

**Central Administrative Tribunal
Principal Bench, New Delhi**

O.A.No.1721/2013

Order reserved on 23rd October 2017

Order pronounced on 5th December 2017

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. K.N. Shrivastava, Member (A)**

S K Tandon s/o late Mr. L N Tandon
r/o Flat No.C-125, Plot No.25
Saraswati Kunj, Group Housing Society
I P Extension, Patparganj, Delhi – 110 092

(Mr. H S Dahiya, Advocate)

..Applicant

Versus

1. Union of India through Secretary
Ministry of Environment,
Forests & Wildlife
Paryavaran Bhavan,
CGO Complex, New Delhi – 03
2. Secretary
Ministry of Personnel, Public Grievances & Pensions
(Department of Personnel and Training)
North Block, New Delhi-03
3. The Director
National Museum of Natural History
FICCI Building, Barakhamba Road
New Delhi – 110 001

..Respondents

(Mr. Ashok Kumar, Advocate)

O R D E R

Mr. K.N. Shrivastava:

Through the medium of this O.A. filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has prayed for the following main reliefs.

“(a) to set the order No.06 (25)/2011-12/NMNH/Adm dated 16.05.2012 by the Director NMNH by which the illegal decision to grant 2nd ACP to the applicant in the pay scale of Rs.6500-10500/- instead of Rs.8000-275-13500/- has been upheld.

(b) set aside the order No.06 (58)/2008/NMNH dated 30.10.2010 by which, it has been ordered to fix his pay in the lower pay scale of Rs.6500-200-10,500/- w.e.f. 24.11.99 instead of higher pay scale of Rs.8000-275-13,500 in which it was fixed earlier on grant of 2nd ACP and to refund the amount of Rs.58,209/- deducted from gratuity, Rs.5000/- from his salary or other amount of approximately about Rs.2000/- from his other dues which were illegally recovered with interest of 18%.

(c) direct the respondents to restore the order of earlier fixation of pay in the pay scale of Rs.8000-13500/- w.e.f. 24.11.1999 of on grant 2nd ACP vide order No.1(9) 199-2000/NMNH dated 3.1.2000 of respondent No.3 and consequentially refix the pay of the applicant accordingly on implementation of VIth Pay Commission recommendation and on grant of 3rd ACP w.e.f. 1.9.2008 with all consequential benefits and arrears of pay. It may also be directed that such arrears of pay be paid with interest of 18% per annum.”

2. The factual matrix of the case, as noticed from the records, is as under:-

2.1 The applicant joined National Museum of Natural History (NMNH) on *ad hoc* basis as Modeller / Exhibit Preparator (since re-designated as Exhibit Preparator) in the year 1974. His appointment was regularized in the year 1975 and he was granted the pay scale of ₹4500-7000.

2.2 In the year 1983, the applicant was promoted to the post of Senior Exhibit Preparator in the pay scale ₹5500-9000 on *ad hoc* basis and granted regular promotion on the said post in the year 1988.

2.3 The applicant was eligible for next promotion to the grade of Assistant Curator (Exhibit Preparator). In terms of the Recruitment Rules

notified vide Annexure A-3 Notification dated 26.05.1984, the post of Assistant Curator (Exhibit Preparator) could be filled up by direct recruitment as well as by promotion. The eligibility criteria prescribed therein were as under:-

“By direct recruitment:

- (i) Degree/Diploma in Modelling or Sculpture from a recognised University / Institution or equivalent.
- (ii) 3 years' experience in exhibit fabrication and preparation of models of plants and animals.

Note: Qualifications are relaxable at the discretion of the Union Public Service Commission in case of candidates otherwise well qualified,

NOTE-2 : The qualification(s) regarding experience is/are relaxable at the discretion of the Union Public Service Commission in the case of candidates belonging to Scheduled Castes and Scheduled Tribes if, at any stage of selection, the Union Public Service is of the opinion that sufficient number of candidates from these communities possessing the requisite experience are not likely to be available to fill up the vacancies reserved for them.

