

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

ORIGINAL APPLICATION No. 167/2013

TUESDAY,....., this the ...3rd..... day of November, 2015

CORAM :

HON'BLE MR. U.SARATHCHANDRAN, JUDICIAL MEMBER
HON'BLE MR.P.K.PRADHAN, ADMINISTRATIVE MEMBER

M.P.Baburaj, s/o M.U.Peethambaran, aged 50 years,
Civilian Motor Driver, Command Transport Workshop,
Southern Naval Command, Naval Base, Kochi,
residing at Mannali House, Kumbalangy,
Kochi -682 007.

Applicant

(By Advocate Mr.M.R.Hariraj)

versus

- 1 Union of India, represented by the Secretary to
Government of India, Ministry of Defence,
New Delhi.
- 2 Flag Officer Commanding in Chief,
Southern Naval Command, Naval Base,
Kochi -682004
- 3 Officer in Charge, Command Transport Workshop,
Southern Naval Command, Naval Base,
Kochi -682004.
- 4 The Senior Accounts officer, Area Accounts Office (Navy),
Perumannoor, Kochi. Respondents

[By Mr. N.Anil Kumar, Sr.PCGC(R)]

This Original Application having been heard on 07.09.2015, this Tribunal
on *03-11-2015* delivered the following:

O R D E R

BY HON'BLE MR.U.SARATHCHANDRAN, JUDICIAL MEMBER

As per the amended OA, the grievance of the applicant is that the 2nd financial upgradation as per the Modified Assured Career Progression(MACP) Scheme granted to him was cancelled and that an order was issued by the respondents to recover the alleged over payments made to him.



2 Applicant joined service of the respondents as an Unskilled Labourer on casual basis w.e.f. 24.04.1991. He was initially regularised w.e.f. 01.07.1991. The date of his regularisation was later modified as 24.4.1991 as per order of this Tribunal in OA No. 548/09. Thereafter he was working under the respondents as unskilled labour on regular basis. In response to a notification for recruitment, applicant applied for the post of Civilian Motor Driver under respondent No.3, He was selected and appointed vide Annexure A/1 Order dt 20.6.2004. In December 2008, his pay was revised to Rs. 6070/- w.e.f. 1.1.2006, in the pay band 5200 -20200 in PB-1 with Grade Pay of Rs. 1800/-. On 21.6.2006, his pay was fixed at 6070/- in PB-1 with Grade Pay Rs. 1900/- in the cadre of Civilian Motor Driver taking into consideration of his past service. Second financial up gradation under MACP was granted to him and he was placed in the Grade Pay of Rs. 2000/- w.e.f. 2.7.2011. The pay fixation orders to that effect are Annexure A3(A) & A3(B) respectively. Since the date of his initial appointment was regularised w.e.f. 24.4.1991, the 2nd MACP granted also was ante-dated to 24.4.2011 vide Annexure A/5. Thereafter respondent No.2 took a stand that since the applicant has been newly recruited as Civilian Motor Driver he is entitled to MACP only on completion of 10 years. Respondent No. 3 cancelled Annexure A/3(A) & A/3 (B) communications vide Annexure A/7 communication dt. 28.6.2012. Applicant was asked to submit technical resignation. Thereafter his pay was revised to Rs. 6070/- with Grade Pay of Rs. 1800/- w.e.f. 1.1.2006 and with Grade Pay of Rs.1900/- w.e.f. 21.6.2006 vide Annexure A/8 communication. After filing the OA, applicant came to know about the issuance of A/11 communication to cancel the fixation benefit given to him under FR 22 (I)(a)(1) and hence the OA had to be amended. Applicant seeks relief as under :

- i. To quash Annexure A6,A7,A9, A10 and A11
- ii. Declare that the fixation of pay granted as per Annexures A2, A3(B) and the MACP placements granted to the applicant as per Annexure A3(A) and A5 are admissible and to direct the respondents to fix the pay of the applicant accordingly with all consequential benefits including arrears of pay and allowances with interest @ 12% per annum;
- iii. To direct the respondents not to make any recovery from the pay and allowances of the applicant based on the impugned orders and to direct the respondents to refund any amount already recovered from the pay of the applicant with interest @ 12% per annum;
- iv. Grant such other reliefs as may be prayed for and the court may deem fit to grant, and
- v. Grant the costs of this Original Application.

