

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. NO. 272 OF 2008

Thursday, this the 22nd day of October, 2009.

CORAM:

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Ms.K.NOORJEHAN, ADMINISTRATIVE MEMBER

Tomy Zacharias,
Assistant Director,
Subsidiary Intelligence Bureau,
Kottayam.

... Applicant

(By Advocate Mr. C.S.G. Nair)

versus

1. Union of India, represented by
the Secretary, Ministry of Home Affairs,
Sardar Patel Bhavan, New Delhi – 110 001.
2. The Director, Intelligence Bureau,
North Block, New Delhi – 110 001.
3. The Joint Director,
Subsidiary Intelligence Bureau,
Vazhuthacadu, Trivandrum – 14. ... Respondents

(By Advocate Mr. T.P.M.Ibrahim Khan, SCGSC)

The application having been heard on 09.10.2009, the Tribunal on 22-10-2009 delivered the following:

ORDER

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

Two of the conditions relating to the exercise of option to switch over to the revised pay scale introduced in the wake of the VI Pay Commission Recommendation are as under:-

(a) If the intimation regarding option is not received within three months from the date of publication of the Revised Pay Rules, the Government servant shall be deemed to have elected to be governed by the revised scale of pay with effect on and from the first day of January, 1996.

(b) The option once exercised shall be final.



2. The grievance of the applicant is that in view of the geographical situation of his place of posting at the crucial time when the option was to be exercised, the applicant was incapacitated from exercising his option and it was only when he could be out of that place, that he could find the junior drawing more pay on account of his exercised the option, which the applicant too could have, had he not been so incapacitated, exercised, in which event, there would not have been any disparity in the pay drawn by him and the junior. And, when on so coming to know of the disparity and the applicant claimed stepping up of pay, the respondents rejected his claim stating that the applicant having not exercised his option, the above condition at (a) above was pressed into service and his deemed option became final by virtue of (b) above. Hence this O.A. praying for a direction to the respondents to step up his pay at par with his junior and consequential benefits thereof.

3. Now the capsulated facts of the case are as under:-

(a) The applicant joined the services as Assistant Central Intelligence Officer Grade II (ACIO Gr. II) on 17-04-1976. He was promoted as ACIO Grade I and later on as Deputy Central Intelligence Officer (DCIO) in 1996. At the time of his promotion, he was asked to exercise his option for fixation of pay and the same was submitted by him on 14th November 1996, vide Annexure A-1. The option read, "As my next increment falls due on January 1, 1997, my pay may be fixed in the scale of DCIO from the next increment date under FR 22(l)(a)(i)" This was acted upon.

(b) The applicant's pay fixation and communication thereof used to take place through the Bangalore office, as for example, vide Annexure A-2, his pay was revised and fixed at Rs.8300 w.e.f. 01-01-1996. His further pay fixation took place taking into account the pay as DCIO from 01-01-1997, as requested for by him vide option exercised as mentioned above. Details of pay fixation as on 01-01-1996 had been given to the applicant through Annexure A-3.

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(c) Annexure A-4 is yet another pay fixation dated 27th March 1998. This was necessitated when the pay scale of Rs.2200-4000 in the grade of DCIO was revised to Rs.8000-13500/-.

(d) Annexure A-5 and A-6 are further orders on pay fixation, on the basis of upgradation of pre-revised pay scale of Rs.2000-3200 to Rs.2200-4000 and revision thereof in the revised pay scale in Rs.8000-13500/- etc., in the grade of DCIO. However, in all such pay fixation, the revised pay scale had been effective from 01-01-1996. All the communications had been made available only through the Bangalore unit to Itanagar and then to the applicant. In the process of repeated pay fixation, the applicant was subjected to recovery to the extent of Rs.4,439/- vide Annexure A-8.

(e) It was only when in January 2000, the applicant came to know about the junior Shri. Tuteja was drawing more pay than him that he had penned a representation dated 13-01-2000 (Annexure A-12) for stepping up of pay at par with the junior, which was however, rejected. Afterwards, the applicant again raised the issue, vide Annexure A-9 dated 05-03-2007. However, this had not also fetched the applicant the desired result as is evident from the impugned order dated 31st May 2007 (Annexure A-10). Hence this OA for a declaration for stepping up of pay to the level of the pay drawn by the junior Shri. P.K. Tuteja; for a direction to the respondents to accordingly step the pay of the applicant and afford all consequential benefits.

