IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO: 514/96

Date of Decision: 30-04-97

Employees State Insurance Corporation Employees Union and one another .. Applicant

Mr.Ramesh Ramamurthy .. Advocate for Applicant

-versus-

U.O.I. & Ors. .. Respondent(s)

Mr.B.P.Vadavkar .. Advocate for Respondent(s)

CORAM:

The Hon'ble Shri M.R.Kolhatkar, Member(A)

The Hon'ble

(1) To be referred to the Reporter or not ? ✓

(2) Whether it needs to be circulated to other Benches of the Tribunal ? X

M R Kolhatkar

(M.R.KOLHATKAR)
M(A)

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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

MUMBAI

O.A. 514/96

Pronounced this the 30th day of April 1997

CORAM:

HON'BLE SHRI M.R.KOLHATKAR, MEMBER(A)

1. Employees State Insurance
Corporation Employees' Union
(MHR Region)
Panchdeep Bhavan,
N.M.Joshi Marg, Lower Parel,
Mumbai - 400 013.
through its General Secretary
Mr.M.S.Inamdar.

2. Shri V.D.Amin
Employed as Assistant in
E.S.I.C.
Panchdeep Bhavan
N.M.Joshi Marg,
Lower Parel,
Mumbai - 400 013.

By Advocate Mr.Ramesh Ramamurthy .. Applicants

-versus-

1. Union of India
through
The Secretary,
Ministry of Labour,
Shramshakti Bhavan,
New Delhi - 110 001.

2. The Director General,
Employees' State Insurance
Corporation,
Panchdeep Bhavan,
Kotla Road,
New Delhi - 110 001.

3. The Regional Director,
Employees' State Insurance
Corporation,
Panchdeep Bhavan,
N.M.Joshi Marg,
Lower Parel,
Mumbai - 400 013.

By counsel Shri B.P.Vadavkar .. Respondents

-: O R D E R :-

(Per M.R.Kolhatkar, Member(A))

In this O.A. the applicants have challenged the orders conveyed under letter dt. 10-5-95, page 21 and 4-1-1994, page 22, as being illegal and arbitrary and prayed that the respondents be permanently

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restrained from reviewing any order of fixation under FR 26(a) and FR 22.

2. The OA has a chequered history and this is a second round of litigation. The letters which are sought to be quashed are the letters which have been issued in pursuance of the directions of the Tribunal in O.A. 370/87 decided on 5-11-92. Those directions were in the nature of giving an opportunity to the union of being heard before passing a further order with reference to the then impugned orders. Thus the present orders have been passed after a post decisional hearing. It is therefore necessary to consider what are the basic issues.

3. The question involved is that of fixation of pay of the employees who were initially appointed on a temporary and adhoc basis. It is not disputed that as per Rule 21(2)(f) of Recruitment Regulations, 1965, recruitment to the post of LDC has to be made by open competitive examination. However, in the absence of approved panel the persons drawn from the Employment Exchange were appointed on purely adhoc basis for a period of 3 - 6 months. On the expiry of the period of such appointment the persons were again re-appointed with the break of 1 to 2 days for a further period 3 to 6months. These employees were also allowed to appear for the open competitive written examination alongwith other fresh candidates for filling up the vacancies. Some of these employees on qualifying the test were appointed on regular basis from the date of availability of regular posts. A question then arose whether the period prior to regular appointment was to be counted for increments under FR 26(a). A decision was taken vide letter dt. 20-5-1978 at page 34 that all period in a post on a time scale counts for increments

in that time scale under FR 26 and accordingly increments were granted. There was however a doubt regarding this interpretation and since ESIC (Staff and Conditions of Service)Regulations,1959 and in particular Regulation 7(3)provides that fixation of pay, grant of increment and connected matters shall, in the case of an employee, be governed by the provisions contained in the FRs and SRs framed thereunder as applicable from time to time to employees of the Central Government and the Central Government clarified that the action taken was not correct and therefore the ESIC issued the memoranda dt. 15-10-85 and 31-10-86 at page-23 and 25 and it is essentially these memoranda which are challenged in this O.A. The mrmorandum dt. 15-10-85 reads as below :

> "Sub: Grant of increment under FR 26(a)- clarification regarding counting of past service rendered on a purely temporary and adhoc basis in a post vis-a-vis fixation of pay on subsequent appointment in the same post under FR -22 - Direct recruits.
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> ...
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> The matter mentioned above has been under consideration of the Headquarters Office for some time past and it has been decided on the basis of clarification received from the Department of Personnel and Administrative Reforms(Ministry of Home Affairs) that the service of an employee rendered in the post of LDC/Peon on adhoc appointments followed by termination, should not be counted for the purpose of grant of increment under FR 26(a) when the same person is re-appointed on adhoc basis or on regular basis in the said posts after termination of the previous adhoc appointment.
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> The adhoc appointments should be made for the barest minimum period and after the expiry of the specified period which should in no case be for more than 2 spells of 90 days each, with a break in between, these

appointments are treated as having come to a close. All subsequent appointments are therefore to be treated as fresh appointments and the pay is to be fixed at the minimum of the scale of pay. In such cases provisions of FR 26 & FR 22 are not attracted.