Desirable

Knowledge of preparing models in fiber glass.

By promotion:

Promotion / transfer on deputation (including) short-term- contract).

- (1) Officers under the Central / State Governments/ Universities / Recognised Research Institutions/ Autonomous Semi-Government or Statutory organisations.
 - (a) (i) holding analogous posts;
 - or
 - (ii) with 3 years' service in posts in the scale of Rs.650-1200 or equivalent;

Or

(iii) with 5 years' service in posts in the scale of Rs.550-900 or equivalent; and

(b) possessing the educational qualification and experience prescribed for direct recruits under Column 7.

(2) The departmental Senior Exhibit Preparator with 5 years' regular service in the grade will also be considered and in case he is selected for appointment to the post, the same shall be deemed to have been filled by promotion.

(Period of deputation/contract including period of deputation in another ex-cadre post held immediately preceding this appointment in the same organisation / department shall ordinarily not exceed 3 years)."

2.4 Since the applicant had completed 24 years of service in NMNH, vide his Annexure A-11 representation dated 22.04.1998, he requested the respondents for granting him second financial upgradation in terms of Assured Career Progression (ACP) Scheme. The respondents, vide Annexure A-12 office order dated 03.01.2000, granted second ACP to the applicant placing him in the promotional pay scale of ₹8000-13500 [pay scale of erstwhile Assistant Curator (Exhibit Preparator)] w.e.f. 24.12.1999.

2.5 The respondents introduced Flexible Complementing Scheme (FCS) in the year 1987 for the scientific cadre. The applicant was not covered under the FCS, as the post of Senior Exhibit Preparator, then held by him, was not a scientific cadre.

2.6 The grant of second ACP to the applicant in the pay scale of ₹8000-13500 was objected to by the Audit and a communication to that effect was sent by the Audit vide letter dated 05.09.2007 to Ministry of Environment & Forests (MoEF) – respondent No.1. On the basis of Audit objection, the

respondents downwardly revised the financial upgradation of the applicant under second ACP and brought him down to the pay scale of ₹6500-10500, vide office order dated 26.09.2007.

2.7 The respondent No.1 had got the case of the applicant examined by the DoPT, who, vide their letter dated 11.08.2009, observed that there was no hierarchy available in the pay scale of ₹8000-13500 on the crucial date of grant of second ACP to the applicant, in view of the fact that the post of Assistant Curator (Exhibit Preparator) (Rs.8000-13500) had been re-designated as Scientist 'SC' and later as Scientist 'B', and thus had become the direct recruitment post (vide O.M. dated 31.10.1987). Hence, in view of the implementation of FCS, the request for grant of second ACP in the pay scale of ₹8000-13500 to the applicant, could not be agreed to.

2.8 Aggrieved by the denial of second ACP in the pay scale of ₹8000-13500, the applicant approached this Tribunal in O.A. No.3009/2009, which was allowed vide order dated 16.05.2010 observing therein "That 2nd ACP benefits given to the applicant has been withdrawn but without affording a reasonable opportunity to show cause, which caused civil consequences, contravenes principles of natural justice".

2.9 Vide Annexure A-2 order dated 30.10.2010 (Annexure A-2), the respondents have rejected the claim of the applicant for grant of second ACP to him in the pay scale of ₹8000-13500. The relevant portion of Annexure A-2 order is extracted below:-

“.....The DoPT after examining the matter observed that since there was no hierarchy available in the pay scale of Rs.8000-13,500 in terms of clarification given on point of doubt No.32 of ACP on crucial date of grant of ACP and since the post of Assistant Curator (Exhibit Preparator) (Rs.8000-13,500) which was re-designated as Scientist “SC” and later as Scientist “B”, has become a direct recruitment post vide OM dated 31.10.1987 in view of implementation of Flexible Complementary Scheme, the 2nd ACP in the pay scale of Rs.8000-13,500 cannot be agreed to”.

