

CASE NO.:
Appeal (civil) 1906 of 2003

PETITIONER:
Post-Graduate Institute of Medical Education and Research & Anr.

RESPONDENT:
A.P. Wasan & Ors.

DATE OF JUDGMENT: 03/03/2003

BENCH:
Ruma Pal & B.N.Srikrishna

JUDGMENT:

J U D G M E N T
(Arising out of SLP(C) No. 6236 OF 2001)

RUMA PAL, J.

Leave granted.

The first appellant is an Institute incorporated under a statute entitled the Post-Graduate Institute of Medical Education and Research, Chandigarh Act 1966 (referred to as the '1966 Act'). The object for setting up the Institute is reflected in the name. The Institute has, broadly speaking, three Departments, namely, Education, Hospital and Engineering Departments. We are concerned with the Engineering Department. The Engineering Department deals primarily with maintenance works of the Institute and includes diverse activities from maintenance of mechanical equipment such as operation tables to collection and distribution of linen. According to the appellants, there are distinct sections dealing with the different kinds of activities, each section having its separate administrative hierarchy. The question to be decided in this appeal is whether in 1980 promotions within the Engineering Department were to be made section wise or cadre wise.

Section 31 of the 1966 Act empowers the Central Government, after consultation with the Institute, to make rules to carry out the purposes of the Act by notification in the Official Gazette. Some of the matters that the rules may provide for have been listed in Section 31. These include under clause (f) of Section (2) to Section 31:
"the number of officers and employees that may be appointed by the Institute and the manner of such appointment";

Section 32 empowers the Institute to frame Regulations with the prior approval of the Central Government providing inter-alia for:
"the tenure of office, salaries and allowances and other conditions of service of the Directors and other officers and employees of the Institute including teachers appointed by the Institute".

On 29th March 1967, the Central Government, by notification in the Official Gazette made the Post-Graduate Institute of Medical Education and Research, Chandigarh, Rules, 1967 (referred to hereafter as the Rules). Rule 7, sub-sections

(1) and (5) (as it stood after an amendment in 1984) read:

"7. Creation of Posts and
Appointments thereto: -

(1) The Institute may create posts, subject to specific provisions in the budget, on such scales of pay as are approved by the Central Government, classify them into grades and specify their designations:

Provided that no post above the Associate Professor level shall be created except with the prior approval of the Central government.

(5) The method of recruitment, the age limit, the educational qualifications and other matters relating to the appointment to various posts in the Institute shall be determined in the manner provided for by regulations.

According to the appellants under Rule 7, posts were duly designated in Schedule V to the Rules together with, inter-alia, the method of recruitment and qualifications for each post. It is not clear when this was done as the document namely 'Schedule U', relied upon in this connection itself has no date. As it stands today, the third and fourth post in the prescribed hierarchy in the Engineering Department are described as Technologist Grade I/Assistant Engineer and Technologist Grade II. The method of recruitment prescribed to the former is "50% by promotion and 50% by direct recruitment in the respective field". Promotion is to be by selection from "amongst Technologist Grade II having 8 years experience in the respective field". As far as the post of Technologist Grade II posts are concerned the only method of appointment prescribed is by direct recruitment and the eligible criteria is "three years diploma with 5 years' experience in respective field of Engineering".

On 18th April 1967, Regulations called the Post-Graduate Institute of Medical Education and Research, Chandigarh Regulations, 1967 were brought into force. Of these regulations, regulation 32(1) and the quoted extract of regulation 34 are relevant:

"32. Qualification for appointment:

(1) Age, experience and other qualifications for appointment to a post shall be as specified by the Institute keeping in view the qualifications and experience prescribed by the Central Government for similar posts before applications of candidates are called for subject to the conditions that non-medical personnel shall not be appointed to the posts of Director and Medical Superintendent.

34. Seniority : - Seniority of employees of the Institute in each category shall be determined by the order of merit in which they were

selected for appointment to the grade in question, those selected on earlier occasion being ranked senior to those selected later:

Provided that the seniority interse of employees, other than the teaching staff of the Institute shall be determined by the length of continuous service on a post in a particular service."

In the background of these provisions, we may now consider the facts of this case. The respondent No.1 was appointed on 16th July 1975. He was recruited to the post of Technologist Grade II (Electrical). The letter of appointment stated, "while employed in the Institute you will be liable to be posted at any place at any time under the control of this Institute". The respondent No. 1 was transferred as Technologist Grade II (Estate) in 1976. R.K. Wadhwa, respondent No. 3 was appointed as Technologist Grade II in January 1975. Shri K.S. Sharma (the respondent No. 4) joined the post of Technologist Grade II on 13.11.75. Respondent No. 5, R.K. Goel joined the post of Technologist Grade II on 1.6.78.