3. All the past cases in which pay has been fixed under FR 26(a) and FR (22) i.e. after wrongly allowing the benefit of past service, may be reviewed and regularised accordingly and the pay refixed immediately and the amount of over payments worked out in individual cases. The number of such cases alongwith the amount if over payments involved may kindly be intimated to Headquarters so that question regarding waiver of over payment/recovery may be examined."

4. The memorandum dt. 31-10-86 merely clarified the memorandum dt. 15-10-85 and the same clarification is as below :

"It is clarified that service in short-term appointments will count for increment only in case of persons who are appointed from the select list of candidates and are eligible for regular appointments and not in the cases of appointments made on adhoc basis from outside the select list."

5. The contention of the applicants is that the breaks were artificial and to the extent the breaks were artifical the service of the adhoc temporary employees should notbe taken to have been terminated but it will have to be counted as a continuous service and the consequence of counting the service as continuous would be that the employees would be entitled to drawing of increments. In this connection the counsel for the applicant relies on the judgment of the CAT in O.A.306/87

decided on 15-3-92 in Balaram Hembram & Ors. vs. U.O.I. of which the short note is reported in 1993(3) SLJ 13. The short note reads as below :

> "The applicants have alleged that the respondents had resorted to give artificial break in service for one day in January 1986 with mala fide intention. The respondents have also admitted that the break for a day after a specific period of service was to ensure that the ad hoc promotion was not continuous. We are unable to support the action of the respondents. It is by now well settled that such artificial breaks by no means take away the rights of the applicants to be treated as having continuously worked against the posts against which they had been promoted on ad hoc basis ignoring the break. Thus for all purposes, where the respondents have given such technical breaks to the applicants' service, they shall not be treated as actual breaks in counting continuous service of the applicants on any ad hoc basis and the periods of break will also be counted for arriving at the period of continuous service in the appropriate cases."

6. The counsel for the applicant has also relied on the Supreme Court judgment in Karnataka State Private College Stop-Gap Lecturers Association, vs. State of Karnataka & Ors, AIR 1992 SC 677 in which case also the Supreme Court issued directions on the footing that the provision in clause 5 of one day's break in service is struck down as ultra vires. The facts in that case did not involve interpretation of FR and SR's but interpretation of a different set of rules and in para 6 of the judgment Hon'ble Supreme Court deprecated the practice of the State Govt. to give break in service for a day or two and paying fixed salary to temporary employees.

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7. Respondents, however, have contended that the action taken was in accordance with the interpretation of FRs and SRs as given by the nodal department viz. Department of Personnel and when the mistake came to be noticed the same was corrected. On the point of Government's power to correct a mistake respondents refer to Supreme Court judgment in O.K.Udayasankaran & Ors. vs. U.O.I. 1996(2)SC SLJ 5. In para 12 of the judgment the Hon'ble Supreme Court observed that the respondents have admitted their mistake and they have sought to correct the mistake and they are entitled to reduce the pay of the appellants on the basis of correct fitment.

8. We have to consider whether there has been any mistake and for that purpose we are required to consider the provisions of FR 22 and FR 26(a).

9. FR 26(a) lays down that "All duty in a post on a time-scale counts for increments in that time scale" provided that for the purpose of arriving at the date of the next increment in that time-scale, the total of all such periods as do not count for increment in that time-scale, shall be added to the normal date of increment. According to respondents however, this direction has to be read with FR 22. According to FR 22 the initial pay of a Govt. servant who is appointed to a post on a time-scale of pay is regulated according to clause (a) and if it is the first appointment it is regulated by clause (b). It is not disputed that it is FR 22(b) which applies to the present case. FR 22(b) to the extent it is relevant is reproduced below :

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"(b)If the conditions prescribed in clause(a) are not fulfilled, he shall draw as initial pay on the minimum of the time scale:

Provided that, both in cases covered by clause (a) and in cases, other than the cases of re-employment after resignation or removal or dismissal from the public service, covered by clause (b), if he -

(1)has previously held substantively or officiated in
(i) the same post, or
(ii)a permanent or temporary post on the same time scale, or
(iii)a permanent post or a temporary post (including a post in a body, incorporated or not, which is wholly or substantially owned or controlled by the Government) on an identical time-scale; or

(2)is appointed subject to the fulfilment of the eligibility conditions as prescribed in the relevant recruitment rules to a tenure post on a time scale identical with that of another tenure post which he has previously held on regular basis;

then the initial pay shall not, except in cases of reversion to parent cadre, governed by proviso (1)(iii)be less than the pay, other than special pay, personal pay or any other emoluments which may be classed as pay by the President under Rule 9(21)(a)(iii)which he drew on the last occasion, and he shall count the period during which he drew that pay on a regular basis on such last and any previous occasions for increment in the stage of the time-scale equivalent to that pay."

