

Present: Qazi Faez Isa, Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ

SABIR IQBAL---Petitioner

Versus

CANTONMENT BOARD, PESHAWAR through Executive Officer and others---Respondents

Civil Petition No.330-P of 2013, decided on 4th January, 2019.

(On appeal from the judgment of Peshawar High Court, Peshawar dated 15-5-2013, passed in W.P. No.2211-P of 2012).

(a) Pakistan Cantonment Servants Rules, 1954---

---R. 50---Removal from service---Legal infirmities in disciplinary proceedings---Order of removal without jurisdiction---Petitioner was serving as a Telephone Operator (BPS-02) in the Cantonment Board---Department initiated disciplinary proceedings against the petitioner for absents himself from work---Inquiry officer recommended that 1/4th amount from the monthly salary of the petitioner be deducted as fine and he be also given last/final chance and in case he did not improve his behavior in future he be punished strictly---Authorized officer, however, removed the petitioner from service---Held, that under R.50 of the Pakistan Cantonment Servants Rules, 1954, the Authority of the petitioner was the President, Cantonment Board and the Authorized Officer was the Cantonment Executive Officer (legal position as it stood prior to the amendments made in R.50 through SRO 205(1)/2012 dated 20th February, 2012)---Procedure of inquiry under the said Rule was that if a major penalty was to be imposed the Authorized Officer was required to forward the case to the Authority along with charge and statement of allegations---In the present case, the impugned order of removal from service had been passed by the Authorized

Officer and had not been forwarded to the Authority---Additionally, the inquiry officer had recommended deduction of salary (1/4th amount from monthly salary) as a fine for absence from duty on and giving the petitioner last chance to improve himself---Authorized Officer, if disagreeing with the inquiry officer, should have issued fresh notice to the petitioner and given reasons for his disagreement and justification for visiting the petitioner with a graver penalty---With said legal infirmities in the disciplinary proceedings, the order of removal of the petitioner was totally without jurisdiction---Order of removal of the petitioner from service and the impugned order passed by the High Court, upholding the removal of the petitioner from service was set aside and the petitioner was reinstated into service without back benefits, as he had categorically stated in court that he did not wish to seek back benefits---Petition for leave to appeal was converted into appeal and allowed accordingly.

Habibullah Bhutto v. Collector of Customs 2011 SCMR 1504 ref.

(b) Constitution of Pakistan---

---Arts. 184(3) & 199---Civil Service---Disciplinary proceedings---Executive discretion of authority---Judicial review --- Proportionality, suitability and necessity, tests of---Scope---Court could examine and judicially review the executive discretion exercised by the authorized officer on the ground of proportionality---Alongside reasonableness, proportionality was a central standard directing the action of the executive branch---Disproportionate act that infringed upon a human right was an illegal act---Court, which guarded the legality of the acts of the executive branch, performed judicial review over these acts and examined whether they fulfilled the tests of proportionality---Proportionality was a standard that examined the relationship between the objective the executive branch wished to achieve, which had the potential of infringing upon a human right, and the means it had chosen in order to achieve that infringing objective---Fiduciary duty, from which the administrative duty of fairness and administrative reasonableness were derived, demanded administrative proportionality as well---Courts would quash exercises of discretionary powers in which there was not a reasonable relationship between the objective which was sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts were wholly out of proportion to the

relevant misconduct---Administrative measure must not be more drastic than necessary---Standards of proportionality and unreasonableness were inextricably intertwined---Unreasonableness contained two elements of proportionality when it required the weight of relevant considerations to be fairly balanced and when it forbade unduly oppressive decisions---Under the first element, proportionality was a test requiring the decision maker to maintain a fair balance, and under this category the courts evaluated whether manifestly disproportionate weight had been attached to one or other considerations relevant to the decision---Second element was that the courts considered whether there had been a disproportionate interference with the claimants rights or interests---More sophisticated version of proportionality provided for a structured test, where under the courts asked first whether the measure, which was being challenged, was suitable to attaining the identified ends (the test of suitability)---Suitability here included the notion of "rational connection" between the means and ends---Next step asked whether the measure was necessary and whether a less restrictive or onerous method could have been adopted (the test of necessity - requiring minimum impairment of the rights or interest in question).

