

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.317/2004

Tuesday this the 1st February 2005

C O R A M:

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

1. K.V.Thimothy, Preventive Officer (Rtd)
Kokkan House, DLB Indira Nagar Road
Palluruthy, Cochin - 682006
2. K.J.Antony Jose Lalphi, Preventive Officer (Rtd)
Kavalakkal House, North Edacochin
Cochin - 680006.

Applicant.

(By Mr.CSG Nair, Advocate)

Vs.

1. Union of India represented by the Secretary
Ministry of Personnel, Public Grievances & Pension
New Delhi.
2. The Commissioner of Customs
Cochin.

Respondents


(By Advocate Mr.TPM Ibrahim Khan, SCGSC)

The application having been heard on 1.2.05 and the same day the Tribunal delivered the following:

O R D E R

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

The applicant two in numbers have been filed this O.A seeking arrears of gratuity after computing the DA prevailing on the date of their retirement. The applicants are retired Central Government pensioners and the first applicant retired on 31.5.1989 as Preventive Officer and the 2nd applicant retired on 30.6.93 as Preventive Officer. The averment in the O.A of the applicants is that at the time of retirement the applicants were given DCRG on the basic pay drawn by them. As per OM Annx.A1, it is contended that the Dearness Allowance is to be merged with pay and has to be treated as dearness pay for the purpose of DCRG and retirement gratuity under the CCS (Pension) Rules 1972 in the case of Central Govt Employees who retired on or after 1st April 1995. The benefit of such merger was not allowed to



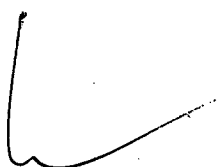
the applicants. They have cited the judgment of the Hon'ble Supreme Court in the case of D.S.Nakara's case (1983(1) SCC(L&S) 305) and pleaded that the applicants are also entitled for the benefit and sought mainly the following reliefs:

- i) to declare that the applicant is eligible for the benefit of inclusion of Dearness Allowance existed on the effective dates of retirement for the purpose of computing emoluments for grant of DCRG.
- ii) to quash Annx.A5 as unconstitutional.
- iii) to direct the respondents to pay the arrears of DCRG taking into account the dearness allowance existed on their effective dates of retirement within a stipulated period.

2. I have heard Mr.CSG Nair, the learned counsel for the applicants and Mr.TPM Ibrahim Khan, SCGSC, counsel for the respondents.

3. When the matter came up for hearing, the learned counsel for the respondents submitted that as per the OM dated 14.7.95, the Dearness allowance is to be merged with the pay and has to be treated as DP for the purpose of DCRG at 97% of the basic pay upto 3500/- under CCS(Pension) Rules 1972 in the case of Central Govt employees who retired on or after 1.4.1995. He argued that the applicants are not entitled to any such benefit.

4. I have given due consideration to the pleadings, materials placed on record and the arguments advanced by the counsel.



5. The claim of the applicants is for grant of DCRG on their retirement calculated on the basic pay plus 97% of the basic pay treated as dearness pay. This Bench of the Tribunal in O.A 993/03 and connected cases dated 22.11.2004 has considered this issue in an elaborate manner and came to the conclusion that the persons who are retired prior to 1.7.93 are not entitled to have the benefit. This court also relied on a Full Bench decision of the Tribunal in O.A No.542, 942 and 943 of 1997, the operative portion of which reproduces as follows:

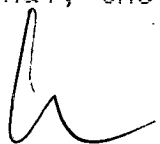
"The 5th Central pay Commission in their interim report which was submitted to the Government on 2nd May, 1995 recommended the grant of interim relief equal to 10% of basic pay subject to minimum of Rs.100/- per month. Further, instalment of interim relief equal to 10% of the basic pension/family pension subject to a minimum of Rs.50/- per month was also recommended. It was suggested that DA linked to the AICPI 1201.66 as on first July, 1993 be treated as dearness pay for reckoning emoluments for the purpose of retirement and death gratuity and the ceiling on gratuity be enhanced to Rs.2.5 lakhs. These recommendations were to be given effect to from first April, 1995(para 1.43 of the report Volume-1). It is seen from this that the objective of the Pay Commission was very clear namely that when the DA reached the average AICPI 1201.66 that DA was to be merged in pay for reckoning emoluments for purpose of retirement and death gratuities. Had the intention been otherwise, then, the Commission would have recommended the DA, which was being drawn as on 1.1.95 which was 125%, but that was not so. The idea was clearly to link it with the DA which was due at the level of AICPI 1201.66. That apart it is to be borne in mind that this recommendation was only in the interim report of the Pay Commission. When the final report of the Pay Commission was submitted the Pay Commission recommended complete parity between past and present pensioners. This is evident from the concern expressed by the Pay Commission about the glaring disparity between the people drawing vastly unequal pension if they had retired at different points of time. The Commission, therefor, attempted a major policy thrust by suggesting complete parity between past and present pensioners at the time of 4th Central Pay Commission while recommending a modified parity between pre 1996 and post 1996 pensioners. The Pay Commission felt that the formula would ensure total equity as between persons who retired before 1986 and those who retired later. It also ensured that all pensioners get at least the minimum pension appurtenant to post 1996 revised scales of pay of the post and at the time of retirement. The thinking of the 5th Central Pay commission clearly establishes that the pay commission was not in favour of creating any disparity, but was for bringing parity. Considering this approach of the 5th Central Pay Commission in the Final report, in our considered view, these recommendations of the