10. From the above, it is clear that the employees on first appointment are to draw initial pay on the minimum of the time scale.

11. The proviso, however, is important. The proviso states that if he has previously held substantively or officiated in the same post then the initial pay

shall not less than the pay which he drew on the last occasion and he shall count the period during which he drew that pay on a regular basis on such last and any previous occasions for increment in the stage of the time scale equivalent to that pay. Now the question to be considered is as to why the pay of the applicants should not be fixed by a plain reading of the rules as reproduced above. It is not disputed that the case of the applicants is not that of re-employment after resignation or removal or dismissal from the service. The case of the applicants is being treated as re-employment or removal from service on the ground that a technical break was given. But the removal from service was not in the technical sense a removal at all. It has come on record that in the case of the applicants artificial breaks were given for technical reasons. In this connection reference may be made to the letter dt. 10th October,94 which appears at Ex.C to the sur-rejoinder wherein it is stated as below:

> "It is also observed that when candidates from panel are not available and new recruitment is likely to take long time, the posts of LDCs are also temporarily filled up by candidate called from Employment Exchange on the basis of interview. As the employees are appointed on purely temporary and adhoc basis their services are to be terminated before completing the specific period for technical reasons for some days before re-appointment the same post. It is not clear from the rules whether the benefit of service rendered by such employees in broken spells can be counted for the purpose of increment when the employees qualify recruitment test and are appointed on regular basis subsequently."

12. The Department of Personnel and Administrative Reforms, however, has rejected the proposal to count the pre-regularisation service of the adhoc appointees on the grounds given by them in their letter dt. 8-5-86 which may be reproduced below :

> "2. In this connection, it is mentioned that ad-hoc appointments could be brought under two categories -
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> (i) where persons already holding regular appointments are promoted on ad-hoc basis to higher posts in the direct line of appointment in the cadre, and
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> (ii) where persons are appointed on ad-hoc basis through employment exchange etc. pending availability of regular appointees, to keep the wheels of the Govt. moving
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> 3. Our stand has been that while in the former category of cases, the service rendered on ad-hoc basis on different spells can be taken into account for fixing pay and grant of increments etc. on subsequent appointment, in the latter category of cases such a benefit cannot be given. In the latter category of cases, when regular appointments are made, it has also to be seen whether provisions of FR 22-B are attracted.
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> 4. Further, it may be stated that when regular appointments are made against short term vacancies, increments would normally accrue under the extant provisions of FR 26."

13. From the reply of the Department of Personnel and Administrative Reforms on the basis of which respondents issued memorandum dt. 15-10-85 it is seen that the interpretation of Department of Personnel is not in terms of plain reading of FR 22(b) but it is in terms of certain notions relating to what type of adhoc appointments should be counted for increments and what should not be counted for increment. The interpretation of the Department does not appear to have any support in the FR 22 which hwas been reproduced

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by me above and from a plain reading of which it is quite clear that the employees in question prior to their regularisation if their artificial breaks are condoned and which must be condoned in terms of the Supreme Court observation are required to be held to have put in continuous service making them eligible for counting that continuous service for increment in the stage of time scale equivalent to pay.

14. The applicants have raised certain other grounds to challenge the orders like the autonomy of ESIC, like whether effective hearing was given in terms of the Tribunal order and so on. I am not, however, required to deal with those arguments for the simple reason that since I am holding on plain reading of FR 22(b) and FR 26(a) that after condonation of artificial breaks such employees are required to be held to have been selected in terms of Recruitment Rules on a regular basis and are hence entitled to count their service for increment in terms of FR 26(a) and to that extent memorandum dt. 15-10-85 and 31-10-86 cannot be sustained.

15. The respondents, however, have contended that in terms of mistake made by them earlier the respondents are entitled to make recovery in respect of the period prior to 1-1-86. However, in view of para-4 of the judgment dt. 5-11-92, the question of recovery of overpayment does not arise but on the other hand to the extent the respondents have to restore the pay fixation of the applicants in terms of position obtaining prior to memorandum dt. 15-10-85 read with memorandum dt. 31-10-86. The fixation is required to be redone by allowing the increments prior to 1-1-86.

