

*

HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on: September 18, 2009

Judgment delivered on: October 06, 2009

+

**W.P. (C) No.1353/2006 and
C.M. No. 1176/2006**

% Ms. Monika Chandel ... Petitioner
Through: Ms. Aishwarya Bhati and Ms. Sweta
Rani, Advocates

versus

UPSC & Others ... Respondents
Through: Ms. Barkha Babbar, Advocate for Union
of India
Mr. Naresh Kaushik, Ms. Aditi Gupta
and Ms. Amita K. Chaudhary,
Advocates for UPSC.
Ms. S. Chatterjee, Respondent No. 5 in
person.

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

SUNIL GAUR, J.

1. In the year 2004, in pursuance to the advertisement (Annexure P-4) Petitioner had applied for selection to the post of Master in English in the Respondent – College. At that time, Petitioner was working on ad-hoc basis on the post of Master in English, which is a Gazetted Group-B post with the Respondent – College. Vide letter of

22nd December, 2005, (Annexure P-6), Petitioner was called upon to appear for the interview for the said post and to produce her experience certificate, etc. Petitioner had claimed age relaxation on the basis of 'No Objection Certificate' of 6th August, 2004, (Annexure P-5), which disclosed that the Petitioner was working as Master in English on ad-hoc basis since April 2001 with break in service in each year.

2. When the Petitioner had appeared for interview on 23rd January, 2006, she was purportedly told that she was not Government Employee as per the new Rules of Department of Personnel Training (hereinafter referred to as 'DoPT'). According to the Petitioner, Respondent – Commission was not justified in refusing to interview the Petitioner on the basis of Communications of 31st December, 2002 (inadvertently referred to as of the year '2005') and of 5th December, 2005 of 'DoPT' (Annexure P-7). It is pointed out that communication of 5th December, 2005 indicates that it has to be uniformly applied to the regular as well as ad-hoc employees. According to the Petitioner, exclusion of ad-hoc government employees for the grant of age relaxation on the basis of Communication (Annexure P-7) is not only illegal but is also arbitrary, as age relaxation has been already granted to one Mr. Satyendra Mishra, who had worked on ad-hoc basis.

3. The relief sought in this petition is of quashing of the Communication (Annexure P-7) denying benefit of age relaxation to

the Petitioner by arbitrarily drawing a line of distinction between the ad-hoc and regular employees. The alternate relief sought is of regularization of the Petitioner as Master in English in the Respondent - College.

4. The response of Union Public Service Commission (UPSC) to this petition is as under:-

“Sh. Satinder Mishra was working as Master in Chemistry on ad-hoc basis and pending clarification from the Department of Personnel and Training whether ad-hoc employees are also to be extended the benefit of age relaxation as permissible to Government servants or not, he was called for interview conditionally. As the clarification received from DOP&T had not reached the officials conducting the inter views as on the date of interview (i.e. 22.12.2005) in that case, his conditional candidature was not cleared at the time of interview and he was interviewed conditionally subject to receipt of the requisite clarification from the Department of Personnel and Training. However, the DOP&T clarification dated 5th/7th December, 2005 that “Only regular Govt. employees are eligible for benefit of age relaxation ...” had been received by the officers’ associated with the interview before 23.1.2006 when Ms. Monika Chandel reported for interview and accordingly, she was not interviewed. The conditional candidature of Shri Satyendra Mishra has also since been cancelled in view of the clarification of the DOP&T dated 5/7.12.2005. Copy of the ‘DoPT’ O.M. order is annexed as Annexure-‘A’.”

5. The Government response to this petition is as follows:-

“The O.M. dated 10.4.1969 only points out that though the age relaxation considered by the UPSC (in terms of the clause put by it in the notice of the advertisement) is strictly speaking, intended for persons who are regular Government servants, this Office Memorandum observed that it had not been practical for the Commission to make a distinction between a person who holds the appointment on ad-hoc basis and other who holds it on regular basis, and, therefore the clause “age limit for Government servant has thus to be applied uniformly in all cases of Government servants whether they hold appointments on ad-hoc basis or otherwise”. This only implies that in view of the practical difficulties, this clause regarding age relaxation for the Government servants has thus to be applied (by UPSC) in all cases irrespective of whether they were regular employees or ad-hoc employees. The absence of the word “by UPSC” in this Office Memorandum is creating an impression that it contains a policy direction of DOP&T conveying age relaxation for all employees (regular as well as ad-hoc) for all cases of direct recruitments, which is not the case as would be seen from the background explained. What the Office Memorandum impressed upon the Ministries and Departments was that as the UPSC is unable to make a distinction, the various Ministries/Departments while making ad-hoc appointment should ensure:

(a) That a person appointed on ad-hoc basis conforms to the age relaxation prescribed under the Recruitment Rules at the time of ad-hoc appointment (so that UPSC does not extend the benefit of age relaxation to those who were over aged at the time of ad-hoc appointment itself) and

(b) That he should be eligible in terms of educational qualification and experience, (so that there is no situation where the ad-hoc appointee to a post is not even considered eligible for regular selection)."

