

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 443/2003

WEDNESDAY THIS THE 29th DAY OF MARCH, 2006.

C O R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER**

Viswanathan N.G. S/o Gopinathan
Lower Division Clerk
Employees Provident Fund Organisation
Kottayam.

Applicant

By Advocate Mr. P.K. Madhusoodanan

Vs.

- 1 The Union of India represented by the Secretary, Ministry of Railways Rail Bhavan, New Delhi.
- 2 The Railway Board represented by its Secretary, Rail Bhavan, New Delhi.
- 3 The Regional Provident Fund Commissioner Employees Provident Fund Organisation Sub Regional Office, CMS College, Kottayam-1

Respondents

By Advocate Mrs. Sumathi Dandapani for R 1-2
By Advocate Mr. George Joseph, ACGSC for R3

O R D E R

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

This Application is filed by a re-employed ex-serviceman challenging fixation of his pay on re-employment and consequential

recovery of excess payment contending that earlier fixation has not been correctly done. He seeks the following reliefs:

- (1) Call for the records leading to the issue of Annexure A7, A-10, A12 A-13 and A-14 to set aside the same as the same is illegal and arbitrary.
- (2) Declare that the applicant is entitled to have the earlier the pay fixation done in accordance with law.
- (3) Any other further relief or order as this Hon'ble Tribunal may deem fit and proper to meet the ends of justice.

2 The facts of the case as submitted by the applicant are that the applicant has served the Indian Army from 26.6.1976 to 31.1.1994 in the rank of Havildar Major as Operator Cipher Class-I in the scale of Rs. 1130-1530. On retirement from the Army he took re-employment as a Lower Division Clerk in the Railway Board, New Delhi w.e.f. 12.6.1995 in the scale of Rs. 950-1500. He submitted a representation on 1.3.1996 for fixation of pay as per rules on the basis that he was drawing a basic pay of Rs. 1477/- at the time of retirement from the Army. Accordingly, his pay was fixed by Annexure A-3 order at Rs. 1325/- in the scale of Rs. 950-1500 w.e.f. 12.6.1995. Later the applicant sought for inter ministerial/departmental transfer to the office of the Employees Provident Fund Organisation, Regional Office at Trivandrum and was relieved from the Railway Board w.e.f. 30.5.1997. His pay in the EPFO was fixed on the basis of the LPC issued by the Railway Ministry. All of a sudden, the Railway Board issued a Memorandum at Annexure A-7 dated 12.7.2001 calling for option from him and similarly placed re-employed ex-servicemen stating that their pay has to be re-fixed under Rule 16 by granting them the number of increments equal to the number of completed years of ex-

combatant service rendered by them in the Army and that the pay was not correctly fixed earlier and the overpayment made has to be recovered. The applicant submitted his option that his pay has to be fixed correctly under Rule 4(b)(ii) read with Sub rule 4(d)(i) thereof. But Annexure A-9 memorandum has been issued stating that only a portion of the option is accepted. Another order at Annexure A-10 directing recovery of Rs. 17641/- has also been issued and by Annexure A-12 orders the amount was proposed to be recovered at the rate of Rs. 500/- per month from May, 2003 onwards and based on the re-fixation his pay in the Regional Provident Fund Office would be refixed from the date of joining and recovery would be regulated from the salary from June, 2003. The applicant has submitted that all these exercises have been done without notice to him in violation of natural justice and the provisions of law, arbitrarily and illegally.

3 Separate reply statements have been filed by both the Railway Board and the Regional Provident Fund Commissioner, Kottayam.. The respondents 1 & 2 on behalf of the Railway Board have submitted that the pay in the re-employed post of Ex-serviceman is fixed as per provisions contained in the CCS(Fixation of pay of Re-employed Pensioners) orders, 1986.

