

(2014) 10 DEL CK 0094

In the Delhi High Court

Case No : Writ Petition (Civil) 39/2014, C.M. Nos. 65, 14120, 14132 and 14394/2014 , W.P.(C) 41/2014, C.M. Nos. 67, 10212, 10600 and 10992/2014 , W.P.(C) 44/2014, C.M. No. 69/2014 , W.P.(C) 45/2014, C.M. No. 70/2014

Delhi Transport Corporation

APPELLANT

Vs

Sanjay Kumar

RESPONDENT

Date of Decision : 31-10-2014

Acts Referred:

Administrative Tribunals Act, 1985 — Section 20
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 47

Citation : (2014) 10 DEL CK 0094

Hon'ble Judges : Vipin Sanghi, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Avnish Ahlawat, N.K. Singh, Gunjan, A.K. Mishra, Madan Lal Sharma and Varun Nischal, Advocate for the Appellant; Surat Singh, Arun Kumar Panwar and Kumar Datta, Advocate for the Respondent

Judgement

S. Ravindra Bhat, J.—This judgment will dispose of common questions of fact and law which arise from the decision of the Central Administrative Tribunal, in O.A. Nos. 2295, 2550 and 3355 of 2013.

2. The brief facts of these cases are that the Delhi Transport Corporation (DTC) requested the Delhi Subordinate Services Selection Board (DSSSB) vide letter dated 7.11.2007, for recruitment of 10,000 Drivers to run the DTCs fleet of busses in Delhi. DSSSB advertised the posts on 21.12.2007 inviting applications - for which the last date for submission of applications was 21.1.2008. Selection was based on written test and driving skill test. The dossiers/files of selected candidates were sent to DTC for further action, such as medical examination and training, etc. The Govt. of NCT of Delhi forwarded copies of the applicants' dossiers with copy of an Office Order No. 52 dated 30.9.2008 to DTC which stated that their appointment would be subject to fulfillment of certain conditions

of eligibility, viz. (i) satisfactory character and antecedents, (ii) medical fitness; and (iii) verification of relevant original documents/certificates. Appointment of the selected candidates was to be made on satisfaction of the competent authority regarding their eligibility, as prescribed in the recruitment rules. Any discrepancy/shortcoming in the documents concerning eligibility of any of the candidates could entail cancellation of appointment at any stage. The applicants were subjected to medical examination by the prescribed medical board of the DTC, which declared them unfit for appointment being "colour blind". All candidates, declared medically unfit, including the applicants, represented for redressal of their grievances to the DTC. Considering the representations, a decision was taken by the DTC by Resolution No. 90/2009 dated 22.12.2009 to take up the matter with Guru Nanak Eye Centre (GNEC) for fresh medical examination of the medically unfit declared candidates, by the DTC medical board as per laid down medical standards of the Corporation.

3. In the light of the above development such candidates, including the applicants, were directed to GNEC for their medical re- examination. In GNEC, the applicants were examined by different doctors and were declared fit and later appointed by DTC as Drivers; they joined the services. One of the candidates, Vinod Kumar, B. No. 24243, who was initially found medically unfit by the DTC medical board and later found fit by the GNEC, like the applicants, caused an accident. He was re-examined by the DTC medical board, which found him unfit for the post of Driver due to DDV & DNV (colour blindness) . In view of the medical condition of Vinod Kumar, the Chief Medical Officer, In-charge, DTC suggested that all such Drivers, who were declared fit by GNEC, had to be directed for medical reexamination to avoid any accident in future. In the circumstances, the DTC medical board issued Resolution No. 25/2012 dated 12.4.2012 to get all such Drivers, who were declared fit by the GNEC on their medical reexamination, medically examined by an independent medical board for detecting the number of defective vision cases. This resolution reads as under:-

"Extracts from the Draft Minutes of the DTC Board Meeting held on 12.04.2012, as approved by the Chairman.

Resolution No. 25/2012: Item 15/2012: Conducting re-medical examination in respect of those candidates (Selected on regular basis through DSSSB for the post of driver in DTC) by an independent Medical Board who have been declared medically unfit by the DTC Medical Board.

(Shri A.K. Goyal, CGM(P) was called in) The DTC Board considered the Agenda item and after detailed discussion thereon, approved that-

(i) All such DSSSB candidates (approx.. 413 amongst the 1st lot of 5148 who have already been working in DTC as drivers and 170 candidates who have applied for re-test out of total 216 candidates as o date amongst the 2nd lot of 2299 candidates) who have been declared medically unfit by the DTC Medical Board, may now be got re-medically examined by an Independent Medical Board,

as resolved by the DTC Board vide Resolution No. 34/2011 dated 11.3.2011 as and when Independent Medical Board is constituted as per para-ii below.