6. In the rejoinder filed by the Petitioner, it was disclosed that the similarly placed ad-hoc employees, i.e., Mr. Prashant Kumar and Mr. Brijesh Chauhan were granted age relaxation and were appointed as Masters in the Respondent - College on regular basis. To meet the aforesaid stand, Respondent – UPSC has filed a short affidavit stating that these two masters/teachers Prashant Kumar and Brijesh Kumar had produced experience certificate showing that they had worked as Government servant, whereas the certificate produced by the Petitioner indicated that she had worked as Government servant on ad-hoc basis. The selected candidate was impleaded as Respondent No. 5 in this petition but she has not chosen to file any response to it.

7. Counsels for the parties have been heard and the record of this case has been perused.

8. Much reliance has been placed by Petitioner's counsel upon an extract from Communication (Annexure P-7), which reads as under:-

"Perhaps, this was a standard clause in all advertisements issued by the UPSC irrespective of whether the Recruitment Rules provided for age relaxation or not. In such cases, where the advertisement

was issued by UPSC, the Commission found it difficult at scrutiny stage to differentiate between regular Government servants and ad-hoc employees. Therefore, as UPSC was considering age relaxation for ad-hoc appointees also, it became imperative to ensure that such ad hoc appointees were within the prescribed age limit at the time of ad hoc appointment and were also eligible to hold the post in all respects.”

9. The contention of the Petitioner is that the Petitioner was appointed on ad-hoc basis vide Appointment Letter (Annexure P-1) and Petitioner's ad-hoc appointment was published in a Gazette (Annexure P-2) and it was as good as a regular appointment and therefore, the Petitioner, in terms of the above extracted Communication of 5th December, 2005, is eligible for age relaxation. Counsel for the Petitioner refers to decisions reported in (2008) 2 SCC 717; (2006) 4 SCC 1; (2005) 11 SCC 304; (1998) 8 SCC 583; (1998) 9 SCC 81; (2006) 11 SCC 731; AIR 1996 SC 1529; (2006) 2 SCC 482, to claim age relaxation on the basis of experience gained while working on ad-hoc basis. The submission advanced is that the weightage of ad-hoc service has to be granted by relaxing the age, in the matter of regular appointments.

10. It is true that the objective behind granting the benefit of age relaxation is to bring experience on a level playing field by giving preference to Government employees, who have been in service, **if**

they are otherwise found fit (eligible), so that their experience could be used for betterment of the institution. The **difficulty experienced by Union Public Service Commission** in distinguishing between persons, who hold appointment on ad-hoc basis and others who hold it on regular basis, has been highlighted in the Communication of 5th December, 2005 (Annexure P-7) with a view to highlight the need of making ad-hoc appointments within the prescribed age limits and of eligible persons.

11. Apex Court in “*State of Haryana vs. Charanjit Singh & Others*”, **JT 2005 (12) 475**, had negated the claim for age relaxation by equating ad-hoc/contractual appointment with regular appointment by noting that the ad-hoc/contractual employees is not governed by the relevant service rules and do not enjoy the privileges of the regular employees and cannot be subjected to the minor penalties which can be imposed upon regular government employee and above all, the appointment of ad-hoc employee is ‘**de hors**’ the Rules.

12. In the light of the aforesaid, what is required to be seen is whether the appointment of the Petitioner on ad-hoc basis was in accordance with the Rules or not. Respondent - College has its own Rules, which are duly notified on 3rd March, 2004, and these rules are called the ‘**Rashtriya Indian Military College (Master) Recruitment Rules 2004**’. Advertisement of July – August, 2004 (Annexure P-4) is in terms with these Rules. The Schedule appended to the aforesaid Rules of 2004 as well as advertisement (Annexure P-4) prescribes

that three years teaching experience in a recognized educational institution is an essential qualification. Petitioner's ad-hoc appointment vide letter of November, 2000 (Annexure P-1) was in pursuance to the advertisement of May, 2000 in the Employment News. The record produced by the Respondent - College reveals that the advertisement of May, 2000 for ad-hoc appointments, provided for teaching experience of one year only as an essential eligibility condition. Though, Petitioner's ad-hoc appointment was not in consonance with the aforesaid Rules of 2004, which required three years teaching experience, but that would not make any difference because Petitioner's ad-hoc appointment has to be in consonance with the Respondent - College Recruitment Rules of 1986, which were applicable then, i.e., in the year 2000. Since, Respondent - College has not placed on record the erstwhile Recruitment Rules of 1986, therefore it cannot be said that Petitioner's appointment was '*de hors*' the Rules.

