

FINAL ORDER
30.9.1988

CENTRAL ADMINISTRATIVE TRIBUNAL
MALABAR BENCH
ERNAKULAM

1. O.A. K-129/88
2. O.A. K-130/88
3. O.A. K-137/88
4. O.A. K-138/88
5. O.A. K-144/88
6. O.A. K-145/88
7. O.A. K-146/88
8. O.A. K-215/87
9. O.A. K-231/87
10. O.A. K-252/88
11. O.A. K-257/88

K. Rajappan Pillai	Applicant in OAK-129/88
D. Krishnan Nair	Applicant in OAK-130/88
M. Chandrasekharan Nair	Applicant in OAK-137/88
N. Madhavan Pillai	Applicant in OAK-138/88
C. Ramachandran	Applicant in OAK-144/88
C. N. Sukumaran Nair	Applicant in OAK-145/88
B. Appukuttan Nair	Applicant in OAK-146/88
K. Kunhikrishnan Nambiar	Applicant in OAK-215/87
P.A. Sukumaran, P.K. Ayyappan Kutty & K. M. Aboobaker	Applicants in OAK-231/87
P. Jayaramachandran Nair	Applicant in OAK-252/88
P. Thankappan	Applicant in OAK-257/88

Vs.

Telecommunication District
Engineer, Alleppey, Kerala

Respondent No. 1 in
OAK-129/88

General Manager, Telecommunication, Trivandrum,	Respondents in OAK-
Director General, Telecommunication, Sanchar Bhavan, New Delhi, &	129/88, 130/88, 137/88, 138/88, 144/88, 145/88, 146/88 & 257/88
Union of India represented by the Secretary, Ministry of Defence, New Delhi	
Superintendent of Post Offices, Badagara, Kerala State,	Respondents in OAK-
Post Master General, Kerala Circle, Trivandrum, &	215/87
Director General of Posts, Sanchar Bhavan, New Delhi	
Union of India represented by the Secretary, Ministry of Finance, Department of Expenditure, New Delhi.	Respondent in OAK- 215/87 & 231/87
The Director General of Telecommunications, New Delhi,	
The District Manager, Telecom, Ernakulam, &	Respondents in O.A.K.- 231/87
The Accounts Officer, Works & Establishments, Office of the District Manager, Telecom, Ernakulam.	
The District Manager, Telecommunication, Trivandrum,	
General Manager, Telecommunication Kerala Circle, Trivandrum, &	Respondents in O.A. K-252/88
Director General, Telecommunication Sanchar Bhavan, New Delhi	
Mr. M. Rajagopalan	Counsel for the applicants in OAK-215/87, 129/88, 130/88, 137/88, 138/88, 144/88, 145/88, 146/88, 252/88 & 257/88

M/s. KRB Kaimal &
TV Ajayakumar

Counsel for the applicant
in OAK-231/87

Mr. Thomas John, ACGSC

Counsel for the respondents
in OAK-215/87, 252/88 &
257/88

Mr. K.P. Thangakoya Thangal,
ACGSC

Counsel for the respondents
in OAK-231/87, 130/88 &
138/88

Mr. P. S. Biju, ACGSC

Counsel for the respondents
in OAK-129/88, 137/88,
144/88, 145/88 & 146/88

CORAM:

Hon'ble Shri G. Sreedharan Nair,
Judicial Member

O R D E R

These applications were heard together as the question involved in all of them is the same. It relates to the fixation of pay of ex-servicemen re-employed as Civilians in the Department of Posts & Telecommunications. According to the applicants who are such re-employed ex-service personnel, while fixing the re-employment pay, the last pay drawn at the time of retirement has to be protected, and this has to be done ignoring the entire pension, pension equivalent of gratuity and other retirement benefits. It is alleged that actually the fixation was done on that basis but subsequently, the earlier orders fixing the pay have been cancelled and fresh orders passed on the basis of which recovery is also proposed

to be made from the pay already drawn. According to the applicants, by the earlier fixation, they have secured a right to retain that pay and it cannot be adversely affected by subsequent executive order. They also challenge the clarifications issued by the Postmaster General, Kerala Circle and the Director General of Telecommunications on this issue as illegal and unsustainable.

