

**CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH, BANGALORE
ORIGINAL APPLICATION NO.170/01373/2019**

ORDER RESERVED ON 09.02.2021

DATE OF ORDER: 22.02.2021

CORAM:

HON'BLE SHRI SURESH KUMAR MONGA, MEMBER (J)

HON'BLE SHRI RAKESH KUMAR GUPTA, MEMBER (A)

Anjitha. P

W/o. Ajesh T.J

Aged about 34 years

Working as Staff Nurse (ANC & LR ward)

Employees' State Insurance Corporation

ESIC Model Hospital

Rajaji Nagar

Bangalore.560010.

....Applicant

(None present for the applicant)

Vs.

1. Deputy Director (Admn)

Employees' State Insurance Corporation

Ministry of Labour & Employment

ESIC Model Hospital

Rajaji Nagar

Bangalore.560010.

2. Administrative Officer

Jaya Prakash Narayana Apex Trauma Centre

All India Institute of Medical Science (AIIMS)

Raj Nagar

New Delhi. 110 029.

3. Union of India

Through the Secretary

Ministry of Labour & Employment

Shakti Bhavan

Rafi Marg

New Delhi.110 001.

...Respondents

(By Advocate Shri Vishnu Bhat)

ORDER**PER: RAKESH KUMAR GUPTA, MEMBER (A)**

The applicant has filed the present Original Application under Section 19 of the Administrative Tribunals Act, 1985 seeking the following relief:

- i. Set aside the impugned letter no.532/A/20/15 (24) 13-14/Estt dated 28.01.2016 (Annexure: A-11) as illegal and wrongly applied the DoP&T's OM dated 10.07.1998 (Annexure: A -10) read with OM dated 30.03.2010 (Annexure: A-11) and against the parameters of the rules of law,
- ii. Direct the respondents to consider the case of the applicant for pay protection on past service in the new post under the Respondent-1 in terms of the identical case dated 22.03.2019 in OA-763/2017 (Annexure: A-20) and the guidelines prescribed by the DOP&T on the facts on records with all consequential benefits within the stipulated time in the interest of justice and equity,
- iii. Grant relief or reliefs as deemed fit and proper, with costs, in the interest of justice and equity.

2. The facts of the case as pleaded by the applicant in his pleadings are as follows:

- a. The applicant was appointed to the post of Sister Grade-II on 28.12.2010 with the Jaya Prakash Narayana Apex Trauma Centre, All India Institute of Medical Science (AIIMS), New Delhi on initial pay of Rs.12,540 with Grade Pay of Rs.4600. She completed 2 years probationary period on 27.12.2012 satisfactorily without extension and shortcomings. She was also further granted increments after expiry of probationary period.

- b. The applicant applied for the post of Staff Nurse vide advertisement dated 08.01.2013 and she was subsequently appointed on 27.09.2013 on initial pay of Rs.17,140 with the Employees State Insurance Corporation(ESIC), Model Hospital, Rajaji Nagar, Bengaluru. The applicant filed representation on 29.11.2013 to the 1st respondent for pay protection and counting of previous services under the 2nd respondent(AIIMS).
- c. The applicant further stated that the satisfactory probationary period was not confirmed so far by the 2nd respondent in her service book. The applicant filed further representation dated 11.02.2015 requesting for confirmation of probationary period by the 2nd respondent. However, no action has been taken in the matter.
- d. The 1st respondent(ESIC) issued a letter to the 2nd respondent(AIIMS) on 05.11.2015 regarding confirmation of probationary period from 28.12.2010 to 13.09.2013 on the request of the applicant for pay protection and to be considered for granting the same on completion of probation in the parent department. The 1st respondent further requested to forward a copy of completion of probation order for necessary action.
- e. The 2nd respondent rejected the claim of the applicant on 18.11.2015 stating that due to technical resignation by the applicant w.e.f. 13.09.2013, the case of the applicant has not been considered for confirmation of service.
- f. The last pay drawn by the applicant from 2nd respondent was Rs.18,740 for the month of August, 2013 i.e. prior to joining the services of the

1st respondent since the applicant had already got increments after completion of probationary period on 27.12.2012.

