

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA 2633/2013
MA 1191/2015

New Delhi this the 13th day of August, 2015

Hon'ble Mr. P.K. Basu, Member (A)
Hon'ble Mr. Raj Vir Sharma, Member (J)

Smt. Nisha JL
Assistant
Dte of Naval Training
IHQ of MOD (Navy)
Sena Bhawan,
DHQ PO, New Delhi-110011Applicant

(Through Shri Padma Kumar S., Advocate)

VERSUS

1. Union of India through the Secretary,
Ministry of Defence,
South Block,
New Delhi-110 011
2. Principal Controller of Defence Accounts
G Block, K Kamaraj Marg,
D.H.Q. PO
New Delhi-110 011
3. DOA (Civ) (Directorate of Administration (Civilian))
IHQ of MoD (Navy),
DHQ PO, New Delhi
4. JD PC (Joint Director Personnel Civilian)
PC Directorate,
Air Headquarters,
New Delhi-11
5. Office of Joint Secretary (Training) &
Chief Administrative Officer/P-I
E Block, DHQ PO,
New Delhi-11

(Through Shri Ashok Kumar, Advocate)

ORDER**Mr. P.K. Basu, Member (A)**

The applicant is aggrieved by the reduction of her salary and also recovery of the alleged overpayment from her salary without any show cause notice.

2. The applicant was appointed as a Lower Division Clerk (LDC) on 25.08.1983 and promoted as Upper Division Clerk (UDC) in May 1992. She was granted Extra Ordinary Leave (EOL) for 502 days from 5.12.2005 to 20.04.2007. The applicant reported back in the office on 19.04.2007. In between, respondents issued promotion order dated 9.10.2006 promoting four employees of Air Headquarters as Assistants. On 30.08.2010, the applicant made a representation and in September 2010, the respondents issued revised pay fixation order showing her pay as Rs.13860/- as on 1.01.2006 and 2.01.2006, Rs.14420/- as on 1.07.2006, 1.01.2007 etc. and ultimately Rs. 15580/- as on 1.07.2008. This pay slip also indicates the arrears that are due to her. However, later on vide Annexure - A1, the department reduced her pay as follows:

(Letter dated 9.05.2013)

"Consequent on the directions of Office of the PCDA, G Block vide their letter No.11092/PFC/PT/Asst Vol. II dated 26.11.2012, Pay re-fixed @ Rs.10230/-* in PB-2 Rs.9300-34800 with Grade Pay of Rs.4600 w.e.f. 01.01.06 with DNI 01.07.2008 as per the provision of Ministry of Finance OM No.1/1/2008-IC dated 16 November, 2009. No annual increment granted on 01.07.2006 and 01.07.2007 due to 208 days EOL (from

05 Dec 2005 to 30 Jun 2006) and 293 days EOL (01 Jul 2006 to 19 Apr 2007) respectively.

Promoted to the grade of Assistant wef 20 Apr 2007 and no fixation is required since pay fixed on notional basis on grant of ACP wef 01.01.2006. Pay further raised as under after grant of annual increment:-

Rs.10680/- with Grade Pay Rs.4600 wef 01.07.08
Rs.11140/- with Grade Pay Rs.4600 wef 01.07.09
Rs.11620/- with Grade Pay Rs.4600 wef 01.07.10
Rs.12110/- with Grade Pay Rs.4600 wef 01.07.11
Rs.12620/- with Grade Pay Rs.4600 wef 01.07.12

This supersedes DO Pt II Orders No.291/VB/III/PC-I/10 dated 30.07.10, 07/2007/Incr/GS and 27/A1/2012.

*Financial effect will be from 20 Apr 2007 since Smt J.L. Nisha, Assistant was on EOL from 05.12.05 to 19.04.07.

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(Letter dated 10.05.2013)

Consequent upon upgradation of pay scale of Rs.5500-175-9000 to Rs.6500-200-10500 wef 15 Sep 06 vide Ministry of Finance OM No.5/2/2004-IC dated 15 Sep 06, 20/29/2006-CS.II (CS.I) dated 25 Sep 06 & Ministry of Finance, Department of Expenditure U.O No.1/1/2008-IC dated 23 June 09 and clarification issued by Ministry of Finance/ Department of Expenditure ID No.21 (1)/2012-E-II (B) dated 1.12.2012, Pay fixed @ Rs. 6500 in the pay scale of Rs.6500-200-10500 wef 15 Sep 06 on revision of pay scale of Assistant. No increment on 01 Sep 07 due to EOL.