2. The respondents contend that the initial pay on re-employment is to be fixed at the minimum stage of the scale of pay of the re-employed post, but in cases where it is felt that such fixation will cause undue hardship, the pay may be fixed at a higher stage by allowing one increment for each year of service which the officer has rendered before retirement in a post not lower than in which he is re-employed. Reference is made to the Office Memorandum dated 25.11.1958 issued by the Government of India, Ministry of Finance. The Director General of Posts has clarified by the letter dated 30.12.1985 that the question of granting of advance increments arises only if there is any hardship, and that hardship is seen from the point whether pay plus pension plus pension equivalent of gratuity (whether ignorable or not) is less than the last pay

drawn at the time of retirement. The Director General of Telecommunications has also in his letter dated 27.7.1987 reiterated the same principle and accordingly the Heads of the Circles have been requested to review all previous cases in which the pay of the re-employed pensioner has been fixed otherwise. It is stated that it is on the strength of these directions that alteration in the fixation of pay has been made on review. It is contended that as the pre-retirement pay of the applicants is less than the total of the pay fixed at the minimum of the scale of pay in the re-employed post plus gross pension and pension equivalent of gratuity, there is no hardship caused so as to justify the grant of any advance increments. According to the respondents, since this is not a case of withdrawal of any benefits but only rectification of a mistake which crept in while interpreting the Office Memorandum, the challenge against the present re-fixation cannot be sustained.

3. The general policy and the principles to be followed in the matter of fixation of pay of re-employed pensioners is contained in the Office Memorandum dated 25.11.1958 issued by the Government of India, Ministry of Finance. According to the said Office Memorandum, the initial pay on re-employment should be fixed at

the minimum stage of the scale of pay prescribed for the post in which an individual is re-employed. It is also stated that where it is felt that the fixation of initial pay of the re-employed official at the minimum of the prescribed pay scale will cause undue hardship, the pay may be fixed at a higher stage by allowing one increment for each year of service which the officer has rendered before retirement in a post not lower than in which he is re-employed. On re-employment, in addition to such pay, the Government servant is enabled to draw "separately" (emphasis applied) any other form of retirement benefits for which he is eligible provided that the total amount of initial pay as fixed plus the gross amount of pension and/or the pension equivalent or other form of retirement benefits does not exceed the pay he drew before his retirement or Rs. 3,000/- whichever is less. From the above provisions, it is clear that the fixation of initial pay on re-employment can only be at the minimum stage of the scale of pay prescribed for the post in which the Government servant is re-employed, and that only in cases where such fixation will cause undue hardship that fixation of pay can be had at a higher stage by allowing increments for the service rendered before

retirement in an equivalent or higher post. As far as the pension that has been earned is concerned, the re-employed Government servant is enabled to draw it separately, subject of course to the restriction that the initial pay fixed on re-employment taken along with such pension and other form of retirement benefits does not exceed the pre-retirement pay or Rs. 3,000/- whichever is less. It is also worthy of notice that what is provided under the O.M. is that where this limit is crossed, the pension and other retirement benefits may be paid in full and the necessary adjustments made in the pay so as to ensure that the total of the pay and the pensionary benefits is within the prescribed limit. By the O.M. dated 16.1.1964, it was directed that pension upto Rs. 50/- may be ignored in making the adjustments in the pay at the time of disbursement. This limit was enhanced to Rs. 125/- by the O.M. dated 19.7.1978. By the subsequent O.M. dated 8.2.1983, with effect from 25.1.1983, it was provided that in the case of personnel below Commissioned Officers rank, the entire pension may be ignored.

4. According to the applicants, by these two Office Memoranda dated 19.7.1978 and 8.2.1983, a significant alteration has been made to the principles laid down

in the O.M. dated 25.11.1958. It was argued that the pension that has been directed to be ignored by the Government's later Office Memoranda cannot be taken into account for any purpose in connection with the fixation of pay. In other words, according to the applicants, the provision in the aforesaid O.M. that the total amount of initial pay fixed on re-employment plus the gross amount of pension shall not exceed the pre-retirement pay can have operation only after ignoring the pension or portion of it which has been directed to be ignored by the subsequent Office Memoranda.

5. I have given careful consideration to the arguments of the counsels of applicants, but I am not persuaded to agree.

6. The basic principle governing fixation of pay of re-employed pensioners as laid down in the O.M. dated 25.11.1958, that the initial pay on re-employment should be fixed at the minimum stage of the scale of pay prescribed for the post in which an individual is re-employed continues to govern the field even after the issue of the Office Memoranda dated 19.7.1978 and 3.2.1983. There is scope for fixation of the initial pay at a higher stage only if the fixation at the minimum of the prescribed scale will cause undue hardship. The clarifications that have

been issued highlighting the aspect that hardship can arise only in cases where the initial pay fixed plus pension and other retirement benefits is less than the last pay drawn at the time of retirement.

By no standards, can it be said that this interpretation of undue hardship is irrational or illogical or inequitous or illegal.

7. By the O.M. dated 25.11.1958, the Government servant is enabled to draw separately the pension sanctioned to him subject to the condition that the initial pay fixed in the re-employed post along with the pension and other retirement benefits shall not exceed the pre-retirement pay or Rs. 3,000/- whichever is less. What was intended by the restriction is quite clear. On re-employment, the Government servant shall not be enabled to anything higher than the pre-retirement pay. In cases where on computation, the limit is exceeded, the direction is to make necessary adjustments in the pay so as to ensure that the total remuneration inclusive of the pay and the pensionary benefits is within the prescribed limit.

