

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ

DIVISIONAL SUPERINTENDENT, POSTAL SERVICES, D.G. KHAN---Petitioner

Versus

NADEEM RAZA and another---Respondents

Civil Petition No. 3855 of 2022, decided on 17th January, 2023.

(Against the judgment of Federal Service Tribunal, Islamabad dated 30.8.2022, passed in Appeal

No.384(R)CS of 2022)

(a) Service Tribunals Act (LXX of 1973)---

---S. 5---Constitution of Pakistan, Art. 212(3)---Factual questions---Service Tribunal, jurisdiction of---Scope---Tribunal is the final forum for the purpose of determination of facts and the Supreme Court cannot go into the reappraisal of the said facts.

Secretary Revenue Division v. Iftikhar Ahmed Tabbasam PLD 2019 SC 563 ref.

(b) Civil service---

---Misappropriation--- Removal from service--- Duration of misappropriation and amount misappropriated nor relevant---Embezzlement or misappropriation constitutes misconduct and the duration of such embezzlement or misappropriation has little relevance---In the present case, the respondent admittedly misappropriated a sum of Rs. 1,24,305/- on account of electricity bills he collected from consumers before depositing the same in the Government exchequer after almost 23 days without any remorse---Tribunal approved the inquiry report which contains conceding statements on behalf of the respondent admitting that he had retained the said amount as he needed it because he was constructing a house, and therefore, did not deposit the same on time---Duration of this misappropriation, or the amount involved, is irrelevant as the act itself is sufficient to constitute misconduct---Tribunal has not given any reasons or explanation to examine the penalty imposed by the department on the touchstone of proportionality and with a stroke of a pen reduced the said penalty from "Removal from Service" to "reduction to three stages lower in pay scale for two years"---Such casual interference by the Tribunal in the penalty imposed by the department cannot be sustained---Even otherwise, in the facts and circumstances of the case, the penalty imposed by the department does not offend the law or the test of proportionality---Petition for leave to appeal was converted into an appeal and allowed, impugned judgment of the Tribunal was set-aside and order passed by the department awarding major penalty of "Removal from Service" was restored.

Divisional Superintendent, Postal Services v. Muhammad Arif Butt 2021 SCMR 1033 and Divisional Superintendent v. Siddique Ahmed 2021 SCMR 1398 ref.

(c) Service Tribunals Act (LXX of 1973)---

---S. 5---Service Tribunal, powers of---Scope---Under Section 5 of the Service Tribunals Act, 1973 ("Act") the Tribunal is empowered to confirm, set aside, vary or modify the order appealed before it, however, such powers are to be exercised carefully, judiciously and after recording reasons for the same--- Tribunal has no jurisdiction to grant arbitrary relief to any person as the powers of the Tribunal under section 5 of the Act are neither unqualified and nor unlimited.

Chief Postmaster Faisalabad v. Muhammad Afzal 2020 SCMR 1029; Divisional Superintendent v. Muhammad Zafarullah, 2021 SCMR 400; Divisional Superintendent v. Muhammad Arif Butt 2021 SCMR 1033; Chairman Dr. A.Q. Khan, Research Laboratories v. Malik Muhammad 2010 SCMR 302 and Central Board of Revenue v. Shafiq Muhammad 2008 SCMR 1666 ref.

(d) Service Tribunals Act (LXX of 1973)---

---S. 5---Service Tribunal, powers of---Limited power of the Service Tribunal to reduce penalty imposed by the department on a civil servant---Scope---Test of proportionality for interfering in quantum of penalty/punishment---Scope---Only in exceptional circumstances, i.e. where it is against the law or is unreasonable or fails the test of proportionality, that the Tribunal can interfere in the penalty imposed by the department and that too supported by detailed reasons---Where the Tribunal or the Court interferes in the quantum or nature of the penalty imposed by the competent authority by terming the same as unreasonable,

perverse or harsh, or by exercising leniency, such interference is, in effect, only made when the Tribunal or the Court concludes that the penalty is disproportionate to the misconduct proved by employing the test of proportionality---Only where the penalty imposed by the department is so shockingly disproportionate to the misconduct or inefficiency proved that to let it stand would be unfair, unjust and inequitable, that the same would justify interference based on the test of proportionality.