3. Respondents contend that as applicant was appointed in the post of Civilian Motor Driver (Ordinary Grade) only w.e.f 21.06. 2006 in the pay band 5200-20200 with Grade pay of Rs. 1900/- his MACP is to be granted from the date of direct entry grade on completion of 10, 20 & 30 years of service. It is contended that the Area Accounts Office (Navy) was not made a party under this OA (by amending the OA applicant has included the Officer in charge of the aforesaid office as Respondent No. 4). According to respondents, the financial up gradation under MACP was erroneously given to the applicant and hence it has to be recovered. As applicant had been given Annexure A/10 notice there is no violation of natural justice. His past service was counted for fixation of pay. Applicant was not carrying the same grade pay in his previous post but he was in a post carrying Rs. 1800/- as Grade Pay. On assumption of the post of Civilian Motor Driver (OG), he became entitled to the Grade Pay of Rs. 1900/- and hence no illegality is attributable to denying of MACP to the applicant.

4. A rejoinder was filed by the applicant reiterating the contentions in the O.A. It is further contended by the applicant that Annexure A/10 does not indicate that applicant was given opportunity for submitting a representation. Therefore it cannot be treated as granting an opportunity for making representation against the impugned action.

5. Additional reply statement was filed by the respondents producing Annexure Nos. R/4 to R/6 intimating that excess payment of Rs. 48,813/- would be recovered in 24 instalments. In response, an additional rejoinder also was filed by the applicant.

6. Heard Mr.M.R. Hariraj, learned counsel for the applicant and the learned Central Govt. counsel for the respondents.

7. The dispute in this case is whether the financial up gradation under MACP scheme granted to the applicant was done in accordance with the extant rules and instructions or not. There is no dispute that applicant was regularised as an unskilled labourer w.e.f. 24.4.1991 (initially w.e.f. 01.7.1991). It is also not in dispute that till his appointment as Civilian Motor Driver he was continuing as unskilled labour. Annexure A/1 appointment order shows that applicant was working as unskilled labour at that time

and that he was selected and appointed as Civilian Motor Driver (OG) through advertisement.

8. According to applicant, the past service rendered by him will not be forfeited in the light of Rule 26 of CCS(Pension) Rules, 1972. He further contends that FR 22 is applicable to Govt. servant who is appointed to a post on time-scale of pay also and that it takes into account the previous service rendered by the official while continuing in the service of Govt. of India. The relevant portion ie. FR 22 (I) (a) (1) reads:

"Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfilment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or (rupees one hundred only) whichever is more.

Save in cases of appointment on deputation to an ex cadre post, or to a post on ad hoc basis or on direct recruitment basis), the Government servant shall have the option, to be exercised within one month from the date of promotion or appointment, as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment or to have the pay fixed initially at the stage of the time-scale of the new post above the pay in the lower grade or post from which he is promoted on regular basis, which may be refixed in accordance with this rule on the date of accrual of next increment in the scale of the pay of the lower grade or post. In cases where an ad hoc promotion is followed by regular appointment without break, the option is admissible as from the date of initial appointment/ promotion, to be exercised within one month from the date of such regular appointment:

Provided that where a Government servant is, immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post held by him on regular basis by an amount equal to the last increment in the time-scale of the lower post or (rupees one hundred), whichever is more".

Rule 26 of CCS (Pension) Rules 1972 reads:

"26. Forfeiture of service on resignation

- (1) Resignation from a service or a post, unless it is allowed to be withdrawn in the public interest by the Appointing Authority, entails forfeiture of past service.
- (2) A resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment, whether temporary or permanent, under the Government where service qualifies.
- (3) Interruption in service in a case falling under sub-rule (2), due to the two appointments being at different stations, not exceeding the joining time permissible under the rules of transfer, shall be covered by grant of leave of any kind due to the Government servant on the date of relief or by formal condonation to the extent to which the period is not covered by leave due to him.
- (4) The appointing authority may permit a person to withdraw his resignation in the public interest on the following conditions, namely:-
 - (i) that the resignation was tendered by the Government servant for some compelling reasons which did not involve any reflection on his integrity, efficiency or conduct and the request for withdrawal of the resignation has been made as a result of a material change in the circumstances which originally compelled him to tender the resignation;
 - (ii) that during the period intervening between the date on which the resignation became effective and the date from which the request for withdrawal was made, the conduct of the person concerned was in no way improper;
 - (iii) that the period of absence from duty between the date on which the resignation became effective and the date on which the person is allowed to resume duty as a result of permission to withdraw the resignation is not more than ninety days;
 - (iv) that the post, which was vacated by the Government servant on the acceptance of his resignation or any other comparable post, is available.
- (5) Request for withdrawal of a resignation shall not be accepted by the Appointing Authority where a Government servant resigns his service or post with a view to taking up an appointment in or under a private commercial company or in or under a corporation or company wholly or substantially owned or controlled by the Government or in or under a body controlled or financed by the Government.
- (6) When an order is passed by the Appointing Authority allowing a person to withdraw his resignation and to resume duty, the order shall be deemed to include the condonation of interruption in service but the period of interruption shall not count as qualifying service.
- (7) A resignation submitted for the purpose of Rule 37 shall not entail forfeiture of past service under the Government."