8. By the Office Memorandum dated 16.1.1964, pension upto Rs. 50/- was allowed to be ignored in the matter of this computation and consequently the adjustments in the pay fixed on re-employment.

The limit of Rs.50/- was enhanced to Rs. 125/- by the O.M. dated 19.7.1978. By the O.M. dated 8.2.1983, it was further enhanced to Rs. 250/- in the case of officers, and in the case of personnel below Commissioned Officers Rank, the entire pension.

9. It was argued on behalf of the applicants that in view of these subsequent Office Memoranda, in the matter of fixation of initial pay on re-employment, the pension and retirement benefits have to be ignored in the case of personnel below the rank of Commissioned Officers. The fallacy in the argument is in over-looking the fact that the fixation of the initial pay is not based on the pension or the retirement benefits as per the O.M. dated 25.11.1958 but in all cases, it has to be done only at the minimum stage of the scale of the pay prescribed for the post in which the individual is re-employed, subject of course to the condition that in a case of undue hardship, it can be fixed at a higher stage. Even in such fixation, it is not fixed with respect to the pension or retirement benefits but is only on the basis of the service rendered before retirement in a post not lower than in which the Government servant is to be re-employed. The element of pension and retirement benefits arises only in so far

as the ceiling on the initial pay to be paid to the Government servant is concerned. In cases where the initial pay fixed along with the pension and other retirement benefits exceeds the pre-retirement pay, necessary adjustments have to be made in the pay so as to ensure that the total of pay and pensionary benefits is within the prescribed limit. In view of the subsequent Office Memoranda of 1978 and 1983, in computing the pension and pensionary benefits for this purpose, the amounts mentioned therein cannot be taken into account.

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 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.E. Kaimal on behalf of the Applicants in O.M. 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 Judgment of the Supreme Court in N.C. Singhad Vs. Director General, Armed Force Medical Services (AIR 1972 SC 628). It 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. dat d 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} stage can it be said that the clarificatory letters have the effect of subsequent instructions varying or altering the earlier instruction on the subject to the detriment of the re-employed pensioner.

12. Lastly, it was submitted by the counsel of the applicants that in any case, before cancelling the earlier orders refixing the pay of the applicants, they should have been given opportunity of being heard. These are cases where on the ground that the re-fixation has been done not in accordance with the principles governing the matter, a review was conducted and in all such cases where the mistake was committed, the ~~Review~~ earlier orders have been cancelled. In a matter of fixation of pay, the Administration cannot be denied the right of rectifying errors as and when such errors

are detected, and merely because before doing so an opportunity is not afforded to the Government servant, it cannot be said that the proceedings are illegal. However, I am of the view that when these applicants were allowed payments pursuant to the fixation of pay done by the Administration itself, it will not be fair and proper to direct them to reimburse the excess amount.

12. In the result, while upholding the re-fixation of pay of the applicants, the respondents are restrained from making any recovery from any of these applicants on the ground of over payment as a result of earlier fixation.

13. These applications are disposed of as above.

sd/-

(G. Sreedharan Nair)
Judicial Member
30.9.1988

Index: Yes/No

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TRUE COPY

Dated

Deputy Registrar

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Date of Decision : 30.3.1990

P R E S E N T

Hon. Shri S.P. Mukerji, Vice Chairman
&
Hon. Shri A.V. Haridasan, Judicial Member

ORIGINAL APPLICATION : 3/89

&

ORIGINAL APPLICATION : 15/89

B. Ravindran ..the applicant in OA 3/89
Kunju Kunju Oommen ..the applicant in OA 15/89

V.

1. The Director General of Posts,)
Dept. of Posts, New Delhi)
2. The Post Master General, Kerala) ..THE RESPONDENTS
Circle, Trivandrum) IN BOTH THE CASES
3. The Union of India represented)
by its secretary, Ministry of)
Communications, New Delhi)

& P.V. Asha, Advocates
M/s. M.R. Rajendran Nair, appeared for the applicants in
both cases.

Mr. K. Narayana Kurup, ACGSC, appeared for the respondents
in OA 3/89

Mr. P. Santhalilingam, ACGSC, appeared for the respondents in
OA 15/89

OB 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, OA 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

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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 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

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. 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

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 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

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

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

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 ~~the~~ ⁶ 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 ⁶. 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 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 IFA's 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 were 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 were 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/ed 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 30.12.1985 at Annexure-X of the case file No. OA 15/89.

