

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

DATE OF DECISION

: 22.12.1989

P R E S E N T

HON'BLE SHRI S.P MUKERJI, VICE CHAIRMAN

&

HON'BLE SHRI A.V HARIDASAN, JUDICIAL MEMBER

ORIGINAL APPLICATION NO.3/89

&

ORIGINAL APPLICATION NO.15/89

B.Ravindran

.. Applicant in O.A No.3/89

Kunju Kunju Oommen

.. Applicant in O.A No.15/89

v.

1. The Director General of Posts,
Department of Posts,
New Delhi.
2. The Post Master General, Kerala Circle,
Trivandrum.
3. Union of India, represented by
its Secretary, Ministry of
Telecommunications, New Delhi. .. Respondents in both the
applications

M/s. M.R Rajendran Nair
& P.V Asha

.. Counsel for the appli-
cants in both the cases.

Mr.K.Narayana Kurup, ACGSC

.. Counsel for respondents
in O.A No.3/89.

Mr. P.Santhalingam, ACGSC

.. Counsel for respondents
in O.A No.15/89

O R D E R

Shri S.P Mukerji, Vice-Chairman

Since common questions of law, facts and reliefs

are involved in these two applications, filed under

Section 19 of the Administrative Tribunals Act by two

Ex-servicemen reemployed in civilian posts, they are

being dealt with by a common order as follows.

2. In the first application, O.A No.3/89, the applicant

(hereinafter referred to as 'first applicant') who has

been reemployed as Postal Assistant under the Post Master

 General, Kerala Circle, has prayed that the impugned

order dated 8.9.86 fixing his pay at Rs.260/- in the scale of Rs.260-480 with effect from 29.11.83 and at Rs.268/- with effect from 1.11.84 and the O.M dated 5th July, 1988 fixing his pay at the minimum of the pay without any advance increments scale at Rs.260/- on the ground that this pay plus pension and pension equivalent of gratuity is more than the last pay of Rs.400/- drawn in the Army should be set aside.

He has also challenged the circular dated 30.12.85 at Annexure-VII 'clarifying' that advance increments to re-employed Ex-servicemen should be given only where there is any hardship, i.e., when pay plus pension and pension equivalent of gratuity, whether ignorable or not, is less than the last pay drawn before retirement from the military. He has further prayed that in fixing his pay in the post of Postal Assistant from the date of his reemployment on 29.11.83 he should be declared to be entitled to advance increments for each completed year of his past military service. The applicant in the second application, O.A 15/89, (hereinafter referred to as the 'second applicant') who is also an Ex-serviceman re-employed as Postal Assistant with effect from 5.5.82, in that application dated 28.12.88, filed under Section 19 of the Administrative Tribunals Act, has prayed that the impugned order dated 4.9.86 (Annexure-II) fixing his pay at the minimum of Rs.260/- of the scale of Rs.260-480 without any advance increments for his service in the Air Force and directing recovery of pension relief during the period of reemployment, the circular dated 30.12.85 at Annexure-X which is the same as Annexure-VII in the

first application and the O.M dated 5th July, 1988 without advance increments fixing his pay at Rs.260/- per month since this pay plus pension and pension equivalent of gratuity was more than his pre-retirement pay in the Air Force, should be set aside. His further prayer is that he should be declared to be entitled to advance increments for each completed year of service in the Air Force with effect from 5.5.82 when he was re-employed as Postal Assistant. The brief facts of the case are as follows.

3. The first applicant was in the Air Force from 4.11.65 to 30.11.80. His pre-retirement pay in the Air Force was Rs.400/- per month and he was in receipt of a pension of Rs.187/- from the Air Force for his military service. The pension equivalent of gratuity was Rs.20.17. He was reemployed as a Postal Assistant with effect from 29.11.83 in the scale of Rs.260-8-300-EB-8-340 -10-360-12-420-EB -480. In the Air Force he was working in posts equivalent or higher than the post of Postal Assistant for eleven years. His grievance is that contrary to the orders of the Government of India dated 25.11.58 he was not given one increment for each completed year of military service in equivalent or higher grade, but his reemployment pay was fixed at the minimum of the pay scale at Rs.260/- with next ^{increment} accruing on 1.11.84 as per Annexure-II. He represented against this denial on 29.9.86(Annexure-III). His contention is that in