9. A reading of the afore quoted provisions in the statutory rules framed under the Proviso to Article 309 of the Constitution of India makes it clear that FR 22(I) (a)(1) is applicable when a Government servant holding a post is promoted **or appointed** in a substantive post. In the instant case, direct recruitment to the post of Civilian Driver (OG) was by of a public notice inviting applications for that post. While working as a regular unskilled labour applicant applied for that post and he was selected. Annexure A/1 appointment order indicates that he was in the regular service of unskilled labourer when Annexure A/1 appointment order came through.

10. Respondents dispute the contentions of the applicant on the ground that the selection to the post of Civilian Motor Driver (OG) was a direct recruitment hence his service in that post can be reckoned only from the date of his appointment i.e. from 20.6.2006. According to them he had submitted a technical resignation also. Therefore, respondents contend that his right for MACP will arise only from the date of his appointment to the post of Civilian Motor Driver (OG) and not from the date on which he was regularised as unskilled labourer i.e. 24.04.1991. In support of the above

contentions respondents rely on clause 9 of the MACP scheme. Annexure R/1 is a copy of the MACP scheme. Clause 9 of the scheme reads:

"9. 'Regular Service' for the purpose of the MACPS shall commence from the date of joining of a post in direct entry grade on a regular basis either on direct recruitment basis or on absorption/ re-employment basis. Service rendered on ad hoc/ contract basis before regular appointment on pre-appointment training shall not be taken into reckoning. However, past continuous regular service in another Government Department, without a break, shall also be counted towards qualifying regular service for the purposes of MACPS only (and not for the regular promotions). However, benefits under the MACPS in such cases shall not be considered till the satisfactory completion of the probation period in the new post."

[emphasis supplied]

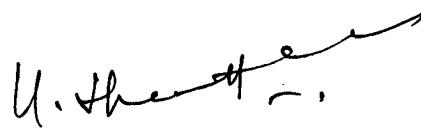
11. A reading of Clause 9 of the MACP scheme together with FR 22(I)(a)(1) and Rule 26 of CCS (Pension) Rules will make it clear that the past continuous regular service in another government department in the post carrying the same Grade Pay prior to regular appointment in the new department without break will also be counted towards qualifying service for the purpose of MACP. In the instant case, respondents pointed out that post of Civilian Motor Driver (OG) carried the Grade Pay of Rs. 1900/- whereas the Grade Pay of unskilled labourer was only Rs. 1800/-. It is worth noticing that MACP is a scheme for financial up gradation of employees who, for a very long time, did not have any opportunity for promotion or were in isolated posts. Financial up gradation as a respite for the stagnation in the career progression is the philosophy of the MACP scheme and its fore-runner ACP scheme. In the instant case, there is nothing to indicate that though the applicant was working as an unskilled labour from 24.4.1991 he had not been granted any benefits of promotion or financial up gradation. While continued in the Govt. service as unskilled labour he was appointed as Civilian Motor Driver. Under FR 22 (I)(a)(1), the circumstances for fixation of pay of Government servant arise when a person continuing as Government servant is appointed to another post. In such cases, such appointment cannot be treated as a promotion. Therefore a conjoint reading of clause 9 of MACP and FR 22 (I)(a)(1) makes it clear that the applicant by his sheer continuous service from 24-2-1991 had the requisite length of service for the 2nd financial up gradations under the MACP.

12 Therefore respondents are wrong in withdrawing the financial benefits already granted to the applicant. According to respondents, it is on account of the insistence of respondent No.4 the MACP benefit given to the applicant was withdrawn. Nevertheless, respondent No.4 is not an authority to decide the legal issues involved in this matter. He ought to have referred the matter to the DoPT/ Department of Legal Affairs through the ministry concerned.

13. In the light of the above interpretation and statutory rules, this Tribunal is of the view that the view taken by the respondent No.4 is not in tune with the aforesaid rules. In the result, O.A. is allowed. Respondents shall restore the MACP placements granted to the applicant. Parties shall suffer their own costs.



(P.K.PRADHAN)
ADMINISTRATIVE MEMBER



(U.SARATHCHANDRAN)
JUDICIAL MEMBER

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