- g. The respondents have violated Articles 14, 16, 309 & 311 of the Constitution of India and failed to comply with the orders of the Hon'ble Apex Court dated 08.07.2010 in Civil Appeal No.596/2007 as circulated by DoP&T's OM dated 30.08.2010 as deemed confirmation after expiry of probationary period.
- h. The applicant further submits that as per DoP&T OM dated 21.07.2014, a detailed clarification has been issued by the Govt. of India regarding completion of probation and confirmation as follows:

PROBATION AND CONFIRMATION

1. *A person is appointed on probation in order to assess his suitability for absorption in the service to which he has been appointed. Probation should not, therefore, be treated as a mere formality. No formal declaration shall be necessary in respect of appointment on probation. The appointing authority may declare successful completion, extend the period of probation or terminate the services of a temporary employee on probation, on the basis of evaluation of performance.*
7. *A probationer, who is not making satisfactory progress, should be informed of his shortcomings well before the expiry of the original probationary period so that he can make special efforts at self-improvement. This can be done by giving him a written warning to the effect that his general performance has not been such as to justify his confirmation and that, unless he showed substantial improvement within a specified period, the question of discharging him would have to be considered. Even though this is not required by the rules, discharge from the service being a sever, final and irrevocable step, the probationer should be given an opportunity before taking the drastic step of discharge.*

[OM No.F.44/1/59-Ests(A) dated 15.04.1959]

TERMINATION OF PROBATION

18. *The decision whether an employee should be confirmed or his probation extended should be taken soon after the expiry of the initial probationary period, that is within six to eight weeks, and communicated to the employee together with the reasons in case of extension. A probationer who is not making satisfactory progress or who shows himself to be*

inadequate for the service in any way should be informed of his shortcomings well before the expiry of the original probationary period so that he can make special efforts at self-improvement.

[OM No.F.44/1/59-Ests(A) dated 15.04.1959]

19. *On the expiry of the period of probation, steps should be taken to obtain the assessment reports on the probationer to:-*

i. Confirm the probationer/issue orders regarding satisfactory termination of probation, as the case may be, if the probation has been completed to the satisfaction of the competent authority; or

ii. Extend the period of probation or discharge the probationer or terminate the services of the probationer as the case may be, in accordance with the relevant rules and orders, if the probationer has not completed the period of probation satisfactorily.

[OM No.21011/2/80-Estt.(C)dated 19.05.1981]

- i. The DoP&T had circulated OM dated 30.08.2010 in compliance of the orders of the Hon'ble Apex Court dated 08.07.2010 in Civil Appeal No.596/2007 in the case of *Khazia Mohammed Muzammil vs. State of Karnataka* regarding automatic/deemed confirmation after expiry of probationary period. Para 22 of the said order of Hon'ble Apex Court is as follows:

22. Before we part with this file, it is required of this Court to notice and declare that the concerned authorities have failed to act expeditiously and in accordance with the spirit of the relevant Rules.

Rule 5 (2) of 1977 Rules has used the expression 'as soon as possible' which clearly shows the intent of the rule framers explicitly implying urgency and in any case applicability of the concept of reasonable time which would help in minimizing the litigation arising from such similar cases. May be, strictly speaking, this may not be true in the case of the appellant but generally every step should be taken which would avoid bias or arbitrariness in administrative matters, no matter, which is the authority concerned including the High Court itself. Long back in the case of Shiv Kumar Sharma Vs. Haryana State Electricity Board (1988) Supp. SCC 669] this Court had the occasion to notice that due to delay in recording

satisfactory completion of probation period where juniors were promoted, the action of the authority was arbitrary and it resulted in infliction of even double punishment. The Court held as under:

"While there is some necessity for appointing a person in government service on probation for a particular period, there may not be any need for confirmation of that officer after the completion of the probationary period. If during the period a government servant is found to be unsuitable, his services may be terminated. On the other hand, if he is found to be suitable, he would be allowed to continue in service. The archaic rule of confirmation, still in force, gives a scope to the executive authorities to act arbitrarily or mala fide giving rise to unnecessary litigations. It is high time that the Government and other authorities should think over the matter and relieve the government servants of becoming victims of arbitrary actions."

We reiterate this principle with respect and approval and hope that all the authorities concerned should take care that timely actions are taken in comity to the Rules governing the service and every attempt is made to avoid prejudicial results against the employee/probationer. It is expected of the Courts to pass orders which would help in minimizing the litigation arising from such similar cases. Timely action by the authority concerned would ensure implementation of rule of fair play on the one hand and serve greater ends of justice on the other. It would also boost the element of greater understanding and improving the employer employee relationship in all branches of the States and its instrumentalities.

