

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA No.109/2001

Wednesday, this the 5th day of February, 2003.

CORAM

HON'BLE MR.G.RAMAKRISHNAN, ADMINISTRATIVE MEMBER
HON'BLE MR.K.V.SACHIDANANDAN, JUDICIAL MEMBER

K.Gopala Pillai
Assistant Store Keeper
Naval Ship Repair Yard
Naval Base
Cochin.

Applicant

(By advocate Mr.M.Rajagopalan)

Versus

1. The Flag Officer Commanding in Chief
Southern Naval Command
Headquarters Southern Naval Command
Cochin.
2. The Chief of Naval Staff
Naval Headquarters
New Delhi.
3. Union of India represented by
The Secretary
Ministry of Defence
New Delhi.


Respondents

(By advocate Mr.C.Rajendran, SCGSC)


O R D E R

HON'BLE MR.K.V. SACHIDANANDAN, JUDICIAL MEMBER


Applicant is a reemployed ex-serviceman. He served in the Air Force for 15 years as (equipment Assistant) Store Keeper and was discharged on 30.4.1981. His last pay in the Air Force was Rs.308/- per month. Subsequently he was reemployed in Cochin Naval, Base with effect from 8.8.83 as Assistant Store Keeper, first on casual basis and was regularized later in the same post. Being a re-employed ex-serviceman the applicant claimed that he is eligible to get his re-employed pay fixed, protecting his last pay. The pay scale in which he was re-employed as Assistant Store Keeper was Rs.260-400. Though the applicant was first appointed on casual basis on 8.8.83 under the first respondent,



he was regularized only with effect from 10.6.86. Till then he continued on casual basis with some technical breaks, along with many others. After his regularization, he made representations for getting his pay fixed, protecting his last pay. Then his pay was fixed at Rs.308/- per month with effect from 8.8.83 to 30.12.85 leaving the periods of actual breaks in the service vide A-1 order dated 22.9.89. As the pay fixation was discontinued from 1.1.86 the applicant again made representation. Then the applicant was served with another letter that as the basic pay scale was revised to Rs.950-1500 he was not eligible for further fixation from Rs.950-1500 from 1.1.86 by A-2 order dated 15.12.89. Applicant again represented against A-2 requesting to count his casual service. Similarly situated persons and the applicant approached this Tribunal for getting the casual service counted. The entire matter was finally decided by a full Bench of this Tribunal in OA No.439/89. The Full Bench decided that the casual service has to be regularized from the date of initial appointment condoning the technical breaks. The respondents implemented the principle only to those applicants and that too after considerable delay. The third respondent subsequently issued a letter extending the benefit to others vide A-3 orders dated 20.6.95. Pursuant to A-3 the casual service put in by some of the employees was regularized from the date of their initial appointment. But the service of the applicant was regularized only from 10.6.86 though his initial appointment was with effect from 6.6.83. Evidence to this effect was annexed as A-4 Establishment List. The applicant contented that Sl.Nos.2,3,5,6,9 and 10 are juniors to the applicant as they were initially appointed as ASK after the applicant. He submitted another representation against discrimination to the first respondent and by the time the 2nd respondent had taken a decision not to condone the technical breaks beyond 30 days. It is further averred that the benefits already given as directed by



the Tribunal on the basis of the Full Bench decision was withdrawn arbitrarily and the arrears given were sought to be recovered. This was again challenged before this Tribunal and the Tribunal dismissed the petitions upholding the contention of the respondents, restricting the benefit only upto 30 days of technical breaks. A-5 dated 5.3.99 is the reply given to the applicant. The matter was taken up before the Hon'ble High Court of Kerala and the applicant was advised to wait for the final decision. The Hon'ble High Court allowed those OAs and declared that the decision prescribing a 30 days period as upper limit for giving the benefit of the judgement as arbitrary and unconstitutional (A-6 order dated 28.7.2000 in OP No.11518/98). Though the applicant again approached the respondents, they refused to entertain any more request telling that the issue was finally closed by A-5 order. The request for fixation of pay was rejected mainly due to the reason of not counting his casual service and aggrieved by the said action/inaction on the part of the respondents, the applicant has filed this OA under Section 19 of the CAT Act seeking the following reliefs:

- (a) Call for the records leading up to Annexure A-6 and quash Annexure A-5.
 - (b) Direct the respondents to regularise the casual service of the applicant from the date of his initial appointment on 8.8.1983.
 - (c) Direct the respondents to fix the pay from 8.8.1983, protecting his last pay, ignoring his defence pension, with all consequential benefits including the arrears.
 - (d) Declare that the applicant is entitled to get his casual service counted from the date of his first casual service, condoning the breaks in between, with all consequential benefits including the pay fixation from that date.
 - (e) To grant such other relief deemed fit to this Hon'ble Tribunal.
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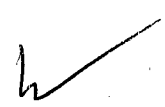
2. Respondents have filed reply statement contending that pursuant to the directions of this Tribunal in OA 1596/98, the claim of the applicant in his representation was considered and communicated to the applicant on 5.3.99 as per A-5 and the challenge of A-5 order comes only after a period of one year. Therefore, the OA is barred by limitation, res-judicata and not maintainable and liable to be dismissed. They averred that the applicant was engaged as Assistant Storekeeper on casual basis with effect from 8th August, 1983 against leave vacancy and absorbed with effect from 10th June 1986 when sanctioned post became available. The break period of the applicant was not condoned from the date of initial engagement as there was a long break of 40 days from 1st May 1986 to 9th June 1986 which cannot be treated as an artificial/technical break. The seniority of the applicant was very rightly granted from the date of his regularization against a Government sanctioned post with effect from 10th June 1986 as per Government orders which has been upheld by Hon'ble Supreme Court of India in Civil Appeal No.9922/95 [R1(a)]. The pay of the applicant was fixed at Rs.308/- as per A-1 for the period from 8th August 1983 to 30th December 1985 and the arrears of pay and allowances as per his entitlement in terms of A-1 amounting to Rs.3734/- was paid to him. The contention of the applicant that similar question challenging the order restricting the benefit upto 30 days break was pending before the Hon'ble High Court and a batch of cases was allowed will not give the applicant any right to claim the benefit since he was not a party in those cases and the order of the Hon'ble High Court is in no way applicable to him. Moreover, the case is pending with the Government for filing SLP against the said judgement as this Tribunal has categorically upheld the action taken by the respondents. Further there is a long delay in filing this OA. It is averred that the applicant has suppressed the factual position to mislead this Tribunal. It is

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further averred that from A-5 it is seen that in pursuance of the direction of this Tribunal, the claim of the applicant as at A-3 has been separately considered and communicated to the applicant. Ignoring the above facts, the applicant has now filed this OA with a long delay even after the judgement of the Hon'ble High Court of Kerala. The applicant has tried to raise the issue through back door entry as he could not challenge A-5 order within time. He has not come with clean hands. The initial pay has to be fixed at the minimum stage of the scale of pay prescribed for the post. In case the minimum of prescribed pay scale would cause undue hardship the pay could be fixed at a higher stage. Applicant's pay was fixed at Rs.308/- with effect from his initial date of reemployment. The applicant could be regularised with effect from 10th June 1986 only when the Government sanctioned post became available. He was not a party in OA 434/89. The Government has decided to extend the benefits to non-petitioners as per A-3 order. The applicant had a long break of 40 days from 1.5.86 to 9.6.86 which cannot be treated as technical/artificial break. Willingness to work always is not the criteria for regularization from the date of initial appointment. Therefore the respondents requested for the dismissal of the OA.


3. Heard Mr.M.Rajagopalan, learned counsel for the applicant and Mr.C.Rajendran, learned SCGSC appearing for the respondents.