17. So far as the two applicants before us are concerned since they were re-employed with effect from 29.11.1983 and 5.5.1982 before the so called clarificatory circular of 30.12.1985 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 ad hoc 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, it was 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 (O.A. 3/89). Thus if for the sake of argument, it is held that for the purpose 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 view of the difference in opinions between us and the judgement of the Single Member Bench dated 30.9.1988 in OA K-129/88, the following two issues were referred to the Hon. Chairman for constituting a Full 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

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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 purpose of pay fixation in accordance with the orders dated 16.1.1964 (Annexure-V), of 19.7.1978 (Annexure V-a) and of 8.2.1983 (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) If yes, i.e. if it is decided that ignorable pension also has to be reckoned for the purpose 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. The Full Bench consisting of Shri B.C. Mathur, Hon. Vice Chairman, Shri P.K. Kartha Hon. Vice Chairman and Shri N. Dharmadan, Hon. Member in their judgment dated 13.3.1990 in O.A. 3/89, OA 15/89, OA-K 288/88 and OA-K 289/88 answered the aforesaid two issues as follows:

"(a) We hold that 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 1958 instructions (Annexure IV in OA-3/89), the whole or part of the military pension of ex-servicemen which are to be ignored for the purpose of pay fixation in accordance with the instructions issued in 1964, 1978 and 1983 (Annexures V, V-A and VI respectively), cannot 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-servicemen.

(b) The orders issued by the respondents in 1985 or 1987 contrary to the administrative instructions of 1964, 1978 and 1983, cannot be given retrospective effect to adversely affect the initial pay of ex-servicemen who were re-employed prior to the issue of these instructions."

20. In view of the aforesaid findings, we dispose of these two applications OA-3/89 and OA-15/89 as follows:

(a) OA 3/89

(i) We declare that the applicant is entitled to be granted one advance increment for each completed year of his military service in equivalent grade in fixing his pay in the post of Postal Assistant with effect from 29.11.1983 if the minimum of Rs.260/- in the pay scale of Postal Assistant together with unignorable part of his pension does not exceed the last pay drawn by him in the Armed Force. The ignorable part of his pension as indicated in the instructions in 1964, 1978 and 1983 (Annexures V, V-A and VI respectively) has to be excluded to reckon whether any 'undue hardship' is caused to the applicant by fixing his re-employment pay at the minimum of the pay scale of the post of Postal Assistant as contemplated in the sub-para (b) of the first para of the Office Memorandum of Ministry of Finance dated 25th November 1958. The impugned orders at Annexures A-2 dated 8-9-1986, A-7 dated 30.12.1988, A-11 dated 5th July 1988 and also the clarificatory U.O. notes of the Department of Personnel and Training, No.1627-Estt.(Pay-II)/85 dated 17.9.1985 and 21.7.1986 are set aside to the extent they are contrary to the aforesaid declaration.

(ii) We direct that the pay of the applicant should be refixed on the above basis within a period of three months from the date of communication of this order.

(b) OA-15/89

(i) We declare that the applicant is entitled to be granted one advance increment for each completed year of his military service in equivalent grade in fixing his pay in the post of Postal Assistant

with effect from 5.5.1982 if the minimum of Rs.260/- of the pay scale of Postal Assistant together with unignorable part of his pension does not exceed the last pay drawn by him in the Armed Force. The ignorable part of his pension as indicated in the instructions of 1964, 1978 and 1983 (Annexures V, V-A, VI) has to be excluded to reckon whether any 'undue hardship' is caused to the applicant by fixing his re-employment pay at the minimum of his pay scale in the post of Postal Assistant as contemplated in the sub-para(b) of the first para of the Office Memorandum of the Ministry of Finance dated 25th November 1958 (Annexure IV). The impugned orders at Annexures A-2 dated 4.9.1986 A-10 dated 30.12.1985, A-14 dated 5th July 1988 and also clarificatory U.O. notes of Department of Personnel and Training No.1627-Esst.(Pay-II)/85 dated 17.9.1985 and 21.7.86 are set aside to the extent that they are contrary to the aforesaid declaration.

(ii) We direct that the pay of the applicants should be fixed on the above basis within a period of three months from the date of communication of the order.

There will be no order as to costs.

A copy of the judgment should be placed on the files of both cases; OA-3/89 and OA-15/89.


30B/80
(A.V. Haridasan)
Judicial Member


30.3.90
(S.P. Mukerji)
Vice Chairman

30.3.1990

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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 applicants 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 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/accruing on 1.11.84 increment 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

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 ^{for} 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

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

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.

9. We are ^{immediately} ~~up~~ against the judgment of ~~the~~ [✓] 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 Bench. 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 much 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)

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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.

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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

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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 ^{S.P.Mukerji} ~~Shri S.P.Mukerji~~ & 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

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"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

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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

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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.0A 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, 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.

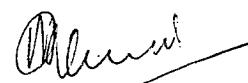
18. In the circumstances/in view of the difference of opinion between us and the judgment of the Single Member Bench dated 30.9.1988 in O.A.K 129/88, the Registry is directed to refer the following issues to the Hon'ble Chairman for constituting a Larger Bench:-

(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) If ~~not~~^{yes}, 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.