A. Barak, *The Judge in a Democracy*, Princeton, p.225 and Halsbury's Laws of England, Vol 1(1), 4th Edition, Para 78 ref.

(c) Civil service ---

---Removal from service---Absence from duty for a day---Executive discretion---Proportionality, suitability and necessity, tests of---Scope---Petitioner was serving as a Telephone Operator (BPS-02) in the Cantonment Board---Department initiated disciplinary proceedings against the petitioner for absenting himself from work---Inquiry officer recommended that 1/4th amount from the monthly salary of the petitioner be deducted as fine and he be also given last/final chance and in case he did not improve his behavior in future he be punished strictly---Authorized officer, however, removed the petitioner from service---Held, applying the test of proportionality to the executive discretion exercised in the present case, the order of the authorized officer, failed to maintain fair balance by removing a person from service because he absented himself from duty for a day---Executive discretion also failed the structured test of proportionality including the test of suitability and test of necessity requiring minimum impairment of the right of the petitioner---Order of removal of the petitioner was set aside and the petitioner was reinstated into service without back benefits, as he had categorically stated in court that he did not wish to seek back benefits---Petition for leave to appeal was converted into appeal and allowed accordingly.

Ghulam Nabi, Advocate Supreme Court and M. Ajmal Khan, Advocate-on-Record alongwith petitioner in person for Petitioner.

Ihsan Ullah, Advocate Supreme Court and Haji M. Zahir Shah Advocate-on-Record for Respondent No.1.

Syed Hamid Ali Shah, Advocate Supreme Court and M. Zahoor Qureshi, Advocate Supreme Court for Respondent No.2.

Date of hearing: 11th December, 2018.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---The petitioner was appointed as Mali (gardener) in BPS-01 vide office order dated 30.04.2009 in the Cantonment Board, Peshawar. Thereafter, he was absorbed against the permanent post of Telephone Operator in BPS-02 vide office order dated 23.08.2010. During his service as a Telephone Operator, the petitioner absented himself from duty on 07.02.2011. The department initiated disciplinary proceedings against the petitioner and appointed an inquiry officer, who recommended in his report dated 10.05.2011 that 1/4th amount from the monthly salary of the petitioner be deducted as fine and he be also given last/final chance and in case he does not improve his behavior in future he be punished strictly. However, the authorized officer removed the petitioner from service vide office order dated 21.05.2011. Thereafter, the petitioner preferred

departmental appeal before the Director, Military Lands and Cantonment, Peshawar which was dismissed vide order dated 24.05.2012, as being barred by time. The petitioner challenged the same through writ petition before the Peshawar High Court which was dismissed vide impugned order dated 15.05.2013.

2. Learned counsel for the petitioner submits that petitioner was removed from service just because he absented himself from service for one day i.e., on 07.02.2011. He further submits that if the authorized officer was to disagree with the findings of the inquiry officer, he should have given reasons and granted fresh opportunity of hearing to the petitioner. In this regard he referred to Rule 7(a) of the Government Servants (Efficiency and Discipline) Rules, 1973 and placed reliance on the case of *Habibullah Bhutto v. Collector of Customs* (2011 SCMR 1504).

3. Learned counsel representing the respondents submitted that the petitioner had been absenting himself in the past and considering his record the penalty of removal is commensurate. He further submitted that petitioner has been removed from service in terms of the Pakistan Cantonment Servants Rules, 1954 ("Cantonment Rules")