accordance with the basic instructions contained in the O.M of 25.11.58 (Annexure-IV) normally the initial pay on reemployment is to be fixed at the minimum of the pay scale, but where such fixation causes undue hardship, the initial pay may be fixed at a higher stage by granting one increment for every completed year of military service in posts equivalent to or higher than the post in which one is reemployed. This O.M also provides that the total amount of initial pay so fixed and the gross amount of pension and pension equivalent of gratuity should not exceed the pre-retirement pay. The applicant further contends that for Ex-servicemen who retired before attaining the age of 55 years, the Government of India as a policy decision directed in the order dated 16.1.64 (Annexure-V) that military pension upto Rs.50/- should be ignored for purposes of pay fixation on reemployment. This exemption limit was increased to Rs.125/- of military pension in the order dated 19.7.1978 (Annexure V(a)) and vide the memo dated 8.2.83 (Annexure-VI) the entire military pension for Non-Commissioned officers like him was ordained to be ignored. Thus when he was reemployed as Postal Assistant on 29.11.83 the entire amount of his pension and pension equivalent of gratuity totalling to Rs.207.17 had to be ignored for the purposes of pay fixation. If his military pension is ignored for the purposes of pay fixation he would be entitled to a much higher pay in the pay scale of Postal Assistant than the minimum, by earning one increment for each year's of

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military service in equivalent or higher grade till the ceiling of the pre-retirement pay is reached. In other words, between the minimum of the pay scale of Postal Assistant of Rs.260/- and the ceiling of the pre-retirement pay of Rs.400/- the monetary gap of Rs.140/- would give him the leeway of counting military service for increments. He would not have got the benefit of these increments if this gap of Rs.140- between the minimum of the pay scale and the ceiling of Rs.400/- is not ignorable consumed by reckoning his/military pension. His plea is that since his entire military pension stood ignored at the time of his reemployment, the field was clear for him for reckoning his military service in equivalent or higher grade for purposes of increment. Since, according to him, he had put in eleven years of service in equivalent or higher grades in the Air Force , his pay at the time of reemployment on 29.11.83 should have been fixed at Rs.350/- per month which by ignoring his military pension would be well within the ceiling of last pay of Rs.400/- drawn by him in the Air Force.

4. However, unfortunately for him the clarificatory orders issued by the respondents at Annexure-VII dated 30.12.85 queered the pitch against the applicant/drawing advance increments for his military service on reemployment. a yardstick for recognising This order prescribed/the hardship which would entitle the reemployed Ex-servicemen to get the benefit of advance increments for military service in accordance with the

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as a clarification of this O.M
O.M of 1958. It laid down that where the minimum of
the pay plus military pension and pension equivalent
of gratuity irrespective of whether any part of pension
is ignorable or not, is more than the last military pay
drawn by the Ex-serviceman, there cannot be a case
of hardship and no advance increment would be allowed.

Based on this 'clarification' his reemployment initial pay
was pegged down to the minimum of the pay scale of Postal
Assistant at Rs.260/- because his case was not considered
to be a case of hardship on the ground that this pay(Rs.260/-)
plus his military pension (Rs.187/-) and pension equivalent
of gratuity(Rs.20.17/-) totalled upto Rs.467.17 which was
not less but
more than his pre-retirement military pay of Rs.400/-.

The applicant has challenged the clarification as
arbitrary and against the provisions of pay fixation
of re-employed persons. According to him the general
principle of re-employment pay is that re-employment pay
plus pension and pension equivalent of gratuity should
not exceed the last pay drawn. If the pension and
pension equivalent of gratuity are to be ignored for
purposes of pay fixation of reemployment there is no
pay
reason why the initial pay on reemployment should not
be fixed at a stage higher than the minimum of the pay
scale by giving him the benefit of military service
in equivalent and higher grade so long as the ceiling
of last pay drawn is not pierced. He has also challenged

the clarificatory order at Annexure-VII as it purports to take retrospective effect by adversely affecting his reemployment pay which was to be fixed long before the order was issued. He has also argued that even on the basis of the clarificatory order it cannot be said that the minimum of pay scale plus military pension is more than what he was getting last in military service, i.e., Rs.400/- because apart from Rs.400/- he was getting free food, accommodation, ration, clothing and other facilities which he is not getting on reemployment. These he has quantified to be worth Rs.1,000/- per month. His argument is that if these perquisites are monetised and added to the pre-retirement pay of Rs.400/- it cannot be said that his reemployment pay plus military pension is more than the last pay drawn by him and therefore he is better off on reemployment than when he was in the military.