Imposition of punishment under the law is primarily the function and prerogative of the competent authority and the role of the Tribunal or the Court is secondary unless it is found to be against the law or is unreasonable. This is because the department/competent authority, being the fact finding authority, is best suited to decide the particular penalty to be imposed keeping in view a host of factors such as the nature and gravity of the misconduct, past conduct, the nature and the responsibility of the duty assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in the department, as well as any extenuating circumstances. The question of interference with relation to the quantum or the nature of the penalty imposed by the department only arises when the Tribunal or the Court, in consonance with the decision of the competent authority, has also found the delinquent guilty of the same or some form misconduct or inefficiency. It is, therefore, only in the above exceptional circumstances, i.e. where it is against the law or is unreasonable, that the Tribunal or the Court can interfere in the penalty imposed by the department. The imposition of the penalty being against the law would entail that it cannot be held as legally sustainable, such as, when misconduct or inefficiency for which the penalty has been imposed has not been proved and a lesser form of misconduct or inefficiency, in the opinion of the Tribunal or the Court, is proved, or the procedure provided under the law for imposing the penalty has not been followed or the penalty imposed has not been provided for in the law or rules applicable, and therefore, the imposition of the penalty itself is not sustainable under the law, thereby, justifying interference. However, where the Tribunal or the Court comes to the conclusion that the misconduct or inefficiency, for which the penalty has been imposed by the department, has been proved, the procedure under the law has been followed and the penalty imposed is provided for under the law amongst other penalties for the like misconduct or inefficiency, interference in the discretion exercised by the department in imposing a certain penalty would only be possible if the penalty imposed is considered to be starkly unreasonable.

Government of Khyber Pakhtunkhwa v. Nargis Jamal 2022 SCMR 2114; *Postmaster General Sindh Province v. Syed Farhan* 2022 SCMR 1154; *Secretary, Government of Punjab v. Khalid Hussain* 2013 SCMR 817; *Deputy Commissioner v. J. Hussain* (2013) 10 SCC 106; *B.C. Chaturvedi v. Union of India* (1995) 6 SCC 749; *Noor Muhammad v. Registrar, Lahore High Court* 2008 PLC (C.S.) 1188; *Muhammad Ali v. FOP* 2008 PLC (C.S.) 428; *Senior Superintendent v. Shahid Nazir* 2022 SCMR 327; *Muhammad Idris Khan v. Secretary/Chairman, Ministry of Railways* 2007 PLC (C.S.) 247 and *Member (ACE & ST), FBR v. Muhammad Ashraf* 2008 PLC (C.S.) 1161 ref.

Where the Tribunal or the Court interferes in the quantum or nature of the penalty imposed by the competent authority by terming the same as unreasonable, perverse or harsh, or by exercising leniency, such interference is, in effect, only made when the Tribunal or the Court concludes that the penalty is disproportionate to the misconduct proved by employing the test of proportionality. However, the application threshold of the proportionality test remains high and interference in the penalty imposed by the department cannot be based on mere conjectures or surmises. Interference with the penalty imposed by the department has to be exercised cautiously and with circumspection where the order imposing the penalty is wholly perverse or ex facie so demonstrably disproportionate and excessive for the misconduct, that to let it stand would be unfair, unjust and inequitable. Merely observing that the penalty imposed is not commensurate with the offence is not enough and constitutes arbitrary capricious and unstructured exercise of jurisdiction on part of the Tribunal. The order must show that the Tribunal has applied its mind to the facts and circumstances of the case and exercised its discretion in a structured, lawful and regulated manner, duly supported by legally sustainable reasoning. Therefore, it is only where the penalty imposed by the department is so shockingly disproportionate to the misconduct or inefficiency proved that to let it stand would be unfair, unjust and inequitable, that the same would justify interference based on the test of proportionality.

Akhtar Ali v. Director, Federal Government 2011 PLC (C.S.) 808; Shibli Farooqui v. FOP 2009 SCMR 281; Muhammad Ali v. Federation of Pakistan 2008 SCMR 214; Muhammad Ali v. FOP 2008 SCMR 214; Commissioner Faisalabad Division v. Allah Bakhsh 2020 SCMR 1418; Government of Khyber Pakhtunkhwa v. Nargis Jamal 2022 SCMR 2114; Chairman v. Goparaju (2008) 5 SCC 569; B.C. Chaturvedi v. Union of India (1995) 6 SCC 749; Pravin Kumar v. Union of India, (2020) 9 SCC 471; Director General Federal Directorate v. Tanveer Muhammad 2021 SCMR 345; Deputy Postmaster General v. Habib Ahmed 2021 PLC (C.S.) 531 and Government of Pakistan v. Nawaz Ali Sheikh 2020 SCMR 656 ref.

