

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O. A. No. 89/90 199
~~XXX~~ No.

DATE OF DECISION 31.5.90

C.P.Valsalan & 10 others Applicant (s)

M.R.Rajendran Nair
D.Mohanan & E.K.Stanly Advocate for the Applicant (s)

Versus

Union of India & 2 others Respondent (s)

P.Sankarankutty Nair,
ACGSC Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. S.P.Mukerji, Vice Chairman

The Hon'ble Mr. N.Dharmadan, Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? No
3. Whether their Lordships wish to see the fair copy of the Judgement? No
4. To be circulated to all Benches of the Tribunal? No

JUDGEMENT

(Shri S.P.Mukerji, Vice Chairman)

The 11 applicants who are Ex-Servicemen ^{and} ~~are~~ re-employed in various capacities under the Government of India have prayed that they should be declared to be entitled to relief on pension even on the ignorable part of the military pension during the period of their re-employment and that their re-employment pay should be re-fixed without loss of increments in accordance with the orders dated 19.7.78 at Annexure-I and 8.2.83 at Annexure-II. In making this prayer, they have relied

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upon the decision of this Tribunal dated 31.10.89 in TAK 404/87 in which pension relief on the ignorable part of the pension during the re-employment as also benefits of re-fixation of re-employment pay with increments but without arrears of pay in accordance with the orders of 19.7.78 and 8.2.83 were allowed to the applicants therein who were similarly circumstanced.

2. The respondents have opposed the application by simply stating that a Special Leave Petition has been filed against the judgement of the Tribunal in TAK 404/87 and connected cases and is pending for decision. They have prayed that in order to avoid multiplicity of proceedings, decision in this case should be ~~stalled~~ ^{stayed} till the SLP is heard and disposed of.

3. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The learned counsel for the applicant, Shri M.R.Rajendran Nair indicated that the SLP against the order of this Tribunal in TAK 404/87 was considered by the Hon'ble Supreme Court on 30.4.90 and it was ^{not} ~~not~~ inclined to ^{notice} ~~issue~~ but adjourned at the request of the learned counsel for the Union of India. In any case, it was conceded by the learned counsel for the respondents that the SLP has not yet been admitted and that no stay

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order has been issued by the Supreme Court. The learned counsel for the respondents did not indicate when it will be possible for them to get any stay order or decision of the Hon'ble Supreme Court on the SLP. In the circumstances, we do not wish to deny the applicants before us who are similarly circumstanced as re-employed Ex-Servicemen as the applicants in TAK 404/87, the benefits which this Tribunal has granted in similar cases and circumstances. In our detailed judgement dated 31.10.89 in TAK 404/87 and 3 other cases, we had allowed to the re-employed Ex-Servicemen the relief on the ignorable part of the pension relying upon the decision of the Larger Bench of this Tribunal dated 20.7.89 in TAK 732/87. That Bench by majority decision decided as follows:

"Where pension is ignored in part or in its entirety for consideration in fixing the pay of re-employed ex-servicemen who retired from military service before attaining the age of 55 years, the relief including adhoc relief, relatable to the ignorable part of the pension cannot be suspended, withheld or recovered, so long as the dearness allowance received by such re-employed pensioner has been determined on the basis of pay which has been reckoned without consideration of the ignorable part of the pension. The impugned orders viz. O.M. No.F.22 (87-EV(A)/75 dated 13.2.1976, O.M.No.F.10(26)-B(TR)/76 dated 29.12.76, O.M.No.13(8)-EV(A)/76 dated 11.2.77 and O.M.No.M.23013/152/79/MF/CGA/VI(Pt)/1118 dated 26.3.1984 for suspension and recovery of relief and adhoc relief on pension will stand modified and interpreted on the above lines. The cases referred to the Larger Bench are remitted back to the Division Bench of Ernakulam for disposal in details in accordance with law and taking into account the aforesaid interpretation given by one of us (Shri S.P.Mukerji Vice Chairman)."

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4. Based on this decision, we have no hesitation in allowing to the applicants before us the relief including ad hoc relief relatable to the ignorable part of military pension and direct that the same should not be suspended, withheld or recovered during their period of re-employment and if there has been any recovery, the same should be refunded to the applicants.