5. The circumstances of the second applicant are more or less the same except that he was reemployed as a Postal Assistant on 5.5.82 i.e., before 8.2.83 when vide the order of that date (Annexure-VIII in the second application) the entire military pension of Non-Commissioned was ordered to be ignored for fixing their pay on reemployment. When the second applicant was reemployed the exemption limit was Rs.125/- of military pension vide

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the memorandum of 19.7.78(Annexure-VII). The applicant was working as a Combatant Clerk in the Air Force from 10.1.67 to 31.1.82. His military pension was Rs.170/-, the pension equivalent of gratuity was Rs.18.25 and his pre-retirement pay was Rs.319/-. He had rendered eight years eleven months and twenty three days of military service in equivalent and higher grades and was thus entitled to eight increments in the pay scale of Postal Assistant, which would have given him an initial pay of reemployment of Rs.324/-. Since from his total military pension of Rs.188.25, Rs.125/- was to be ignored for purposes of pay fixation, the non-ignorable part of pension was Rs.63.25. Since the last military pay drawn by him was Rs.319/-, his reemployment pay was fixed at Rs.319/- less the non-ignorable part of pension of Rs.63.25, i.e., Rs.255.75. The position changed with effect from 25.1.83 when by virtue of the order dated 8.2.83(Annexure-VIII) his total pension had to be ignored in fixing his reemployment pay. Thus the ceiling of his reemployment pay could be Rs.319/- and he could be entitled to the benefit of advance increments for eight years of his military service in equivalent or higher grades. But unfortunately again for him also because of the clarificatory memo of 30.12.85(Annexure -X) since the minimum of the pay

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scale of Rs.260/- plus his military pension(Rs.170/-) plus pension equivalent of gratuity(Rs.18.25) totalling to Rs.448.25 was more than the last military pay drawn by him of Rs.319/- his case was not considered to be one of hardship and his reemployment pay was fixed at the minimum of the pay scale at Rs.260/-. Since the second applicant also has advanced the same arguments as the first applicant, it is not necessary to repeat them.

6. The respondents in the first application have indicated that the question of granting advance increments for each year of service rendered before retirement in a post not lower than the post in which one is reemployed is allowed only where fixing the initial pay at the minimum of the pay scale causes undue hardship. The D.G, Posts in his letter dated 30.12.85 has defined hardship from the point where pay plus pension plus pension equivalent of gratuity(whether ignorable or not) is less than the last pay drawn at the time of retirement. They have argued that the policy decision in the order dated 8.2.83 ignoring the total military pension was not intended to give undue advantage to the reemployed pensioners. Referring to the advice given by the Department of Personnel and Training(Annexure R1(a) in of the first application), it has been stated that the O.M of 25.11.1958 the concept of hardship was introduced to ensure that there was no drop in the total packet of

pay and pension on reemployment with reference to pre-retirement pay of a pensioner. With the O.M of 8.2.83 whereby the entire pension was ignored "in almost all the cases the total of the gross pension together with the minimum far exceeded pre-retirement pay. In such cases, there was no hardship. To have allowed advance increments by comparing only the minimum to the pre-retirement pay would have entailed double and unintended benefit. Hence a conscious decision was taken that only where pay at the minimum plus the gross pension fell short of pre-retirement pay, it could be considered a case of hardship and grant of advance increment could be considered". They have justified giving advance increments to two Ex-servicemen unlike the applicants, named by the first applicant by stating that/they had not opted for the order of 8.2.83 of total exemption of pension, hence the applicant cannot claim equal treatment.

7. On the second application the respondents have stated that the applicant opted for coming over to the O.M of 8.2.83, but he was not satisfied and made a representation to reconsider his case. He moved the Tribunal who directed the D.G to consider his representation by passing a speaking order and a speaking order was passed at Annexure -XIV affirming the order dated 5.7.88 and indicating why his pay had to be fixed at the minimum of the pay scale. They have conceded that he had rendered more than eight

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years of military service in equivalent or higher grades but by allowing eight increments his pay on reemployment would be Rs.324/- which would be more than the last pay of Rs.319/- drawn by him in military service. Accordingly his pay was fixed by taking into account the non-ignorable part of pension and refixed at the minimum of the pay scale because that pay plus pension and pension equivalent of gratuity was more than the last pay drawn by him in the military. The respondents have not answered the point raised by the applicants that if the non-monetary portion of their emoluments which they were getting as perquisites are taken into account, the ceiling of the last pay drawn in military service would be much more than what they were getting in monetary terms.

8. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The short point in these cases simply put is this. For reemployed persons the general principle is that pay on reemployment plus gross pension should not exceed the last pay drawn. Where it exceeds the last pay drawn the basic pay on reemployment is reduced so that the reduced pay plus gross pension is equal to the last pay drawn. In certain circumstances the reemployed pensioners are allowed one advance increment for each completed year of service in equivalent or higher grades rendered before retirement. But again the reemployment pay with advance increments plus

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gross pension should not exceed the last pay drawn and to that extent the advance increments are reduced in full or in part. In case of Ex-servicemen who retired before attaining the age of 55 years, in order to compensate them for premature retirement and in recognition of their services in the Armed Forces for the protection of the country, part or the whole of the military pension has been ignored for the purposes of fixation of their pay on reemployment in civilian posts. That is while reckoning their pay on reemployment with advance increments for their past equivalent service, the ignorable part of the pension is not added to see whether the total exceeds the last pay drawn before retirement. As a result of part or whole of the pension being ignored, they become entitled to higher pay on reemployment with advance increments than if their pension had not been ignored. The respondents while accepting that part or the whole of pension of reemployed Ex-servicemen has to be ignored for fixing their reemployment pay at the minimum of the pay scale, have decided that for the purposes of granting advance increments on the basis of their military service, the ignorable part of the pension also has to be considered and if the minimum of the pay scale plus the ignorable and non-ignorable part of pension exceed the last pay drawn, they will not be allowed advance increments even though the reemployment pay with advance increments plus the non-ignorable

part of pension (which is nil in these cases) is far less than the last pay drawn before retirement. The point at issue is whether the pension which is ignored for purposes of pay fixation on reemployment can be taken into account for denying the Ex-servicemen the benefit of advance increments within the limit of last pay drawn.

immediately
9. We are up against the judgment of a [✓]
Single Member Bench of this Tribunal dated 30.9.1988 in O.A.K 129/88 and others , a copy of which has been appended as R-1(b) with the counter affidavit dated 14th June, 1989 filed by the respondents in the second application, O.A 15/89. In that order it was held that the clarificatory orders issued in 1986 and 1987 categorising cases of hardship being those where pay plus pension and other retirement benefits, whether ignorable or not, is less than the last pay drawn at the time of retirement cannot be faulted for purposes of granting advance increments on reemployment of Ex-servicemen. We respectfully and emphatically differ from the learned Single Member [✓]. For the purposes of convenience, the relevant part of the judgment of the Hon'ble Single Member is quoted below:-

"10. The clarifications issued in the year 1986 and in 1987 have only the effect of laying down what has been really meant by the concerned Office Memoranda. They stress that for the purpose of fixation of the initial pay at a higher stage, there must be hardship which can

"arise only where the pay plus pension and other retirement benefits, whether ignorable or not, is less than the last pay drawn at the time of retirement. The submission of the counsel of the applicants is that when pension or a portion thereof has been directed to be ignored by the Office Memoranda of 1978 and 1983, it should not have been taken into account as has been done in the clarificatory letters. I do not see any merit in the submission. Merely because the initial pay fixed is lower than the pre-retirement pay, it cannot be said that there is hardship, for the re-employed Government servant is enabled to draw pension, which when taken along with the initial pay that is fixed on re-employment will be far in excess of the pre-retirement pay.

"11. It was argued by Advocate Mr.K.R.B Kaimal on behalf of the applicants in O.A 231/87 that the clarificatory order of 1987, even if acceptable, can operate only prospectively. It was submitted that by a subsequent administrative instruction, the benefits of an earlier administrative instruction cannot be deprived with retrospective effect. Reliance was placed on the Judgement of the Supreme Court in C.Singhad Vs. Director General, Armed Force Medical Services (AIR 1972 SC 628). That was a case where the condition of service of an Army Officer was altered to his prejudice by a subsequent Army instruction with retrospective effect, which was held to be bad. The decision has no application to the facts of these cases. As regards re-employed pensioners, how the initial pay is to be fixed has been laid down in the O.M dated 25.11.1958. The subsequent Office Memoranda issued in 1978 and in 1983 provided for not computing portion of the pension or the pension in full in the matter of the ceiling prescribed by the O.M. of 1958. On the question of the fixation of pay at the initial stage of the scale of the re-employed

"post, there has absolutely been no alteration. So also by the later Office Memoranda, no change has been made in the principle to be followed in fixing the initial pay at a higher stage in case of undue hardship. The clarificatory orders have only laid down what has actually been intended and it has been done on consultation with the Department of Personnel & Training. By no stretch can it be said that the clarificatory letters have the effect of subsequent instructions varying or altering the earlier instructions on the subject to the detriment of the re-employed pensioner."

