Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 2662 of 2014

Mst. Tarmeem Kausar

Vs

Director General Education Islamabad, etc.

PETITIONER BY:	Mr. Mazhar Hussain Shah Shirazi, Advocate.
RESPONDENTS BY:	Mr. Farrukh Shahzad Dall, Assistant Attorney General. Mr. Muhammad Azam Gakhar, Director Legal and Syed Muhammad Rehan, Assistant Director Legal, Federal Directorate of Education.
Date of Hearing:	**08.02.2021**.

BABAR SATTAR, J.- Through this Petition the petitioner seeks regularization of her employment with effect from 06.09.2012 when she was appointed as a Farash (BS-01) on contract basis under the Prime Minister's Assistance Package for Families of Government Employees who die in service (***"PM's Assistance Package"***).

2. Brief facts of the case are that the petitioner is the widow of Muhammad Rafiq who was regular employee of the Federal Directorate of Education and died in service on

21.03.2010. The petitioner was appointed as Naib Qasid on contract basis on 08.07.2010 pursuant to O.M No. 7/40/2005-E.2 dated 13.06.2006 under the PM's Assistance Package, which stated that the next-of-kin of an employee who dies in service may be appointed in BS-01 to BS-15 on contract basis for a two-year period without advertisement. The petitioner was appointed as Farash on 06.09.2010 against a vacant post for a period of two years. She filed various applications for regularization of her service. The Principal of Islamabad Model School for Girls also made multiple requests for the regularization of the petitioner's service and also for extension of her initial contract which expired on 08.09.2012. The competent authority, however, passed no orders in relation to such applications and requests of both the petitioner and the Principal of Islamabad Model School for Girls. On 06.06.2012, thirty six (36) contract employees of the Federal Directorate of Education who had completed more than one year of service as on 29.02.2012 were regularized against sanctioned posts. But the petitioner, who had also served for more than a year against a vacant post, was not considered for regularization. Aggrieved by discriminatory treatment meted out to her, she filed the instant petition in 2014.

3. Learned counsel for the petitioner submits that the petitioner was entitled to regularization in accordance with government policy when similarly placed employees were

regularized by order dated 06.06.2012; that she was entitled to continuation of her contract employment pending regularization and suffered legal injury when her contract was not extended and she was forced to serve as a daily wager which status continues till date; that the judgment of this Court in ICA No. 340 of 2017 titled *"Imran Ahmed and others vs. Federation of Pakistan, etc."* had directed that employees from BS-01 to BS-15 under control of Ministry of Capital Administration & Development ***("CADD")*** be considered for regularization by the Federal Cabinet within a period of ninety (90) days and employees in service at the time will not be terminated till final decision of the Federal Government, but the case of the petitioner was not included in the summary moved by Ministry of CADD in compliance with the judgment in *Imran Ahmed*; and that the petitioner was paid no salary for the period from 09.09.2012 to 02.06.2013 while she continued to serve in her capacity as Farash pending consideration of her application for extension of her contract and regularization of her services, which application was never considered or decided.

4. Learned Assistant Attorney General has placed on record various office memoranda, extract from relevant cases decided by this Court and a certificate issued by the Principal/Sanctioning Authority for Islamabad Model School for Girls where the petitioner continues to serve as Farash on daily wage basis. The learned Assistant Attorney General

along with the officials from the Legal Directorate of respondent No.1 have taken me through the relevant office memoranda and have stated that in all fairness the initial contract offered to the petitioner, which expired on 08.09.2012, was liable to be extended by virtue of O.M No. 08/10/2000-CP.I dated 23.12.2000. The relevant clause 4(iii) of the said O.M. reads as follows:

> *4. As regards appointments beyond two years to posts in BPS-19 and below falling outside the purview of the FPSC following instructions may be followed:*
>
> > *(iii). Extension of contract appointments beyond two years to post in BPS 15 and below shall be subject to approval of a BPS 21 officers designated by Secretary in the case of Ministries/Divisions and Head of Department in the case of Attached Departments and subordinate officers;"*

The learned Assistant Attorney General, assisted by departmental representatives, admits that similarly placed employees of respondent No.2 were regularized by office order dated 06.06.2012, and that the case of the petitioner falls within the scope of Para 123(vi) of the judgment of this Court in *Imran Ahmed* but the summary moved for regularization of employees from BS-01 to BS-15 in pursuance of this Court's instructions in the said judgment does not include the name of the petitioner.