(A.V HARIDASAN)
JUDICIAL MEMBER



S.P. Mukerji
22.11.89

(S.P. MUKERJI)
VICE CHAIRMAN

n.j.j

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

DATE OF DECISION : 13.3.1990

P R E S E N T

Hon'ble Shri B.C. Mathur, Vice-Chairman

Hon'ble Shri P.K. Kartha, Vice-Chairman

&

Hon'ble Shri N. Dharmadan, Member(Judicial)

1. OA- 3/89

B. Ravindaran Vs. Director General of Posts,
New Delhi & Others

2. OA-15/89

Kunju Kunju Oommen Vs. Director General of Posts,
New Delhi & Others

3. OAK-288/88

M.K. Raja Mohanan Nair Vs. The General Manager,
Telecommunications,
Kerala & Others

4. OAK-289/88

N. Vamadevan Vs. Union of India represented by
Dept. of Telecommunications &
Others.

Mr. M.R. Rajindran Nair - Counsel for Applicant in Sls.1 & 2

Mr. P.V. Mohanan - Counsel for Applicant in S1.3

Mr. V.K. Issac - Counsel for Applicant in S1.4.

Mr. K. Narayananakurup, - Counsel for Respondents in S1.1
ACGSC

Mr. P. Santhalingam, - Counsel for Respondents in S1.2
ACGSC

Mr. P.A. Mohamed, - Counsel for Respondents in Sls.
ACGSC 3 & 4.

(Judgement of the Bench delivered by Hon'ble
Shri P.K. Kartha, Vice-Chairman)

The question of refixation of pay of ex-servicemen
obtaining re-employment in Government service, has been

considered by Hon'ble Shri G. Sreedharan Nair, presently Vice-Chairman(J), Patna Bench of the Tribunal, in his judgement dated 30th September, 1988 while sitting as a Judicial Member in a batch of cases decided at the Ernakulam Bench (OAK-129/88 and connected matters - K. Rajappan Pillai Vs. Telecommunications District Engineer, Alleppy, Kerala). The said judgement was relied upon by the respondents in OA-3/89 and OA-15/89, Shri B. Ravindaran and Another Vs. Director General of Posts & Others, which were heard by a Division Bench consisting of Hon'ble Shri S.P. Mukerji and Hon'ble Shri A.V. Haridasan, Judicial Member and were disposed of by order dated 22.12.1989. Following the said order, Shri S.P. Mukerji, while sitting as a Single Member, has delivered order dated 16.1.1990 in OAK-288/88 (Shri M.K. Raja Mohanan Nair Vs. the General Manager, Telecommunications, Kerala & Others). A Bench consisting of Hon'ble Shri N.V. Krishnan, Administrative Member and Hon'ble Shri A.V. Haridasan, Judicial Member, has also considered the same issue in its order dated 1.3.1990 in OAK-289/88 (Shri N. Vamadevan Vs. Union of India & Others). We have thus before us the order passed by Hon'ble Shri G. Sreedharan Nair upholding the contention of the respondents that the clarificatory orders issued by them 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 of re-employment of ex-servicemen. A Division Bench consisting of Shri S.P. Mukerji and Shri A.V. Haridasan, and another Division Bench consisting of Shri N.V. Krishnan, A.M., and

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Shri A.V. Haridasan, J.M., have taken a different view. In view of the difference of opinion, the Division Bench consisting of Shri S.P. Mukerji, Vice-Chairman, and Shri A.V. Haridasan, J.M., have referred OA-3/89 and OA-15/89 to the Hon'ble Chairman for constituting a Larger Bench to adjudicate on the following two issues:-

(a) Whether for the purpose of granting advance increments over and above ~~the~~, the minimum of ~~or~~ in accordance with the O.M. of 25.11.58, the pay-scale of the re-employment post~~or~~ the whole or part of the military pension of the ex-servicemen which is to be ignored for the purpose of pay fixation, can be taken into account to reckon that the minimum of the pay-scale of the re-employment post plus pension, is more or less than the last military pay drawn by the re-employed ex-serviceman for the grant of advance increments on re-employment; and

(b) if 'Yes', i.e., if it is decided that the ignorable pension also has to be reckoned for the purpose of admissibility of advance increments, whether the orders issued to this effect in 1985 or 1987 can be given retrospective effect so as to adversely affect the initial pay of ex-servicemen who were re-employed prior to the issue of these instructions.