(ii) For the above purpose, an Independent Medical Board comprising 03 (three) Doctors, one Doctor (Eye Specialist) from Guru Nanak Eye Centre (GNEC) or any other Govt. Hospitals of the GNCTD considering no. of defective vision cases and another Govt. Doctor (GDMOs) from GNCTD for other cases of deformities of the candidates and one Doctor from DTC Medical Board be constituted to examine both the groups of drivers mentioned in Para (i) numbering approx. 413 & 216 drivers respectively.

The Board further directed that all previous medical reports / relevant medical papers of such cases for re-medical be placed before the Independent Medical Board."

2. The Principal Secretary (Health) , Department of Health & Family Welfare, Delhi Secretariat, New Delhi constituted an independent medical board, vide Order No. F/25/88/X/MB-DTC/H&FW/5062-70 dated 26.9.2012, for re-medical examination of such Drivers. The said Order issued in this regard reads as under:-

"Reference request received from Chairman- cum-MD, DTC vide letter No. PLD-III/(Driver) /DSSSB/2012/1745 dated 01.06.2012 regarding nomination of two Doctors to be a part of Medical Board alongwith one DTC Doctor for conducting re- medical examination of DSSSB selected drivers.

The Competent Authority after due consideration of request, orders for constitution of Medical Board consisting of the following doctors for Re/Medical examination of DSSSB selected drivers.

1. Dr. Anil Kumar Moghe, CMO (SAG) , Central Distt, DHS (Member) .

2. Dr. Gia Chaudhary, Associate Professor, GNEC (Member) for first seven days
Dr. Punita Sodhi, Associate Professor, GNEC (Member) for next seven days. Dr. Subhash Dahiya, Professor, GNEC (Member) till the Medical Examination comes to end.

3. Third Member of the Medical Examination Board will be nominated by the CMD, DTC.

This issues with prior approval of Pr. Secretary (H&FW) ."

4. A Circular dated 18.10.2012 was issued to all the DTC Unit Officers directing Drivers covered by the Resolution No. 25/2012 dated 12.4.2012 to report to the independent medical board for their re-medical examination. However, the Board constituted could not proceed with the medical reexamination and subsequently, by an order dated 17.4.2013, the Superintendent (H-II) , Govt. of NCT of Delhi, Health & Family Welfare Department, Delhi Secretariat, IP Estate, New Delhi, conveyed that the re-medical examination of the applicants might be conducted by the Government hospitals, viz. Deen Dayal Hospital, GTB Hospital and Lal

Bahadur Shastri Hospital comprising 3 doctors (2 doctors from Government hospital and 1 doctor, CMO, DTC) as members of the independent medical board. The Order dated 17.4.2013 reads as under:-

"The Competent Authority after due consideration, hereby directs constitution of two Medical Boards consisting of the following doctors for medical re-examination of cases relating to Eyes Defects:

A. Ist Medical Board to conduct Medical Re-Examination at Deen Dayal Upadhyay Hospital

B. 2nd Medical Board to conduct Medical Re-Examination at Guru Teg Bahadur Hospital

C. 3rd Medical Board to conduct Medical Re- Examination at Lal Bahadur Shastri Hospital.

The Competent Authority further directs constitution of 3rd Medical Board consisting of the following doctors for examining the cases relating to Orthopedics Defects, Height and Amputation etc. and this board will work at LBS Hospital.

(a) Dr. L.M. Singh, SAG, CMO, General Physician, LBS Hospital.

(b) Dr. Hari Mansukhani, SAG, CMO, Orthopedics, LBS Hospital

(c) Third Member of the Medical Examination will be nominated by the CMD, DTC.

It is further directed that the Medical Board constituted earlier by this department vide order No. F.25/88/X/MB-DTC/H&FW/5062/-70 dated 26-09-2012 shall stand discontinued henceforth.

List of candidates, after examination date and the hospital at which they will be examined will be coordinated and intimated to the respective hospitals by the DTC. This has the approval of Secretary (H&FW) ."

5. All applicants were re-examined and found medically unfit being colour blind. The relevant details regarding the applicants, were given by DTC in its reply to the applications (except in O.A. No. 3355/2013) before the CAT. In these circumstances, DTC laid off the applicant from duties in the months of April/May 2013 and they filed applications before the CAT seeking directions to the DTC to assign them duties forthwith on any post for which they are considered fit.