(e) Civil service---

---Penalty, quantum of---Test of proportionality---Reasonableness for the purposes of assessing the quantum or nature of a penalty imposed by the department is to be gauged by applying the test of proportionality---Penalty imposed must be commensurate with the misconduct or inefficiency that has been proved.

Sabir Iqbal v. Cantonment Board PLD 2019 SC 189; Postmaster General Sindh Province v. Syed Farhan 2022 SCMR 1154; Government of Punjab v. Muhammad Arshad 2021 PLC (C.S.) 47 and Inspector-General (Prisons) v. Syed Jaffar Shah 2009 PLC (C.S.) 47 ref.

(f) Civil service---

---Misappropriation or embezzlement of public funds---Moral turpitude---Scope---Misappropriation or embezzlement of public funds while in Government service would be considered as gross misconduct involving moral turpitude.

Imtiaz Ahmed Lali v. Returning Officer 2008 PLC (C.S.) 934 and Ghulam Hussain v. Chairman, P.O.F. Board 2002 SCMR 1691 ref.

(g) Service Tribunals Act (LXX of 1973)---

---S. 5---Service Tribunal, powers of---Moral turpitude---Punishment, quantum of---Test of proportionality for interfering in quantum of penalty/punishment imposed by department/competent authority---Scope---Notion of proportionality requires that the punishment ought to reflect the degree of moral culpability associated with the offence for which it is imposed---In order to render punishment compatible with justice, it is not enough to restrict punishment to the deserving, but also to restrict the degree of punishment to the degree that is deserved---Degree of wrongfulness is described variously as the "moral culpability", "gravity" or "depravity" associated with the offence---Therefore, along with the gravity of the misconduct, interference on the grounds of proportionality in the penalty imposed for misconduct is also assessed in view of the depravity or moral culpability associated with the same---Test of proportionality is, therefore, more stringent in cases of misconduct involving moral turpitude in view of the depravity or moral culpability involved.

Burgh, Richard W. Do the guilty deserve punishment? *Journal of Philosophy* 79 (4):193-210 (1982) and Ian P. Farrell, Gilbert and Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment, 55 *Vill. L. Rev.* 321 (2010). <https://digitalcommons.law.villanova.edu/vlr/vol55/iss2/2> ref.

Hassan Nawaz Makhdoom, Additional A.G.P. and Ali, Assistant Superintendent for Petitioner.

M. Ramzan Khan, Advocate Supreme Court for Respondent No. 1.

Assisted by: Muhammad Hassan Ali, Law Clerk.

Date of hearing: 17th January, 2023.

ORDER

SYED MANSOOR ALI SHAH, J.---The question that has come up for determination before us is with regards to the power of the Federal Service Tribunal ("Tribunal") of reducing the penalty imposed by the department on a civil servant.

2. The brief facts of the case are that respondent No. 1, a Mail Peon working for the Postmaster General, was proceeded against departmentally on the charge of misappropriation of government money amounting to Rs. 1,24,305/- that he collected, while he was working as an officiating Counter Clerk Utility Bills Collection, on account of electricity bills from the consumers but did not deposit the same with the Government exchequer. The said misappropriation surfaced after receipt of complaints from the consumers. The record shows that respondent No.1 collected the said amount on 28.7.2018 and 30.7.2018 and retained the same before depositing it on 18.8.2018 and 20.8.2018. For the said misappropriation, the department imposed a major penalty of

"Removal from Service" on respondent No.1 vide order dated 31.10.2019 against which he preferred a departmental appeal, which was rejected on 17.2.2020. Thereafter, on an appeal filed by respondent No.1 before the Tribunal, the penalty was reduced from "Removal from Service" to "reduction to three stages lower in pay scale for two years" vide the impugned judgment dated 30.8.2022. The Tribunal held that the respondent had committed misappropriation/ embezzlement but termed the same as "temporary misappropriation" and declared that the punishment of "Removal from Service" was too harsh. The instant petition has been filed seeking leave to appeal from the said impugned judgment.

3. The learned Additional Attorney General appearing on behalf of the petitioner submits that the Tribunal, once holding that the respondent had committed misappropriation, could not have reduced and converted the penalty of "Removal from Service" to that of "reduction to three stages lower in pay scale for two years" without giving any reason. He relied on Syed Farhan¹, Muhammad Afzal² and Allah Bakhsh³ to submit that such a reduction in penalty was without lawful authority.

4. The learned counsel for the respondent took pains to explain the merits of the case to us and pointed out that the respondent never admitted to the charges against him; that the inquiry was not conducted in accordance with law; and that the respondent never collected or deposited the money.