5. As regards the other relief of getting their re-employment pay re-fixed on the basis of the orders of 19.7.78 and 8.2.83 without loss of increments, the following extracts from our judgement in the aforesaid case OA 404/87 would be relevant:

"As regards the second relief the petitioners have challenged the Ministry of Finance's OM No.F5(14)-E.III(B)/77 dated 19.7.78 and Ministry of Defence's O.M.No.241/83/D(Civ-I) dated 8th February, 1983 in so far as they restrict and reduce the benefits of the higher limits of ignorable pension of Rs 125 in the first memorandum and the entire pension by the second O.M. in case of those who had been re-employed earlier than the dates of issue of the memoranda. The offensive portion of the O.M. of 19.7.78 reads as follows:

"In the case of the persons who are already re-employed, the pay may be re-fixed on the basis of these orders with immediate effect provided they opt to come under these orders. If they so opt their terms would be determined afresh as if they had been re-employed for the first time from the date of these orders.

5. The option should be exercised in writing within a period of 6 months from the date of issue of these orders. The option once exercised shall be final."

"The relevant portion from the O.M. of 8th February, 1983 reads as follows:

"In the case of the pensioners who are already on re-employment, the pay may be re-fixed on the basis of these orders with immediate effect provided they opt to come under these orders. If they so opt, their terms would be determined afresh as if they have been re-employed for the first time from the date of these orders. The option should be exercised in writing within a period of six months from the date of these orders. The option once exercised shall be final."

" The petitioners have argued that there should be no discrimination based on the date of re-employment. Referring to the celebrated ruling of the Supreme Court in D.S.Nakara v. Union of India, AIR 1983 SC 130, they have indicated that just as for the availability of the benefits of the Liberalised Pension Rules, the Supreme Court has made no distinction between the categories of pensioners who retire before or after the crucial date on which the scheme of liberalised pension was promulgated, likewise the benefit of the ignorable pension should be equally available to all re-employed pensioners irrespective of whether they were re-employed before or after the date on which the pensioners were re-employed. The respondents have argued that the orders of the Government enhancing the amount of ignorable pension for fixation of pay on re-employment in respect of those who retired before attaining the age of 55 years have been made applicable from a specific date decided by the Government. Those who were re-employed before that date are governed by the orders and instructions prevailing at the time of their re-employment. If they want to come over to the revised orders if they are more beneficial to them they can opt for the same, but once they opt for the revised orders their re-employment pay will be fixed as if they were re-employed for the first time on the date of issue of the revised orders.

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" 8. We have given our anxious consideration to the rival contentions of both the parties and have also examined the applicability of the principle enunciated by the Supreme Court in the case of D.S.Nakara. We feel that re-employed military pensioners cannot be discriminated on the basis of the date of re-employment just as pensioners cannot be discriminated on the basis of the date of retirement, as has been laid down by the Supreme Court in Nakara's case. The difficulty arises as regards the computation of re-employment pay of such pensioners before and after the issue of the aforesaid O.M. of 19.7.78 or of 8th February, 1983. For the sake of convenience let us take the O.M. of 8th February, 1983. The petitioners who were not Commissioned Officers would be entitled to get their entire military pension ignored with effect from 8th February 1983 by virtue of the O.M. of that date if they had been re-employed after 8th February, 1983. Since they had been re-employed before that date, in order to get the benefit of this O.M. they would have to opt for this O.M. and in that case their re-employment pay will be fixed as if they have been re-employed with effect from 8th February, 1983. This means that their previous service on re-employment during which period they had earned a number of increments would be totally lost to them. That is, if one of the petitioners had been re-employed in 1979

" and had earned four increments in the re-employment post, his pay in February, 1983 will be re-fixed as if he was re-employed for the first time in February, 1983. In other words, if there is another re-employed military pensioner who is recruited for the first time without any previous re-employment service, the petitioner and the newly re-employed military pensioner will be treated alike like fresh starters in the post.

" 9. If however, for the petitioner who was re-employed in 1979 when the ignorable pension was Rs 125/-. is allowed to get his re-employment pay in 1979 revised by ignoring the entire pension (vide the O.M. of 1983) and given increments for the period from 1979 to 1983 and his pay in 1983 revised on that basis, will it be giving retrospective effect to the O.M. of February, 1983? Following the dicta of Nakara's case, if no arrears of pay on revision are paid to the petitioner between 1979 and 1983 but his pay in 1979 is fixed notionally to determine his actual pay in 1983 it will not be tantamount to giving retrospective effect to the O.M. The following extracts from the judgement in Nakara's case may be relevant:

"49. But we make it abundantly clear that arrears are not required to be made because to that extent the scheme is prospective. All pensioners whenever they retired would be covered by the liberalised pensions scheme, because the scheme is a scheme for payment of pension to a pensioner governed by 1972 Rules. The date of retirement is irrelevant. But the revised scheme would be operative from the date mentioned in the scheme and would bring under its umbrella all existing pensioners and those who retired subsequent to that date. In case of pensioners who retired prior to the specified date, their pension would be computed afresh and would be payable in future commencing from the specified date. No arrears would be payable."