10. First and foremost we do not agree with the orders of 1986 and 1987 cannot be passed as innocuously clarificatory in nature. Referring to the so-called clarificatory order dated 30.12.85 at Annexure-VII in the first application, the respondents in their counter affidavit dated 12th April, 1989 enclosed the advice of the nodal Department of Personnel and Training at Annexure R-1(a). The relevant portion of the advice is quoted below:-

"In OM dt. 25.11.1958 the concept of hardship was to ensure that there was no drop in the total packet of pay and pension on re-employment with with reference to pre-retirement pay of a pensioner. With the issuance of Ministry of Defence OM dated 8.2.83, the entire pension being ignored in almost all the cases the total of the gross pension together with the minimum far exceeded pre-retirement pay. In such cases, there was no hardship. To have allowed advance increments by comparing only the minimum to the pre-retirement pay would have entailed double and unintended benefit. Hence a conscious decision was taken that only where pay at the minimum plus the gross pension fell short of pre-retirement pay, it could be considered a case of hardship and grant of advance increment could be considered. (Emphasis added)

clearly
 The above will show that defining hardship was effected not in the process of a clarification, but in the expression

of "a conscious decision" that where the minimum of the pay scale on reemployment and gross pension fell short of the last pay drawn before retirement, only then hardship can be presumed for the purposes of granting ⁶ advance increment.

11. If it is a conscious decision which was promulgated by the circular of D.G,P&T dated 30.12.85 by established law it cannot be given effect to those like the applicants who had been reemployed well before that date. Even the statutory rules cannot be given retrospective effect where it adversely affect vested rights. In P.M.Agarwal and others v. State of U.P and others, ATR 1987(2) SC 128, the Supreme Court held that even the statutory rules framed under the proviso to Article 309 of the Constitution cannot be amended or altered with retrospective effect so as to take away or impair vested rights. In Syed Shamim Ahmed v. State of Rajasthan and others, 1981(1) SLR 100, it was held that the Government is not entitled to resile from its own circular. The basic order of 25th November, 1958(Annexure-IV in the first application) allows the fixation of pay of reemployed pensioners at a higher stage than the minimum in the following terms:-

" In case where it is felt that the fixation of initial pay of the re-employed 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 increments for each year of service which the officer has rendered before retirement in a post not lower than in which he is re-employed".

The above is, however, subject to the ceiling of the pay so fixed plus gross pension not exceeding the last pay drawn before retirement. The circular of the Ministry of Finance's dated 16th January, 1964(Annexure-V ibid) while raising the ignorable portion of military pension to Rs.50/-, states as follows:-

" Quantum of Civil/Military pension to be ignored in fixing pay on re-employment - The Government have had under consideration the question of raising the limit laid down at Art. 521 and 256 of the Civil Service Regulations consequent on the liberalisation of pension Rules and the general increase in pay scales on the basis of the Second Pay Commission's recommendations. It has been decided that in the case of persons retiring before attaining the age of 55, the pension as shown below may be ignored in fixing their pay on re-employment:-

- (i) in the case of pension not exceeding Rs.50 per mensem the actual pension;
- (ii) in other cases, the first Rs.50 of the pension

Pension for the purpose of these orders includes pension equivalent of gratuity and other forms of retirement benefits".

There is not even a whisper of an indication that the ignorable part of pension will not be ignored in determining the pay on reemployment above the minimum of the pay scale. The ignorable portion of the pension is to "be ignored in fixing their pay on reemployment", which also includes the question of fixing the pay higher than the minimum of the pay scale of the re-employment post. This tenor and line of policy was reiterated in the order dated 19th July, 1978(Annexure -V(a) ibid)

when the ignorable part of the pension was increased to Rs.125/- and in the order dated 8.2.83(Annexure-VI ibid) where it was increased to Rs.250/- for military officers and to the entire pension for Non-Commissioned officers.