5. I have heard the learned counsel for the parties and reviewed the record.

6. This petition raises three legal questions that need to be answered:

> *(i) Having been appointed as a contract employee against a vacant post pursuant to PM's Assistance Package, was the petitioner entitled to have her contract considered for extension?*
> *(ii) Does the petitioner fall within the category of employees in relation to whom instructions have been issued to the Federal Government in Imran Ahmed that their services be regularized? and*
>
> *(iii) Is the state liable to compensate the petitioner for the period from 09.09.2012 to 02.06.2013, when it continued to receive and benefit from the services of the petitioner without compensating her for the same, pending consideration of her contract for extension after the initial contract stood expired?*

7. The PM's Assistance Package for families of government employees who die in service was notified in O.M dated 13.06.2006 and stated that a next-of-kin shall be entitled to employment to a post in BS-01 to BS-15 on a two-year contract without advertisement. Such entitlement for initial appointment is to be read in conjunction with extension in contract appointments governed by instructions in O.M No. 8/10/2000-CP.I dated 23.12.2000, which authorizes grant of extension subject to approval of BPS-21 officer designated by the Secretary of the relevant ministry. The petitioner's case for extension put forward by the Principal of Islamabad Model School for Girls was never considered by the competent authority due to which the contact was not extended and she continued to serve without salary from 09.09.2012 to

02.06.2013, after which she begun to be regarded as a daily wager and paid from student-generated school funds, and continues to serve in such status till date.

8. The petitioner was appointed by AEO on daily-wage basis out of students fund with effect from 03.06.2013. The certificate dated 22.01.2021 issued by the Principal/ Sanctioning Authority of Islamabad Model School for Girls states the following:

> *"This is to certify that Mrs. Termeem Kausar has been working in this Institution as a Frash on daily wages basis. She came in service w.e.f. 09.09.2010 against deceased quota on contract basis for two years. Her contract period was not extended after two years despite several letters written/sent to FDE from this institution. Later on she was appointed by AEO on daily wages basis out of students fund w.e.f. 03.06.2013. She regularly performing her duty w.e.f. 09.09.2010 to date but she was not paid salary for the period of 09.09.2012 to 02.06.2013."*

9. Through Office Memorandum dated 20.10.2014, terms of PM's Assistance Package were amended and the entitlement for employment of next-of-kin was stated in the following terms:

> *"Employment of widow/widower, one son or daughter to the posts in BS-01 to BS-15, on regular basis without advertisement against the post criteria of which the applicant fulfills."*

10. The PM's Assistance Package was then amended by O.M No. 8/10/2013-E-2(Pt) dated 04.12.2015, which reverted

the employment entitlement of next-of-kin to two-year contracts without advertisement, subject to continuing extension in terms of O.M dated 23.12.2000 reproduced above. The PM's Assistance Package was further amended by O.M No. 8/65/2016-E-2 dated 09.09.2016, which states the employment entitlement of next-of-kin as follows:

> *"Employment for posts in BS-01 to BS-15 on Five (05) years contract appointment without advertisement which may further be extendable till the age of superannuation or regularization as the case may be."*

11. Starting in 2006 the PM's Assistance Package afforded a next-of-kin of an employee who died in service a two-year contract pursuant to O.M. dated 13.06.2006, extendable indefinitely subject to approval by a BPS-21 officer when read together with O.M dated 23.12.2000. This was changed to an entitlement to be considered for regular appointment in 2014 pursuant to O.M. dated 20.10.2014. This was then reversed back to two-year extendable contract employment in 2015 by O.M. dated 04.12.2015. The entitlement under PM's Assistance Package, as it presently stands by virtue of O.M. dated 09.09.2016, is five-year extendable contract employment till the age of superannuation with the entitlement to be considered for regularization.

12. The answer to the first question posed in para 6 above is that the petitioner, having been offered contract employment in 2010 under PM's Assistance Package in accordance with its criteria, was entitled to be considered for extension of her contract at the expiry of her original contract in 2012. That her contract extension was admittedly not considered by the competent authority for no fault of the petitioner, despite applications filed by her and the Principal of Islamabad Model School for Girls seeking such consideration, and such request for extension was also never rejected. The petitioner has been in continuous service in Islamabad Model School for Girls since 2010- as a contract employee till 2012 and as a daily wager thereafter – till date. The petitioner is thus entitled to be considered for extension of contract employment, till the age of superannuation with the entitlement to be considered for regularization, under PM's Assistance Package pursuant to O.M. dated 09.09.2016, presently in field.