4. We have given due consideration to the pleadings and the materials placed on record. Learned counsel for the applicant submitted that restricting the benefits only upto 30 days of technical break is not correct and juniors to the applicant were granted this benefit which is a discrimination under Articles 14 & 16 of the Constitution. Counsel for the respondents submitted that all benefits including the arrears for the entitled casual



service have been given to the applicant and the OA does not merit. The break period of the applicant was not condoned from the date of his initial engagement as there was long break of 40 days from 1.5.86 to 9.6.86 which cannot be treated as an artificial/technical break. The benefit of the orders of the Hon'ble High Court of Kerala also cannot be extended to the applicant since he was not a party to the said case and the Government proposes to file an SLP against such judgement.

5. The question for consideration before this Tribunal is whether the period from 8.8.83 to 30.12.85 has to be counted for the purpose of pensionary benefits of the applicant. As discussed above, the respondents' case is that this period cannot be reckoned for the benefit the applicant sought for the reason that it is not a technical break and as per rules, breaks only up to 30 days can be condoned. The applicant's case is that the break is 40 days from 1.5.86 to 9.6.86 and the impugned order A-5 is faulted. A-5, according to the respondents, was passed in giving effect to the orders of this Tribunal in OA 1596/98 disposing of the representation of the applicant dated 5.3.97 and his claim was rejected mainly on the following grounds:


- (i) As per the existing policy, break periods exceeding 30 days cannot be treated as technical/artificial break and condoned for regularization of casual service.
 - (ii) The point regarding applicant's juniors drawing more pay is because of the fact that they had less break periods and their services were regularized prior to his regularization.
 - (iii) The seniority in the grade of Assistant Store Keeper has been fixed/counted from the date of applicant's regularization as per the Government rules in force.
 - (iv) Applicant's pay was fixed at Rs.308/- in addition to PEG in the scale of Rs.260-400 from 8.8.83 during the casual/regular spells of employment as per GOI/MOD letter No.CP(P)/9181/1295/NHQ/3916/D(Civ) dated 22nd Sept. 1989 after taking into consideration the applicant's service in the Air Force.
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6. In A-4 Civilian Establishment List No.44/96 dated 14th May 1996 the applicant's service was regularized from the date of initial appointment with all consequential benefits except seniority, condoning the break in service and subsequent appointment. In other words, his claim for the period from 8.8.83 to 30.12.85 has not been considered on the ground that this is not an artificial break and cannot be condoned.

7. As per A-1 dated 22nd September, 1989, the applicant's pay was fixed as follows:

"At Rs.308/- p.m. in addition to pension and PEG but without adhoc relief, in the scale of Rs.260-6-290-HB-6-326-8-366-EB-8-390-10-40 during the period from 8.8.83 to 4.11.83, 7.11.83 to 6.12.83, 9.1.84 to 31.3.84, 3.4.84 to 14.5.84, 3.7.84 to 29.9.84, 22.10.84 to 3.1.85, 3.7.84 to 29.9.84, 22.10.84 to 3.1.85, 7.1.85 to 30.3.85, 2.4.85 to 24.6.85, 7.1.85 to 30.3.85, 2.4.85 to 24.6.85, 10.7.85 to 23.9.85, 3.10.85 to 30.12.85 in terms of Ministry of Defence OM No.2(1)/83/D(Civ.I) dated 8th February 1983."