The mischief of reintroducing the ignorable part of pension for denying advance increments on re-employment was perpetrated through the circular dated 30.12.85 (Annexure-VII) in the garb of a clarificatory instruction in the following terms:-

" and say that the Department of Personnel and Training after consulting the Ministry of Finance have given the following clarification about the mode of pay fixation of re-employed pensioner (Ex-servicemen) while implementing the above O.M. The same is detailed below:

When a re-employment 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 arise only if there is any hardship. Hardship is seen from the point where pay plus pension plus pension 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.

3. In the light of the above decision, the Heads of Circles are requested to review all such previous case, in which the pay of the re-employed pensioners has been otherwise fixed under the aforesaid 1983 orders in consultation with their IFAs or by the Directorate and report the action taken thereof".

Not only there was a denial of advance increments, but the denial was given retrospective effect. This, as we have stated earlier, is even otherwise against good law and by the Department of Personnel's own showing, was not a clarificatory order but a conscious decision taken subsequent to the policy of ignoring part or whole of the military pension of Ex-servicemen.

12. The theory of double benefit which the Department of Personnel has adopted in their advice at Annexure R-1(a) part of which was quoted in para 10 above, had already been considered by a Full Bench of this Tribunal presided over by the Hon'ble Chairman Mr. Justice Amitav Banerji in a similar case of Ex-servicemen. In that case also the re-employed Ex-servicemen during the period of re-employment, were being denied not advance increments but pension relief even on the ignorable part of pension on the plea that on re-employment they are getting dearness allowance on the notional unreduced full pay of the re-employment post even though their actual pay is determined by reducing the full pay by the amount of non-ignorable part of pension. By a majority judgment in T.A.K 732/87 and others dated 20th July, 1989 to which one of us (Shri S.P Mukerji, Vice-Chairman) was a party, it was held that since the ignorable part of the military pension plays no part in the determination of reemployment pay, dearness allowance paid on the reemployment pay should have no effect on the relief on pension relatable to the ignorable part of pension and the question of re-employed pensioners getting double benefit of dearness allowance does not arise. The Madras Bench consisting of Hon'ble

Shri G.Sreedharan Nair and Hon'ble Shri Srinivasan in T.A.K 334/87 held that since the ignorable part of pension is not taken into account in reducing the re-employment pay of the pensioners, in calculating the dearness allowance, the ignorable part of the pension does not play any part in fixation of pay and dearness allowance. Therefore, the situation of giving double benefit of dearness allowance and pension relief on the ignorable part of pension does not arise. This approach was upheld by one of us (Shri S.P Mukerji, Vice-Chairman) and the Hon'ble Chairman. The following extracts from the judgment rendered by him will be pertinent:-

"9. The position however undergoes a qualitative change if a part of or whole of the pension is to be ignored in fixing the effective pay on re-employment. If the whole of the pension is ignored, the effective pay on re-employment becomes equal to the pay of the post. The ineffective pay vanishes and the conceptual link between ineffective pay and pension completely breaks down. The dearness allowance which such re-employed ex-servicemen receives is 100% related to the effective pay and no element of dearness allowance can be related to ineffective pay which he can be deemed to be receiving in the shape of pension, because there is no ineffective pay at all. The pension assumes an independent status untrammelled by the fact of reemployment and impotent to reduce the pay of the post. In such a situation the pension relief which is basically and organically related to and derived from pension cannot be touched by the re-employing authority. Where the re-employing authority cannot reckon pension for the purpose of fixation of re-employment pay it will be illogical and irrational to assume that he can touch the pension relief. The situation from double payment of relief on pension

"also does not survive because no part of the dearness allowance can be related to ineffective pay cum pension as indicated above.

"10. The same 'ratio' will apply where a part of pension is to be ignored for the purpose of pay fixation. In such a case the pay of the reemployment post is reduced by the amount of non-ignorable part of the pension yet the dearness allowance which the reemployed ex-serviceman receives is given on the reduced pay as also on the ineffective pay which he is receiving as the non-ignorable part of the pension. The dearness allowance however does not cover the ignorable amount of pension because this amount of pension plays no part in the determination of the basic pay of the re-employed ex-servicemen, in the same manner as if he was not receiving the ignorable part of pension at all. Where the ignorable amount of pension cannot be reckoned by the re-employing authority, he cannot touch that part of pension relief either, which is relatable to the ignorable part of pension. Thus I find that the theory of double payment on the basis of which the respondents have built up their case of withdrawal or suspension or recovery of relief (including adhoc relief) on pension of ex-servicemen during the period of their re-employment, will be valid only for the non-ignorable part of the pension and is wholly unwarranted in respect of the ignorable part of the pension".