Financial effect from 20 Apr 07 since the individual was on EOL from 05.12.05 to 19.04.07."

3. The respondents also directed recovery of excess amount paid. The applicant made a representation on 15.05.2013 but the respondents reduced her pay by Rs.9000/- without following any procedure. She has thus filed the present OA with the following prayers:

(a) Quash and set aside impugned orders dated 9.05.2013 and 10.05.2013 (Annexure A-1 colly).

(b) Direct the respondents to grant all the consequential benefits of the above.

4. According to the applicant, if on the basis of empanelment for promotion against vacancies arising in a vacancy year, a promotion order contains name of a person who is on a sanctioned leave, a copy of the same is to be endorsed to the officer at his leave address by registered/speed post, etc., along with necessary advice about the authority to whom he is to report for assuming charge of the higher post. If the Officer assumes charge of the higher promotional post by curtailing leave, if necessary, within the currency of the vacancy year for which the panel is prepared, or within six months from the date of the promotion order, or before the last person borne on the panel is offered promotion without being required to be reassessed by a fresh DPC, whichever is later, the officer will not be required to be considered afresh by the next DPC and he will retain his seniority as per the position in the panel on the basis of which he/she has been promoted. If, however, he does not join to assume charge of the higher post within the period as specified above and continues to remain on long leave or seeks further extension of leave, the order of promotion, insofar as the said officer is concerned, will become invalid and the officer will be required to be considered afresh by the next DPC held in the normal course after he joins his duty on expiry of the leave. His seniority on subsequent promotion will be as per the position in the fresh panel. This will equally

apply to cases of promotion by mode of selection as well as non-selection. While referring the order of promotion to the officer on leave, it would be necessary to bring to his/ her notice the above position.

5. According to the learned counsel, the respondents did not intimate the applicant about the promotion order so that he could have returned from EOL and joined the promotional post. It is further stated that vide order dated 9.10.2006, the applicant has been promoted as Assistant with minimum pay attached to the post being Rs.13860/-, she has been granted the same vide pay slip referred to above. Therefore, her pay cannot be reduced below that level.

6. It has also been stated that the applicant was granted ACP in the pay scale of Rs.5500-9000 attached to the post of Assistant with effect from 1.01.2006. According to the applicant, this pay scale has been revised by the respondents to Rs.7450-11500 with effect from 1.01.2006. It is alleged by the applicant that now the respondents are making adverse changes in ACP related benefits as well.

7. According to the respondents, the applicant was promoted as Assistant in the pay scale of Rs.5500-9000 (V CPC) on 1.01.2006. However, since she was on EOL for 501 days from 5.12.2005 to 19.04.2007, she assumed charge of the post only on 20.04.2007. On 31.01.2007, orders were issued granting the applicant second financial upgradation under the previous ACP Scheme in the pay scale of Rs.5500-

9000 (applicable to the next higher grade of Assistant) with effect from 1.01.2006. Consequent to this, her pay was fixed at Rs.5500/- in the pre-revised scale of Rs.5500-9000, notionally with effect from 1.01.2006 but with financial effect from 20.04.2007 only, since she was on EOL and had joined after availing EOL on that date.

8. Consequent to implementation of VI Pay Commission recommendations, the applicant's pay was fixed at Rs.13860/- in PB-2 (Rs.9300-34800) with Grade Pay of Rs.4600/- with effect from 1.01.2006 with reference to the fitment table of the upgraded pre-revised pay scale of Rs.7450-11500/-. Annual increments due on 1.07.2006 and 1.07.2007 were not granted since the applicant was on 501 days EOL from 5.12.2005 to 19.04.2007. However, on 26.11.2012, the Principal Controller of Defence Accounts (PCDA) informed that pay fixation was not in order in respect of those UDCs who got second financial upgradation under ACP Scheme on 1.01.2006 and were promoted as Assistants after 1.01.2006, and whose pay was fixed from the date of grant of ACP/ promotion with reference to the fitment table of the upgraded pre-revised pay scale of Rs.7450-11500 in terms of para 4 (c) of Ministry of Finance, Department of Expenditure UO No.19/41/E.III-A/2011 dated 11.05.2012. As such, Office of PCDA directed to review such cases of pay fixation done in terms of para 4 (c) of the UO *ibid* and take corrective action for re-fixation of their pay with effect from 1.01.2006 with reference to the fitment table of the pre-revised pay scale of Rs.5500-9000, in terms