2. The Division Bench consisting of S/Shri N.V. Krishnan and Haridasan in OAK-289/88, has referred the following further questions to the Full Bench for

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consideration:-

- (i) Whether on the facts and in the circumstances of the case, the question of undue hardship arises or not, in terms of the 1958 instructions, is an essential ingredient or step in the process of fixation of pay of a re-employed pensioner?
- (ii) If the answer to this question is in the affirmative, whether the directions in Article 521 and Article 526 of the Civil Service Regulations, that certain amounts of pension stated therein should not be taken into account in fixing pay on re-employment, have to be given effect while determining the question whether undue hardship arises or not?
- (iii) Whether, considering the reasons given in the O.M. dated 16.1.1964 for granting such reliefs, the clarification given by the Department of Personnel & Training as referred to in Annexure A-6, is irrational and arbitrary?
- (iv) Whether the said clarification can, in effect, over-ride the mandatory provisions of Articles 521 and 526 of the Civil Service Regulations, the scope of which alone have been further amplified by the Ministry of Defence O.M. dated 8.12.1983 (Annexure A-1)?

3. At the outset, it may be stated that the Government have issued detailed instructions on the grant of extension of service/re-employment to Central Government servants in

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O.M. No.26012/6/87-Estt. (A) dated 13th April, 1988 issued by the Department of Personnel & Training (vide Swamy's Complete Manual on Establishment and Administration for Central Government Offices, 2nd Edition, Chapter 34, pages 350-361). It has been clarified in the said O.M. that re-employment of Military pensioners who have not reached the age of superannuation for Central Government employees, will not be governed by the said O.M. The Government have provided various incentives to the ex-servicemen from time to time in recognition of their valuable services rendered to the nation, the comparative young age at which they ~~had~~ ^Q opted out of Military service and similar other factors. The Government have throughout drawn a distinction between the terms and conditions applicable to the civilian pensioners and Military pensioners on their re-employment in Government service. Article 526 of the Civil Service Regulations which deals with the fixation of pay and allowances of ex-servicemen, reads as follows:-

"526 (a) Where a pensioner formerly in military service obtains employment in Civil Department after having been granted a military pension, and continues to draw his military pension, the authority competent to fix the pay and allowances in which he is re-employed shall in fixing his pay and allowances in the post in which he is re-employed, take into account the amount of pension, including such portion of it as may have been commuted,

(b) Where a military officer, departmental officer, warrant or non-commissioned officer or soldier who is granted a pension under military rules while he is in civil employ, draws such pension while he is in civil employ, the authority competent to fix the pay and allowances of the post in civil employ, may, with effect from the date from which the pension is granted reduce such pay and allowances, with reference to such officer or soldier by any amount not exceeding amount of such pension.

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(c) In the case of service personnel who retire from the Forces before attaining the age of 55 and are re-employed in civil posts on or after 16th January, 1964 the pension shown below shall be ignored in fixing their pay on re-employment:-

(i) in the case of pensions not exceeding Rs.50 per mensem, the actual pension;

(ii) in other cases the first Rs.50 of the pension.

Those who were re-employed before 16th January, 1964 and who had opted for the above orders will, however, be treated as fresh entrants from the date."

4. In substance, the provisions of Clause (c) extracted above are identical with the order of the Ministry of Finance No.7(34)Estt.III/62 dated 16th January, 1964.

5. The Civil Service Regulations which were made some time prior to 1914, acquired statutory authority under Section 96-B(4) of the Government of India Act, 1919 and have been continued in force by virtue of Article 313 of the Constitution. These regulations are statutory in nature.

6. Article 510 of the Civil Service Regulations provides that when a person who was formerly in civil or military employment of any Government in India, obtains re-employment, whether temporarily or permanently, in Government service or in the service of a local Fund, it shall be incumbent on him to declare to the appointing authority the amount of gratuity, bonus or pension granted to him in respect of previous employment. The authority re-appointing him shall specifically state in the order of re-employment whether any deduction is to be made from pension or salary as required by the rules contained in Chapter XXI and shall communicate a copy of the order

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to the Audit Officer. The Government of India have issued administrative instructions under Article 510 which are of a supplementary nature. These instructions are contained in the Ministry of Finance Memoranda Nos. 8(34)/Estt.III/57 dated 25th November, 1958 (Annex.IV in OA-3/89), No.F.5(4)-E.III(B)/77 dated 19th July, 1968 (Annex. V-A in OA-3/89) and No.2(1)83/D(CIV-I)/62 dated 8.2.1983 (Annex. VI in OA-3/89). In the reference before the Full Bench, we are concerned with the interpretation of the aforesaid decisions of the Government of India.

7. Paras. (b) and (c) of the 1958 instructions which are relevant in the present context, read as under:-

"(b) The initial pay, on re-employment, should be fixed at the minimum stage of the scale of pay prescribed for the post in which an individual is re-employed.

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

(c) In addition to (b) above, the Government servant may be permitted to draw separately any pension sanctioned to him and to retain any other form of retirement benefit for which he is eligible, e.g., Government contribution to a Contributory Provident Fund, gratuity, commuted value of pension, etc., provided that the total amount of initial pay as at (b) above, plus the gross amount of pension and/or the pension equivalent of other forms of retirement benefit, does not exceed:-

(i) the pay he drew before his retirement (pre-retirement pay), or

(ii) Rs.3,000/-, whichever is less."