" 10. The Supreme Court in Nakara's case compared the position of pensioners vis-a-vis the Liberalised Pension Scheme with the position of serving Government servants vis-a-vis the scheme of revised pay scales. The following further extracts from the same judgement will be relevant:

"Revised pay-scales are introduced from a certain date. All existing employees are brought on to the revised scales by adopting a theory of fitments and increments for past service. In other words, benefit of revised scale is not limited to those who enter service subsequent to the date fixed for introducing revised scales but the benefit is extended to all those in service prior to that date. This is just and

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"fair. Now if pension as we view it, is some kind of retirement wages for past service, can it be denied to those who retired earlier, revised retirement benefits being available to future retirees only. Therefore, there is no substance in the contention that the Court by its approach would be making the scheme retroactive, because it is implicit in theory of wages." (emphasis added)

"From the above it is clear that the Supreme Court were keen that no discrimination should be made between the pensioners based on the date of retirement. It was also felt that notional fixation of pension on the date of retirement even though it may be anterior to the promulgation of Liberalised Pension Scheme without giving them arrears for the past period (between the date of retirement and date of promulgation of scheme) will not be giving retrospective effect to the Scheme and will not violate its prospective nature. In the case of revision of pay scale from a particular date even old entrants are allowed revision of pay scale from a particular date and the benefit of increments which they had earned during the past period is also duly accounted for. It therefore seems to us inequitable that the re-employed pensioners who had been re-employed prior to February, 1983 should be forced to lose the benefit of their past service by exercising option on a "take it or leave it basis".

"11. We feel that for those Ex-servicemen who had been re-employed prior to the issue of the O.M. their re-employment pay should be determined notionally on the date of their re-employment by applying the enhanced limit of ignorable pension and their pay as on 8th February, 1983 reckoned by giving them the benefit of earning increments over and above the notional pay so fixed. Their actual pay will be revised accordingly with effect from the date of issue of the relevant O.M. without any arrears based on notional pay fixation for the past period."

6. Based on the aforesaid decision, we allow this application to the extent of and on the lines as indicated below:

- (a) The petitioners are declared to be entitled to adhoc and regular relief on the ignorable part of the pension during the period of their re-employment and if any amount has been


withheld or recovered, the same should be refunded to them within a period of three months from the date of communication of this order.

The relevant impugned orders and instructions will stand modified or interpreted accordingly.

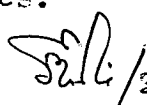
- (b) If the petitioners have opted for the O.M. of 19.7.78 and/or 8.2.83 indicating enhanced limits of ignorable pension, their re-employment pay on the date of their re-employment should be notionally fixed on the basis of the enhanced limits and their revised re-employment pay with effect from the date of issue of the O.M. will be determined by giving them the benefits of notional increments ^c over and above the notional pay so fixed on the date of their re-employment. No arrears of pay on the basis of notional pay fixation would be given for the period prior to the date of issue of the O.M. Those petitioners if any, who have not opted for these O.Ms. should be given an opportunity to opt for the same and if they do so, their actual pay from the date of issue of the O.M. should be determined on the above lines.

- (c) Action on the above lines should be completed within a period of six months from the date of communication of this order.

There will be no order as to costs.


(N. Dharmadan)
Judicial Member

31.5.90


(S.P. Mukerji)
Vice Chairman

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upon the decision of this Tribunal dated 31.10.89 in TAK 404/87 in which pension relief on the ignorable part of the pension during the re-employment as also benefits of re-fixation of re-employment pay with increments but without arrears of pay in accordance with the orders of 19.7.78 and 8.2.83 were allowed to the applicants therein who were similarly circumstanced.