final report would prevail over the recommendations made in the interim report. Therefore, we feel that no distinction should have been made on the basis of the date of retirement while fixing the date of merger of DA of 97% in the pay from the date of 1.4.1995. The judgements referred to by [the respondents have already been distinguished by the learned counsel for the applicant and we agree with the same. We are in agreement with the learned counsel for the applicant that in the present case there is no synchronisation of the date of grant of DA of 97% with the cut off date as in the case of P.N.Menon(Supra). The objective was to link to DA as on the date of average AICPI 1201 for the merger of DA in pay. This being so it would have been rational and it would have had a nexus with the objective if the date for merging 97% in pay had been fixed as 1.7.93 instead of 1.4.95, which has no nexus with the object. In the case of P.N.Menon (supra) the Hon'ble Apex Court held cut off date of 30.9.77 as reasonable and not arbitrary mainly because the date of grant of date and the cut off date were the same. The respondents have failed to put forth any convincing ground to justify the cut off date of 1.4.95 except that the pay commission had recommended it. The applicants are also justified in drawing support in the case of V.Kasthuri (Supra). A plea has been raised since it is a policy matter involving pay, allowances etc., it is not to be interfered with by the Tribunal. The judgement in the case of Union of India and another Vs. P.V.Hariharan (1997 SCC (L&S) 838) has been cited in support. In this case while holding that it is for the Expert Bodies like Pay Commission to go into the problems of pay, pay fixation etc. It has been held that unless a case of hostile discrimination is made out, courts would not be justified for interference for fixation of pay scales. Thus, if there is a hostile discrimination this Tribunal can consider adjudicating in the matter. In the present case, it cannot be ignored that all factors being equal the applicants have been discriminated against on the ground that they had retired earlier than the cut off date. We, therefore, hold that the applicants who retired between 1.7.93 to 31.3.95 are entitled to the benefits of the scheme of the merger of 97 % DA in the pay for purposes of emoluments for calculating death /retirement gratuities.

6. On going through the Full Bench decision, I find that the Full Bench have elaborately considered and a final decision was derived as above and I am in respectful agreement with the finding of the Full Bench. Therefore, I hold that the applicant who had retired from 1.7.93 upto 31.3.95 and thereafter, are entitled to get the benefit.


7. It is pertinent to note that against the order in O.A 165/92, identical/similar case, where the benefit was granted by this Tribunal, the respondents approached the Hon'ble High Court



of Kerala by filing W.P.(C) 9191/2004 which is pending disposal. However, in the interim stay proceedings the Hon'ble High Court had passed the following orders:

"Admit. Issue urgent notice to the respondents. Having regard to the facts and circumstances of the case, we are not inclined to stay the proceedings in furtherance of Ext.P3 order of the Central Administrative Tribunal, Ernakulam Bench. However, it is made clear that any payment made to the respondents on the basis of this Writ Petition and also liable to be adjusted in terms of the final decision in the Writ Petition. The amount due under Ext.P3 order shall be paid to the respondents within one month of the respondent filing an affidavit before this Court undertaking that in the event of the petitioners succeeding in the Writ Petition, any excess amount received by him shall be refunded to the petitioners."

7. This court in an earlier O.A No.165/2002 also followed the decision and decided the matter. Considering the above aspects of the matter, I am of the view that the applicant No.1 had retired prior to 1.7.1993 i.e. on 31.5.1989 (AN) he is not entitled to the benefit. Since applicant No.2 retired on 30.6.1993 (AN) i.e with effect from 1.7.1993 he is entitled to get the benefit. Accordingly I direct the respondents to grant the benefit to applicant No.2 within a period of two months from the date of receipt of a copy of this order obtaining an undertaking, if necessary, in case excess amount received by him to be refunded as a result/consequent of any judicial pronouncements in this issue. No order as to costs.


 (K.V.Sachidanandan)
 Judicial Member.

kkj