing Annual Confidential Reports / Performance Evaluation Reports in respect of transferred employees including Petitioners is also against the prescribed rules / procedure applicable to the Petitioners whose service ought to be governed under Civil Servants Act, 1973 and rules framed thereunder as a result of which the Petitioners are being seriously prejudiced at the hands of Respondents No.3 and 4, who have foisted their own made system in respect of writing confidential reports of the Petitioners. That the Petitioner No.11, who has recently retired, was/is also entitled for 365 days' pay in lieu of un-availed LPR as per SRO issued vide gazette notification dated 01.9.2012 issued by the Federal Government, but despite repeated requests by the Petitioner No.11, Respondents No.3 and 4 did not allow his legitimate request. Petitioners have submitted that the

mala fide of Respondents No.3 and 4 in respect of terms and conditions of services of the Petitioners is apparent on the face of record, which is contrary to the laws applicable to the Petitioners having status of transferred employees and fall within the definition of Civil Servants Act, 1973, in the light of various pronouncements made by the Honorable Supreme Court and there appears no probability of implementation of Civil Servants Act, 1973 and Rules made thereunder. Petitioners being aggrieved by and dissatisfied with the purported policy i.e. PSM, introduced by the Respondent-company with malafide intention to deprive the Petitioners from their jobs to accommodate their favorites, have filed the instant petition on 15.4.2014.

3. Upon notice, Respondents No.2 to 4 filed comments and denied the allegations leveled against them.

4. Syed Shoa-un-Nabi, learned counsel for the Petitioners has contended that the instant petition has been filed against the Respondents, who after taking management control of the Pakistan Telecommunication Company Limited are blatantly violating each and every terms and conditions of service of the Petitioners including rights and benefits, as defined in Section 3 to Section 22 of Civil Servants Act, 1973 and rules framed thereunder; that all the Petitioners were transferred to Pakistan Telecommunication Corporation on the same terms and conditions to which they were entitled in former Telegraph & Telephone Department; that during the era when the PTC was functioning, transferred/departmental employees had been governed under Civil Servant Act, 1973 and rules framed thereunder and there was no dispute with regard to their terms and conditions of employment with the Corporation; that till 2004-2005, all the employees of PTC irrespective of whether appointed by T&T, PTC or PTCL, were being governed

under Civil Servant Act, 1973 and rules framed thereunder in all service matters without any discrimination; that in minor 26% Share-Purchase and Shareholder Agreements, executed between the President of Pakistan on behalf of Federation of Pakistan and M/s Etisalat International (Pakistan), the terms and conditions of service and rights and benefits of the employees of PTCL were acknowledged / undertaken by both the parties; that Performance Management System (PMS) of the Respondent-Company is not a systematic, periodic and impartial rating of an employee's excellence, in matters pertaining to their present job and their potential for a better job as determined by the Respondents; that Performance Appraisal is non-statutory, having no backing of any law, is void ab-initio and unlawful in respect of transferred employees as such does not apply in the service terms and conditions of transferred employees; that the Respondents having observed that the Petitioners being transferred employees for the last many decades or so on, without any break in their services and payment of their emoluments, perks and perquisites/benefits of employment for all the legal purposes; might ask for bringing them to the status of Civil Servants, framed a new strategy to create insecurity and confusion in the ranks of the Petitioners by way of introducing a new Performance Management System policy with new terms and conditions of employment, quite distinguishable from the previous one; that the terms and conditions formulated by the Respondents are in derogation of the fundamental/service rights of the Petitioners as guaranteed in the Constitution, 1973 and statutory law; that the powers exercised and abused by the Respondents are void ab-initio as such are liable to be annulled; that the Petitioners, on the contrary, being threatened for forcible removal from the employment under the garb of their powers and authorities, as the Respondents are bent

upon to further victimize and remove the Petitioners and other employees from service in violation of law and disregard of the Constitution; that imposing the terms prejudicial to the fundamental rights are void ab-initio, therefore, liable to be set aside. In support of his contentions, learned counsel for the Petitioner has placed reliance upon the case of Atique Hussain v. Federation of Pakistan [2005 CLC 1931], Masood Ahmed Bhatti v. Federation of Pakistan [2012 SCMR 152], Muhammad Riaz v. Federation of Pakistan [2015 SCMR 1783], P.T.C.L. v. Masood Ahmed Bhatti [2016 SCMR 1362]. He lastly prayed for allowing the instant petition.