of para 4 (a) of Ministry of Finance UO dated 11.05.2012. Accordingly, revised pay fixation proposal in respect of the applicant was forwarded by Naval Headquarters to the Office of the PCDA, G Block, New Delhi for approval. After their approval, office order No.DA/Civ/14775/N-2 dated 9.05.2013 was issued by Naval HQ refixing her pay at Rs.10230/- plus Grade Pay of Rs.4600/- in PB-2 (Rs.9300-34800) with effect from 1.01.2006 with reference to the fitment table of pre-revised pay scale of Rs.5500-9000. This also resulted in consequent recovery of excess payment amounting to Rs.4,61,951/-. In the light of these facts, the respondents pray that the applicant is not entitled for any relief and the OA deserves to be dismissed.

9. In support of her case, the applicant relied on the following:

(i) O.A. 840/2011, **C. Sreekantan and others Vs. The Principal Registrar, CAT, Principal Bench, New Delhi and others**, decided by the Ernakulam Bench of the Central Administrative Tribunal. The applicants in this case were serving employees of the Ernakulam Bench of the C.A.T. They held the post of Assistant/ UDC. (The UDCs have their financial upgradation under the ACP scheme and were enjoying the pay scale of Rs.5500-9000). Their scale of pay prior to 1.01.2006 was Rs.5500-9000/-. Their grievance in that OA was that the pay fixation carried out in the wake of upgradation of the pay scale of Assistants from Rs.5500-9000 to Rs.7450-11500, followed by the replacement pay scale in

the PB-II – Rs.9300-34800 + Grade Pay of Rs.4600/- has not been correctly done and the OA was allowed;

- (ii) **O.A. 856/2011, K. K. Vijayan and others Vs. The Principal Registrar, CAT, Principal Bench, New Delhi and others**, decided by the Ernakulam Bench of the Central Administrative Tribunal. This was similar to (i) above;
- (iii) **O.A. 521/2011, Smt. Seema Vashist Vs. Union of India and others**, decided by the Principal Bench of the Tribunal. This case related to Assistant Librarian in Safdarjung Hospital. The facts of this case are not similar to the present case;
- (iv) **Bhagwan Shukla Vs. Union of India and others**, 1995 (2) AISLJ 30. In this case, the Hon'ble Supreme Court held that action causing civil consequences cannot be taken without show cause;
- (v) **Management of M/s M.S. Nally Bharat Engineering Co. Ltd. Vs. State of Bihar and others**, (1990) 2 SCC 48, where the Hon'ble Supreme Court held that not giving the opportunity of pre-decisional hearing is itself a prejudice;
- (vi) **S.L. Kapoor Vs. Jagmohan and others**, (1980) 4 SCC 379. The ratio laid down by the Hon'ble Supreme Court in this case was similar to (iv) and (v) above; and

(vii) **State of Punjab and others Vs. Rafiq Masih (White Washer) etc., 2014 (8) SCALE 613.**

In this case, the Hon'ble Supreme Court held as follows:-

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be 20 that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
- (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
- (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

10. On the subject of grant of second Financial Upgradation, the following was made clear in the order itself:

"The pay of the above officials shall be fixed under the provision of FR 22 (1)(a)(i) subject to the

minimum financial benefit of Rs.100/- as per the DOP&T OM under reference. Before granting financial upgradation, the concerned Admin Sections may ensure that the officials are clear from vigilance angle. The financial benefit allowed under the ACP Scheme shall be final and no pay fixation benefit shall accrue at the time of regular promotion, i.e. posting against a functional post in the higher grade of Assistant.”

and this is based on para 9 of Annexure-1 of OM dated 09.08.1999, which reads as follows:-

“On upgradation under the ACP Scheme, pay of an employee shall be fixed under the provisions of FR 22(1)(a)(1) subject to a minimum financial benefit of Rs.100/- as per the DoP&T OM No.1/6/97-Pay.I dated July 5, 1999. The financial benefit allowed under the ACP Scheme shall be final and no pay fixation benefit shall accrue at the time of regular promotion i.e. posting against a functional post in the higher grade”.