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3. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The learned counsel for the applicant, Shri M.R.Rajendran Nair indicated that the SLP against the order of this Tribunal in TAK 404/87 was considered by the Hon'ble Supreme Court on 30.4.90 and it was not ^{notice} inclined to issue ^{but} adjourned at the request of the learned counsel for the Union of India. In any case, it was conceded by the learned counsel for the respondents that the SLP has not yet been admitted and that no stay

order has been issued by the Supreme Court. The learned counsel for the respondents did not indicate when it will be possible for them to get any stay order or decision of the Hon'ble Supreme Court on the SLP. In the circumstances, we do not wish to deny the applicants before us who are similarly circumstanced as re-employed Ex-Servicemen as the applicants in TAK 404/87, the benefits which this Tribunal has granted in similar cases and circumstances. In our detailed judgement dated 31.10.89 in TAK 404/87 and 3 other cases, we had allowed to the re-employed Ex-Servicemen the relief on the ignorable part of the pension relying upon the decision of the Larger Bench of this Tribunal dated 20.7.89 in TAK 732/87. That Bench by majority decision decided as follows:

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4. Based on this decision, we have no hesitation in allowing to the applicants before us the relief including ad hoc relief relatable to the ignorable part of military pension and direct that the same should not be suspended, withheld or recovered during their period of re-employment and if there has been any recovery, the same should be refunded to the applicants.

5. As regards the other relief of getting their re-employment pay re-fixed on the basis of the orders of 19.7.78 and 8.2.83 without loss of increments, the following extracts from our judgement in the aforesaid case OA 404/87 would be relevant:

"As regards the second relief the petitioners have challenged the Ministry of Finance's OM No.F5(14)-E.III(B)/77 dated 19.7.78 and Ministry of Defence's O.M.No.2(1)/83/D(Civ-I) dated 8th February, 1983 in so far as they restrict and reduce the benefits of the higher limits of ignorable pension of Rs 125 in the first memorandum and the entire pension by the second O.M. in case of those who had been re-employed earlier than the dates of issue of the memoranda. The offensive portion of the O.M. of 19.7.78 reads as follows:

"In the case of the persons who are already re-employed, the pay may be re-fixed on the basis of these orders with immediate effect provided they opt to come under these orders. If they so opt their terms would be determined afresh as if they had been re-employed for the first time from the date of these orders.

5. The option should be exercised in writing within a period of 6 months from the date of issue of these orders. The option once exercised shall be final."

"The relevant portion from the O.M. of 8th February, 1983 reads as follows:

"In the case of the pensioners who are already on re-employment, the pay may be re-fixed on the basis of these orders with immediate effect provided they opt to come under these orders. If they so opt, their terms would be determined afresh as if they have been re-employed for the first time from the date of these orders. The option should be exercised in writing within a period of six months from the date of these orders. The option once exercised shall be final."

- " The petitioners have argued that there should be no discrimination based on the date of re-employment. Referring to the celebrated ruling of the Supreme Court in D.S.Nakara v. Union of India, AIR 1983 SC 130, they have indicated that just as for the availability of the benefits of the Liberalised Pension Rules, the Supreme Court has made no distinction between the categories of pensioners who retire before or after the crucial date on which the scheme of liberalised pension was promulgated, likewise the benefit of the ignorable pension should be equally available to all re-employed pensioners irrespective of whether they were re-employed before or after the date on which the pensioners were re-employed. The respondents have argued that the orders of the Government enhancing the amount of ignorable pension for fixation of pay on re-employment in respect of those who retired before attaining the age of 55 years have been made applicable from a specific date decided by the Government. Those who were re-employed before that date are governed by the orders and instructions prevailing at the time of their re-employment. If they want to come over to the revised orders if they are more beneficial to them they can opt for the same, but once they opt for the revised orders their re-employment pay will be fixed as if they were re-employed for the first time on the date of issue of the revised orders.
- " 8. We have given our anxious consideration to the rival contentions of both the parties and have also examined the applicability of the principle enunciated by the Supreme Court in the case of D.S.Nakara. We feel that re-employed military pensioners cannot be discriminated on the basis of the date of re-employment just as pensioners cannot be discriminated on the basis of the date of retirement, as has been laid down by the Supreme Court in Nakara's case. The difficulty arises as regards the computation of re-employment pay of such pensioners before and after the issue of the aforesaid O.M. of 19.7.78 or of 8th February, 1983. For the sake of convenience let us take the O.M. of 8th February, 1983. The petitioners who were not Commissioned Officers would be entitled to get their entire military pension ignored with effect from 8th February 1983 by virtue of the O.M. of that date if they had been re-employed after 8th February, 1983. Since they had been re-employed before that date, in order to get the benefit of this O.M. they would have to opt for this O.M. and in that case their re-employment pay will be fixed as if they have been re-employed with effect from 8th February, 1983. This means that their previous service on re-employment during which period they had earned a number of increments would be totally lost to them. That is, if one of the petitioners had been re-employed in 1979

" and had earned four increments in the re-employment post, his pay in February, 1983 will be re-fixed as if he was re-employed for the first time in February, 1983. In other words, if there is another re-employed military pensioner who is recruited for the first time without any previous re-employment service, the petitioner and the newly re-employed military pensioner will be treated alike like fresh starters in the post.