After the order of the Honourable Tribunal the matter was again considered in the Ministry of Environment and Forests who after examining the points raised by Shri Tandon in his representation dated 03.09.2010 have come to the conclusion that Shri Tandon has not taken any new grounds apart from the grounds he had already raised in his earlier representation and which grounds have been duly considered by the different agencies and found to be not tenable accordingly.

On the basis of the order issued by CAT, a show cause notice dated 24.08.2010 was issued to Shri Tandon where full opportunity was given to him for submitting of representation why his pay scale pay not be fixed in the scale of Rs.6500-Rs.10,500 instead of Rs.8000-13,500. After scrutiny of this representation, the MoEF found that ‘nothing new has emerged in the representation of Shri Tandon and the fact that the benefits were withdrawn purely on the advice of the nodal Ministry and Audit, and the representation of Shri Tandon cannot be accepted.’

Keeping in view of the above, it is hereby informed to Shri Tandon that his representation cannot be accepted and that an amount of Rs.58,209/- (Rupees fifty eight thousand Two hundred and Nine only) will be recovered from his gratuity on the basis of the certification issued from P&AO, MoEF.”

2.10 Aggrieved by Annexure A-2 order dated 30.10.2010, the applicant approached this Tribunal for the second time in O.A. No.2519/2011, which was disposed of vide order dated 28.11.2011 with the following directions to the respondents:

“5. In view of the aforementioned, we quash the impugned order dated 30.10.2010 and direct the respondents to re-examine the claim of the applicant for grant of financial upgradation in the pay scale of Rs.8000-13,500 keeping in view clarification issued by DoPT on doubt No.32 vide its OM No.35034/1/97-Estt. (D)(Vol.IV) dated

10.02.2000 and pass a speaking order thereon within a period of three months from the date of receipt of a certify copy of this order. OA is accordingly disposed of with no order as to costs.”

2.11 In compliance of the *ibid* order of the Tribunal, the respondents, vide Annexure A-1 dated 16.05.2012, have again rejected the claim of the applicant for granting him second ACP in the pay scale of ₹8000-13500. The relevant portion of this order is extracted below:-

“Whereas Shri S.K. Tandon had filed an Original Application before the Central Administrative Tribunal, Principal Bench, New Delhi with a prayer for setting aside the earlier speaking order dated 30.10.2010 by which it has been ordered to fix the pay of Shri Tandon in the lower pay scale of Rs.6500-200-10500/- with effect from 24.11.1999 instead of higher pay scale of Rs.8000-275-13500/-. Shri Tandon in the aforesaid original application has also prayed for restoration of the earlier pay granted to him.

Whereas the Hon’ble Tribunal vide their judgment dated 28.11.2011 was pleased to dispose off the original application with a direction to the respondents to re-examine the claim of the applicant (Shri Tandon) for grant of financial upgradation in the pay scale of Rs.8000-13500/- keeping in view clarification issued by DoPT on doubt No.32 vide its OM dated 10.02.2000 and pass a speaking order thereon.

Whereas, the undersigned has carefully looked into the contents of the judgment dated 28.11.2011 passed by the Hon’ble Tribunal as also considered the records of the case as also the previous speaking orders passed in the case of Shri Tandon.

Whereas in terms of the directions passed, the undersigned has looked into the clarification No.32 of OM dated 10.02.2000 of DoPT. As per the clarification, it is stipulated that where the cadres / hierarchies is limited to two grades only then in case of attached/ subordinate offices, the second upgradation under the ACPs may be given in keeping with the pay scale of an analogous grade of a cadre/post of the concerned office. However, if no such cadre/post exists in the concerned office, comparison may be made with an analogous grade available in other attached/subordinate offices of the Ministry/department concerned.

Whereas the matter has been examined strictly keeping in view the clarification of the DoPT as also the judgment passed by the Hon’ble Tribunal. In the case of Shri Tandon who belonged to the

cadre of Exhibit Preparator (Rs.4500-7000/-) the next higher promotion is to the grade of Senior Exhibit Preparator (Rs.5000-9000/-). The next higher post of Assistant Curator (Exhibit Preparator) (Rs.8000-13500/-) has since been re-designated as Scientists 'SC' and later as Scientist 'B', and is therefore out of the hierarchy of promotion. It is such circumstances the question arises as to what grade the 2nd ACP should be accorded.