The principle which was enunciated and approved by the Larger Bench was that if any part of the pension is to be ignored for the purposes of fixation of salary on reemployment, the ignorable part of the pension should be taken as 'non est' as if the re-employed pensioner is not in receipt of the ignorable part of pension and that pension and relief thereon cannot be touched in the matter of fixation of pay and allowances on the reemployment post. On that basis we come to the logical conclusion in these cases also that if ignorable part of the pension is not relevant for the purposes of pay fixation and is to be considered to be 'non est' for that purpose it cannot be taken into account to determine

whether there is any hardship for the purposes of granting advance increments on the reemployment post.

Since the ignorable part of pension has no nexus with fixation of pay on reemployment it can have no nexus to determine whether there is any hardship in pay fixation.

13. Since the ignorable part of the pension is extraneous to the consideration of fixation of pay on reemployment by the conscious and consistent policy of the Government in respect of Ex-servicemen, to take it into account to determine whether there is any hardship in fixing the pay of the re-employed Ex-servicemen at the minimum of the pay scale will be like determining the hardship for the purposes of grant of advance increments by taking into account the ancestral property of the reemployed Ex-serviceman or whether he has any other sources of income. Since the other sources of income are not taken into account for granting or not granting advance increments to the re-employed pensioners, there is no reason why the ignorable part of the pension should be taken into account to deny him the benefit of advance increments by saying that he has no hardship.

14. We are impressed by the argument of the learned counsel for the applicants that apart from the last pay drawn in military service the applicants were receiving various other facilities and perquisites in kind like

free rations, clothing and travel facilities etc. which they are not getting during re-employment. If the monetary equivalence of these facilities are also added to the last pay drawn the ceiling of last pay drawn would be much higher. Accordingly to say that reemployment pay with increments plus pension is more than the last military pay drawn, will be unrealistic as in the reckoning of the last pay drawn, the perquisites are not taken into account. If they are taken into account reemployment pay with increments plus pension even including the ignorable part could be less than the last pay drawn including the perquisites. We are not taking into account the real value of the military pay last drawn which will be much more than its monetary value because of the inflation factor taking away about 10% of value every year. Thus Rs.300/- of military pay drawn three years ago will be equivalent to Rs.390/- if not more at present value.

15. Further the criterion of hardship enunciated is inequitable also. To take an example, suppose there are two reemployed Ex-servicemen who were before retirement from the military were holding identical posts in the scale of Rs.100-300-500. Suppose the first Ex-serviceman retired from the military when his last pay was Rs.500/- and was granted a military pension of Rs.200/- . Suppose the second Ex-serviceman retired from the same post but with a pay of Rs.300/- and was granted a military pension

of Rs.100/- . Supposing both of them are re-employed in identical posts on a pay scale of Rs.200-500. The first Ex-serviceman who is in receipt of a military pension of Rs.200/- will be given advance increments over and above Rs.200/- so that his re-employment pay can go upto Rs.500/- which by ignoring and not adding the ignorable pension of Rs.200/- will not exceed the last pay of Rs.500/-. In accordance with the clarification of Ministry of Finance since the minimum of the pay scale on re-employment, i.e., Rs.200/- with the pension of Rs.200/- is less than the last pay drawn of Rs.500/- he will be entitled to the advance increments. On the other hand, in case of the second Ex-serviceman no advance increments will be given to him even though his pension was only Rs.100/- because this pension along with the minimum of the pay scale of Rs.200/- is not less than the last pay drawn of Rs.300/-. The above illustration will show that between two Ex-servicemen who retired from identical posts and are re-employed in identical posts the poorer Ex-serviceman will get pay at the minimum of the pay scale, while advance increments will be given to the more affluent Ex-serviceman. Also it will be clear that for the second Ex-serviceman the order regarding ignoring his military pension of Rs.100/- gives him no benefit at all because by the clarificatory order even by ignoring his military pension for pay but not ignoring it for increments his re-employment pay would still be Rs.200/-. While if this pension is ignored even for

assessing hardship he would have been entitled to get to reach the ceiling of last pay drawn. Rs.100/- more in shape of advance increments. It will also be clear that by not ignoring the ignorable part of pension for the purpose of advance increments and hardship, the Ex-serviceman with ignorable pension would get the same re-employment pay as any civilian pensioner whose entire pension has to be taken into account for pay fixation. It will thus be seen that the clarificatory order purports to undo the policy of giving some benefits of reemployment pay to Ex-servicemen who had retired before attaining the age of 55 years.