The applicant's pay was fixed at Rs. 1325/- in accordance with the above rules by granting benefit of increments in the reemployed post to the extent of number of years served in the Army. However, respondents have not taken into account non-ignorable portion for reduction from the

pay as provided under Explanation (ii) of Rule 16(2). This was an inadvertent omission. The respondents ought to have deducted Rs. 520/- i.e (Rs. 535/- pension minus Rs. 15) from the re-employment pay of Rs. 1325/- They have also submitted that an option should have been obtained from the individual either to get the pay fixed under Rule 4 or Rule 16(2) and this was also not obtained. The mistake was detected and Annexure A-7 notice was issued. It is well accepted principle of law that an administrative error can be corrected at any time. One of the incumbents who was similarly situated like the applicant had moved the Chandigarh Bench of the CAT on identical grounds which had been dismissed by Annexure R-1(a) order. The loss sustained by the Government has to be recovered and there is no other option.

4 The applicant in the rejoinder stated that the proposal for refixation of his pay has been made after long lapse of time, no notice was given to him. Therefore reliance has been placed on the judgments of the Hon'ble Apex Court to the effect that amounts paid to the employee on the basis of wrong fixation of pay cannot be recovered.

5 The respondents have also filed an additional reply statement stating that there is nothing wrong in setting right a bonafide mistake as and when it is detected and the orders issued by the EPFO was consequent to the Railway Board's order refixing the pay on re-employment. The intention of the Board to revise the pay was communicated to him through Annexure A-7 and based on the option given by the employee the orders at Annexure A-9 was issued.

6 Both the counsel have submitted written argument notes. The applicant contended that the recovery of the alleged excess amount at this belated stage is against the settled dictum of the Apex Court reported in :-

- (i)Nandkishore Sharma Vs. State of Bihar (1995(3) Suppl. SCC 722)
- (ii)Union of India & Others V.M. Bhaskar and Others (1996(4) SCC 416
- (iii)Sahib Ram Vs. State of Haryana & Others (1995 SCC (L&S) 248
- (iv)Shyam Babu Varma and Another Vs. Union of India &Others (1994 SCC (L&S) 683)

7 The respondents on the other hand contended that administrative errors can be corrected at any time and the applicant himself has admitted that his pay was revised on the misrepresentation made by him in Annexure A-8. Therefore the excess amount drawn by him is liable to be recovered.

8 The short question that arises for consideration is whether the revised pay fixation of a re-employed ex-serviceman has been correctly made in the case of the applicant and if an error has been committed whether the excess amount drawn can be recovered. Admittedly the applicant was serving in the Indian Army and retired as Havildar Major and on his retirement from the Army he took re-employment as Lower Division Clerk. At the time of release from the Army he was drawing a basic pay of Rs. 1477/- and he was getting a basic pension of Rs. 535/- w.e.f. 1.2.1994. On his reemployment under provisions contained in CCS (Fixation of Re-employed Pensioners) order 1986, his pay was to be fixed either under Rule 4 or Rule16 of the above Rules. The relevant portion of Rule 4 and Rule 16 are extracted below:

Rule 4. Fixation of pay of re-employed pensioners

(a) Re-employed pensioners shall be allowed to draw pay only in the prescribed scales of pay for the posts in which they are re-employed. No protection of the scales of pay of the posts held by them prior to retirement shall be given.

(b) (i) In all cases where the pension is fully ignored, the initial pay on reemployment shall be fixed at the minimum of the scale of pay of the re-employed post.

(ii) In cases where the entire pension and pensionary benefits are not ignored for pay fixation, the initial pay on re-employment shall be fixed at the same stage as the last pay drawn before retirement. If there is no such stage in the re-employed post, the pay shall be fixed at the stage below that pay. If the maximum of the pay scale in which a pensioner is re-employed is less than the last pay drawn by him before retirement, his initial pay shall be fixed at the maximum of the scale of pay of the re-employed post. Similarly, if the minimum of the scale of pay in which pensioner is re-employed, is more than the last pay drawn by him before retirement his initial pay shall be fixed at the minimum of the scale of pay of the re-employed posts. However, in all these cases, the non-ignorable part of the pension and pension equivalent of retirement benefits shall be reduced from the pay so fixed.

© The re-employed pensioner will in addition to pay as fixed under para (b) above shall be permitted to draw separately any pension sanctioned to him and to retain any other form of retirement benefits.

(d) In the case of persons retiring before attaining the age of 55 years and who are re-employed, pension (including pension equivalent of gratuity and other forms of retirement benefits) shall be ignored for initial pay fixation to the following extent:

(i) in the case of ex-servicemen who held posts below commissioned officer rank in the Defence Forces and in the case of civilians who held posts below Group-A posts at the time of their retirement, the entire pension and pension equivalent of retirement benefits shall be ignored.

