

IN THE HIGH COURT OF SINDH AT KARACHI

CP. No. D-3670 of 2023

(Rehan Pervez v Federation of Pakistan & others)

| Date | Order with signature of Judge |
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Before:

Mr. Justice Muhammad Karim Khan Agha

Mr. Justice Adnan-ul_Karim Memon

Date of hearing and Order: 31.01.2025

Malik Naeem Iqbal advocate for the petitioner.

Dr. Shahab Imam advocate for Respondent No.2

Ms. Wajiha Mehdi, Additional Attorney General.

ORDER

Adnan-ul_Karim Memon, J: The petitioner, Rehan Pervez challenges his dismissal from the service order dated 09.12.2020, issued by Karachi Port Trust (KPT), for 13 months of unauthorized absence after study leave.

2. The case of the petitioner is that he was appointed Assistant Executive Engineer in Karachi Port Trust (KPT) in the year 2000, vide office letter dated 04.01.2001, and promoted to BS-18 in the year 2009. Petitioner has averred that in 2013, he received a fully funded PhD offer from the Victoria University of Wellington in Infrastructure Engineering, related to his work. He intended to use this knowledge to benefit KPT. The Director General KPT approved 5 years (1825 days) of study leave (1140 days half-pay, 685 days unpaid) effective 17.11.2014 to 15.11.2019. Despite entitlement, he received no half-pay. However, after completing his PhD, the petitioner applied (01.11.2019) for a leave extension to gain practical experience, intending to benefit KPT. This was rejected vide office order dated 07.01.2020 without reason. Subsequent applications were also rejected on 04.03.2020. The petitioner alleges the authority was misled, treating his study leave extension request as an "Ex-Pakistan" leave extension, which is handled differently in the KPT rules. Hoping for leave extension approval, the petitioner instead received a charge sheet dated 23.04.2020 for absence since completing his study leave (15.11.2019). He replied vide letter dated 03.05.2020, explaining the need for such an extension. His response was deemed unsatisfactory, and an inquiry officer (IO) was appointed, summoning him with only 4 days' notice during the peak of the COVID-19 lockdown, making his travel almost impossible. The short notice to appear before the IO during a pandemic, requiring travel from abroad, suggests bad faith and predetermination. The petitioner responded vide letter dated 28.06.2020, explaining his situation. Despite the petitioner's notice of travel restrictions, the IO issued another hearing notice dated 29.06.2020, (received on 30.06.2020) with less than two days' notice, ignoring the petitioner's previous letter dated 28.06.2020. The petitioner sent another

detailed letter dated 01.07.2020 and offered to submit his statement via email. The respondents agreed, and he submitted his statement and annexures (07.07.2020). The petitioner's reply was deemed unsatisfactory, and he received a final show-cause notice dated 26.08.2020. He replied vide letter dated 09.09.2020, requesting an online hearing and 3-4 months to appear in person due to COVID-19. Instead, he was given only 3 days' notice (15.10.2020, received 16.10.2020) to appear. He again explained his travel difficulties and requested more time. He alleges that the entire process seemed predetermined. Despite repeated requests, the petitioner received another hearing notice dated 27.10.2020 requiring his presence within two weeks. Unable to travel, and denied alternative hearing methods, he submitted another response vide letter dated 11.11.2020. He was dismissed from service vide office letter dated 09.12.2020. His departmental appeal (16.12.2020) to the Secretary was not addressed. He then requested the Chairman KPT for reinstatement or early retirement vide letter dated 03.02.2023. The respondents informed him vide letter dated 10.04.2023 that his appeal was dismissed, compelling him to approach this court on 25.7.2023.

3. Learned counsel for the petitioner has contended that the impugned dismissal letter is illegal, unlawful, malafide in violation of principles of natural justice, equity, and fairness. He has further added that the petitioner applied for an extension well within time and before the expiry of his sanctioned leave, the respondents without any plausible reasons and under a misconception deliberately created that the petitioner was seeking an extension in Ex-Pakistan leave that his application was never considered in terms of applicable rules. He has next contended that the petitioner has always served the respondent department to the best of his ability with the utmost diligence and honesty and imposing such a harsh penalty on him, despite mitigating circumstances and genuine inability to travel is uncalled for and very unfair. He next contended that the petitioner has more than 20 years of meritorious service at his credit and in the circumstances, dismissal from service is not commensurate with the nature of the charge of unauthorized absence from duty particularly when his extension in leave requests were declined without any plausible reason. He referred to the approval of the competent authority of half pay for 1140 days out of 1825 days of leave which respondent No.2 illegally withheld without reason. Learned counsel referred to the case of one Zafarullah Nizamani, an employee of KPT and in identical facts and circumstances he was granted an extension in study leave as such the case of the petitioner is akin and he be treated similarly. He has further contended that the petitioners' study leave extension cannot be denied in terms of fundamental rules, which allow such study leave. He has further

contended that an absence from duty cannot be treated as misconduct on the part of the petitioner, however, he agreed to the extent that the penalty of dismissal from service be converted into compulsory retirement in terms of law laid down by the Supreme Court in the case of Zahid Hussain Makhdoom, **2018 SCMR 2077**. In support of his contention, he relied upon the cases of Secretary Establishment Division & others v Dr. Imdad Ali Raza Seehar **2018 SCMR 1998**, Sardar Imdad Hussain Gorchani v The president National Bank of Pakistan & others **2024 PLC (CS) 203** and Syed Faizan e Rasool v The Lahore High Court through Registrar **2024 SCMR 1871**, Chairman Pakistan Ordnance Factories Board v Shahzad Amin and others **2021 SCMR 1055**, Muhammad Ali S. Bukhari v Federation of Pakistan & others 2008 SCMR 214, Abdul Qadir v Government of West Pakistan & others PLD 1967 SC 506 and Chairman Pakistan Ordnance Factories Board v Dr. Naveeda Rauf & others 2021 SCMR 173. He requested this court to allow this petition.