8. As already pointed out, the 1964 instructions provided that in the case of persons retiring before

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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 ... The actual pension exceeding Rs.50 per mensem,
- (ii) In other cases ... The first Rs.50 of the pension.

9. Pension for the purpose includes pension equivalent of gratuity and other forms of retirement benefits.

10. The ignorable portion of pension of Rs.50/- was increased to Rs.125/- per mensem by the 1978 instructions taking into account the liberalisation of the Pension Rules and the general increase in the pay-scales on the basis of the Third Pay Commission's recommendations. It was provided 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 ... The actual pension not exceeding Rs.125/- per mensem
- (ii) In other cases ... The first Rs.125/- of the pension.

11. It was also clarified that pension for the purpose includes pension equivalent of retirement benefits. The 1978 instructions were to take effect from 19th July, 1978.

12. The 1983 instructions were issued whereby the ignorable portion of pension of ex-servicemen was increased from Rs.125/- to Rs.250/- per mensem in the case of service officers, and the entire pension in the case of personnel below commissioned officer rank retiring before attaining the age of 55 years. It was also provided that the pension for the purpose includes pension equivalent of gratuity and other forms of retirement benefits.

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13. The learned counsel for the applicants who appeared before us, submitted that the practice of ignoring a portion of pension of ex-servicemen while fixing their pay on re-employment, has been followed by the Government for several years, from 1964 to 30th December, 1985. There has been a progressive liberalisation of the ignorable portion of the pension, i.e., from Rs.50/- to Rs.125/- and from Rs.125/- to an unlimited amount in the case of non-commissioned officers and upto the first Rs.250/- in the case of other officers.

14. On 30.12.1985, the Directorate General, P & T, issued a circular letter with reference to the 1983 instructions wherein it was stated that the Department of Personnel & Training, after consulting the Ministry of Finance, had given the following clarification about the mode of pay fixation of re-employed ex-servicemen while implementing the 1983 instructions:-

"When a re-employed 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 arises only if there is any hardship. Hardship is seen from the point whether pay plus pension plus 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."

15. Thereafter, the respondents adopted the advice of the Department of Personnel & Training and have fixed the pay of ex-servicemen on the basis of the said advice. This has resulted in fixing pay at the lower minimum pay than had been given to them earlier and thereby involving recovery of huge amounts from them. The respondents have also relied upon a further

clarification given by the Department of Personnel & Training on the question of fixation of pay of ex-servicemen in the context of the 1983 instructions. Reiterating their earlier stand, the Department of Personnel & Training have stated that the question of allowing full ignorance of pension as well as protection of pre-retirement pay did not arise, as the same would place a re-employed pensioner at an inordinately advantageous position vis-a-vis a direct recruit. According to them, the position was different when only a fraction of pension was ignored upto the year 1978, which could be ignored as an income and pay could be fixed by comparing the minimum together with the reckonable amount of pension ~~pre-@~~ to the retirement pay and where the former fell short of the latter, advance increments could be considered. But once the entire elements of pension and pension equivalent of gratuity were ignored for pay fixation, the concept of hardship had to be determined afresh, taking into account the changed circumstances. It was only the 1958 instructions that laid down the principle of hardship and the subsequent instructions where quantum of ignorable pension had been enhanced from time to time, did not touch on hardship. In the 1958 instructions, the concept of hardship was to ensure that there was no drop in the total packet of pay and pension on re-employment with reference to pre-retirement pay of a pensioner. With the issuance of the 1983 instructions, 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, they were of the view that there was no hardship. To have allowed advance

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increments by comparing only 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.

16. It is true that the instructions issued in 1964, 1978 and 1983 did not touch on hardship. To our mind, under the 1964 instructions, pension to the extent of Rs.50/- was ignorable to judge hardship in fixation of pay of ex-servicemen on re-employment. The enhancement of the ignorable portion of pension was by way of liberalisation having regard to the increase in the cost of living and it cannot be contended that the Government was not conscious of the factor of hardship while issuing the said instructions. The learned counsel for the respondents had no explanation to offer in this regard. The respondents have also not produced before us the relevant files containing the policy decision taken by them in 1985 pursuant to which the impugned orders have been passed contrary to the provisions of the 1983 instructions.

17. There is also another aspect of the matter. The clarifications issued by the Department of Personnel and Training in 1985 and later are not consistent with the orders issued in 1964, 1978 and 1983 and as such, they cannot have any retrospective operation so as to prejudicially affect the vested ^{interests} ~~of~~ ^{of} ex-servicemen to ~~exacted~~ the benefit of fixation of pay in accordance with the earlier instructions. Administrative instructions cannot be issued with retrospective effect so as to adversely affect persons who have enjoyed any benefit under the law or earlier instructions issued thereunder.