11. That on grant of second Financial Upgradation under the old ACP scheme, pay in respect of the applicant and other similarly placed UDCs was fixed w.e.f. 01.01.2006 in the higher pre-revised pay scale of Rs.5500-9000(applicable to next higher grade of Assistant). Accordingly, pay of the applicant was fixed under FR-22(I)(a)(1) at Rs.5500 w.e.f. 01.01.2006 in the pay scale of Assistant (Rs.5500-9000), raising from her earlier pay of Rs.5100/- w.e.f. 01.12.2005 in the pay scale of UDC (Rs.4000-6000). Since the applicant was on EOL on private affairs for 501 days from 05.12.2005 to 19.04.2007 without pay & allowances, her pay was fixed at Rs.5500/- w.e.f. 01.01.2006 notionally, but with financial effect from 20.04.2007 i.e. the date she resumed duty after EOL.

12. It is stated by learned counsel for the respondents that the applicant assumed the appointment of Assistant on 20.04.2007 i.e., the date she resumed her duties after availing 501 days EOL. It is submitted that at the time of her regular promotion wef. 20.04.2007 in the grade of Assistant (carrying pay scale of Rs.5500-9000), she is not entitled for further pay-fixation benefits under FR 22(I)(a)(1), as per DOP&T's ACP Scheme quoted above and as per para 4 of the order No.A/47920/ACP/06-07/Asstt/CAO/P-I dated 31.01.2007 (Annexure R-7) which reads as follows:

“4. The pay of the above officials shall be fixed under the provision of FR 22(I)(a)(1) subject to the minimum financial benefit of Rs.100/- as per the DOP&T OM under reference. Before granting financial upgradation, the concerned Admn Sections may ensure that the officials are clear from vigilance angle. The financial benefit allowed under the ACP Scheme shall be final and no pay fixation benefit shall accrue at the time of regular promotion, i.e., posting against a functional post in the higher grade of Assistant.”

13. The learned counsel for the respondents also relied on the judgment of the Hon'ble Supreme Court dated 1.11.2013 in Civil Appeal No.9873/2013, **U.T. Chandigarh & ors. Vs. Gurcharan Singh and anr.** in which the Hon'ble Supreme Court held as follows:

“12. Though a submission had been made on behalf of the respondent that no amount should be recovered from the salary paid to the respondent, the said submission can not be accepted because if any amount had been paid due to mistake, the mistake must be rectified and the amount so paid in pursuane of the mistake must be recovered. It might also happen that the employer might have

to pay some amount to the respondent as a result of some mistake and in such an event, even the appellant might have to pay to the respondent. Be that as it may, upon settlement of the account, whatever amount has to be paid to the respondent employee or to the appellant employer shall be paid and the account shall be adjusted accordingly."

14. It is amply clear from the narration of facts that revised pay fixation done by the respondents is as per rules and we are of the view that there has been no error committed in this regard. We are also of the opinion that this was correction of an error committed by the respondents in pay fixation. It is evident from payment documents submitted by the applicant at Annexure-A-6 to the OA. However, the judgment of the Hon'ble Supreme Court in Rafiq Masih (supra) would apply in this case and, as a result, it was not permissible for the respondents to recover the excess payment made from the applicant.

15. Therefore, we hold that while the orders dated 9.05.2013 and 10.05.2013 as regards revised pay fixation are in order, the portion thereof directing recovery is not sustainable and accordingly that portion is quashed and set aside. The respondents will not make any recovery as a result of revised pay fixation and in case any recovery has been made, that shall be refunded to the applicant within a period of one month from the receipt of a copy of this order. The OA is disposed of with the above directions. No costs.

(Raj Vir Sharma)
Member (J)

/dkm/

(P.K. Basu)
Member (A)