5. We have heard the learned counsel for the parties and have also perused the record with their assistance. We are afraid we cannot go into the facts of the case as far as the determination of the question of embezzlement/misappropriation is involved as the respondent has not challenged the impugned judgment of the Tribunal which affirms this fact, thereby, acquiescing to the said findings. Besides, this Court has already held that the Tribunal is the final forum for the purpose of determination of facts and this Court cannot go into the reappraisal of the said facts.⁴ We, therefore, proceed to examine the legal question regarding reduction of penalty by the Tribunal. For the said purposes, it would be useful to reproduce the following excerpt from the impugned judgment wherein the Tribunal has held that:-

"7. ... Only temporary embezzled amount of Rs. 123,405/-⁵ was not deposited in the Government Accounts which was subsequently made good by him ... There is no doubt that there is no loss to the department and that the impugned amount was deposited on two dates i.e. 18.08.2018 and 20.08.2018, which shows a kind of temporary misappropriation which is clear as per impugned and appellate impugned orders as per record. The basic question is of breach of trust of the public and the department. He received Wapda electricity bill amounts from several consumers but did not deposit in time rather they did late, so was imposition of embezzled amount for quite some time. This also amounts to misconduct and inefficiency as rightly pointed out in impugned orders. Though the procedure is fraught with lacunas and false as pointed out by the learned counsel for the appellant but this cannot mitigate his commission of breach of trust and misconduct. However, proportion of punishment is too harsh as compared to commission of this act."

At the outset, we are surprised by the use of the term "temporary misappropriation" by the Tribunal. We understand that embezzlement or misappropriation constitutes misconduct and the duration of such embezzlement or misappropriation has little relevance. In this case, as per the record, the respondent misappropriated a sum of Rs. 1,24,305/- on account of electricity bills he collected from consumers on 28.7.2018 and 30.7.2018 before depositing the said amount on 18.8.2018 and 20.8.2018 after almost 23 days. The Tribunal has approved the inquiry report which contains conceding statements on behalf of the respondent dated 18.8.2018 and 20.8.2018, admitting that he had retained the said amount as he needed it because he was constructing a house, and therefore, did not deposit the same on time. The duration of this misappropriation, or the amount involved, is irrelevant as the act itself is sufficient to constitute misconduct.⁶

6. The Tribunal, after holding that the respondent had committed embezzlement/ misappropriation, proceeded to modify the punishment of "Removal from Service" to "reduction to three stages lower in pay scale for two years". We hereunder examine the exercise of powers of the Tribunal to reduce penalties in a particular case.

7. Under section 5 of the Service Tribunals Act, 1973 ("Act") the Tribunal is empowered to confirm, set aside, vary or modify the order appealed before it, however, such powers are to be exercised carefully, judiciously and after recording reasons for the same.⁷ This Court has repeatedly held that the Tribunal has no jurisdiction to grant arbitrary relief to any person as the powers of the Tribunal under section 5 of the Act are neither

unqualified and nor unlimited.⁸ It is also settled law that the imposition of punishment under the law is primarily the function and prerogative of the competent authority and the role of the Tribunal or the Court is secondary unless it is found to be against the law or is unreasonable.⁹ This is because the department/competent authority, being the fact finding authority, is best suited to decide the particular penalty to be imposed keeping in view a host of factors such as the nature and gravity of the misconduct, past conduct, the nature and the responsibility of the duty assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in the department, as well as any extenuating circumstances.¹⁰ The question of interference with relation to the quantum or the nature of the penalty imposed by the department only arises when the Tribunal or the Court, in consonance with the decision of the competent authority, has also found the delinquent guilty of the same or some form misconduct or inefficiency. It is, therefore, only in the above exceptional circumstances, i.e. where it is against the law or is unreasonable, that the Tribunal or the Court can interfere in the penalty imposed by the department.

8. The imposition of the penalty being against the law would entail that it cannot be held as legally sustainable, such as, when misconduct or inefficiency for which the penalty has been imposed has not been proved and a lesser form of misconduct or inefficiency, in the opinion of the Tribunal or the Court, is proved¹¹, or the procedure provided under the law for imposing the penalty has not been followed¹² or the penalty imposed has not been provided for in the law or rules applicable¹³, and therefore, the imposition of the penalty itself is not sustainable under the law, thereby, justifying interference. However, where the Tribunal or the Court comes to the conclusion that the misconduct or inefficiency, for which the penalty has been imposed by the department, has been proved, the procedure under the law has been followed and the penalty imposed is provided for under the law amongst other penalties for the like misconduct or inefficiency, interference in the discretion exercised by the department in imposing a certain penalty would only be possible if the penalty imposed is considered to be starkly unreasonable.