16. From the above analysis we are convinced that for the purposes of advance increments also, the ignorable part of military pension of Ex-servicemen has to be totally ignored. In other words, where the minimum of the pay only scale of the reemployment post plus/the unignorable part of military pension does not exceed the last military pay drawn, the reemployed Ex-serviceman would be entitled to one advance increment for each completed year of military service in equivalent or higher posts. Since we are differing from the judgment dated 30.9.88 on this issue given by a Single Member Bench of this Tribunal in O.A.K 129/88 etc. (Annexure R-1(b) in O.A.K 15/89), we direct that these two cases may be referred to the Hon'ble Chairman for constituting a Larger Bench for

a decision whether ignorable part of military pension of re-employed Ex-servicemen should also be added to the minimum of the pay scale of the re-employment post along with the non-ignorable part of pension to deduce that the advance increments for equivalent service cannot be given because the total of the minimum of the pay scale of the re-employment pay plus ignorable and non-ignorable gross pension exceeds the last military pay drawn by him as indicated in D.G(P)'s circular dated 30.12.85 at Annexure-X of the case file No. OA 15/89. If the Larger Bench agrees with our analysis, reference to ignorable part of pension from that circular has to be deleted.

17. So far as the two applicants before us are concerned since they were re-employed with effect from 29.11.83 and 5.5.82 before the so called clarificatory circular of 30.12.85 was issued and since we have found (vide para 10 supra) that this circular was not based on any clarification but a conscious decision, the circular cannot be applied to deny advance increments to the applicants, so long as their pay with increments along with only the non-ignorable part of their gross pension does not exceed the last pay drawn by them before retirement. They will also be entitled to relief including adhoc relief on the ignorable part of pension during the entire period of

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their reemployment. In the judgment dated 30.9.1988 of the Single Member Bench of this Tribunal, extracts of which have been quoted in para 9 above, held that the orders issued in 1986/87 being clarificatory in nature, the question of these letters being interpreted as subsequent instructions varying or altering the earlier instructions on the subject to the detriment of the re-employed pensioners does not arise. We have differed with this approach in our analysis in paras 10 and 11 above and shown that these orders were as a result of a 'conscious decision' as indicated by the Department of Personnel's noting copied at Annexure R-1(a) in the first application(OA 3/89). Thus ~~even~~ if for the sake of argument, it is held that for purposes of advance increments even the ignorable part of pension has to be taken into account by the instructions of 1985/87, ^{even then} the same cannot be given retrospective effect so as to deny the advance increments to the retired Ex-servicemen who had been re-employed prior to the issue of the clarificatory orders.

18. In the circumstances/in view of the difference of opinion between us and the judgment of the Single Member Bench dated 30.9.1988 in O.A.K 129/88, the Registry is directed to refer the following issues to the Hon'ble Chairman for constituting a Larger Bench:-

(a) Whether 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 O.M of 25.11.58(Annexure-IV in O.A 3/89), the whole or part of the military pension of Ex-servicemen which are to be ignored for the purposes of pay fixation in accordance with the orders dated 16.1.64(Annexure-V), of 19.7.78(Annexure V(a)) and of 8.2.83 (Annexure-VI), can 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-serviceman.

(b) ^{Yes}
If ~~not~~, i.e., if it is decided that ignorable pension also has to be reckoned for purposes of advance increments, whether the orders issued to this effect in 1985 or 1987 can be given retrospective effect to adversely affect the initial pay of Ex-servicemen who were re-employed prior to the issue of these instructions.

19. Since a number of cases are pending where the aforesaid two issues are relevant, an early decision of the Larger Bench would help finalisation of these cases of re-employed Ex-servicemen.

checked by

Sd/-
(A.V HARIDASAN)
JUDICIAL MEMBER

Sd/-
(S.P MUKERJI)
VICE CHAIRMAN