8. This was in giving effect to A-1 order of the Government of India, Ministry of Defence No.CP(P)/9181/295/NHQ/3919/D(Civ-I) dated 22nd September, 1989 fixing the pay of the applicant on his re-employment as Assistant Store Keeper during the casual/regular spells of re-employment. Therefore, for all practical purposes, his pay has been fixed considering his casual/regular spells of employment for the period from 8.8.83 to 30.12.85. If this is so, the question that arises is why this benefit should not be extended to him for the purpose of pensionary and other benefits as claimed in the OA, or can it be denied to him on the technical ground that the breaks cannot be condoned. Considering all the legal aspects of the issue, the Bombay Bench of this Tribunal in OAs 306/88, 516/88 and 732/88 has granted the benefits to other petitioners working in the Naval Establishments belonging to Groups 'C' & 'D' not exceeding 4313 employees (including those who have not got such benefits by filing fresh petitions and



implementation of the same by the Government). But the respondents contended that the applicant's case cannot be considered in terms of the above decision on the ground that he had break in service for more than 30 days. Had it been 30 days, as per the respondents, it could have been considered. Our attention is brought to the copy of A-6 judgement of the Hon'ble High Court of Kerala in OP No.11518 of 1998, K. T. Shanmughan vs. Flag Officer Commanding in Chief Headquarters, Southern Naval Command, Kochi and Ors., filed by a similarly situated employee. In that case, break of one day more (total 31 days) was condoned and the respondents were directed to regularize the casual service of the said applicant. In para 4 of the said judgement, the Hon'ble High Court observed as follows:

"4.It may be that Department was finding difficulty to pin point the actual length or duration of artificial/technical breaks. And that may be the reason for the condonation of break on a whole sale manner. However, a rethinking after implementation and adoption of a short cut method of prescription of a thirty days period as an upper limit for the benefit enuring from the judgement, according to us, leads us to come to a conclusion that the decision is hit by vice of arbitrariness. It violates the fundamental right envisaged under Article 14 of the Constitution of India and interference is warranted."


9. In the aforesaid matter, Hon'ble High Court made it clear that the department was finding difficulty to pin point the actual length or duration of artificial/technical breaks and that may be the reason for condonation of break on a wholesale manner and found that the decision is hit by vice of arbitrariness and violation of Article 14 of the Constitution of India. Accordingly, Hon'ble High Court interfered that matter and condonation of 31 days was granted. Learned counsel for the applicant argued that if 31 days condonation can be granted, imbibing the spirit of that judgement, 40 days condonation may also be granted to the applicant in this case. There is some force in this argument.



10. Respondents have filed R-1 Supreme Court judgement in Civil Appeal No.9922 of 1995 in Union of India & Ors. Vs. M.Dharani & Ors. where the question of service break has been agitated. The Hon'ble Supreme Court observed that "if the respondents are entitled to the benefit of the letter of 26th of June, 1995, they will be entitled to make a representation to that effect before the appropriate authority who will decide the same in accordance with law". Needless to say that Hon'ble Supreme Court had referred the matter to the discretion of the administration.

11. Considering the above two judgements and vires and spirit of the same, we are of the opinion that the said judicial pronouncements are in favour of applicant regarding condonation of break, which is reflected in Annexure A/3 order of the Ministry of Defence. But keeping in mind the judgement of Hon'ble Supreme Court, we are of the view that instead of giving a direction by us, it will be fitness of things if the matter is remitted to the respondents for appropriate orders.

12. Keeping all aspects in view, we feel that if this 40 days break is not condoned, an employee put in more years of service being denied of his pensionary benefits at the fag end of his service life, which in our view, is a denial of justice. In this view of the matter, it would be just and proper to direct the respondents to consider applicant's case afresh untrammelled by the observation made in Annexure A/5 order and take an appropriate decision in tune with the observations made in preceding paras and in the true spirit of the decisions of Hon'ble High Court and Hon'ble Supreme Court (supra). This exercise shall be carried out and the decision communicated to the applicant within a period of four months from the date of receipt a copy of order.

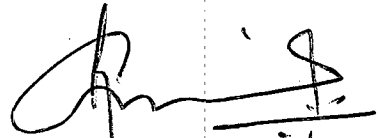


13. The O.A. is disposed of as above with no order as to costs.

(Dated, 5th February, 2003)



K.V.SACHIDANANDAN
JUDICIAL MEMBER



G.RAMAKRISHNAN
ADMINISTRATIVE MEMBER

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