9. Reasonableness for the purposes of assessing the quantum or nature of a penalty imposed by the department is to be gauged by applying the test of proportionality. In *Sabir*¹⁴ it was held that 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. It was also observed that a more sophisticated version of proportionality provided for a structured test, whereby it will firstly be assessed whether the measure taken is suitable in attaining the identified ends (the test of suitability, which includes the notion of "rational connection" between the means and ends) and then whether the measure is necessary or if a less restrictive or onerous method could have been adopted (the test of necessity). In essence, an administrative decision must not be more drastic than necessary and therefore, it follows that the penalty imposed must be commensurate with the misconduct or inefficiency that has been proved.¹⁵ Where the Tribunal or the Court interferes in the quantum or nature of the penalty imposed by the competent authority by terming the same as unreasonable, perverse or harsh, or by exercising leniency¹⁶, such interference is, in effect, only made when the Tribunal or the Court concludes that the penalty is disproportionate to the misconduct proved by employing the test of proportionality.

10. However, the application threshold of the proportionality test remains high and interference in the penalty imposed by the department cannot be based on mere conjectures or surmises. Interference with the penalty imposed by the department has to be exercised cautiously and with circumspection where the order imposing the penalty is wholly perverse or ex facie so demonstrably disproportionate and excessive for the misconduct, that to let it stand would be unfair, unjust and inequitable.¹⁷ Merely observing that the penalty imposed is not commensurate with the offence is not enough and constitutes arbitrary capricious and unstructured exercise of jurisdiction on part of the Tribunal. The order must show that the Tribunal has applied its mind to the facts and circumstances of the case and exercised its discretion in a structured, lawful and regulated manner¹⁸, duly supported by legally sustainable reasoning.¹⁹ Therefore, it is only where the penalty imposed by the department is so shockingly disproportionate to the misconduct or inefficiency proved that to let it stand would be unfair, unjust and inequitable, that the same would justify interference based on the test of proportionality.

11. Being relevant to the instant case, another question that arises is with regards to the applicability of the test of proportionality to interfere with a penalty imposed for misconduct which involves moral turpitude. "Moral turpitude" was defined in *Imtiaz Ahmed*²⁰ as "the act of baseness, vileness or the depravity in private and social duties which man owes to his fellow man, or to society in general contrary to accepted and customary rule of right and duty between man and man." In *Ghulam Hussain*²¹, it was held that moral turpitude includes anything which is done contrary to the good principles of morality, any act which runs contrary to justice, honesty, good moral values or established judicial norms of a society. Therefore, for all intents and purposes, misappropriation or embezzlement of public funds while in Government service would be considered as gross misconduct involving moral turpitude.

12. The modern notion of proportionality requires that the punishment ought to reflect the degree of moral culpability associated with the offence for which it is imposed.²² In order to render punishment compatible with justice, it is not enough to restrict punishment to the deserving, but also to restrict the degree of punishment to the degree that is deserved.²³ The degree of wrongfulness is described variously as the "moral culpability", "gravity" or "depravity" associated with the offence.²⁴ Therefore, along with the gravity of the misconduct, interference on the grounds of proportionality in the penalty imposed for misconduct is also assessed in view of the depravity or moral culpability associated with the same. The test of proportionality is, therefore, more stringent in cases of misconduct involving moral turpitude in view of the depravity or moral culpability involved.

13. We, therefore, hold that the Tribunal exercising its powers under section 5 of the Act to reduce the penalty imposed by the department on a civil servant can only do so if the said penalty is either against the law or fails the test of proportionality and that too supported by detailed reasons. In the instant case, the respondent admittedly misappropriated public funds for almost a period of 23 days i.e. from 28.7.2018 to 20.8.2018 before depositing the same in the Government exchequer without any remorse. The Tribunal has not given any reasons or explanation to examine the penalty imposed by the department on the touchstone of proportionality and with a stroke of a pen has reduced the said penalty from "Removal from Service" to "reduction to three stages lower in pay scale for two years". Such casual interference by the Tribunal in the penalty imposed by the department cannot be sustained. Even otherwise, in the facts and circumstances of the case, we are of the view that the penalty imposed by the department does not offend the law or the test of proportionality.

14. In view of the above, we set aside the impugned judgment and restore the order passed by the department dated 31.10.2019 whereby the major penalty of "Removal from Service" was awarded to respondent No. 1. This petition is converted into an appeal and allowed accordingly.

MWA/D-3/SC Appeal allowed.