13. The matter of regularization of appointments of federal government employees was addressed in detail in *Imran Ahmed*. The principles emanating from the jurisprudence that has evolved in Pakistan in relation to regularization of service in public sector were summarized in *Imran Ahmed* in para. 116, and include, *inter alia*, the following:

(i). If appointment on temporary post has been made despite the availability of permanent post, the person so appointed should be considered against the permanent post with effect from the date of appointment.

(ii). Discriminatory treatment should not be made in any organization where one set of employees employed on daily wages were regularized and other set of similarly placed employees were denied of such rights.

(iii) Removal of employee form public sector employment without due process offends Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 because right to life includes right to lawful and meaningful livelihood.

(iv) Policy evolved by the Government regarding regularization of contract/daily wages employees must be implemented in letter and spirit.

It has been further held in para 118 in *Imran Ahmed* that:

(i). Equal treatment of all similarly placed employees is the basic principle based on equity, justice and fair play. If even handed justice is not administered, it can have any adverse and negative effects on the Society. It can cause discontentment and frustration in the social setup. There can be no denial that social justice is an objective and enshrined in our Constitution.

(ii.) Discretion becomes an act of discrimination only when it is improper or capricious exercise or abuse of discretionary authority, and the person against whom the discretion is exercised faces certain appreciable disadvantages which he would not have faced otherwise.

(iii) Exercise of discretion is circumscribed by principle of justice and fairness and authority should not act arbitrarily, unreasonable, and in complete disregard of relevant rules and regulations.

(iv) Functionaries of any organization or establishment cannot be allowed to exercise discretion at their whims,

sweet will or in an arbitrary manner, rather they are bound to act fairly, evenly and justly.

14. The petitioner's case falls within the instruction issued in para. 123(vi) in *Imran Ahmed* in the following terms:

"All employees who have been appointed from BPS-1 to BPS-15 under contract of Ministry of CADD on any civil post (not on a project) be absorbed, regularized against permanent post subject to one time concurrence given by the Federal Government as Minister for CADD, Dr. Tariq Fazal Chaudhry, got recorded his statement before this Court to the extent of all those departments which are under the administrative control of Ministry of CADD, wherein he made a categorical statement on behalf of the Federal Government that Federal Government has no objection for regularization of jobs of BPS-1 to BPS- 15 to the extent of employees covered, controlled and who fall under the Ministry of CADD, therefore, the Minister for CADD is directed to place the case of teachers, employees and other allied staff of departments under the control of Ministry of CADD before the Federal Cabinet who shall given their approval within a period of 90 days, notification in this regard shall be issued forthwith. However, all those employees who are in service are protected and they shall not be terminated till the final decision of the Federal Government, however, this will be subject to the condition that they have been appointed in a transparent manner."

15. The issue of regularization of service of employees appointed under PM's Assistance Package also came up for adjudication in ICA No. 1087 of 2013 titled "*Chairman, Federal Board of Revenue vs. Muhammad Imtiaz and others*", wherein FBR had challenged a writ issued in favour of regularization of

such employees. Dismissing the appeal against such order, a learned Division Bench of this Court held as under:

> *14. The matter regarding the regularization of contract employees appointed in any Ministry or Division of the Federal Government is to be dealt with in accordance with the law laid down by this Court in the case of Imran Ahmed Vs. Federation of Pakistan (supra). The said judgment does not deal with the regularization of the services of contract employees who had been appointed pursuant to the Assistance Package. Admittedly, none of the private respondents had been appointed through any competitive process prior to their appointment on contract basis or the provisional regularization of their services.*
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> *15. In Paragraph 123(viii) and (ix) of the judgment, in the case of Imran Ahmed Vs. Federation of Pakistan (supra), this Court gave the following directions:*
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> > *"viii. All employees, who have been regularized by the Government of Pakistan/competent authority through Cabinet Committee, who have not been given joining due to the restriction imposed by the Government and they are only waiting for their posting orders, the concerned Ministries and Divisions are directed to issue their posting orders within a period of 90 days subject to fulfillment of other codal formalities, however, their appointments will be considered permanent from the issuance of notification/joining orders.*
> >
> > *ix. Employees who are already working in different Ministries, Divisions and others whose services have been regularized; they should not be disturbed as their cases fall within the ambit of past and closed transaction subject to conditions that they*