6. The applicants urged that the medical reexaminations which preceded their being denied employment was illegal, and contrary to natural justice. It was also argued that since the second medical board re-examination was conducted at the behest of DTC itself, it was estopped from conducting yet another medical board. The applicants also argued that the DTC should have acted with caution, considering that many of the selected drivers could have developed disability after employment. The CAT allowed the applicants, inter alia, reasoning that:

"24. As far as the issue of promissory estoppel is concerned, the same only applies in such cases where a party/person makes some promises or statement of facts and the principle cannot be invoked against a rule of natural science, such as medical examination, etc. The mistaken outcome of medical examination cannot be completely ruled out. It was for this reason only that despite being declared medically unfit by the DTC medical board, the applicants were subjected to re- medical examination in GNEC. If the principle of promissory estoppel is applied to, the outcome of principle of natural science, such as medical examination, etc. would also apply against the applicants for the simple reason that initially they were declared unfit by the DTC medical board. Merely because the DTC medical board initially accepted the result of the medical examination conducted by the GNEC, they are not estopped from subjecting the applicants to another medical examination.

25. Though in these Original Applications the applicants have questioned the withdrawal of the job of Driver from them and no termination order has been passed, during the course of hearing, it was submitted by learned counsels for the parties jointly that the respondent-Corporation is in the process of terminating the services of the applicants. Rather the learned counsel for respondent also produced the notices issued to the applicants to show cause that why their services should not be terminated. Even if it is so, in view of Section 20 of Administrative Tribunals Act, 1985, we cannot interfere with the same. In the event the services of the applicants are terminated, they would have their remedy to take apposite course.

26. Since during the course of hearing learned counsel for applicants emphasized that the technology in GNEC was advance and the one adopted by the Special Medical Board and DTC medical board was outdated and the view taken by the doctors regarding fitness of the applicants in GNEC need to be accepted, we first summoned the doctor from DTC with Ishihara colour plates and asked him to test some of the applicants before the Court. In respect of three applicants we were satisfied that they were colour blind while in respect of one candidate one of us (Mr. A.K. Bhardwaj, Judicial Member) had a doubt. In the circumstances, we summoned Dr. B. Ghosh, Director of GNEC and asked him to submit his report regarding medical examination of the applicants conducted in the GNEC. He responded with promptness and presented a list of candidates medically examined in the GNEC regarding their suitability for the post of Driver in DTC....Along with the said list, Dr. Ghosh also presented certain other documents, i.e., the opinion of the doctors.

27. In these cases not only an issue of livelihood of quite a large number of persons but also the question of public safety is involved. Had the applicants been disabled for the post of Driver, maybe being colour blind, on acquiring disability after joining the service, we could have no hesitation in asking the DTC to apply provisions contained in Section 47 of the Disability Act 1995 but in these Original Applications, the applicants were considered medically unfit for the post

during the recruitment process. When the doctor from the DTC submitted that the colour blindness is by birth and cannot be incurred during the course of employment, Dr. Ghosh, Director, GNEC took a stand that a person may start lacking some colour perception even later also. Though, at this stage, we could dismiss the Original Applications as premature also but since the applicants had approached this Tribunal to seek an interim stay against their termination and this Tribunal entertained O.A. No. 2295/2013 on 11.7.2013 when it came up for hearing afresh and as a result also, O.A. No. 2550/2013 on 30.7.2013, and considering the fact that aforesaid two OAs involve the employment of large number of DTC, in the interest of justice, we dispose of the same with the following directions:

(i) The DTC medical board or the board constituted in terms of the order dated 17.4.2013 would medically re-examine the applicants adopting the device followed by the GNEC and using its infrastructure, and also applying the Ishihara colour plates, for which the Director of the Centre will make all necessary arrangements, within two weeks from the date of receipt of copy of this order.

(ii) If the said Board (not to be interfered with by the staff of GNEC, except to the extent of making the infrastructure available) considers them fit for the post in question, they would be put back in service,

(iii) In case the Board finds them again unfit for the post, the respondent-Corporation would be at liberty to complete the process initiated by them to deal with the applicants; and

(iv) The applicants would submit their reply to show cause notices promptly and the present order would not stand in the way of the Corporation to pass final order. However, in the fitness of things the Corporation may have its own decision to pass final order after considering the report of the above medical examination. No costs."

7. The DTC submits that the CAT fell into error in issuing the impugned directions. Arguing that the CAT should not have interfered with the determination of which employees fulfilled the medical parameters, learned counsel stated that all applicants had been tested and found wanting in the first instance. On account of their representation, a decision was taken to have their eyesight tested again. This time, they were certified to have been within the prescribed parameters, and possessing normal eyesight. When one such driver committed an accident, the matter was reviewed and a third medical test was conducted through 3 separate, independent panels of doctors. Each of the applicants was found to be colour blind. In these circumstances, the CAT could not have directed yet another test. It was emphasized that the basis for the direction appeared to be that the test conducted earlier was technically unsound—a decision that could not have been arrived at by CAT. It was held that since there was no finding of illegality or mala fides, the CAT could not have donned the role of a medical expert to direct DTC to disregard the opinion of three

independent medical boards.