4. Respondents have resisted the O.A. According to them, the basic difference between the case of the applicant and his junior is that the applicant failed to exercise his option and that the junior availed of the option and this made the difference. Again, the respondents submitted that since in another case where option exercised was sought to be revised and the case was taken up with the DOPT, the latter rejected the request. Further, there is no provision for relaxation of the rules either for exercising of option beyond the time prescribed by the Rules or for changing the same.



5. Rejoinder and additional reply, followed by affidavit by the applicant have all been filed and taken on record.

6. Counsel for the applicant argued that this is indeed a very hard case. The applicant at the material point of time was somewhere at the remotest area, Chinese Border, called Ziro where communication was not at all available. There was no correspondence and it was such a secluded area that there was no scope for any communication. Hence, he could not exercise the option as required under the Rules. However, when he came to know of the disparity in pay between the applicant and his junior, he had taken up the matter but of no avail. The counsel submitted that the applicant has since retired and all that is now required is that the pay of the applicant be stepped up on notional basis, so that the increased pay would benefit the applicant in drawing some additional pension and terminal benefits.

7. Counsel for the respondents submitted that the applicant having not exercised his option, his case cannot be considered and stepping up of pay is not provided for to meet such a contingency.

8. Arguments were heard and documents perused. The applicant was in the pay scale of Rs.2000-3200 (pre-revised) when he was functioning as ACIO and on his promotion as DCIO, his pay scale was Rs.2200-4000 (pre-revised). At the time when the applicant gave the option for fixation of pay at the promotional post, he was at Bangalore. The Revised Pay Rules, 1997 did not come into existence by then. After the pay Rules came into existence, giving retrospective effect, under Rule 6 thereof, option should be exercised

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and those who did not exercise the option were deemed to have opted for pay fixation in the revised scales w.e.f. 01-01-1996. The applicant had of course, been prevented from exercising his option as required due to the geographical situation of his place of posting, where communication could not be normal. He has also stated that no forms were sent to him and no communication in this regard had been received. These facts have not been rebutted by the respondents in the counter or in oral submission. Para 5 of the reply which is in respect of para 4.3 of the O.A, refers. In the absence of calling for option at the relevant point of time, the question is whether the applicant should be given an opportunity for such an option beyond the date provided for as per the rules.

9. The purpose of exercise of option is only to ensure that the individuals avail of the best financial benefits available to them due to fixation of pay. Rules provide for retention of the old pay scale not only upto the date of their next increment, even subsequent increments, as could be seen from the proviso to Rule 5, which reads as under:-

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

10. In the instant case, the junior who was not posted to the remote area could exercise his option on time to get the benefit whereas, the applicant (senior) who was posted near Chinese Border could not exercise his option and only on coming to Itanagar in January 2000, could the applicant observe this anomalous situation of junior drawing more pay and hence moved his representation vide Annexure A-12.

11. In para 5 of their reply, the respondents have stated, "Further there is no provision in rules to relax the option once exercised or option not exercised." In other words, had there been a provision in the Rules for relaxation, the same would have been invoked, keeping in view the peculiar facts of this case. In another case of Chandran the respondents had taken up the case with the DOPT which however, refused to entertain the request. It was a case where option once exercised was sought to be varied and on the ground that one of the conditions of option being that option once exercised is final, the DOPT rejected the request. The case of the applicant is that he did not exercise his option – due to inevitable circumstances and the respondents had taken his silence as "deemed option to have the pay scale effective from 01-01-1996". The case of the applicant is distinguishable from that of the other individual on the following twin grounds:-

- (a) That the case of Shri. Chandran is one of change of option exercised, while the case of the applicant is deemed option to be replaced by option exercised.
- (b) The peculiar facts and circumstances of the case available in the case of the applicant are not available in the case of Chandran.

12. Though the respondents have in their counter had stated that there is no provision for relaxation of the Rules, the case of Chandran had been taken up with the DOPT "for fixation of his pay in the post of ACIO-I in terms of CCS(RP) 1996 rules, in relaxation of rules so that anomaly in his pay with reference to his junior may be removed" (Para 4 of reply statement refers) The stand taken by the respondents in the case of the applicant that there is no provision in rules to relax the option once exercised or option not exercised, vide para 5 of the reply is thus thoroughly



contradictory to the earlier paragraph. In fact, provision does exist for any such relaxation as could be seen from Rule 13 of the CCS(Revised Pay) Rules 1997 which reads as under:-

"13. Power to relax - Where the President is satisfied that the operation of all or any of the provisions of these rules causes undue hardship in any particular case, he may, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner."