- j. The applicant was granted increments by the 2nd respondent after expiry of the probationary period, but her service was not formally confirmed for no fault of the applicant. The applicant had filed technical resignation for joining the post under the 1st respondent and the same was accepted by the 2nd respondent on 19.03.2013 and the applicant was relieved on 13.09.2013 on administrative grounds of the 1st respondent.

k. As per para-9 of DoP&T OM dated 11.02.1988 regarding technical resignation, the following is notified:

9. *In cases where Government servants apply for posts in the same or other departments through proper channel and on selection, they are asked to resign the previous posts for administrative reasons, the benefit of past service may, if otherwise admissible under rules, be given for purposes of fixation of pay in the new post treating the resignation as a 'technical formality'.*

1. The applicant is accordingly eligible for the benefits in terms of DoP&T OM dated 22.01.1993 and para-2.3 of OM dated 22.04.2016 which is as below:

"2.3. Pay Protection, eligibility of past service for reckoning of the minimum period for grant of Annual Increment in cases of appointment of a Government servant to another post in Government on acceptance of technical resignation, the protection of pay is given in terms of the Ministry of Finance OM No. 3379-E.III (B)/65 dated the 17th June, 1965 read with provisions of FR 22-B. Past service rendered by such a Government servant is taken into account for reckoning of the minimum period for grant of annual increment in the new post/service/cadre in Government under the provisions of FR 26 read with Rule 10 of CS(RP) Rules, 2008. Pay of the substantive post held by the Government servant is protected. After Sixth Pay Commission, only the pay in the pay band is protected and the employee gets the grade pay of the post to which he is appointed after his resignation."

m. The applicant further submitted that her case is identical to the case of Yasar Arafat which has been decided by this Tribunal in OA.No.763/2017 on 22.03.2019. The applicant is eligible to get the same benefit as provided in OA.No.763/2017.

3. Learned counsel for the respondents Shri Vishnu Bhat in his reply statement has averred as follows:

a. The respondent No.2(AIIMS) vide their Memorandum No.F.45-505/2010-Estt.(TC) dated 21.02.2020 have confirmed the services of the applicant

w.e.f. 28.12.2012 after filing of this OA. The respondent No.1 (ESIC) has to process the above memorandum for counting of past service of the applicant.

- b. The applicant was appointed under respondent No.2 w.e.f. 28.12.2010 and under respondent No.1 w.e.f. 27.09.2013 and comes under NPS scheme. The case of the applicant is being considered as per the instructions issued by the Govt. of India vide No.28/3/2019-P&PW(13) dated 25.02.2019.
- c. The applicant is entitled to gratuity under the National Pension System. As per the provisions of DOP&PW OM dated 30.05.1995, proportionate pensionary liability is to be discharged by the previous department to the new department even in cases where service period of the employee concerned is less than 5 years. Thus, the proportionate gratuity in respect of the applicant is to be discharged by respondent No.2 for services rendered in office of 2nd respondent, to enable respondent No.1 to count her past services.
- d. As per the applicant's qualifying service in the office of 2nd respondent from 28.12.2010 to 13.09.2013 i.e. 2 years 8 months and 15 days, her proportionate retirement gratuity is to be calculated. As per the prescribed formula, this works out to Rs.44,508/-. Accordingly, the demand raised by the applicant for protection of pay drawn by her in the office of 2nd respondent can be processed by 1st respondent, only after discharging the due proportionate pensionary liability (including gratuity) by making a lump-sum payment by the 2nd respondent in favour of 1st respondent. The

applicant's case will be considered once the aforementioned lump sum is discharged by the 2nd respondent.

4. After going through the pleadings made by the applicant as well as the respondents and hearing the learned counsel for the respondents, it is apparent that the applicant is entitled to get her past service counted both for pensionary benefits as well as pay protection, since her services under respondent No.2 have now been confirmed by respondent No.2 w.e.f. 28.12.2012. The only impediment for final consideration of the case is the fact that 2nd respondent has apparently not yet paid the proportionate gratuity amounting to Rs. 44,508/- pertaining to the applicant to the 1st respondent.
5. Accordingly, the 2nd respondent is directed to consider release of the proportionate gratuity amount due to the applicant, in favour of 1st respondent within a period of one(1) month from the date of receipt of a certified copy of this order. The 2nd respondent is also directed to consider granting the relief to the applicant in terms of pay protection on the past service rendered in the post under 2nd respondent, within a period of two(2) months from the date of receipt of copy of this order with all consequential benefits.
6. The OA is accordingly, allowed. However, there shall be no orders so as to costs.

(RAKESH KUMAR GUPTA)
MEMBER (A)

(SURESH KUMAR MONGA)
MEMBER (J)

/ps/