On 7th August 1976 a decision was taken by the Governing Body of the appellant to convert 25 existing technical supervisory posts into 22 posts. The technical supervisory posts were those of Overseers, Foremen, Linen Bank Manager, Foremen Grade I and Foreman Grade II, Foreman Stores and Horticulturist. The converted posts were initially designated as Foreman Grade II (12 posts), Foreman Grade I (6 posts) and Foreman, Selection Grade (4 posts). The posts of Foreman were re-designated as Technologists on 17th August 1978. Consequently with effect from 1978 there were 12 posts of Technologist Grade II, 6 posts of Technologists Grade I, and 4 posts of Technologists (Selection Grade).

On 13th December, 1979 the respondent No. 1 wrote to the appellant requesting that his name be considered for further promotion to the post of Technologist Grade I as he was the senior most Technologist Grade II. The respondent No.1's application was rejected on 21st December 1979 on the ground that there was no vacancy of Technologist Grade I (Estate) against which the respondent No. 1 could be considered for promotion. The respondent No. 1 stated that he did not seek promotion in the Estate Branch and should be considered as and when any vacancy of Technologist Grade I arose.

In 1980, the Departmental Promotion Committee (DPC) met to consider the suitability of Technologist Grade II candidates for 4 posts of Technologist Grade I in the following sections of the Engineering Department of the appellant:

1. Electrical Section
2. Public Health Section
3. Civil Section
4. Stores Management Section

The minutes of the DPC of the meeting held on 8th January 1980 show that the following qualifications/experience were taken into consideration while assessing the suitability of the candidates:

i) Diploma in respective trade of Engineering from a recognised University/ Institute or its equivalent qualification.

ii) 8-10 years experience in the respective field. Preference will

be given to those who have worked in a big hospital/ University.

The DPC considered three candidates for promotion to Technologist Grade I (Electrical Section), namely, R.K. Wadhwa, the respondent No. 1 and one I.C. Sharma. It was found that R.K. Wadhwa was found suitable for the post and that the service records of the other two candidates were not superior to the extent that would justify supersession of R.K. Wadhwa. As far as R.K. Goel was concerned, he was promoted to the post of Technologist Grade I (Public Health) as he was "the only eligible candidate". K.S. Sharma was selected out of two candidates for promotion to the post of Technologist Grade I in the Stores Management Section. It is clear from the minutes that the DPC did not consider the respondent No. 1's candidature for promotion to any of the other Sections apart from the Electrical Section.

Pursuant to the recommendations of the DPC, orders were issued to R.K. Wadhwa, K.S. Sharma and R.K. Goel promoting them as Technologist Grade I at the appellant/Institute with immediate effect. In none of these orders of promotion was it mentioned that the promotion was made within any particular section.

The respondent No. 1 and respondent No. 2, one R.K. Sareen, filed a writ application on 26th May 1980 in the High Court of Punjab and Haryana. It was claimed that since 1976 there was one single cadre of Technologist Grade II and that the seniority list had to be worked out on the basis of such single cadre. Their grievance was that despite their seniority, they were not considered against the available vacancies in the post of Technologist Grade I and that the respondents Nos. 4 and 5 who were admittedly junior to the writ petitioners had been promoted superseding them. They prayed for the quashing of the promotion of R.K. Goel and K.S. Sharma and for a directive on the appellant to consider their claim for promotion to the post of Technologist Grade I.

The writ application was disposed of by the learned Single Judge on 17th February 1989 who accepted the reasoning of the writ petitioners and held that promotions from Technologist Grade II and Grade I were to be made cadre wise and not section wise. However, the writ petition was allowed only as far as R.K. Sareen was concerned. The claim of the respondent No. 1 was rejected on the ground that his candidature had in fact been considered by the DPC. The appellant/ Institute did not challenge the decision of the learned Single Judge and R.K. Sareen was duly promoted to the post of Technologist Grade I.

