

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH, NEW BOMBAY

(11)

1) Original Application No. 295/86.

Shri J.K. Golam,
Room No. 19, Yogi Nivas,
Kisan Road, Malad(West),
BOMBAY - 400 064.

... Applicant.

V/S

Union of India,
Through the Director General,
Employees State Insurance
Corporation, Esic Building,
Kotla Road,
NEW DELHI - 110 002.

The Director General,
Employees State Insurance
Corporation, Esic Building,
Kotla Road,
NEW DELHI - 110 002.

The Regional Director,
Employees State Insurance
Corporation,
108, N.M. Joshi Marg,
Lower Parel,
BOMBAY - 400 013.

... Respondents.

2) Original Application No. 386/87.

Shri G.K. Kamath,
Flat No. 2-B, Ground floor,
Premkunj, 7th Road,
Santacruz(West),
BOMBAY - 400 055.

... Applicant.

V/S

The Director General,
Employees State Insurance
Corporation, Esic Building,
Kotla Road,
NEW DELHI - 110 002.

The Regional Director,
Employees State Insurance
Corporation,
108, N.M. Joshi Marg,
Lower Parel,
BOMBAY - 400 013.

... Respondents.

Appearance:

Mr. W.W. Waishampayan,
learned Advocate for
the applicant.
Mr. M.I. Sethna,
learned Counsel for
the respondents.

~~Mr. M.I. Sethna,~~
learned Advocate for
the applicant.
Mr. M.I. Sethna,
learned Counsel for
the respondents.

Coram: The Hon'ble Vice-Chairman, Shri P.S. Chaudhuri, The Hon'
The Hon'ble Member(A), Shri P.S. Chaudhuri, The Hon'

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(12)

JUDGMENT:-

Date: 12th September 1989

¶ Per P.S. Chaudhuri, Member(A) ¶

Original Applications No. 295/86 and 386/87 were filed before this Tribunal on 24.9.1986 and 3.6.1987 respectively under Section 19 of the Administrative Tribunals Act, 1985. As the facts and the reliefs claimed in these two cases are similar, we are deciding both the cases by this common judgment and order. The basic dispute in both the cases concerns the refixation of pay of the applicant on his promotion to the post of Head Clerk from the post of Upper Division Clerk In-charge (for short, UDC.I/C) and consequently on his promotion to higher posts also.

2. Both the applicants were employees of the Employees State Insurance Corporation (for short, ESIC) from which Corporation they retired in 1988 and 1987 respectively, i.e. after these applications were filed. (This Corporation has been brought within the jurisdiction of this Tribunal with effect from 12.5.1986 by a notification issued by the Central Government on 2.5.1986 under Section 14(2) of the Administrative Tribunals Act, 1985.) Both the applicants had been promoted to the post of UDC.I/C prior to 1.1.1973 at which time the scale of pay of UDC.I/C was Rs. 130-300 plus Rs. 25/- as special pay. Revised scales of pay were brought into force from 1.1.1973 on the basis of the recommendations of the Third Pay Commission. There was, however, no automatic revision of pay scales of employees of ESIC as ESIC is a Corporation. The pay scales of the employees of this Corporation have to be considered by the Corporation and its Standing Committee. Further, an important factor is that, in terms of the E.S.I. Act, 1948, the sanction of the Central Government is necessary for such revision. As

an interim measure a revised scale of pay of Rs. 330-560 plus Rs. 25/- as special pay was initially allotted by ESIC for UDC.I/C. The incumbents were given options to opt for this initial revised scale for UDC.I/C with effect from 1.1.1973 or such other subsequent date as suited them. The position regarding the pay fixation of the applicants in these two cases on the basis of this order is set out below:-

	<u>O.A. No. 295/86</u>	<u>O.A. No. 386/87</u>
Name of applicant	J.K. Golam	G.K. Kamath
Date selected for pay refixation in the post of UDC.I/C and pay as refixed on that date.	1.11.1973 - Rs. 464/- plus Rs. 25/- special pay.	1.2.1973 - Rs. 464/- plus Rs. 25/- special pay.
Date of, and pay fixation on, promotion as Head Clerk in the scale of Rs. 425-700.	14.11.1973 - Rs. 485/-	28.2.1973 - Rs. 485/-
Date of, and pay fixation on, promotion as Insurance Inspector in the scale of Rs. 550-900.	25.1.1978 - Rs. 600/-	7.1.1978 - Rs. 600/-

3. It may be noted that the scale of pay allotted for Head Clerk was Rs. 425-700. It is also necessary to mention at this stage that the fixations of pay on promotion both as Head Clerk and also as Insurance Inspector were done on the basis of Fundamental Rule 22C (for short F.R. 22-C).

