Form No: HCJD/C

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Writ Petition No.1764 of 2021

Afnan Farid, etc
Versus
Federation of Pakistan, etc.

Petitioner by :	***Ali Nawaz Kharal, Advocate.***
Respondent by :	***Mr. Umar Ijaz Gillani, Advocate.*** **Ch. Fayyaz Hussain Dhariwal, AAG.** **Muhammad Irfan, S.O, (Lit) Establishment Division.** **Syed M. Ibrahim Shah, Law Officer, for respondents No.1&2.**
Date of Decision :	**29.09.2021**

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BABAR SATTAR, J. - Through this petition, the petitioner has impugned notification issued by Ministry of Housing & Works dated 30.03.2021, pursuant to which it has been declared that 10% of the posts of the Executive Engineer (Civil) (BS-18) are to be allocated and reserved for promotion of Assistant Executive Engineer (Civil) (BS-17), possessing B.Tech degree to the post of Executive Engineer (QS) (BS-18) and that such Executive Engineers (BS-18) shall not carry out duties as professional Engineers.

2. Learned counsel for the petitioner submitted that the impugned notification had been issued without lawful authority and in breach of provisions of the Rules of Business, 1973 ***("Rules of Business")***, the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 ***("APT Rules")*** and the Pakistan Engineering Council Act, 1976. His first contention was that according to rule 3(2) of the APT Rules, the method of appointment and qualifications and other conditions applicable to a post are to be laid down by the Ministry

concerned in consultation with the Establishment Division. That in the instant case, the conditions for appointment and qualification for promotion to Executive Engineer (QS) (BS-18) had been laid down through the impugned notification without consultation with the Establishment Division. The second contention was that under rule 11 of the Rules of Business, no Division was authorized to issue any orders, without prior consultation with the Establishment Division, that affected any change in the terms of the service of civil servants. The third contention was that under the Pakistan Public Works Department Code, the duties of an Executive Engineer were prescribed as follows:-

> **Executive Engineer (Structure)**
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> *4.15 He shall be responsible to the Superintending Engineer Structure of the preparation of accurate designs, drawings for all projects, assigned to him. He shall also inspect works under construction as and when required by his 'Superintending Engineer to see that the approved structural designs are being adhered to at site. Any imperfection and change from the approved structural design shall be brought simultaneously to the notice of the Executive Engineer (Site Control) of the work as well as to his Superintending Engineer. He shall be the Controlling Officer of his subordinates.*

He submitted that the job description of an Executive Engineer involved quintessential engineering functions and such functions could only be discharged by a licensed engineer in view of the provisions of the Pakistan Engineering Council Act, 1976 ***("PEC Act")***. That in view of the provisions of the PEC Act, B.Tech degree was a diploma not recognized as an Engineering qualification by Pakistan Engineering Council and consequently respondent No.1 could not issue a notification stating that 10% of the appointments of

Executive Engineer (BS-18) would be reserved for those possessing B.Tech degrees which were not recognized Engineering qualification.

3. Learned Assistant Attorney General was unable to furnish any explanation regarding the authority pursuant to which the Secretary of respondent No.1 i.e. Ministry of Housing and Works had decreed that 10% of posts for promotion to Executive Engineer (BS-18) would be reserved for those possessing B.Tech degrees. He was unable to present any record before the Court of consultation with Establishment Division or approval of terms and conditions of service for purpose of appointment to the post of Executive Engineer (BS-18) by the Federal Government. Learned AAG submitted that the impugned notification related to the terms and conditions of services of Civil Servant and in lieu of the Article 212 of the Constitution, the adjudication of such question fall within the domain of the Federal Service Tribunal and this Court ought not exercise jurisdiction under Article 199 of the Constitution.

4. In written response filed by the M/o Housing and Works, it took the position that amendment of recruitment rules in order to insert the quota notified through the impugned notification was under process and in the event that such amendment was given effect, those possessing B.Tech degrees would be promoted against non engineering posts.

5. Learned counsel for Pakistan Engineering Council ***("PEC")*** submitted that PEC Act stated unequivocally that engineering posts are to be filled only by licensed professional engineers. He relied on the law laid down in ***Maula Bux Shaikh vs Chief Minister Sindh*** **(2018 SCMR 2098)** wherein it was held that *"Government shall not*

allow or permit any person to perform professional engineering work as defined in the PEC Act, who does not possess accredited engineering qualification from the accredited engineering institution and his name is not registered as a registered engineer or professional engineer under the PEC Act". He supported the contentions of the petitioner that the M/o Housing and Works could not authorize promotion of those employees who were not licensed engineers in terms of PEC Act to hold positions that required performance of engineering work or oversight of such work.

6. Let us first address the question of maintainability. Article 212 (1)(a) of the Constitution states that *"matters relating to the terms and conditions of person in the service of Pakistan including disciplinary matters"*, shall fall within the exclusive jurisdiction of Federal Service Tribunal. The matter before this Court does not relate to terms and conditions of any particular person who is aggrieved by the impugned notification or any person who is claiming a right on the basis of such notification. Such grievance would fall within the terms and conditions of a civil servant would certainly belong within the exclusive domain of the Federal Service Tribunal. The question before this Court is whether or not the impugned notification which has been issued by a functionary of the Federal Government is backed by legal authority or not. Article 199(1)(a)(ii) states that in the absence of any adequate remedy provided by law on the application of an aggrieved party this Court may make an order, "declaring that any act done or proceeding taken without the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation a Provides or a local

authority has been done or taken without lawful authority and is of no legal effect".