4. We have heard the learned counsel for the parties and have examined the record. The petitioner, during his service as Telephone Operator, earlier absented himself from duty on 21.11.2010. As a result he was fined a sum of Rs.2000/-. He then absented himself on 07.02.2011, which resulted in his removal from service, which is the subject matter of this petition. Under Rule 50 of the Cantonment Rules, the Authority of the petitioner is the President, Cantonment Board and the Authorized Officer is the Cantonment Executive Officer¹. The procedure of inquiry under the said Rule is that if a major penalty is to be imposed the Authorized Officer is required to forward the case to the Authority along with charge and statement of allegations. In the instant case, the impugned order has been passed by the authorized officer and has not been forwarded to the Authority. Additionally, the inquiry officer had recommended deduction of salary (1/4th amount from his monthly salary) as a fine for absence from duty on 07.02.2011 and giving him last chance to improve himself. The Authorized Officer, if disagreeing with the inquiry officer, should have issued fresh notice to the petitioner and given reasons for his disagreement and justification for visiting the petitioner with a graver penalty. Reliance is placed on *Habibullah Bhutto v. Collector of Customs* (2011 SCMR 1504). Learned counsel appearing for the respondent Cantonment Board candidly conceded to both these omissions. With these legal infirmities in the disciplinary proceedings, the order of removal of the petitioner was totally without jurisdiction, therefore, the question of the departmental appeal being barred by time pales into insignificance. It is also noticed that earlier absence of the petitioner from duty, while working as a Mali, weighed with the High Court in upholding his removal order. The petitioner had absented himself from work on 25.01.2010, 08.05.2010 and 10.05.2010. According to the record, the petitioner has already been penalized for absenting himself on the said dates and more importantly inspite of this background, he on the basis of his "satisfactory performance," was absorbed against a permanent higher post i.e., Telephone Operator in BPS-02, on 23.08.2010.

5. There is yet another dimension of the case. The court can examine and judicially review the executive discretion exercised by the authorized officer on the ground of proportionality. Alongside reasonableness, proportionality is now a central standard directing the action of the executive branch. The point of departure is that a disproportionate act that infringes upon a human right is an illegal act. The court, which guards the legality of the acts of the executive branch, performs judicial review over these acts and examines whether they fulfill the tests of proportionality. Proportionality is a standard that examines the relationship between the objective the executive branch wishes to achieve, which has the potential of infringing upon a human right, and the means it has chosen in order to achieve that infringing objective. The fiduciary duty, from which the administrative duty of fairness and administrative reasonableness are derived, demands administrative proportionality as well.² "The courts will quash exercises of discretionary powers in which there is not a reasonable relationship

between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct³. An administrative measure must not be more drastic than necessary or to sum up in a phrase - not taking a sledgehammer to crack a nut⁴. According to De Smith's Judicial Review⁵, the standards of proportionality and unreasonableness are inextricably intertwined. Unreasonableness contains two elements of proportionality when it requires the weight of relevant considerations to be fairly balanced and when it forbids unduly oppressive decisions. Under the first element, proportionality is a test requiring the decision-maker to maintain a fair balance. Under this category the courts evaluate whether manifestly disproportionate weight has been attached to one or other considerations relevant to the decision. The second element is that the courts consider whether there has been a disproportionate interference with the claimants rights or interests. A more sophisticated version of proportionality provides for a structured test. Here the courts ask first whether the measure, which is being challenged, is suitable to attaining the identified ends (the test of suitability). Suitability here includes the notion of "rational connection" between the means and ends. The next step asks whether the measure is necessary and whether a less restrictive or onerous method could have been adopted (the test of necessity - requiring minimum impairment of the rights or interest in question).

6. Applying the test of proportionality to the executive discretion exercised in the instant case, the order of the authorized officer, other than the legal infirmities discussed above, fails to maintain fair balance by removing a person from service because he absented himself from duty for a day. The executive discretion also fails the structured test of proportionality including the test of suitability and test of necessity requiring minimum impairment of the right of the petitioner.

7. For the above reasons, this petition is converted into an appeal and allowed. The order of removal of the petitioner from service and the impugned order passed by the High Court, upholding the removal of the petitioner from service is set aside and the petitioner reinstated into service without back benefits, as the petitioner has categorically stated in court that he does not wish to seek back benefits.

8. These are the reasons for short order dated 11-12-2018, which is reproduced hereunder:-

"The learned counsel for the petitioner does not claim back benefits and only seeks his reinstatement in service.

2. We have heard the learned counsel. For reasons to be recorded later, this petition is converted into an appeal and is allowed by reinstating the petitioner to the same position that was held by him when he was removed from service, however, he shall not be entitled to back benefits."

MWA/S-1/S Petition allowed.