4. Finally, on 22.3.1978 the sanction of the Central Government under Section 17(2) of the ESI Act, 1948 was conveyed to the revision of the scale of pay of UDC.I/C from Rs. 130-300 plus special pay of Rs. 25/- to Rs. 425-600 with effect from 1.1.1973. In this order it was clarified that the special pay of Rs. 25/- attached to the post of UDC.I/C would be treated as part of existing emoluments for purposes of pay fixation in this final revised scale of pay. The

employees were given a chance to revise their options regarding the date from which they wanted their pay refixed in this final revised scale. The applicants exercised their option in terms of this order and the pay of the applicants as UDC.I/C was fixed at Rs. 485/- in the scale Rs. 425-600 with effect from 1.1.1973, the date of next increment being 1.1.1974.

5. Subsequently, on 17.7.1978 clarifications were issued by ESIC Headquarters regarding the Order dated 22.3.1978 mentioned earlier. It was clarified that " As both the posts viz. UDC. Incharge and Head Clerk are Group 'C' posts and scale attached to the post of UDC. Incharge is in the lower segment of Rs. 425-600 of the common scale of Rs. 425-700 pay on appointment as Head Clerk from UDC. Incharge will be fixed under F.R. 22(a)(ii) and not F.R. 22C." Thereafter, on 23.6.1980 further clarifications were issued by ESIC Headquarters. These were circulated by the Bombay Office of ESIC on 14.10.1980. In these clarifications it was indicated that " pending the finalisation of the Recruitment Regulations for the post of UDC.I/C this post may for all practical purposes for the present be treated as ex-cadre." It was clarified that on promotion as Head Clerk the pay would be fixed under F.R. 22C not with reference to the ^{last} pay drawn in the cadre of UDC.I/C but with reference to the pay drawn as Upper Division Clerk (for short, UDC) on the date of promotion. Further clarifications were issued on 31.7.1981 in which it was stated that " fall in total emoluments would not be possible in case refixations have been done keeping in view the clarifications contained in GIMF Office Memo No. 7(75)-E.III(A)/71, dated 3.4.1972." The other clarifications regarding fixation of pay of persons working as UDC.I/C on 1.1.1973 issued both earlier and later need not concern us.

6. The operative part of the Office Memo dated 3.4.1972

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that concerns us reads as under:-

- * It was earlier provided that in the case of a Government servant who draws pay in the scale of pay attached to an ex-cadre post, if he reverts to his parent cadre and is appointed in that cadre to a post higher than the ex-cadre post immediately held before reversion, his pay shall be fixed under F.R. 22-C with reference to pay drawn in the ex-cadre post.

With the amendment to proviso to F.R. 22, vide notification No. 1 (25)-E.III(A)/64, dated 30.11.1965, benefit of service rendered in an ex-cadre post, counting for increments in a cadre post on an identical scale is no longer admissible except to the extent the conditions laid down therein are fulfilled. A question has been raised whether the benefit of fixation of pay in a cadre post with reference to pay drawn in an ex-cadre post under F.R. 22-C still continues to be available. It is clarified that after the amendment of F.R. 22 as referred to above, the orders have become obsolete and it is not permissible to fix pay in a cadre post on the basis of pay in an ex-cadre post.

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7. The operative parts of F.R. 22 and F.R. 22-C that concern us read as under:-

* F.R. 22.

The initial substantive pay of a Government servant who is appointed substantively to a post on a time-scale of pay is regulated as follows:-

- (a) If he holds a lien on a permanent post, other than a tenure post, or would hold a lien on such a post had his lien not been subsuspended--
 - (i) When appointment to the new post involves the assumption of duties of responsibilities of greater importance (as interpreted for the purposes of Rule 30) than those attaching to such permanent post, he will draw as initial pay the stage of the time-scale next above his substantive pay in respect of the old post;
 - (ii) When appointment to the new post does not involve such assumption, he will draw as initial pay the stage of the time-scale which is equal to his substantive pay in respect of the old post, or, if there is no such stage, the stage next below that pay, plus personal pay equal to the difference, and in either case will

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continue to draw that pay until such time as he would have received an increment in the time-scale of the old post or for the period after which an increment is earned in the time-scale of the new post, whichever is less. But if the minimum pay of the time-scale of the new post is higher than his substantive pay in respect of the old post, he will draw that minimum as initial pay;

....."
■ F.R. 22-C.