> *were appointed in accordance with law in a transparent manner."*
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> *16.The term "transparent manner" adopted in paragraph 123(ix) of the said judgment implies a competitive process (i.e. advertisement, test and interview). The private respondents have admittedly not been appointed through such process before their services had been provisionally regularized by F.B.R. vide letter dated 20.03.2013. However, on 09.09.2016, the Establishment Division issued an office memorandum, whereby the Assistance Package was revised. The revision was to the effect that employment against posts in BPS-01 to BPS-15 would be on contract basis for five years which would be extendable till the age of superannuation or regularization as the case may be. In view of the said office memorandum, the services of the contract employees who had been appointed pursuant to the Assistance Package could have been regularized. Since the Cabinet Sub-Committee had, indeed, recommended that the services of the private respondents be regularized, we do not find any plausible reason to interfere with the impugned order dated 20.02.2013. Consequently, the instant appeal is dismissed with no order as to costs.*

16. The petitioner is neither working against a project post nor a temporary post. She has been working continuously since 09.09.2012 against a vacant post, except that she has been denied consideration for appointment on a regular basis and she has been conferred with the status of a daily wager even though she was entitled to be considered for extension of her contract after its initial expiration in 2012 and was eligible to be considered for regularization since 2016 pursuant to O.M dated 09.09.2016 that delineates the latest entitlements under

PM's Assistance Package. The answer to the second question in para 6 above is thus also in the affirmative, as in view of directions issued in *Imran Ahmed*, read together with the O.M dated 09.09.2016, the petitioner ought to have been considered for regularization and her name should have been included in the summary that was sent to the Federal Cabinet for regularization of employees.

17. Now come to the petitioner's contention that she has not been paid for services rendered for the period from 09.09.2012 to 02.06.2013. It is unconscionable that the State would receive services from any employee, let alone a widow appointed in BS-01 as way of providing subsistence to her in aftermath of her husband's demise, and not pay salary/emoluments for such services. Receiving services or allowing employees to continue to provide services during such period when the continuation of their employment agreements is being considered and they are hanging in a state of limbo and not paying for such service is tantamount to unjust enrichment of the State. Delinquency in paying for services received is a failure of the State to discharge its obligations to its employee citizens in accordance with principles of fairness and good conscience on the one hand, and a breach of fundamental rights of such citizens to life and subsistence, to dignity, and lawful occupation guaranteed by Articles 9, 14 and 18 of the Constitution on the other. The failure of the State to pay salary to an employee who has admittedly discharged services amounts

to exploitation and is in breach of Article 3 of the Constitution which states the following:

> *"The State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability, to each according to his work."*

18. Unjust enrichment refers to a situation where one party acquires a benefit at the expense of another in circumstances that are unjust and the remedy prescribed under the common law of obligations in face of such situation is that of restitution. A claim for unjust enrichment does not require any wrongdoing on part of the beneficiary and therefore restitution for unjust enrichment is not to be confused with restitution for wrongdoing. In *Lipkin Gorman vs. Karpnale Ltd.* ([1991] 2 AC 548) the UK House of Lords recognized restitution as a remedy in equity separate from and independent of any claim in contract.

19. The latest English judgment on the test for unjust enrichment is *Bank of Cyprus UK Ltd vs. Menelaou* ([2015] UKSC 66), which reiterates the four elements required to establish a claim for unjust enrichment:

> *"…it is now well established that the court must ask itself four questions when faced with a claim for unjust enrichment. They are these:*
> *(1) Has the defendant been enriched?*
> *(2) Was the enrichment at the claimant's expense?*
> *(3) Was the enrichment unjust?*
> *(4) Are there any defenses available to the defendant?"*

20. The concept of unjust enrichment and the remedy of restitution to be afforded to the claimant is not alien to the jurisprudence developed in Pakistan. In Pfizer Laboratories Ltd. v. Federation [PLD 1998 Supreme Court 64] the august Supreme Court in para 13 summarized principles that the State must abide by in face of unjust enrichment, which included, inter alia, the following:

> *"(vi) to return what has been taken wrongly is as much a duty and grace of government as to levy relentlessly and fully what is due."*

21. It was held in MCB Bank Ltd. v. Deputy Commissioner Inland Revenue [2015 PTD 911], that "unjust enrichment offended the principle of economic justice embodied in the Constitution."