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16. O.A. is therefore allowed and the respondents are directed to refix the pay of the employees on the footing that memoranda dt. 15-10-85 and 31-10-86 are nonest. The arrears in terms of this order be paid to the employees who are members of the applicant No.1 but the same should be restricted to the period three years prior to the date of filing of the O.A.

17. There will be no order as to costs.

M.R. Kolhatkar

(M.R. KOLHATKAR)
Member(A)

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CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

R.P. NO.: 52/97 IN O.A. NO.: 514/96.

Dated Pronounced the 16th day of October, 1997.

CORAM : HON'BLE SHRI M.R. KOLHATKAR, MEMBER (A).

Employees State Insurance
Corporation Employees Union
& Another. ... Review Petitioners
(Original Applicants)

(By Advocate Shri M.S. Ramamurthy)

VERSUS

Union Of India & Others ... Respondents
(Original Respondents)

(By Advocate Shri M.I. Sethna)

TRIBUNAL'S ORDER :

{ PER.: SHRI M.R. KOLHATKAR, MEMBER (A) }

In the O.A., the relief was granted in the following terms :-

> "O.A. is therefore allowed and the respondents are directed to refix the pay of the employees on the footing that memoranda dt. 15.10.1985 and 31.10.1986 are nonest. The arrears in terms of this order be paid to the employees who are members of the applicant No. 1 but the same should be restricted to the period of three years prior to the date of filing of the O.A."

In this Review Petition, the review petitioner/original applicant has sought limited review of the order

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restricting the arrears to only three years prior to the filing of the O.A. I decided to give hearing to both the parties instead of disposing of the review petition by circulation and accordingly, the respondents were allowed to file reply to the R.P. and the parties were heard.

2. According to the Review Petitioner, refixing has been ordered w.e.f. 01.01.1986. The applicants have actually worked on the said posts and they have been continuously agitating the matter. In the order dated 05.11.1992 in O.A. No. 370/87 filed by the said applicants for the same relief, the Tribunal had directed the respondents to give show cause notice and pass a fresh order. Thus, it is evident that the issue has been continuously agitated since 1986. According to the applicant, therefore, the order restricting the arrears to only three years is inconsistent with the findings of the Tribunal in question and is an error apparent on the face of the record and deserves to be reviewed.

3. The respondents to the review petition, who were also the original respondents, have first raised the issue relating to review petition not being filed within the prescribed period. The same has been considered by me vide order dated 10.07.1997. Next, the respondents

have stated that a Single Bench of the Central Administrative Tribunal has no jurisdiction to deal with any matter relating to fixation of pay, as these matters fall within the jurisdiction of the Division Bench. In this connection, the respondents rely on the Supreme Court decision in Union Of India & Another V/s. P.V. Hariharan & Another (1997 SCC (L&S) 838) in which the Hon'ble Supreme Court observed towards the end of the order that it would be in the fitness of the things that ~~if~~ all matters relating to pay scales are heard by a Bench comprising atleast one Judicial Member and the Chairman of the C.A.T. and the Chairman of the S.A.T. i.e. State Administrative Tribunals, shall consider issuing appropriate instructions in the matter.

4. In the context of the above orders or otherwise, the Hon'ble Chairman of the C.A.T. has issued Notification No. 1/32/87-J(Vol.II) dated 14.05.1997 directing deletion of cases relating to fixation of pay from the schedule of cases which can be heard by a Single Bench. My judgement is dated 30.04.1997 and the Chairman's Notification is dated 14.05.1997. After the receipt in normal course of the Chairman's Notification, a Single Bench may not deal with any cases relating to pay fixation.

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The present case is prior to the date of notification and its receipt. The contention of the respondents, therefore, that this Tribunal has no jurisdiction to deal with any matter relating to pay fixation even by way of review is, therefore rejected. Next, the respondents have contended that review jurisdiction is limited and cannot take the place of appellate jurisdiction. In this connection, reliance is placed on Thungabhadra Industries Ltd. V/s. The Government of Andhra Pradesh (AIR 1964 SC 1372) wherein at page 1377 it has been held that - "a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error." According to the respondents, the Tribunal has taken a view and given a concious decision to restrict the payment of arrears to a period of three years prior to the filing of the O.A. and this concious decision cannot be treated as an error apparent on the face of the record.

5. I have considered the matter and I am of the view that although I have jurisdiction but the review petition is not within the parameters of the review jurisdiction, as laid down in the rules under Order No. 47 of C.P.C. The decision to restrict the payment of arrears to a period of three years may or may not be justified, and if it is not justified, the party

considering it to be unjustified, is at liberty to go to the appellate forum but cannot agitate the matter by way of review because it is not an error apparent on the face of the record.

6. I, therefore, hold that there is no merit in the Review Petition and the same is, therefore, dismissed with no order as to costs.

MR Kolhatkar

(M. R. KOLHATKAR)
MEMBER (A).

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