5. Conversely, Mr. Abdul Moiz Jafferi, learned counsel for Respondents No.3 and 4, has contended that Sections 35 and 36 of the Pakistan Telecommunication (Re-organization) Act, 1996 provides protection to transferred employees but only in so far as their terms and conditions are not to be adversely changed to their detriment; that any change in terms and conditions denoting betterment in terms of procedure cannot be deemed to be barred under Sections 35 and 36 of the above mentioned Act of 1996; that the Petitioners are not entitled to the protection of the Civil Servants Act, 1973 and its rules in light of the fact that they are not civil servants; that the terms and services of employees, who had been inducted prior to the Act of 1991 were statutory in nature. There have been no violations in regards with the terms and conditions of services of the Petitioners and any violations as stated by them are not supported by cogent evidence; that the PMS involves Performance Reviews and is an extensive process done on an annual basis. The review is divided on form in an 80/20 percent manner; that after the immediate supervisor fills out the form, to eliminate any partiality or bias on his part and for further objectivity of assessment of performance the form for the employee

is filled out by an authority higher than that of the immediate supervisor, known as the senior supervisor; that the Respondent No.3 has the utmost authority to introduce procedural changes not adversely affecting the terms and conditions of the employees. The Respondents have been fully compliant with all requirements laid down upon them in regards dealing with the terms and conditions of the Petitioners. All employees, transferees or otherwise are aware of the importance of their role in the organization, whilst the Respondent No.3 cannot adversely change the terms and conditions of the Petitioners, it cannot simply take into account only the Petitioners while reaching crucial decisions such as the management and betterment of all the employees on the whole; that the Petitioners have filed this petition by twisting and contorting facts and such dispute regarding the factual controversies involved in this case cannot be resolved in exercise of its constitutional jurisdiction by this Court. He, therefore, prayed for dismissal of the instant petition.

6. Mr. Nishat Warsi, learned Deputy Attorney General representing Respondent No.1 and 2, has referred to the comments filed on behalf of the Respondent No.2 and adopted the arguments of Mr. Abdul Moiz Jafferi, learned counsel for Respondent-Company.

7. We have heard the learned counsel for the parties at length and carefully gone through the record and case law cited at the bar.

8. In our view, the Petitioners' assertion for determination could be summarized as under:-

- i) Whether performance Appraisal of the petitioners under Performance Management System (PMS) introduced by the Respondent-company is adversely affecting the terms and conditions of the service of the petitioners under the law?

ii) Whether Civil Servant Act, 1973, and Rules framed thereunder, including Disciplinary matters under Civil Servants (Efficiency & Disciplinary) Rules 1973; Pay, Pension and Gratuity Rules, Leave Rules 1980 are applicable to the case of the petitioners?

iii) Whether petitioners are entitled for all financial increases given by the Federal Government to its employees under Civil Servant Act 1973?

9. There is no denial of the fact that the Petitioners were employees of the T&T Department and enjoyed the status, "Transferred Employees" of the Respondent-company. The terms and conditions of their service were protected in terms of the Share Purchase Agreement between M/S Etisalat and the Government of Pakistan as well as under section 36 of the Act of 1996.

10. The first argument that was pressed before us was whether the services of the employees of PTCL, who were originally employees of Pakistan Telecommunication and Telegraph Department, were transferred to Pakistan Telecommunication Company Limited, still be regarded as civil servants?

11. A five member bench of the Honorable Supreme Court in the case of *PTCL v. Masood Ahmed Bhatti* (2016 SCMR 1362) has settled all issues involved in this matter, except the issue of PMS, which needs our determination. In our view, the terms and conditions of such transferred employees have been protected but they do not retain the status of civil servants for the simple reason that 'the departmental employees on their transfer to the Corporation became employees of the Corporation under section 9 of the Act of 1991 and then of the Company under section 35 of the Act of 1996. Their terms and conditions of service were fully protected under section 9(2) of the Act of 1991 and 35(2) of the Act of 1996. None of the terms and conditions could be varied to their disadvantage as is provided by the sections reproduced above. Not only that the legislature also bound the Federal Government to guarantee the existing terms and conditions of service and rights

including pensionary benefits of the transferred employees. Since they by virtue of the aforesaid provisions became employees of the Corporation in the first instance and then the Company, they did not remain Civil Servants any more. But the terms and conditions of their service provided by sections 3 to 22 of the Civil Servants Act and protected by section 9(2) of the Act of 1991 and sections 35(2), 36(a) and (b) of the Act of 1996 are essentially statutory’.