An appeal was preferred by the respondent No. 1 before the Division Bench. On 7th January 1999, the Division Bench allowed the respondent No. 1's appeal. It noted that the finding of the Single Judge that promotion was to be made cadre wise and not section-wise had not been challenged by the appellant/Institute. It also noted that the appellants had refused to consider the promotion of the respondent No. 1 only because they were of the view that he was serving in a particular Section. It was held that the stand of the appellant/Institute was erroneous particularly when no rules to support the stand were produced by the appellant/Institute. It was found that R.K. Wadhwa and K.S. Sharma were both senior to respondent No. 1 and therefore, the respondent No. 1 could not have a legitimate grievance as far as their promotions were concerned. However, as far as R.K. Goel was concerned, it was found that he was definitely junior to the respondent No. 1 and since it had not been shown that R.K. Goel's service record was

superior to that of respondent No. 1, the respondent No. 1 should have been considered for promotion along with R.K. Goel. It was further directed that even if the respondent No. 1 was not found to be more meritorious than R.K. Goel, he was entitled to be considered for promotion from the date his other juniors were considered for promotion.

It may be mentioned that during the pendency of the writ application, R.K. Wadhwa left the Institute in 1981. In 1982, the respondent No. 1 was transferred from the Estate Branch to the Engineering Department and was subsequently posted on temporary basis as Technologist Grade II responsible for the following sections;

1. Electrical Section
2. Public Health Section
3. Air Conditioning Section
4. Lift Section and Other Engineering Services

The respondent No. 1 was then shifted as Technologist Grade II Planning Division and then again from the Planning Division to the Stores Sub Division.

According to the respondent No. 1 despite the High Court's order, promotions continued to be made by the appellants from Technologist Grade II personnel to the post of Technologist Grade I but the respondent No. 1 was not considered for any of the promotions. It has been claimed that since R.K. Wadhwa left the service, the respondent No. 1 should have been promoted in the vacancy so created. According to the respondent No. 1, I.C. Verma who was junior to the respondent No. 1 by three years and who was below the respondent No. 1 in the 1980 panel for Technologist Grade I (Electrical) as considered by the DPC, has been promoted as Technologist Grade I on 11th August 1988 without considering the respondent No. 1's case. Other instances have also been given. On the allegation that the appellants had flouted the order of the High Court, the respondent No. 1 filed an application before the High Court invoking its contempt jurisdiction.

The Special Leave Petition challenging the decision of the Division Bench of the High Court was filed before this Court on 7th March 2001 by the appellants. This Court by an order dated 10th August 2001 stayed the operation of the High Court's order. An application for intervention has been filed by Mr. Arun Vohra, R.C. Tuli, Rajnish Puri and R.K. Gupta. The application is allowed and the matter disposed of after hearing them.

The appellants, the respondents Nos. 4 and 5 and the interveners have made submissions which are substantially similar. As they have all in effect impugned the High Court's decision, they are, for the sake of convenience, referred to collectively as the appellants. They claim that pursuant to the decision of the Building Committee constituted under the 1967 Regulations the posts of Technologist Grade I and II were bifurcated into different sections such as Mechanical, Electrical, Civil, Laundry etc. Thus they say for the post of Technologist (Civil) the qualification prescribed was a Diploma in Civil engineering; for the post of Technologist (Public Health) the qualification was a Diploma in Civil or Mechanical Engineering, for the post of Technologist (Bio-Medical), the diploma required was Bio/Mechanical/Industrial Engineering; for the post of Technologist (Refrigeration), the requisite diploma was in the field of Mechanical/Refrigeration & Air-conditioning; for the post of Technologist (Laundry), the diploma required was Mechanical/Electrical/Laundry Technology and that for the post of Technologist (Stores) and Technologist (Purchase), three years diploma was required in any branch of Engineering. The only distinction between Technologist Grade I and Grade II according to the submission, is a difference in the length of service/experience. Separate section wise seniority lists were

maintained which have been updated from time to time and circulated to all the employees of the appellant/Institute. It is emphasised that the qualification and experience in a particular field has been considered for promotion to Technologist Grade I posts which were in respect of those particular sections. They say that the respondent No. 1 was recruited to the post of Technologist Grade II (Electrical) and could not be considered for any post other than Technologist Grade I (Electrical) since a distinction has been drawn between the Technologist Grade I posts on the basis of the workload in the different sections. It is said that in 1980 only four posts of Technologist Grade I in the field of Electrical, Public Health, Civil and Stores were sought to be filled up and that the respondent No. 1 was duly considered for promotion to the post of Technologist Grade I (Electrical) but R.K. Wadhwa was found more meritorious. As far as the post of Technologist Grade I (Stores) was concerned, it is claimed that K.S.Sharma who was promoted in 1980 was in fact senior to the respondent No. 1. It is stated that the respondent No. 1 was considered again by the DPC for promotion to the post of Technologist Grade I (Electrical) on 2nd August 2001 but his juniors were found better suited for promotion. It is said that since 1983 there has been a restructuring of the Engineering Department and the old cadres have been abolished and new cadres created under four different Divisions viz. Civil, Bio-Medical, Electrical and Air conditioning. They have relied upon advertisements issued by the appellants for recruitment to the posts of Hospital Engineers/Assistant Engineer, Junior Engineer etc. The interveners have an added grievance. They say their career prospects have been jeopardised by the decision of the High Court without their being given any opportunity of being heard.