13. Admittedly, Shri Tuteja, the junior is drawing more pay than the applicant and the applicant requests for stepping up of pay. His request for such a step up is certainly on the strength of the rules on step up. The said rule contained in order No. F 2(78)-E III(P)66 dated 04-02-1966 reads as under:-

"10. Removal of anomaly by stepping up of pay of senior on promotion drawing less pay than his junior.— (a) As a result of application of FR 22-C.—In order to remove the anomaly of a government servant promoted or appointed to a higher post on or after 1-4-1961 drawing a lower rate of pay in that post than another government servant junior to him in the lower grade and promoted or appointed subsequently to another identical post, it has been decided that in such cases the pay of the senior officer in the higher post should be stepped up to a figure equal to the pay as fixed for the junior officer in that higher post. The stepping up should be done with effect from the date of promotion or appointment of the junior officer and will be subject to the following conditions, namely:

(a) Both the junior and senior officers should belong to the same cadre and the posts in which they have been promoted or appointed should be identical and in the same cadre;

(b) the scale of pay of the lower and higher posts in which they are entitled to draw pay should be identical;



(c) the anomaly should be directly as a result of the application of FR 22-C. {now FR 22(1)(a)(i)}. For example, if even in the lower post the junior officer draws from time to time a higher rate of pay than the senior by virtue of grant of advance increments, the above provisions will not be invoked to step up the pay of the senior officer."

14. In OM dated 04-11-1993, cases where stepping up of pay cannot be pressed into service have been itemized. The same are as under:-

"(a) Where a senior proceeds on Extraordinary Leave which results in postponement of date of next increment in the lower post, consequently he starts drawing less pay than his junior in the lower grade itself. He, therefore, cannot claim pay parity on promotion even though he may be promoted earlier to the higher grade:

(b) If a senior foregoes/refuses promotion leading to his junior being promoted/appointed to the higher post earlier, the junior draws higher pay than the senior. The senior may be on deputation while the junior avails of the ad hoc promotion in the cadre. *The increased pay drawn by a junior either due to ad hoc officiating/regular service rendered in the higher posts for periods earlier than the senior, cannot, therefore, be an anomaly in strict sense of the term.*

(c) If a senior joins the higher post later than the junior for whatsoever reasons, whereby he draws less pay than the junior, in such cases the senior cannot claim stepping up of pay on a par with the junior.

(d) If a senior is appointed later than the junior in the lower post itself whereby he is in receipt of lesser pay than the junior, in such cases also the senior cannot claim stepping up of pay at par with the junior.

(e) Where a person is promoted from lower to a higher post his pay is fixed with reference to the pay drawn by him in the lower post under FR 22-C and he is likely to get more pay than a

direct appointee whose pay is fixed under different set of rules. For example, a UDC on promotion to the post of Assistant gets his pay fixed under FR 22-C with reference to the pay drawn in the post of UDC, whereas the pay of Assistant (DR) is fixed normally at the minimum under FR 22-B(2). In such cases, the senior direct recruitment claim pay parity with the junior promoted from a lower post to higher post as seniority alone is not a criteria for allowing stepping up.

(f) Where a junior gets more pay due to additional increments earned on acquiring higher qualifications."

15. The above illustrations, referred to in the order dated 4-11-1993 did not contain the situation as the one in hand, i.e. junior drawing more pay than the senior in the wake of revision of pay scales. It cannot be that cases of this nature would not have occasioned in the wake of the IV Pay Commission Recommendations. Absence of such a contingency in the above sets of reasons which do not qualify for stepping up of pay, goes to show that stepping up of pay is permissible in the case where the difference in pay is due to fixation of pay in the wake of Pay revision.

16. Of course, the stepping up could be permissible but there should not be any lapse on the part of the senior in performing his part such as exercising of option. This may be one of the requirements and in case such a requirement is not getting fulfilled due to reasons beyond the control of the individual, there should be a solution. It is for this reason that Rule 13 has been provided for. Such a power to relax has to be exercised, cautiously not capriciously and should receive liberal interpretation and not a rigid one. In this regard, the following decisions would be appropriate to refer to:-

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(a) In *Ashok Kumar Uppal v. State of J&K*, (1998) 4 SCC 179, the Apex Court has held as under:-

27. *In State of Maharashtra v. Jagannath Achyut Karandikar* it was held as under:

"The power to relax the conditions of the rules to avoid undue hardship in any case or class of cases cannot now be gainsaid. It would be, therefore, futile for the respondents to make any grievance."