Notwithstanding anything contained in these Rules, where a Government servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued.

....."
8. Thus, the consequences of these clarifications was that the benefit of fixation of pay under F.R. 22-C was no longer available to the applicants when they were promoted from the post of UDC.I/C to the post of Head Clerk and this also adversely affected their pay fixation on their next promotion, i.e. to the post of Insurance Inspector, to the extent of two increments in each of these two promotions.

9. Based on these clarifications, the respondents issued orders dated 26.2.1985, 26.2.1985 and 16.4.1985 fixing the pay of the applicant in O.A. 295/86 in the posts of UDC.I/C Head Clerk and Insurance Inspector respectively. Such orders were also issued on 22.5.1985, 22.5.1985 and 26.12.1985 in respect of the applicant in O.A. No. 386/87.

10. Being aggrieved at this revised pay fixation, the applicants filed these applications which the respondents have opposed by filing their reply. We also heard Mr. M.M. Waishampayan learned Advocate for the applicant and Mr. M.I. Sethna, learned Counsel for the respondents.

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11. Mr. Waishampayan put forward a number of oral arguments. His first was that the revised scale for UDC.I/C, viz. 425-600, was higher than the revised scale for UDC, viz. 330-560. It was his contention that thus the post of UDC.I/C was not an ex-cadre post but a promotional post. It was his submission that, in any case, under Section 17 of the ESI Act, 1948 sanction of the Central Government was required to treat the post of UDC.I/C as an ex-cadre post. A plain reading of the Act shows that there is no merit in this last submission.

12. The next submission of the applicants was that the refixation of their pay in 1985 was a case of modification of their service conditions with retrospective effect. Mr. Waishampayan cited Ex-Major N.C. Singhal v. Director General, Armed Forces Medical Services, New Delhi and another - AIR 1972 SC 628 - the head note of which reads "Government has no power to alter or modify the conditions of service of a Government servant with retrospective effect to the prejudice of the Government servant." We do not see how this applies to the applicants in this case. Whether a promotional post to which an employee can aspire is a cadre post or an ex-cadre can-not be deemed to be a service condition in which he has a vested right.

13. The next submission of the applicants was that in any case recovery of the overpayments, if any, could not be effected retrospectively. Mr. Waishampayan cited Karnataka Electricity Board, Bangalore and others v. Y.V. Venkatakrishna and others (1986 LAB.I.C. 1176 at 1180, para. 17) which reads as under:-

" The refixation of their pay was done under the valid order made by the competent authority. The Counsel for the respondents, therefore, urged that such amounts cannot be recovered by retrospectively altering the law. We must, without hesitation, accept without hesitation, the contention. A condition of employment of an employee cannot be retrospectively altered to the prejudice of the employees. On this fact, the law is clear. On this point, there are two opinions, at any rate, after the decision of the Supreme Court in N.C. Singhal v. Director General of Armed Forces, AIR 1972 SC 628 at p. 630: p. 630:

But this decision need not concern us in the present case.

14. The main submission of the respondents is that the posts of UDC.I/C were ex-cadre posts and in terms of the office memorandum of 1972 it is not permissible to fix pay in a cadre post on the basis of pay in an ex-cadre post. The applicants countered this by submitting that there are a series of decisions holding that it is incorrect to treat the post of UDC.I/C as an ex-cadre post. This submission of the applicants is well founded and we now go through these earlier decisions.

15. The case of C.S. Gopal Sharma v. Director General, E.S.I.C., New Delhi and another (Application No. 67/87 - unreported) and 3 similar cases which were decided by the Bangalore Bench of this Tribunal on 26.5.1987 was cited by Mr. Waishampayan. The grievance of the applicants in that case was that "when they were promoted from posts of Upper Division Clerks Incharge (U.D.C.I/c) to posts of Head Clerk they were not given the benefit of F.R. 22.C. Their contention is that the post of Head Clerk carries higher responsibilities than that of U.D.C. i/c and so they were entitled to fixation of their initial pay as Head Clerk under F.R. 22-C with reference to the pay drawn by them as U.D.C.I/c immediately before such promotion." In this case it was decided that "we have considered the rival contentions carefully. We do not agree with Shri Papanna that merely because the applicant held posts of UDC.I/C as a temporary arrangement they are not entitled to the benefit of F.R. 22-C. We are unable to understand how the posts of U.D.C.I/C can be treated as ex-cadre posts. As a matter of fact posts of UDC.I/C existed at the material time in every department of Government. Therefore, we do not agree that these posts were ex-cadre posts disentitling the applicants to the benefit of F.R. 22-C on their appointment as Head Clerks.