7. In view of Article 199 (1)(a)(ii) of the Constitution it is patent that the question before this Court is whether the impugned notification is without lawful authority and consequently of no legal effect and not a grievance related to the terms and conditions of an employee of the Federal Government. Therefore, this Court is vested with jurisdiction to adjudicate the matter.

8. The report/comments filed by respondent No.1 acknowledge that the impugned notification is issued without lawful authority. It has been stated in the report that recruitment rules applicable to the M/o Housing and Works have been purposed to be amended and consultation in this regard between the M/o Housing and Works and the Establishment Division is under way. This in itself is admission of the fact that the impugned notification has not been issued after consultation with the Establishment Division as required under the Rule 3(2) of the APT Rules read together with the Rule 11 of Rules of Business.

9. In terms of the content of the impugned notification this Court ought not delve into the question when it has already been found that the impugned notification is not in accordance with the procedural requirements laid down in the APT Rules and the Rules of Business and consequently suffers from infirmity as the Secretary, M/o Housing and Works is vested with no legal authority to approve any changes to the terms and conditions that apply to Civil Servants. Such changes can only be introduced by the competent authority

under the Civil Servants Act, 1973, and the Rules and Regulations framed thereunder. And the Secretary, M/o Housing & Works is not the competent authority to change the term and conditions of Civil Servants who serve within the M/o Housing and Works. Consequently, the impugned notification is without lawful authority and of no legal effect.

10. As regards legality of the content of the impugned notification the matter can be looked at in an appropriate case. However, as the question has come before the Court, let us consider the dicta of the Courts in this regard. The august Supreme Court in ***Muhammad Younus Aarin vs. Province of Sindh (2007 SCMR 134)*** held that:-

> *The diploma engineers certainly are not qualified engineers in terms of Pakistan Engineering Council Act, 1976 and cannot claim the status of engineers at par to the professional engineers registered with PEC.*
>
> *This is settled law that diploma engineers cannot be recognized professional engineers who hold recognized engineering qualification as provided in section 2(j) of PEC Act, 1976, which provides as under:--*
>
> > *"Professional engineer" means a person who holds a recognized engineering qualification and is registered as a professional engineer."*
>
> *The basic qualification for a professional engineer under the law is B.Sc. degree in engineering from a recognized institution in Pakistan and diploma in engineering is not a recognized qualification for a professional engineer in terms of PEC Act, 1976. The service rules governing the service of the petitioner (SCUG Service Rules, 1982) and the promotion policy of the Government of Sindh, would neither override the provisions of the above Act nor relax the requirement of basic qualification of professional engineer for promotion to BPS-20 in the engineering branch of Government of Sindh.*

11. The question of qualification of individuals performing engineering works came before the august Supreme Court in ***Maula***

Bux Shaikh vs. Chief Minister Sindh (2018 SCMR 2098) wherein it was held that:-

> *21. The PEC Act as its preamble itself shows so also reading of the whole Act shows that it essentially deals with regulations of engineering profession in it, inter alia, it prescribes for qualification of professional engineers, maintenance of register of professional engineers and accrediting of engineering universities etc and not as a regulator of employment be that be of government service or in the private service. The reasons for it could be found that all sort of engineering work could not be and may not be a professional engineering work for performance of which professional engineers are required. For example, technician, mechanic, draftsman, foreman, supervisor and overseer etc at best could be a skilled Workman who may work independently or under the supervision of professional engineer and for such technician, mechanic, draftsman, foreman, supervisor and overseer/ the employer may not require holding of professional engineering degree. However, if the person is required to perform any of professional engineering work as defined under the PEC Act, the provisions of this Act will come into operation for ensuring as the work of professional engineer can and only be performed by professional engineer as recognized by PEC Act. The professional engineering work has been clearly defined under section 2(xxv) of the PEC Act which has already been reproduced above and lays down in sufficient details the works which are noted to be as professional engineering works and such works as mandatorily required by the PEC Act to be performed by a professional engineer possessing accredited engineering qualification from accredited engineering institutions in Pakistan and abroad with experience and passing of test of the Council and no other person is allowed to perform professional engineering works be that be a diploma holder or B.Tech. degree holder.*

12. What is obvious in view of the provisions of PEC Act as interpreted by the august Supreme Court is that PEC is the regulator of engineering professionals and only such persons can be licensed as professional engineers who have recognized engineering degrees and licensed by PEC in accordance with the rules and regulations framed under the PEC Act.

13. The Federal Government is bound by provisions of the PEC the Act to the extent of the terms and conditions of persons

discharging professional engineering work as defined under Section 2(xxv) of the PEC Act. What the Federal Government can certainly not do is declare that a post that involves discharging, performing or supervising professional engineering work is to be filled by someone who is not a professional engineer as defined under Section 2(xxiii) of the PEC Act subject to the condition that such non-engineer will not perform professional engineering work while serving against a post that requires performance of professional engineering work. However, as said above, the impugned notification has been set aside for not being backed by legal authority and it was settled by the august Supreme Court in ***Lahore Development Authority vs. Imrana Tiwana*** ***(2015 SCMR 1739)*** that courts in their Constitutional jurisdiction, while exercising judicial review powers, ought to determine the legality or lack thereof of legal instruments on the narrowest grounds. Thus the legality of appointing non-engineers to posts that traditionally require performance of engineering related functions can be looked at in an appropriate case.

14. For the foregoing reasons, the instant petition is ***allowed*** and the impugned notification dated 30.03.2021, issued by respondent No.1 is ***set aside*** for without being lawful authority not having been issued by competent authority in accordance with the procedure prescribed in the APT Rules and the Rules of Business.

(BABAR SATTAR)
JUDGE

Shakeel Afzal/-