

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O. A. No.
T. XXXXX.

66/1990

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DATE OF DECISION 28.2.1991

K.J.Francis and 4 others Applicant (s)

Mr.M.Girijavallabhan Advocate for the Applicant (s)

Versus

Union of India, represented by
the Secretary, Min.of Defence,
New Delhi. Respondent (s)

Mr.K.Prabhakaran,ACGSC Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. **S.P.MUKERJI, VICE CHAIRMAN**

The Hon'ble Mr. **A.V.HARIDASAN, JUDICIAL MEMBER**

1. Whether Reporters of local papers may be allowed to see the Judgement?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the Judgement?
4. To be circulated to all Benches of the Tribunal?

JUDGEMENT

(Hon'ble Shri S.P.Mukerji, Vice-Chairman)

The five applicants who are ex-servicemen re-employed as Mechanics in the department of Naval Aircraft Yard, Cochin in the Southern Naval Command in this application dated 10.1.1990 have prayed that the impugned order dated 27.10.89(Annexure-J) should be set aside and that they should be declared to be entitled to fixation of pay in the revised scale on the basis of their pay which they were drawing vide Annexure-B series of orders. They have also prayed that it should be declared that Note 7 of the order at Annexure-K is not applicable to them. The brief facts of the case are as follows.

2. The five applicants are military pensioners from the Indian Air Force who retired before attaining the age of 55 years. They were reemployed in the civil side under the Flag Officer Commanding-in-Chief, Southern Naval Command on various dates between 2.5.85 and 1.8.85 as Mechanics in the pre-revised scale of Rs.260-400 which was revised to the scale of Rs.950-1500 with effect from 1.1.86. They were

holding the posts of Mechanics on a casual basis with intermittent breaks till they were appointed against regular posts of Mechanics with effect from 30.6.86. Their pay prior to 30.6.1986 was regulated in accordance with the Ministry of Defence O.M of 15.7.1960(Annexure-K). According to this O.M the initial pay of reemployed pensioner like the applicants is fixed at the minimum of the pay scale of the reemployment post but where it is felt that fixation of initial pay at the minimum will cause undue hardship, the initial pay is fixed at a higher stage by allowing one increment for each year of military service in a post not lower than that in which he is reemployed. Accordingly all the five applicants were getting a initial pay of Rs.350/- in the scale of Rs.260-400 upto 31.12.85 vide Annexures B1 to B5. While fixing their initial pay like thus, the military pension was ignored in accordance with the O.M of 8th February 1983 at Annexure-C. They were given increments for their military equivalent service because the minimum of the pay scale of the post of Mechanics to which they were re-employed was less than what they were drawing prior to their retirement from the Air Force. The pay scale of the post held by them was revised from Rs.260-400 to Rs.950-1500 with effect from 1.1.86 by the order issued in September, 1986. The Head of the Department of the applicants provisionally fixed their pay in the revised scale corresponding to the pay of Rs.350/- which the applicants were getting in the unrevised pay scale. The Deputy Controller of Defence Accounts, however, did not accept such a fixation and advised that fresh Government sanction be obtained. On the basis of the representations submitted by the applicants, action was initiated for obtaining Government sanction .On this the applicants moved the Tribunal in O.A.K 250/87 which was disposed of by this Tribunal with the direction to the respondents to pass suitable orders on the issues involved. Finally after the applicants had moved a contempt petition the impugned order dated 27th October 1989 was passed rejecting the claim of the applicants to have their pay in the revised scale fixed corresponding to the pay they were drawing on 31.12.85. The contention

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of the applicants is that if they had exercised the option to come over to the revised scale from a date later than 3.4.86 they would have got the pay fixed as claimed by them in accordance with Rules 5 and 7 of the CDS(Revised Pay)Rules, 1986. They have also argued that Note 7 at Annexure-K will not apply to them as they were not appointed from one cadre to another cadre but were regularised with effect from 3.4.86. They have also quoted Rule 3 of the aforesaid rules in support of their claim.

3. The respondents have stated that till 3.4.86 the applicants were given reemployment on a casual basis with intermittent breaks and on each reemployment their pay was fixed in accordance with Annexure-K as fresh appointment. They were given advance increments over and above the minimum of the unrevised pay scale of Rs.260-400 as their last pay in the military was higher than Rs.260. Since on revision of the pay scale to Rs.950-1500 with effect from 1.1.86 such a condition ceased to exist, ⁶ their initial pay was fixed at the minimum of the revised pay scale. Where however the total emoluments drawn by them before retirement from the military happened to be more than Rs.950/- their initial pay in the revised pay scale was fixed at the corresponding stage. Being casual employees the applicants could not be given any option to come over to the revised scale as contemplated in Rule 5 of the CDS(RP) Rules. For that matter Rule 3(2) of the CDS(RP) Rules also is not applicable to them. They have also argued that since they were fresh appointees after 1.1.86 they were not entitled to fixation corresponding to the pay drawn by them in the pre-revised scale as the provisions of Rule 3(3) of the CDS(RP)Rules is applicable only to regular employees.

4. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The respondents have indicated that until the applicants were regularly appointed as Mechanics with effect from 30.6.86 they were working as Mechanics on a casual basis from 1985. It is now established law that casual workers cannot be deemed to be holding posts as such. This is supported by the decision of the Supreme Court in State of Assam vs. Kanak

Chandra ,AIR 1967 SC 884. A Larger Bench of this Tribunal presided over by the Hon'ble Chairman Mr. Justice Amitav Banerji in T.161 of 1986 and other group of cases (Rahamatullah Khan and others vs. Union of India and others) reported in Full Bench Judgments of the Central Administrative Tribunal(1986-1989), published by the Bahri Brothers and reported on page 323 relying on the Supreme Court's ruling in the aforesaid case and other rulings ^{laid down} ~~that~~ the "principle laid down by the Supreme Court that the casual labour does not hold a civil post is binding as a precedent". Thus the applicants before us cannot be held to be holding a civil post under the Government prior to 30.6.86 when they were reemployed for the first time against a regular post of Mechanic. In accordance with Rule 3 of the Civilians in Defence Services (Revised Pay) Rules, 1986, the definitions of existing scale, present scale, revised scale given therein would be applicable only against posts held by the Government servants. The definition of existing scale as given in Rule 3(2) of those Rules is as follows:-

"(2)"existing scale" in relation to a Government servant means the present scale applicable to the post held by the Government Servant(or, as the case may be, personal scale applicable to him)as on the 1st day of January, 1986 whether in a substantive or officiating capacity;"

Since the applicants before us were only casual employees on 1st January 1986 they cannot be held to be holding any posts on that date and the question of their existing scale or present scale to be revised with effect from 1.1.86 does not arise. Rules 5 and 7 of the aforesaid Rules read as follows:-

"5. Drawal of pay in the revised scales - Save as otherwise provided in these rules, a Government servant shall draw pay in the revised scale applicable to the post to which he is appointed;

Provided that a Government servant may elect to continue to draw pay in the existing scale until the date on which he earns his next or any subsequent increment in the existing scale or until he vacates his post or ceases to draw pay in that scale.

Explanation 1:The option to retain the existing scale under the proviso to this rule shall be admissible only in respect of one existing scale.

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" Explanation 2: The aforesaid option shall not be admissible to any person appointed to a post on or after the 1st day of Jan. 1986, whether for the first time in Government service, or by transfer or promotion from another post and shall be allowed pay only in the revised scale. "

" Explanation 3: Where a Government servant exercises the option under the proviso to this rule to retain the existing scale in respect of a post held by him in an officiating capacity on a regular basis for the purpose of regulation of pay in that scale under Fundamental Rule 22 or Fundamental Rule 31, or any other rule or order applicable to that post, his substantive pay shall be the substantive pay which he would have drawn had he retained the existing scale in respect of the permanent post on which he holds a lien or would have held in lien had his lien not been suspended or the pay of the officiating post which has acquired the character of substantive pay in accordance with any order for the time being in force, whichever is higher."

"7. Fixation of Initial pay in the revised scale:-

(i) The initial pay of a Government Servant who elects, or is deemed to have elected under sub rule (3) of rule 6 to be governed by the revised scale on and from the 1st day of January, 1986, shall, unless in any case the President by special order otherwise directs be fixed separately in respect of his substantive pay in the permanent post on which he hold a lien or would have held a lien if it had not been suspended, and in respect of his pay in the officiating post held by him, in the following manner, namely:-

"(A) in the case of all employees, -

- (i) an amount representing 20 per cent of the basic pay in the existing scale, subject to a minimum of Rs.75/-, shall be added to the "existing emoluments", of the employee;
- (ii) after the existing emoluments have been so increased, the pay shall thereafter be fixed in the revised scale at the stage next above the amount thus computed; "

Since the applicants were not holding any posts on 1.1.86 the Rules 5 and 7 for exercising options and fixation of initial pay with reference to the pay of the post held by them on 1.1.86 does not arise. In the above circumstances even if the applicants had been drawing a pay above the minimum of the pay scale of the post of Mechanic, i.e., Rs.260-400/- before revision of the pay scale with effect from 1.1.86, this being a pay drawn by them as casual worker, that pay would not be relevant for fixing their pay in the revised scale of Rs.950-1500/-

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with effect from 30.6.1986 when for the first time they started holding a regular post of Mechanic. In this view of the matter Note 7 of the Ministry of Defence's Office Memorandum dated 15th July 1960 at Annexure-K need not even be applied to the applicants for determination of their initial pay as on 30.6.1986. Clauses (b) and (c) of para 1 of the aforesaid O.M of 15th July 1960 at Annexure-K reads as follows:-

"(b)The initial pay, on reemployment, should be fixed at the minimum stage of the scale of pay prescribed for the post in which an individual is reemployed.