13. Now reverting back to basic issue of entitlement of the Petitioner to age relaxation by taking into account the ad-hoc service, it is primarily based upon a passing reference in Communication (Annexure P-7) by the Government to Union Public Service Commission regarding difficulty in differentiating between regular and ad-hoc employees at the scrutiny stage. Union Public Service Commission in its counter affidavit has categorically stated that after 'DoPT' clarification (Annexure P-7), the candidature of similarly

placed person Mr. Satyendra Mishra has been cancelled. Short affidavit of Respondent – UPSC clarifies that Prashant Kumar and Brijesh Chauhan were given age relaxation because their Experience Certificate of January and February, 1999, simply stated that they had the required experience as a Government servant. Since it was not recorded in the Experience Certificate of Prashant Kumar and Brijesh Chauhan that they were Government servants on ad-hoc basis, therefore, they were granted the benefit of age relaxation. Simply because benefit of age relaxation stand granted to Prashant Kumar and Brijesh Chauhan by inadvertent lapse or bona fide omission, it would not entitle the Petitioner to have the benefit of the same.

14. Impugned Communication (Annexure P-7) is between 'DoPT' and the Union Public Service Commission and by relying upon OMs of 20th July, 1976 (Annexure R-2) and OM of 9th April 1981 (Annexure R-3), it has been stated that the regular Government employees are eligible for benefit of age relaxation. Although, OM of 9th April, 1981 (Annexure R-3) and of 24th October, 1985 (Annexure R-4) holds the field but much reliance has been placed by counsel for the Petitioner on the OM of 10th April 1969 (Annexure R-1) to claim the relaxation of age limit, by asserting that it has to be applied uniformly to ad-hoc as well as regular employees. It is evident from OM (Annexure R-4) that the earlier instructions issued by Office Memorandum have been reviewed and neither in the OM of 1981 (Annexure R-3) nor in OM of

1985 (Annexure R-4), it has been said that the clause regard age relaxation would apply to ad-hoc employees also.

15. Furthermore, there is no challenge to the legality of OMs Annexure R-3 and Annexure R-4, which are applicable; therefore, challenge to the Communication (Annexure P-7) would not suffice.

16. The stand of Department of Personnel and Training ('DoPT') regarding office memorandums, referred to above, speaks volume and is as under:-

“It is further submitted that DP&AR Office Memorandum dated 10.4.1969 (copy annexed as Annexure R-1 to the counter affidavit) does not contain the policy decision of Government for allowing age relaxation to ad-hoc employees. The benefit of age relaxation as general provision for all Central Government employees was introduced only in 1976 vide Office Memorandum dated 20.7.1976 (copy annexed as Annexure R-2 to the counter affidavit). Prior to this, UPSC was indicating in the Notifications for examinations a provision for age relaxation for Government servants, this provision did not flow from any general policy provision for age relaxation issued by Government (DOP&T). This Office Memorandum dated 10.4.1969 was only advisory in the context of the UPSC's Notifications providing for age relaxation to Government servants and the Commission finding it difficult in making a distinction between a person holding appointment on ad-hoc basis and another holding a post on regular basis. In this perspective, this Office Memorandum contained

certain guidelines for the Ministries to be borne in mind while making ad-hoc appointments. Consequent on issue of DP&AR Office Memorandum dated 20.7.1976, circulating the policy decision on age relaxation being admissible to Central Government employees, subject to fulfillment of certain conditions, all cases of direct recruitment including appointments made by UPSC, were to be regulated by the provisions of these instructions in the matter of grant of age relaxation (except those posts where special provisions of age relaxation were/are prescribed in the Recruitment Rules).

*This Department's letter dated 5.12.2005 only clarified/pointed out to the UPSC the above perspective of DP&AR Office Memorandum dated 10.4.1969 and also clarified the scope of applicability of the provisions of age relaxation contained in DP&AR policy Office Memorandum dated 20.7.1976 and the subsequent Office Memorandum dated 9th April 1981 (copies of Office Memorandum dated 20.7.1976 and Office Memorandum dated 9.4.1981 is annexed as Annexure R-2 and R-3 respectively to the counter affidavit). The Respondent department's earlier letter dated 31.12.2002 to UPSC has also clarified the implications of these policy circulars on age relaxation and has stated that the benefit is admissible to Central Government employees appointed on regular basis. **As these letters of 2002 and 2005 contain clarifications on the policy circulars on age relaxation and do not consist of or convey a fresh decision taken in the matter, there is no question of giving retrospective effect to these letters, as contended by the Petitioner."***

17. During the course of the argument, counsel for the Petitioner had given up the prayer for direction to the Respondent - College to regularize the Petitioner on the post of Master in English. Challenge to the communication (Annexure P-7) without an effective challenge to the OMs, Annexure R-3 and Annexure R-4, is meaningless. Moreover, Petitioner fails to show that the required experience for regular appointment to the post of Master in English in the year in question, i.e., 2000 was one year only. This was required to be so done because the minimum teaching experience required vide advertisement (Annexure P-4) was three years for regular appointment.

18. In view of the aforesaid, this petition challenging Communication (Annexure P-7) without questioning its basis, i.e., Office Memorandums (Annexure R-3 and Annexure R-4) fails and is hereby dismissed. Pending application is disposed of as infructuous.

19. It is made clear that it is still open to the Petitioner to challenge the Office Memorandum (Annexure R-3 and Annexure R-4) and anything said herein shall not be construed as opinion on validity of these Office Memorandums.

20. No costs.

Sunil Gaur, J.

October 06, 2009
pkb