(A)

We have gone through the decision of this Tribunal in A. Nos. 170 and 171/86 and we are entirely in agreement with the decision rendered therein that the post of Head Clerk carries higher responsibilities than that of a UDC.I/C and is in fact a promotional post. We therefore hold that the applicants are entitled to fixation of their initial pay as Head Clerk under F.R. 22-C with reference to the pay drawn by them as UDC.I/C immediately before their appointment to the post. The respondents will fix the initial pay of the applicants accordingly and pay the applicants all consequential arrears flowing therefrom.

In the result, the applications are allowed. Parties to bear their own costs."

16. The case of T.K. Pandarish v. Regional Director, ESIC, Bangalore and another (Application No. 1580/88 - unreported) and 15 similar cases which were decided by the Bangalore Bench of this Tribunal on 23.12.1988 was also cited by Mr. Waishampayan. In that case the applicants prayer was to direct the respondents to fix the pay of the applicants in the post of Head Clerk (and others in the identical time scale of pay of Rs. 425-700) under F.R. 22-C with reference to the pay last drawn by them in the pay scale of the post of UDC.I/C as distinct from UDC with retrospective effect and to grant them all consequential reliefs inclusive of arrears of pay. The applicants in that case had claimed that the posts of Head Clerk etc. entailed higher responsibilities than that of UDC.I/C and, therefore, they were entitled to the benefit of F.R. 22-C with reference to the pay last drawn by them in the post of UDC.I/C while fixing their pay in the post of Head Clerk and order Clerk. The application succeeded. In the judgment in this case it was held that "the decision in Gopal Sharma's case has the lineaments of a judgment in rem and, therefore, is not binding on all those similarly placed but who did not approach the Tribunal."

the Tribunal."

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17. Mr. Waishampayan also cited two other cases in which a similar view had been taken. These are V.R. Hegde v. Secretary, Ministry of Labour and two others (Writ Petition No. 6086/1978 - unreported) which was decided by the Karnataka High Court on 9.8.1978. The second case was H.S. Sadashiy v. Secretary, Ministry of Labour and two others (Applications No. 170 and 171/86 - unreported) which was decided by the Bangalore Bench of this Tribunal on 28.11.1986. Of course, both these cases pertain to employees of the Central Provident Fund Commissioner but the issue involved is similar. In these two cases it was held that the appointment from the post of UDC.I/c to the post of Head Clerk is deemed to be in the nature of promotion.

18. The final case cited by Mr. Waishampayan is P. Raveendran v. Deputy Regional Director, E.S.I.C., Trichur - (1989)10 ATC 221 - which was decided by the Ernakulam Bench of this Tribunal on 25.1.1989. In that case it was held that " The argument of the learned counsel for the respondents that the special pay which the petitioner drew as UDC-in-charge cannot be included as it was deemed to be an ex cadre post bears little scrutiny. The UDCs and UDCs-in-charge are part and parcel of the ESIC's establishment and any motivated exclusion of the post of UDCs-in-charge from the cadre for denying higher pay by a subsequent clarification is not only illogical but illegal. The Bangalore Bench of the Tribunal in a similar case of the ESIC in Application Nos. 67 to 69 of 1987 in their judgment dated 26.5.1988 (Ext. P-8), categorically refused to treat the post of UDC-in-Charge of the Corporation as ex cadre post. In their judgment, they have considered the post of Head Clerk as carrying higher responsibilities than those of UDC-in-Charge and allowed the application of F.R. 22-C in fixing the pay of the UDCs-in-Charge when promoted as Head Clerks....."

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19. We are in respectful agreement with the views expressed in these judgments and have no difficulty in holding that these applications deserve to succeed. We, therefore, propose to pass an order on the same lines as in Pandarish's case mentioned earlier.

20. We direct that the fixation of pay of the applicants in the posts of Head Clerk and Insurance Inspector made in 1985 be set aside. The applicants are entitled to fixation of their initial pay in the post of Head Clerk in accordance with F.R. 22-C with reference to the pay drawn by them as UDC.I/C immediately prior to their appointment to the post of Head Clerk. The respondents are directed to fix their initial pay in the post of Head Clerk accordingly and grant them all consequential benefits and arrears with retrospective effect. We specifically make it clear that consequential benefits and arrears shall include subsequent pay fixation in the post of Insurance Inspector as also pension and other settlement dues. All payments due shall be made within a period of four months from the date of receipt of a copy of this order.

21. There will be no order as to costs.