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Rule 16. Fixation of pay of Ex-Combatant Clerks/storemen

(1) In partial modification of the provisions contained in order 4 and 5 above, ex-combatant Clerks on their re-employment as Lower Division clerks or Junior Clerks in the Civil Posts and ex-Storemen in the Armed Forces on their re-employment as Storemen in civil posts shall have the option to get their pay fixed under orders 4 and 5 above in accordance with the procedure indicated in sub para (2) below.

Explanation

(i) The option once exercised is final. The re-employed pensioner should be asked to exercise the option within the period of three

months from the date of his re-employment.

(ii) Ex-combatant Clerks and Storemen referred to in this order will include reservists released at their own request or on compassionate or medical grounds.

(2) Service rendered as Combatant Clerks and Storemen in Armed Forces shall be treated as equivalent to service as lower division clerks/Junior Clerks and Storemen respectively in Civil Posts irrespective of the pay drawn in those posts in the Armed Forces. The initial pay in such cases shall be fixed in the time scale of the re-employed posts at a stage equivalent to the stage that would have been reached by putting in the civil posts the number of completed years of service rendered in the posts in the Armed Forces. The pay so fixed will not be restricted to the "pre-retirement pay." The fixation of pay in these cases shall be done by invoking the provisions of Fundamental Rule 27.

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(ii) Pension as defined in order 3(i) above shall be deducted from the pay fixed under this rule after ignoring Rs. 15/- thereof and only the next pay is payable.

(iii) If the resultant amount does not correspond to a stage in the scale applicable to the re-employed posts, pay may be fixed in the next lower stage and the difference allowed as personal pay to be absorbed in future increases of pay.

(iv) Where the pay in such cases is fixed below the minimum of the pay scale of there-employed post, as a result of adjustment of amounts of pension drawn by him from the Army in excess of Rs. 15/- per month increases in pay may be allowed after each year of service in the rate of increment admissible as if the pay has been fixed at the minimum till the minimum of the scale is reached. Thereafter, subsequent increments may be granted in the scale of the re-employed post in the usual manner.

9 That would imply that under Rule 4 his initial pay would be fixed at the minimum of the scale of pay ignoring the pension if the pension is fully ignored, otherwise the pay shall be fixed at the same stage as that of the scale of LDC and if any such stage at the pay scale is not there it shall be fixed at the stage below, in such cases, the non-ignorable part of the pension shall be reduced from the pay so fixed. Further sub rule (d)(i) provides that in the case of an ex serviceman who has retired below the

rank of a Commissioned Officer the entire pension and pension equivalent of retirement benefits shall be ignored. It is admitted by the applicant as also the respondents that the applicant was a non-Commissioned rank officer in the Defence Force and therefore he falls under sub rule (d)(ii) of Rule 4 and in his case the entire pension has to be ignored. Since the entire pension is ignorable his pay fixation has to be necessarily done under the sub rule (b)(i) of Rule 4 i.e. his pay shall be fixed at the minimum of the scale. These rules were partially modified in 1997 by Rule 16 according to which an option became available to such ex combatant Clerks on their re-employment as LDC by following the procedure under Rule 16(ii). According to sub rule (ii) of Rule 16, the initial pay could be fixed in the time scale equivalent to the scale that would have been reached by computing the number of completed years of service rendered in the Force. Even under this rule, sub clause (ii) provides that pension shall be deducted from the pay after ignoring Rs. 15/- and only the net pay after such deduction is payable. It is clear from the records that the pay of the applicant was fixed in Annexure A-3 orders on the representation made by him at Annexure A-8 invoking the procedure under Rule 16(ii) and that it is also made clear from the note in the file at Annexure A-3. It was also mentioned therein that the fixation was considered at the request of the applicant on 9.3.1996. However, the respondents while fixing the pay has not taken into account deduction of pension from the pay after ignoring Rs. 15/- as provided under the sub rule (ii). When this mistake was deducted, the respondents also found that the rule provided an option to be given by the re-employed person to follow the procedure above which was not given ^{be} taken from the applicant. It was also considered that if the option was exercised to