8. Counsel for the applicants submitted that the order of the CAT is justified and does not call for interference. Highlighting that the drivers were subjected to a review medical board at the behest of DTC, in which they were all cleared, it was contended that the DTC could not have again reviewed its decision and subjected the employees to yet another test. This showed a predisposition to decide the issue in a particular manner. Besides, contended counsel, the DTC was duty bound to take into account the service rendered satisfactorily by each applicant and not draw a universal conclusion on the basis of a solitary accident caused by one colour blind driver. It was submitted that the CAT's direction to the DTC to conduct another medical test had to be viewed in the light of the fact that the livelihood of a large number of employees was at stake. Counsel also relied on the decision of this Division Bench in *Suresh Chand & Anr. v. Delhi Transport Corporation W.P.(C) 4212/2014* (decided on 14.07.2014) and urged that the DTC was directed to hold a proper inquiry in similar circumstances, since the valuable rights of employees under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was involved. It was submitted that in the present case, similar considerations apply and the rights of the applicants to be afforded another opportunity cannot be denied and that this would not prejudice DTC.

9. It is evident from the above discussion that in the first instance, the applicants were disqualified on the ground of colour blindness. Their representation yielded a positive response, in that GNCTD asked them to be tested in one of its hospitals. All the applicants were cleared then, along with several others. The precise ground for this re- examination was to decide whether any of them was colour blind. Unfortunately, after this re-examination, one of the Drivers was involved in an accident; he was diagnosed with colour blindness. At this stage, a decision was taken to constitute three separate independent boards to test each applicant for colour blindness. Significantly, the applicants did not challenge that decision. When they underwent this (third) medical examination, the independent boards found all of them to be colour blind. This prompted them to approach the CAT, since DTC decided not to assign work to them, and consequently not pay wages. This court notices at the outset, that the CAT rejected the applicants' plea that DTC was estopped, in view of the second medical exam results, from examining again to determine if any of them was colour blind. Having made this decision, i.e. that the DTC is unshackled by the results of the second medical test, and cannot be hindered from holding a third medical test, there ought to have been a compelling basis for the CAT to conclude that the results of that third medical test were flawed. The speculative reasoning discernible in its impugned order, suspecting the appropriateness of the technology used (or its obsolescence) to test colour blindness, in this Court's considered view, is unsustainable. The CAT cannot act as an authority over the medical expert; sans a strong reason, based on relevant material, it cannot hold that the technology used by three separate medical teams to test colour

blindness was inappropriate or out dated. The reasoning of CAT on this aspect has to be rejected.

10. As to whether CAT could have issued the directions to DTC to conduct yet another medical test, this Court has no doubt that, in the present circumstances, such an order could not have been made. The post in question is that of Drivers; they have to man large buses, which ply on crowded public streets. Vision is a crucial part of the medical parameters required for the discharge of duties attached to that post. Colour blindness is an unacceptable condition. The applicants are, fortunately, not saying that despite their colour blindness, the DTC has to employ them; what they urge is that DTC should have held another test by using another technology. It is here that the CAT, in this Court's opinion, fell into error. Having not challenged the decision to hold a re-medical examination (a third in that series) in relation to colour blindness, and having undergone that medical examination, (in which by three separate boards' independent appraisal, the applicants were determined to be colour blind) the applicants could not have legitimately challenged the results of that decision. Absent proven mala fides, or illegality, procedural irregularity or violation of a binding instruction or guideline, CAT could not have directed yet another medical test - to be held in a particular manner. In the present case, no rule, administrative circular, law or guideline was shown to have been violated; there was no allegation of lack of bona fides in the decision to hold a third medical test. In these circumstances, the CAT's order directing a fourth medical test, was unwarranted.

11. This Court is also of the opinion that the decision in Suresh Chand (supra) affords no assistance to the applicants. There, the applicants had incurred disability after employment; the Court held that the DTC's unilateral decision that such disability was a pre- employment condition could not have been taken in the manner and under the circumstances which occurred. In the present case, the last medical test was based on a decision which was not challenged. That such a medical examination was warranted in the background of accident caused by one driver subsequently found to be colour blind, was the rationale for the decision to hold a third medical board. DTC, as an employer, had the right to decide and satisfy itself that the incumbents satisfied the medical parameters required for the post, and spelt out at the time of recruitment.

12. In the light of the above discussion, this Court is of opinion that the impugned order cannot be sustained; it is accordingly set aside. The writ petitions are allowed in the above terms, but without any order as to costs.