28. *In J.C. Yadav v. State of Haryana*, it was held as under:

"The relaxation of the Rules may be to the extent the State Government may consider necessary for dealing with a particular situation in a just and equitable manner. The scope of Rule is wide enough to confer power on the State Government to relax the requirement of Rules in respect of an individual or class of individuals to the extent it may consider necessary for dealing with the case in a just and equitable manner. The power of relaxation is generally contained in the Rules with a view to mitigate undue hardship or to meet a particular situation. Many a time strict application of service rules create a situation where a particular individual or a set of individuals may suffer undue hardship and further there may be a situation where requisite qualified persons may not be available for appointment to the service. In such a situation the Government has power to relax Requirement of Rules. The State Government may in exercise of its powers issue a general order relaxing any particular rule with a view to avail the services of requisite officers. The relaxation even if granted in a general manner would ensure to the benefit of individual officers."

29. This decision was followed in *Sandeep Kumar Sharma v. State of Punjab* in which Hon'ble Punchhi, J. (as His Lordship then was), observed as under:

"The power of relaxation even if generally included in the service rules could either be for the purpose of mitigating hardships or to meet special and deserving situations. Such rule must be construed liberally, according to the learned Judges. Of course arbitrary exercise of such power must be guarded against. But a narrow construction is likely to deny benefit to the really

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deserving cases. We too are of the view that the rule of relaxation must get a pragmatic construction so as to achieve effective implementation of a good policy of the Government."

30. *In view of the above, the Government can exercise the power to relax the Rules in all those cases in which hardship is caused in the implementation of those Rules to meet a particular situation or where injustice has been caused to either individual employee or class of employees. Of course, this power cannot be exercised capriciously or arbitrarily to give undue advantage or favour to an individual employee."*

17. The instant case, readily qualifies to be considered as a deserving case for relaxation, for, the applicant, as could be seen from the pleadings and documents had been meticulous in exercising his option in the past, as also in ensuring that his claim is based on just grounds. His omission to exercise his option when he was at the Chinese Border cannot be held to be one of carelessness or lapse on his part. Any one in his position would have omitted to exercise the option, as no communication could be able to reach the remote area.

18. As already stated, at the time of argument, learned counsel for the applicant fairly stated that the applicant would be fully satisfied even if the pay is fixed notionally and the pay so fixed is taken into account for fixation of pension and other terminal benefits. Of course, had the counsel for the applicant insisted for arrears of pay and allowance, limitation would have stared at the applicant. The claim is based on recurring cause of action.

19. The prayer is thus, the most reasonable and the facts readily certify that the case is one where the DOPT, when approached, would consider the case of the applicant for relaxation with that spirit as expressed in various

decisions of the apex court, including the decision in the case of Sandeep Kumar Sharma (supra) and *Ashok Kumar Uppal v. State of J&K*, (1998) 4 SCC 179, (in which the above cases have been referred to).

20. In view of the above, the OA is allowed to the following extent: as a direction to the respondents:-

(a) The respondents shall treat Annexure A-12 representation as one which includes, in addition to the request for stepping up of pay, an option exercised in terms of Rule 6 of the CCS(Revised) Pay Rules, 1997.i.e. deferring the date of switching over to the revised pay scale w.e.f. 01-01-1997; In that event, not only the pay revision, but also promotion as DCIO as well as increment in the pre-revised pay scale would be as on 01-01-1997.

(b) The respondents shall, prepare a statement of case in respect of the applicant's request for stepping up of pay, giving full and complete details, as required for consideration of DOPT with their recommendations for exercising the power vested with the DOPT for considering the relaxation of Rules. They should further follow up the case with the DOPT in this regard on priority basis.

21. It is hoped that the DOPT would consider the entire case in its proper perspective, keeping in view the decisions of the Apex Court cited above and arrive at a judicious decision in respect of stepping up of pay of the applicant at par with his junior as prayed for in the O.A. and communicate the same to the respondents herein. Priority may also be accorded by the DOPT in considering the matter. As and when the respondents receive the decision, they may act according to the same with due intimation to the applicant. In the event of relaxation being granted, the respondents shall ensure working out of the notional pay of the applicant at par with that of his junior and the last pay drawn would form the basis for working out the amount of pension and other terminal benefits admissible to the applicant. It is made clear that the applicant

would not be entitled to any arrears of pay and allowance. All that the arrear he may get is only the arrears arising out of the reworking of the pension and other terminal benefits.

22. As this is the case of a retired officer, due priority shall be given by the respondents. At the same time, as the case involves more than one department/ministry, sufficient time should be made available and time limit of six months, which is considered reasonable, is calendared for full compliance of this order. No cost.

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(Dated, the 22 October, 2009.)


K.NOORJEHAN
ADMINISTRATIVE MEMBER

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Dr.K.B.S.RAJAN
JUDICIAL MEMBER