continue ^{the under} with the Rule 4 fixation the burden due to recovery would have been much less and therefore an option was given by memorandum at Annexure A-7 to the applicant along with some others. The applicant opted for being considered under Rule 4 but he submitted his option under provision of Rule 4(b)(ii) and under sub rule (d)(i), the respondents finding that these two sub rules are in conflict with each other, have approved his option as covered by sub rule b(f) read with sub rule d(i) and issued the impugned orders. The main contention of the applicant is that the principle of natural justice has been violated as he has not been given notice. This objection cannot be sustained as first of all Annexure A-7 memorandum issued to him is very much in the nature of a notice and is a speaking order explaining the circumstance under which the re-fixation has become necessary and also taking into account the fact that the option is being given so that portion of recovery can be reduced. The applicant responded to this option and after giving the option now he cannot turn round and say that he has not been given sufficient notice. He could as well have retained the option to come under Rule 16, the benefit of which he had already availed of. But either way he can not get out of the provision relating to deduction of the Army pension from the pay so fixed. He has himself admitted that he was a non-commissioned officer in the Defence Force and therefore came within the purview of rule 4-d(i). The applicant's pay has to be fixed as per the rule applicable to ex-combatant Clerks by ignoring the entire pension. Having accepted this position he cannot opt for the provision relating to pay fixation under sub rule 4-b(ii) which relates to persons in whose cases pension is not fully ignored. In short, he wants to get benefits of both the clauses to the extent it is

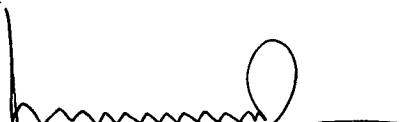
favourable to him. An option has to be firm and unequivocal and is always 'either' this 'or' that. One cannot have a part of 'this' and another part of 'that'. The respondents have therefore rightly accepted the option of the applicant as falling within his eligibility and refixed his pay in accordance with Rule 4(b)(i) read with 4(d)(i).

10. The next question relates to the right to recovery. The applicant has relied on the judgments of the Supreme Court and High Courts. The respondents have also relied on the legal dictum that administrative errors can be corrected at any time. Since there are conflicting judgments in this regard, we are of the view that each case has to be considered on the factual situation therein and in the factual matrix of this case we find that the applicant had made a representation to the respondents as if his case is covered under Rule 16(ii) and even if he ^was justified by coming under that rule he has to take the impact of the full rule in its complete form by which even at that point of time he was eligible for fixation only after deducting his pension. It can be said that he had then agreed to fixation of his pay in accordance with Rule 16. Therefore, no fresh option was required to be given to him. The respondents committed an error of not enforcing that portion of the rule dealing with reduction of pension with the result that he was drawing both the higher fixation amount as well as the pension whereas actually he was not eligible to get both. In fact it is an administrative error. He was eligible as a non-combatant Clerk to draw the full pension but in that case his pay fixation could be only at the minimum of the pay scale. Except for the fact that a mistake has been corrected after passage of six years we cannot find fault with the impugned

orders issued by the respondents. The respondents decided to give an option at this belated stage, though it was not necessary to give him another opportunity so as to minimise the burden of recovery on him. In any event, recovery cannot be avoided. They have also tried to minimise the hardship of the applicant by ordering recovery in instalment restricted only to Rs. 500/- per month. The case of similar employee who had approached the Chandigarh Bench of the CAT (Saldir Singh Vs. Union of India and another by O.A. 900/2002) was dismissed on the ground that it was an action to correct a mistake which cannot be faulted.

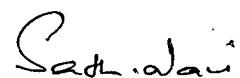
11 In the light of the above discussions we are of the view that the impugned order cannot be assailed. However, we make it clear that in the light of the revised pay fixation the applicant is eligible for drawing full pension as the entire pension is ignorable under Rule 4 and the respondents shall make this aspect clear in the orders so that the matter is not left in doubt. The OA is disposed of accordingly. No costs.

Dated 29.3.2006.



GEORGE PARACKEN
JUDICIAL MEMBER

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SATHI NAIR
VICE CHAIRMAN