In cases where it is felt that the fixation of initial pay of the reemployed officer at the minimum of the prescribed pay scale will cause undue hardship, the pay may be fixed at a higher stage by allowing one increment for each year of service which the officer has rendered before retirement in a post not lower than that in which he is reemployed.

For the purpose of the above sub clause, a military pensioner who retired as a JCO or OR will be deemed to be appointed to a comparable civilian post of the pay of the military post with the emoluments mentioned under Note 3 below sub paragraph (c) is equal to or more than the minimum of the scale of pay applicable to the civil the minimum of the scale of pay applicable to the civil post.

(c) In addition to (b) above, the Govt. servant may be permitted to draw separately any pension sanctioned to him and to retain any other form of retirement benefit for which he is eligible eg., Government's contribution to a Contributory Provident Fund, gratuity, commuted value of pension, etc. provided that the total amount of initial pay as at (b) above, plus the gross amount of pension and/or the pension equivalent of other form of retirement benefit does not exceed.

(i) the pay he drew before his retirement (preretirement pay), or

(ii) Rs.3,000/- whichever is less."

Since the entire military pension of the applicants had to be ignored the restrictive provision of clause (c) above would not be applicable to them. In accordance with clause (b) above, the applicants would be entitled to get one increment for each year of equivalent military service fixation of their pay at the minimum of Rs.950/- in the prescribed scale of Rs.950-1500/- causes undue hardship. The Department of Personnel and Training in 1983 issued instructions clarifying how the hardship could be identified, on the following lines:-

"When a re-employed pensioner asks for re-fixation of pay under the 1983 orders, his pay has to be fixed at the minimum of the scale. The question of granting him advance increments

arises only if there is any hardship. Hardship is seen from the point whether pay plus pension plus equivalent of gratuity (whether ignorable or not) is less than the last pay drawn at the time of retirement. If there is no hardship, no advance increment can be granted."

A Full Bench of this Tribunal in their judgment dated 13.3.90 in O.A 3/89 etc.held as follows:-

" We hold that for the purpose of granting advance increments over and above the minimum of the pay-scale of the re-employed post in accordance with the 1958 instructions (Annexures IV in OA-3/89), the whole or part of the military pension of ex-servicemen which are to be ignored for the purpose of pay fixation in accordance with the instructions issued in 1964, 1978 and 1983(Annexures V,V-a, and VI, respectively), cannot be taken into account to reckon whether the minimum of the pay-scale of the re-employed post plus pension is more or less than the last military pay drawn by the re-employed ex-servicemen."

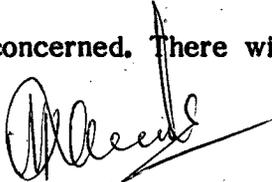
Thus the applicants would be entitled to increments on the basis of their equivalent military service only if their last emoluments in military service happened to exceed their emoluments excluding military pension which they would be getting from 30.6.86 in the revised pay scales. The respondent in their counter affidavit have given the statement of their pre-retirement pay and the minimum pay of the civilian posts in which they are re-employed as follows:-

<u>Name of the applicant</u>	<u>Pre-retirement military pay</u>	<u>Minimum of the pay of the post in which they are reemployed.</u>
1.K.J Francis	Rs.1074.60	Rs.950/-
2.P.J.Abraham	Rs.644.00	Rs.950/-
3.E.P.Joy	Rs.986.10	Rs.950/-
4.T.K.Devassykutty	Rs.936.40	Rs.950/-
5.P.R.Devassy	Rs.1170.60	Rs.950/-

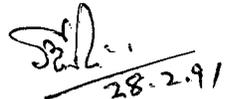
From the above it is clear that while the 1st, 3rd and 5th applicants at the minimum of the pay scale of the re-employment post are getting less emoluments than what they were getting in the military, the 2nd and 4th applicants are getting more emoluments at the minimum of the pay scale of the re-employment post than what they were getting in the military. Thus the element of hardship is discernible in the case of the 1st, 3rd and 5th applicants and in accordance with clause(b)

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of the O.M dated 15th July 1960 at Annexure-K they will be entitled to get the initial pay fixed with one increment for each year of equivalent military service subject to the condition that pay with advance increments would not exceed the pre-retirement pay. Accordingly the first applicant would be entitled to get in the revised pay scale a pay of Rs.1070/- with a personal pay of Rs.4.60 to be absorbed in future increment. The 3rd applicant would be entitled to get an initial pay of Rs.970/- with a personal pay of Rs.16.10 to be absorbed in future increment. The 5th applicant would be entitled to the initial pay of Rs.1150/- with a personal pay of Rs.20.60 to be absorbed in future increment. In the conspectus of facts and circumstances we allow this application in part only to the extent of re-fixation of the initial pay of the 1st, 3rd and 5th applicants on the lines indicated above. The application is dismissed in so far as the 2nd and 4th applicants are concerned. There will be no order as to costs.



(A.V.Haridasan)
Judicial Member



(S.P.Mukerji)
Vice Chairman