" 9. If however, for the petitioner who was re-employed in 1979 when the ignorable pension was Rs 125/-. is allowed to get his re-employment pay in 1979 revised by ignoring the entire pension (vide the O.M. of 1983) and given increments for the period from 1979 to 1983 and his pay in 1983 revised on that basis, will it be giving retrospective effect to the O.M. of February, 1983? Following the dicta of Nakara's case, if no arrears of pay on revision are paid to the petitioner between 1979 and 1983 but his pay in 1979 is fixed notionally to determine his actual pay in 1983 it will not be tantamount to giving retrospective effect to the O.M. The following extracts from the judgement in Nakara's case may be relevant:

"49. But we make it abundantly clear that arrears are not required to be made because to that extent the scheme is prospective. All pensioners whenever they retired would be covered by the liberalised pensions scheme, because the scheme is a scheme for payment of pension to a pensioner governed by 1972 Rules. The date of retirement is irrelevant. But the revised scheme would be operative from the date mentioned in the scheme and would bring under its umbrella all existing pensioners and those who retired subsequent to that date. In case of pensioners who retired prior to the specified date, their pension would be computed afresh and would be payable in future commencing from the specified date. No arrears would be payable."

" 10. The Supreme Court in Nakara's case compared the position of pensioners vis-a-vis the Liberalised Pension Scheme with the position of serving Government servants vis-a-vis the scheme of revised pay scales. The following further extracts from the same judgement will be relevant:

"Revised pay-scales are introduced from a certain date. All existing employees are brought on to the revised scales by adopting a theory of fitments and increments for past service. In other words, benefit of revised scale is not limited to those who enter service subsequent to the date fixed for introducing revised scales but the benefit is extended to all those in service prior to that date. This is just and

"fair. Now if pension as we view it, is some kind of retirement wages for past service, can it be denied to those who retired earlier, revised retirement benefits being available to future retirees only. Therefore, there is no substance in the contention that the Court by its approach would be making the scheme retroactive, because it is implicit in theory of wages." (emphasis added)

"From the above it is clear that the Supreme Court were keen that no discrimination should be made between the pensioners based on the date of retirement. It was also felt that notional fixation of pension on the date of retirement even though it may be anterior to the promulgation of Liberalised Pension Scheme without giving them arrears for the past period (between the date of retirement and date of promulgation of scheme) will not be giving retrospective effect to the Scheme and will not violate its prospective nature. In the case of revision of pay scale from a particular date even old entrants are allowed revision of pay scale from a particular date and the benefit of increments which they had earned during the past period is also duly accounted for. It therefore seems to us inequitable that the re-employed pensioners who had been re-employed prior to February, 1983 should be forced to lose the benefit of their past service by exercising option on a "take it or leave it basis".

"11. We feel that for those Ex-servicemen who had been re-employed prior to the issue of the O.M. their re-employment pay should be determined notionally on the date of their re-employment by applying the enhanced limit of ignorable pension and their pay as on 9th February, 1983 reckoned by giving them the benefit of earning increments over and above the notional pay so fixed. Their actual pay will be revised accordingly with effect from the date of issue of the relevant O.M. without any arrears based on notional pay fixation for the past period."

6. Based on the aforesaid decision, we allow this application to the extent of and on the lines as indicated below:

- (a) The petitioners are declared to be entitled to adhoc and regular relief on the ignorable part of the pension during the period of their re-employment and if any amount has been

withheld or recovered, the same should be refunded to them within a period of three months from the date of communication of this order. The relevant impugned orders and instructions will stand modified or interpreted accordingly.

- (b) If the petitioners have opted for the O.M. of 19.7.78 and/or 8.2.83 indicating enhanced limits of ignorable pension, their re-employment pay on the date of their re-employment should be notionally fixed on the basis of the enhanced limits and their revised re-employment pay with effect from the date of issue of the O.M. will be determined by giving them the benefits of notional increments over and above the notional pay so fixed on the date of their re-employment. No arrears of pay on the basis of notional pay fixation would be given for the period prior to the date of issue of the O.M. Those petitioners if any, who have not opted for these O.Ms. should be given an opportunity to opt for the same and if they do so, their actual pay from the date of issue of the O.M. should be determined on the above lines.

- (c) Action on the above lines should be completed within a period of six months from the date of communication of this order.

There will be no order as to costs.

(N.Dharmadan)
Judicial Member

(S.P.Mukerji)
Vice Chairman