The arguments of the appellants appear plausible but do not bear close scrutiny. It was not necessary for the respondent No. 1 to have impleaded the interveners nor can the High Court's decision be criticized because they were not made parties. The grievance of the respondent No. 1 was against the appellant/ Institute and its alleged policy to promote Technologist Grade-II section-wise. It was for the appellant/Institute to have justified its action. The justification would serve to protect the interests of other employees if it were legally sustainable. If it is not legally sustainable it must be negated and not hearing of employees who may be affected as a result of the rejection of the justification, would not vitiate such negation. See General Manager, S.C. Railway V. Siddhantti : 1974 (4) SCC 335 , A. Janardhana V. Union of India and Others : 1983 (3) SCC 601 at 626 and V.P. Shrivastava v. State of M.P. : (1996) 7 SCC 759, 763. Furthermore, both K.S. Sharma and R.K. Goel whose stand on the promotional policy of the Appellant Institute coincides with those of the interveners, were partners and had the opportunity of presenting their case. Besides. the Division Bench had merely reiterated the view taken in 1989 by the learned Single Judge when he granted relief to R.K. Sareen holding that promotions should be made cadre wise and not section wise. No protest was made by the interveners at that stage. They were content to allow the appellant/Institute to appoint R.K. Sareen on such basis. They cannot now make a grievance that they were not heard before the Division Bench granted the respondent No. 1 the same relief. Indeed even the appellant/Institute did not impugn the Single Judge's decision in which it was held:
"After converting 25 technical posts, 22 posts of Technologists were carved out. Thus bringing all the incumbents of technical posts in Engineering Department at par.

If the respondent no. 1 and 2 are left to adopt the criteria of promotion section-wise, then there is every possibility of favouritism and arbitrariness in as much as the persons of choice can be easily posted in the sections where there are chances of promotion.

I am of the considered view that merely by posting a particular person in a particular section, his chance of promotion cannot be marred if he is otherwise suitable and eligible for the higher post particularly when it is not in dispute that seniority of Technologist Grade II is common. More so, the distribution of posts of Technologists shows that there are some sections where there is no post of Technologist Grade II but there exists post of Technologist Grade I vice versa.

Hence from this angle also promotion cannot be branchwise. So the respondents were duty bound to consider all the incumbents falling within consideration zone for promotion from the post of Technologist Grade II to Technologist Grade I irrespective of their posting in a particular selection."

(Emphasis supplied)

The direction on the appellants as far as R.K. Sareen was concerned was to consider his claim along with other suitable and eligible candidates "for the post of Technologist Grade I with reference to DPC for which respondents Nos. 3 to 5 were selected".

According to the appellants although they did not prefer a counter appeal, which they could have done under the Explanation to Order XLI Rule 22 of the Code of Civil Procedure, they could nevertheless challenge the finding in the respondent No.1's appeal to the Division Bench. It may be, as has been held in Ravinder Kumar Sharma V. State of Assam 1999 (7) SCC 435 that the Explanation inserted by the 1976 amendment to Order XLI Rule 22 the Code does not make it obligatory to file a cross-objection against an adverse finding of a lower Court and that the respondent could attack such finding in its submissions to the appellate forum. But in this case, there is nothing to show from the records that the appellants did in fact challenge the finding of the Single Judge before the Division Bench. If they had and the Division Bench had not recorded it, it was incumbent on the appellants to have had the matter clarified before the Division Bench particularly when the Division Bench expressly recorded that the appellants had not challenged the finding. [See Chitra Kumar V. Union of India 2001(3) SCC 208, 220].

Additionally, it was not open to the appellants to have challenged the finding because it would have effectively resulted in upsetting the relief granted to R.K. Sareen by the Single Bench. This they could not do without preferring a substantive appeal. Not only did the appellants not raise the issue before the Division Bench, but they acted on the basis of the finding of the Single Judge by appointing R.K. Sareen as Technologist

Grade I as directed. The order as far as R.K. Sareen is concerned has become final. It is not open to the appellants now to re-open the issue on the basis of which R.K. Sareen was granted relief. This finding should be sufficient to have dismissed the appeal, but since several other points have been raised we will deal with them briefly.