“Though in the cases of Pakistan Telecommunication Corporation and another v. Riaz Ahmed and 6 others and Divisional Engineer Phones, Phones Division, Sukkur and another v. Muhammad Shahid and others (supra) it was held that the departmental employees on their transfer to the Corporation and then to the Company would continue to be the Civil Servants, but this interpretation does not appear to be correct as they on their transfer became employees of the Corporation under section 9 of the Act of 1991 and then of the Company under section 35 of the Act of 1996. **Retention of their status as civil servants is thus not supported by the words used in the aforesaid provisions.**”(Emphasis Added)

12. Our view is further supported by the decision rendered by the Honorable Supreme Court in the case of *Iqbal Husain versus General Manager Southern Telecom Region-II (2017 SCMR 353)*, on the aforesaid proposition.

13. Reverting to the contention of the parties with regard to increase in pension, we have noted that the Honorable Supreme Court in the case of *Pakistan Telecommunication Employees Trust and others vs. Muhammad Arif and others (2015 SCMR 1472)* has already settled the aforesaid pleas raised in the present matter and held that ‘while the Company may be entitled to fix the terms and conditions of service of its employees so also the provision of pension by the Board of Trustees of the Trust but as discussed above, as regards the employees of T&T Department transferred to the Corporation and then to the Company, their terms and conditions of service stand protected by the provision of section 9 of the Act of 1991 and sections 35, 36 and 46 of the Act of 1996 and thus they will be entitled to payment of increase in pension as is announced by the Government of Pakistan.’

“20. For the foregoing reasons, we have come to conclusion that the respondents, who were the employees of T&T Department having retired after their transfer to the Corporation and the Company, will be entitled to the same pension as is announced by the Government of Pakistan and that the Board of Trustees of the Trust is bound to follow such announcement of the Government in respect of such employees. Consequently, these petitions are dismissed.”(Emphasis Added)

14. In view of the forgoing, apparently all the provisions provided in sections 3 to 22 of the Civil Servants’ Act, 1973 and rules framed thereunder are applicable to the transferred employees including disciplinary matters as provided in section 16 of the Civil Servants’ Act, 1973. In our view prima-facie no prejudice will be caused to the Respondent-Company if they take appropriate measures to deal with the service matters of the petitioners preferably under the aforesaid Rules rather than under the PMS policy as they have served the Respondent-Company for considerable time and now at the verge of retirement, even some of them have retired. In our view, the Honorable Supreme court in the case of Pakistan Telecommunication Employees Trust and others as discussed supra has already declared the status of the transferred employees, more particularly with regard to the applicability of the aforesaid rules, which are now part of the terms and condition of their service. For convenience sake an excerpt of the same is reproduced as under:-

‘Since they by virtue of the aforesaid provisions became employees of the Corporation in the first instance and then the Company, they did not remain Civil Servants any more. But the terms and conditions of their service provided by sections 3 to 22 of the Civil Servants Act and protected by section 9(2) of the Act of 1991 and sections 35(2), 36(a) and (b) of the Act of 1996 are essentially statutory. Violation of any of them would thus be amenable to the constitutional jurisdiction of the High Court’(Emphasis Added).

15. To elaborate further on the aforesaid issue, it is expedient to have a glance on the salient features of PMS, which is available at Page No.327 to 399 of the Court’s file.

“Performance Management System – Overview & History in PTCL

- . **Performance Management is a process by which managers and employees work together to plan, monitor and review an employee’s work objectives and overall contribution to the organization.**
- . **Online PMS was first launched in 2009 using in-house developed system.**
- . **From 2010 to 2013, the performance evaluations of all employees were done in SAP but it had limited features and was not much user friendly.**
- . **Last year in 2014, PTCL implemented state of the art cloud based system (Success Factors) which is very user friendly, totally transparent and fair scoring system. Personal scorecards of all Management**

employees were developed and they were evaluated by their managers. But the PMS of Non-Management staff was done on another system.

- In 2015, again the scorecards of all Management employees were developed in Success Factors and their Mid-Year Review was conducted.
- This year, the PMS of 2015 will be done for both Management & Non-Management employees in Success Factors.

Performance Management System – Rating Scale

These guidelines to be followed while evaluating the employees.