22. In Sui Northern Gas Pipelines v. Deputy Commissioner Inland Revenue [2014 PTD 1939], the concept of unjust enrichment was explained in detail by reviewing jurisprudence and academic writings from other common law jurisdictions. The learned Lahore High Court noted that:

> *"Unjust enrichment is the retention of a benefit by a person that is unjust or inequitable. The Supreme Court of Canada has recently taken the opportunity of reviewing the law regarding unjust enrichment in Garland v. Consumers' Gas Co (2004 SCC 25) wherein Iacobucci J held: "As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2)*

> *a corresponding deprivation of the plaintiff; and (3) an absence of a juristic reason for the enrichment…" Thus, for recovery to lie, something must have been given, whether goods, services or money. The thing which is given must have been received and retained by the defendant, and the retention must be without juristic justification."*

It went on to quote Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* ([1943] A.C. 32 H.L.):

> *"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep."*

The learned Lahore High Court also cited dicta from *Sahakari Khand Udyog Mandal Ltd. v. CCE & Customs* [(2005) 3 SCC 738 at 748) to underscore the right to recovery in the event of unjust enrichment as follows:

> *"Unjust enrichment occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else…The doctrine of unjust enrichment, therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of unjust enrichment arises where retention of a benefit is considered contrary to justice or against equity."*

23. The four-part test provided in Bank of Cyprus UK Ltd vs. Menelaou appears to be the most appropriate formulation to consider whether a claim for unjust enrichment qualifies for retribution. In the instant case, the State has been enriched for

it continued to receive and benefit from full-time services being provided by the petitioner at the Islamabad Model School for Girls. The enrichment was at the petitioner's expense of course. The enrichment of the State was unjust as it did not compensate the petitioner for services that it continued to receive. And there are no defenses available to the State to refuse compensation for services received, as (i) the petitioner's claim for restitution is not rooted in contract, but in equity and good conscience, and (ii) even if the services were being provided under the mistaken belief that had been contracted or were being provided in an interim period while contract extension was being considered, the State cannot refuse compensation for services after utilizing them on the basis that it never ordered them.

24. In order to guard itself against claims for restitution from daily wagers or contractual employees whose contracts have expired, the onus is on the State to ensure that provision of services is halted once services are not needed in case of daily wagers or at the expiration of the contractual period in case of contract employees. The State can, however, not deny a claim for compensation for services received on the ground that receipt of services was not duly authorized by the competent authority. Legitimizing such defense would encourage the State and its agents to benefit from services provided, especially by lowly employees, out of an earnest desire to pursue extension of contractual employment with the state or regularization in case of daily wager, only to be denied the fruits of their labor

subsequently. Such defense falls foul of Article 3 of the Constitution.

25. In view of the above, the instant is allowed and it is held that (i) the petitioner was treated in breach of Article 4's guarantee to be treated in accordance with law when her contract was not considered for extension in accordance with O.M dated 23.12.2000 when her initial contract expired on 08.09.2012 and further when her case was not included in the summary sent for regularization of employees in compliance with the directions of this Court in para 123(vi) in *Imran Ahmed* read together with O.M. dated 09.09.2016, and (ii) failure of the State to pay for her service from 09.09.2012 to 02.06.2013 amounts to dereliction of duty by the State leading to its unjust enrichment and exploitation of the petitioner within the meaning of Article 3 of the Constitution, rendering it liable for restitution in order to make the petitioner whole for unpaid services.

26. Consequently, respondent No. 1 is directed as follows:

> *(I). to prepare a summary for regularization of petitioner's employment in terms of O.M. dated 09.09.2016 read with directions in Imran Ahmed within a period of three weeks and forward her case to be considered for regularization by the Federal Cabinet, routing it through the Ministry of Education in terms of the judgment of this Court in Imran Ahmed;*
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> *(II). while the petitioner's case is considered for regularization in the terms above, initiate another summary within a period of three weeks to the competent*

authority to consider granting her the status of contract employee till superannuation as provided in O.M. dated 09.09.2016 for the benefit of employees appointed under PM's Assistance Package;

(III). initiate a summary for the competent authority to order payment of dues to the petitioner for the period from 09.09.2012 to 02.06.2013 as a daily wage employee when the petitioner continued to discharge services and the respondents continued to receive them without payment of compensation which shall be paid within a period of three months; and

(IV). submit copies of the summaries together with a compliance report to the Deputy Registrar (Judicial) upon expiry of the aforesaid timelines, for perusal in Chambers.

27. The office is directed to send a copy of this judgment to the Secretary, Ministry of Education, to ensure its compliance.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 11.02.2021.

JUDGE

Saeed.