The reasoning contained in the decision of the learned Single Judge and that of the Division Bench, appear to us to be unexceptionable. Furthermore the High Court had observed that the appellant/Institute had not produced any rules for promotion before it. We allowed the relevant Rules, if any, to be produced before us. The relevant extracts have been set out earlier to this judgment. There is nothing to show that Schedule 'U' referred to by the appellants, did in fact operate in 1980. As has been noted earlier when the respondent No. 1 was appointed, his letter of appointment stated quite clearly that while the respondent was employed in the Institute he was liable to be placed "at any place at any time under the control of the Institute". There was nothing in the letter of appointment which limited the respondent No.1's posting only to the Electrical Section in the Department of Engineering. It is also not in dispute that the respondent No. 1 was in fact posted as Technologist Grade II (Estate) and his application for further promotion was rejected by the authorities solely on the ground that there was no vacancy to the post of Technologist Grade I (Estate). Subsequently, the respondent No. 1 has been posted in different sections other than the Electrical Section as noted above. The submission of the appellants that he was looking after the said sections only for verifying the bills is unacceptable having regard to the language of the posting orders. Even if there were rules governing promotions from Technologist Grade II to Technologist Grade I, it is clear that the practice followed by the appellant/Institute was to treat the Technologist Grade II cadre as one cadre. The two other posts which were filled on the recommendation of the 1980 DPC, namely, Public Health and Stores Management. Accordingly for the post of Technologist Grade-I (Stores) no particular kind of engineering degree or other academic qualification was necessary. That the respondent No. 1 was not considered for the posts has not been disputed. Yet it is also not disputed that respondent No. 1 has subsequently been asked to discharge functions relating to the Public Health section and Stores Management. In view of the inter-sectional transferability of Technologist Grade II posts, there was no sense in making the promotion to the post of Technologist Grade I dependant upon the initial point of entry into a particular section. And, as has been recorded earlier, the orders of appointment to the post of Technologist Grade I which have been relied upon by the respondent No. 1 do not mention that promotions to the post of Technologist Grade I were in respect of a particular section.

According to the respondents, the post of Technologist Grade I in a particular section has been created having regard to the workload. Indisputably, R.K. Wadhwa who had been appointed as Technologist Grade I (Electrical) in 1980 has left the services in 1981. It has not been shown to this Court how this particular vacancy was met or how the supposedly separate Electrical section was manned in the absence of an incumbent in the post of Technologist Grade I (Electrical).

The reliance on the advertisements issued by the appellant/Institute is misplaced as they were in respect of direct recruitments to the post of Technologist Grade I. It does not deal with the requirements for promotion from Technologist Grade II to the post of Technologist Grade I. Apart from the fact that the advertisements relied upon expressly state that the qualifications/experience were relaxable in case the candidate

was exceptionally qualified, it is clear from the facts as narrated that the appellant Institute did not rely on the prescribed qualifications for posting persons to different sections. Therefore, the placement in a particular section was fortuitous. Since, according to the respondents all sections of the Engineering Department did not have a Technologist Grade I post, a person's claims of promotion could be effectively curtailed by such fortuitous circumstances.

The so called seniority lists have been produced by the appellants before this Court for the first time. It has not been shown how the seniority lists were prepared or under which statutory provision. No leave was obtained prior to the submission of these documents, nor do they form part of the Court records nor are they supported by any affidavit. They cannot be taken for consideration by this Court in the circumstances. The respondent No. 1's writ petition was filed about 23 years ago. On 30th April, 1983 an office order was passed abolishing the previously sanctioned posts in the cadre of the Engineering Department which were:

Sr.No.	Name of the post	No. of posts
1.	Superintending Hospital Engineer	1
2.	Hospital Engineers	
	Mechanical	1
	Electrical Air-conditioning	1
	Bio medical	1
	Material Management	1
	Civil	1
3.	Technologists Grade I	14
4.	Technologists Grade II	16

It is noteworthy that the posts of Technologists Grade I and II were not described with reference to any particular section. Indeed even in the revised cadre the absence of any description continued. There may be a new nomenclature for the post of Technologist Grade-I, but this should not deprive him of the right that he had to be considered in respect of the vacancies which existed in 1980 and subsequently in the post of Technologist Grade I or its equivalent.

For all these reasons, we are of the view that the order of the High Court does not suffer from any infirmity. The appeal is dismissed with costs.