4. However the assertion of the petitioner has not been conceded to by the counsel for the respondent KPT, for the reason that the petitioner cannot be granted leave for more than 5 years and since the petitioner was dismissed from service long ago as such there is no room for him to be reinstated in service. The learned counsel for respondent-KPT argued that no fundamental rights of the petitioner have been violated; the petitioner misrepresented facts as such this petition is premature due to a pending appeal and involves disputed facts; learned counsel for the respondent-KPT further states that the petitioner was granted 5 years' combined Ex-Pakistan leave, due to return on 16.11.2019, but failed to report. He was charged on 23.04.2020 under KPT rules for unauthorized absence from 16.11.2019. A departmental inquiry was conducted, and despite opportunities, the petitioner failed to appear. However, charges were proven. A show-cause notice dated 26.08.2020 and multiple personal hearing opportunities were ignored by the petitioner. The Chairman, KPT, dismissed him from service vide an impugned order. He submitted that the petitioner requested vide letter dated 01.11.2019 a 3-year study leave extension, which was denied. A second request letter dated 20.01.2020 was also denied. The charge sheet dated 23.04.2020 was for unauthorized absence. The inquiry officer recommended dismissal due to no provision for extending extraordinary leave. Learned counsel submits that, based on the foregoing legal and factual arguments, the petition is without merit and should be dismissed with costs.

5. Ms. Wajiha Mehdi, the Assistant Attorney General has adopted the argument of the learned counsel for the respondent KPT and submitted that the petition is not maintainable; therefore, she requested the dismissal of the petition.

6. We have heard the learned counsel for parties on the maintainability of the petition and have perused the material available on record and case law cited at the bar with their assistance.

7. The question for our determination is whether the service of the petitioner could be dispensed with by the KPT based on unauthorized absence from duty w.e.f. 16.11.2019 till date and whether the penalty of dismissal from service could be converted into compulsory retirement from service.

8. It appears from the record that the petitioner was found guilty of misconduct on account of unauthorized absence from duty w.e.f. 16.11.2019 till date. He was served with the statement of allegations and the inquiry officer found him guilty of misconduct, however, he was given several opportunities to appear and join the duty, but he failed and neglected to join the duty to date, and he requested that his major penalty from dismissal from service be converted into compulsory retirement from service as he has 20 years length of service in his credit.

9. There is no denial of the fact that the petitioner was allowed 1825 days Ex- Pakistan study leave (1140) days on half pay and 685 days without pay w.e.f. 01.02.2014 for PhD program in the field of Civil Infrastructure Engineering from Victoria University of Wellington, New Zealand on private affairs, however in 2019 petitioner requested three years of study leave with certain reasoning, which was rejected vide letter dated 07.01.2020 and correspondence continued to take place. Finally, the petitioner was dismissed from service on 09.12.2020 after providing the opportunity of a hearing, which he failed to avail due to remaining out of the country, his appeal was considered vide office order dated 10.04.2023.

10. The Supreme Court in the recent judgment in the case of *Sakhil Zar vs. M/s K-Electric Limited & others* (**2024 SCMR 1722**) has held that even 10 days' absence without leave is quantified as misconduct and on proving the guilt of the employee after fulfilling the requisite formalities envisaged under the law, and that could not be modified and no premium or advantage could be given on this count for any compassionate or sympathetic view. The management has a legitimate and unbridled right and authority to make a decision and mete out the punishment as provided under the law including the dismissal/termination of service of a delinquent.

11. The Supreme Court further held that the distinction between the act of misconduct and the quantum of punishment provided under the law for such misconduct. Likewise, different acts of misconduct are defined in the different laws with different quantum or genres of punishments to be

imposed according to the fine sense of judgment of the competent authority/management/employer in which the Courts have no role to play in the decision making of management which is the sole arbiter.

12. It is well settled now that unexcused absence from duty is misconduct. This court cannot offer relief simply because the absence was brief or otherwise. Interpreting absence from duty as potentially extending to a certain period, improperly rewrites the law on the subject issue, effectively changing the threshold for misconduct. This is an incorrect interpretation.

13. The Supreme Court has held that as soon as the act of misconduct is established and the employee is found guilty after due process of law, it is the prerogative of the employer to decide the quantum of punishment, out of the various penalties provided in law. The casual or unpremeditated observation that the penalty imposed is not proportionate with the seriousness of the act of misconduct is not adequate but the order must show that the competent authority has applied its mind and exercised the discretion in a structured and lawful manner.

14. In view of the foregoing, no Court has any jurisdiction to grant arbitrary relief without the support of any power granted by the Constitution or the law. Without a doubt, the Court in exceptional or appropriate cases or circumstances, may examine the quantum of punishment to figure out the proportionality and reasonableness and may also nullify or overturn such punishment if found out of proportion vis-à-vis the act of misconduct and in this scenario, the punishment awarded by the competent authority may be revisited and converted into some lesser or alternative punishment if provided under the law but to exercise such jurisdiction for mitigation, the set of circumstances of every case have to be considered minutely.

15. Considering the case in hand, the respondent-KPT cannot modify the act of misconduct i.e. absence from duty without authorization into any of the minor penalties, hence the impugned order passed by the respondent KPT dispensing with service of the petitioner due to unauthorized absence from duty was rightly passed and is now affirmed by this Court.

16. For the reasons stated, we find no error in the impugned order of the respondent KPT. This petition is meritless and accordingly dismissed along with the pending application(s).

JUDGE

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