PMS Category	Description	Scale
Outstanding	Performance level for exceed normal expectations. This category is reserved for the employee who truly stands out and clearly and consistently demonstrates exceptional accomplishment	
Exceeds Expectations	Performance frequently exceeds job requirements. Accomplishments are regularly above expected levels.	
Meets expectations	Performance only meets all the requirements of the position in terms of quality and quantity of work.	
Needs Improvement	Performance is noticeably less than expected. The need for further development and improvement is clearly recognized.	
Unsatisfactory	Employee is not performing to the requirements of the job.	

Performance Management System – Bin Ranges

Category	Bin Label	Scores	Composition
A	Outstanding	4.5 & above	10%
B	Exceeds Expectations	3.9 to < 4.5	20%
C	Meets Expectations	3.4 to < 3.9	40%
D	Needs Improvement	2.9 to < 3.4	30%
E	Unsatisfactory	Below 2.9	

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| <ul style="list-style-type: none"> • This year putting 10% employees in “E-Unsatisfactory” is Not mandatory. • You have to put only 30% employees in either D or E <p>For Non-Management Employees system will force you to place 10% of employees in “E” – Unsatisfactory” then send details of those employees to concerned HRBP. (for HQ send it to OD team). Concerned HRBP with 1 SM from Technical and Business Operations each would review the case and decide accordingly.</p> |
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16. We have noticed that main object of the Respondent-Company, while introducing PMS is to just evaluating the Performance Appraisal of its employees. Per learned counsel for Respondent-Company that PMS is the systematic, periodic and impartial rating of an employee's excellence, in matters pertaining

to his present job and his potential for a better job, which is the prerogative of the management of the Respondent-Company; that PMS was introduced by the Respondent No.3 to better the system for awarding increments, promotions and career planning, which is not discriminatory; that through PMS each employee's performance shall be checked and evaluated by his superiors. In support of their contention, they relied upon various features of PMS and compared the ACRs with PMS system and argued that the Respondent No.3 has the utmost authority to introduce procedural changes not adversely affecting the terms and conditions of the employees. Be that as it may, the learned Single Bench of Islamabad High Court did not agree with the aforesaid reasoning of the Respondent-Company, so far as the transferee employees are concerned and dealt with the aforesaid issue in its judgment dated 13.10.2016 in Writ Petition No.2205/2014 and held as under: -

*“15. While submitting report and parawise comments, the respondents have taken a stance that petitioners' cases for promotion were deferred as they were not found fit in view of their Performance Evaluation Reports. In this regard, Performance Evaluation Forms in case of every individual are placed on record, as those infer fitness of any individual for promotion. The Evaluation Form can hardly be conserved as ACR/PER, which again are required to be maintained on the same pattern as provided by the Book/Guideline for preparing ACRs of any civil servant, which is still intact and is required to be adopted while assessing skills of any civil servant for promotion. **Therefore, it is observed that such practice adopted by respondent PTCL is in adequate hence is hereby annulled. It is directed that cases of petitioners for promotion be considered in the light of their seniority-cum-fitness basis hence to this extent all acts done and efforts made by the respondent PTCL are declared as illegal. In this regard, directions are issued that record of old/transferred employees of respondent PTCL shall be maintained which shall not be intermingled with new inductees and seniority lists of transferred as well as new inductees shall be maintained separately and all documentation provided in respective Rules or methods adopted in their cases shall also be arranged. It would be the prerogative of respondent PTCL to deal with the employees duly inducted after promulgation of the Pakistan Telecommunication (Re-Organization Act, 1996 in accordance with their service structure.**”*

17. In the light of above facts and circumstances of the case, this petition is disposed of in the terms whereby the Respondent-Company is directed to implement the terms and conditions of the service of the Petitioners in its letter and spirit as has been done in the cases of Civil Servants under Civil Servants Act, 1973 and Rules framed thereunder by implementing the judgment passed by the Honorable Supreme Court in the case of

Masood Ahmed Bhatti & others v. Federation of Pakistan & others (2016 SCMR 1362), Pakistan Telecommunication Employees Trust v. Muhammad Arif & others (2015 SCMR 1472) and deal with the service matters of the petitioners under the aforesaid Rules and grant the service and ancillary benefits to the Petitioners and retirement dues of the retired petitioners as per law.

18. The petition stands disposed of in the above terms along with pending application[s].

JUDGE

JUDGE

Zahid/*