(Vide Dr. (Miss) Subhash Kaushal Vs. State of Punjab, 1982 (1) SLJ 684 (Pb. & Haryana); R.R.Rajasekharan Vs. Union of India, 1986 (2) SLJ (CAT) 132; and P.W. Agarwal & Others Vs. State of U.P. & Ors., A.T.R. 1987 (2) SC 121).

18. To our mind, the instructions issued in 1964, 1978 and 1983 supplement the relevant provisions of the Civil Service Regulations discussed above. The clarificatory orders issued in December, 1985 and thereafter, run counter to the main provisions of the said Regulations as well as the instructions issued thereunder. Such clarificatory orders cannot over-ride the statutory provisions or instructions issued thereunder which also have equally binding force. In this context, reference may be made to the observations of the Supreme Court in *Union of India Vs. Tulsi Ram Patel*, 1985 (3) S.C.C. 398 at 500 that "Executive instructions stand on a lower footing than a statutory rule, for they do not have the force of a statutory rule." In *P.D. Agarwal Vs. State of U.P., A.T.R.*, 1987 (2) S.C., 121 at 128, the Supreme Court has observed that while the Government has got the power to make rules and amend them retrospectively, such retrospective amendments cannot take away the vested rights. In *J.R. Raghupathy Vs. State of Andhra Pradesh*, 1988 (4) S.C.C. 364, at 372 and 387, the Supreme Court has observed that guidelines issued by the Government which are in the nature of administrative instructions, do not have statutory force and that the Court can intervene where the decision of the Government is reached by taking into account factors that were legally irrelevant or by using its power in a way calculated to frustrate the policy of the enactment. In the instant case, this is what the respondents have actually done, as by the clarificatory orders issued in 1985 and thereafter, they have sought to frustrate the policy embodied in Article 526 (c) of the Civil Service Regulations and the administrative instructions issued thereunder in 1964, 1978 and 1983.

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19. In the light of the foregoing, we hold that the fixation of pay of ex-servicemen on their re-employment in Government service, will have to be on the basis of the instructions in force at the relevant time before the clarifications were issued by the Department of Personnel & Training in 1985. We further hold that the clarifications issued by the Department of Personnel will have no retrospective operation so as to prejudicially affect the pay already fixed in respect of ex-servicemen who were re-employed before the issue of such clarifications. We also are of the opinion that the respondents will not be justified in effecting any recovery from the ex-servicemen on account of the alleged over-payments consequent upon the receipt of the clarifications from the Department of Personnel & Training.

20. The learned counsel for the respondents drew our attention to the Central Civil Services (Fixation of Pay of re-employed pensioners) orders, 1986, which came into force on 1st July, 1986. We do not propose to consider the same as they are not relevant to the case of the applicants before us who were re-employed prior to the said date. The administrative instructions of 1964, 1978 and 1983 which were of a beneficial nature, call for a liberal interpretation as the Government itself is committed to the task of welfare of ex-servicemen. While interpreting such a beneficial provision like the one embodied in the administrative instructions issued in 1964, 1978 and 1983, we are inclined to lean on the interpretation which is more advantageous to the employees concerned in respect of whom they have been issued rather than on a narrow construction of the said provisions canvassed before us by the respondents.

21. In the light of the foregoing discussions, the questions posed to the Full Bench in OA-3/89, OA-15/89 and OAK-288/88, are answered as follows:-

(a) We hold that 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 1958 instructions (Annexures IV in OA-3/89), the whole or part of the military pension of ex-servicemen which are to be ignored for the purpose of pay fixation in accordance with the instructions issued in 1964, 1978 and 1983 (Annexures V, V-a, and VI, respectively), cannot 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-servicemen.

(b) The orders issued by the respondents in 1985 or 1987 contrary to the administrative instructions of 1964, 1978 and 1983, cannot be given retrospective effect to adversely affect the initial pay of ex-servicemen who were re-employed prior to the issue of these instructions.

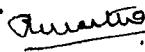
22. The questions posed to the Full Bench in OAK-289/88 are answered as follows:-

(i) to (iv)

The provisions of the Civil Service Regulations are statutory in nature and the instructions of 1964, 1978 and 1983 have been issued by the Government under the said Regulations and supplement the provisions of the said Regulations. The clarifications issued by the respondents on 30.12.1985 and subsequent dates, cannot over-ride the earlier instructions issued in 1964, 1978 and 1983. The purported modification of the earlier instructions on the subject will have only prospective operation.

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23. The reference to the Full Bench is answered on the above lines. Let the Benches concerned deal with these O.As and similar O.As in the light of the observations in this judgement.

  
(N. Dharmadan) " (P.K. Kartha) (B.C. Mathur)
Member (Judicial) Vice-Chairman (J) Vice-Chairman (Adm.)

The Judgment is pronounced in open court
on behalf of the Larger Bench by
Hon'ble Shri N.Dharmadan, Judicial Member.


(N. Dharmadan)
Member (Judicial)
13.3.1990