Whereas in terms of clarification No.32 of DoPT OM dated 10.02.2000 was looked into and it is found that posts of Asst. Curator (Taxidermy) Asst. Curator (Exhibit Preparator) and Asst. Curator (Display) have all been re-designated as Scientist SC and later as Scientist B and have become direct recruitment posts and hence the said pay scale attached to these posts i.e. Rs.8000-13500/- cannot be granted to Shri Tandon in the shape of 2nd ACP in terms of clarification No.32. It is in the above circumstances that the matter was considered and it has been found that there is no analogous grade / post in the hierarchy in the same Ministry/Department/ subordinate / attached offices which answers to the definition of analogous post in the scale of Rs.8000-13500 and hence Shri Tandon cannot be granted the 2nd ACP in the said scale keeping in view the clarification No.32 of DoPT OM dated 10.02.2000.

Now, therefore, the undersigned accordingly finds that Shri Tandon has been correctly granted the 2nd ACP in the scale of Rs.6500-10500/- which decision has also been confirmed by the Audit as also by the Nodal Ministry, i.e., Department of Personnel and Training."

Aggrieved by the Annexure A-1 order, the applicant, through this O.A., has approached this Tribunal, for the third time, seeking the reliefs, as indicated in paragraph (1) above.

3. The main contention of the applicant in the O.A. is that the respondents have wrongly held that the promotional post of Assistant Curator (Exhibit Preparator) in the pay scale of ₹8000-13500 was not in existence when he was granted the second ACP in that pay scale vide order dated 03.01.2000 (Annexure A-12). The applicant's argument is that the post of Assistant Curator (Exhibit Preparator) was abolished by respondent No.1 in the year 2003 and hence he was entitled for the second ACP in the

pay scale of ₹8000-13500 and by denying him the same, great injustice has been done to him. Incidentally, the replacement scale for the pay scale of ₹8000-13500 in 6th Central Pay Commission (CPC) is PB-3 – ₹15600-39100 + Grade Pay of ₹5400/-, whereas the replacement scale of ₹6500-10500 is PB-2 – ₹9300-34800 + G.P. ₹4200/-.

4. Pursuant to the notices issued, the respondents entered appearance and filed their reply. The main contention of the respondents is that applicant's financial upgradation under 2nd ACP has been done in accordance with Clarification No.32 of DoPT OM dated 10.02.2000, which is extracted below:-

32.	<p>Where the cadres/ hierarchy is limited to two grades only, what should be the pay scale for grant of second upgradation under ACPS?</p>	<p>Such a cadre/ hierarchy shall not fall in the isolated category as defined at Sl. No.31 above. Hence, the standard/common pay-scales mentioned in Annexure-II of the Office Memorandum dated 9.8.1999 shall not be applicable in such cases. Action in such cases may, therefore, be taken as per following clarifications:-</p> <p>i) If such cadre/ hierarchy exists in the Ministry/ Department concerned, the second upgradation may be allowed in keeping with the pay-scale of an analogous grade of a cadre/ post in the same Ministry / Department. However, if no such cadre exists in the Ministry / Department concerned comparison may be made with an analogous grade</p>
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		<p>available in other Ministries/ Departments.</p> <p>ii) In the case of attached/ subordinate offices, the second upgradation under ACPS may be given in keeping with the pay scale of an analogous grade of cadre/post of an analogous grade of a cadre/post of the concerned office. However, if no such cadre/post exists in the concerned office, comparison may be made with an analogous grade available in other attached / subordinate offices of the Ministry/ Department concerned.</p>
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5. It is further stated by the respondents in the reply that there were only 2 Grades available in applicant's cadre/hierarchy, and hence he was given the second ACP in the pay scale of ₹6500-10500, i.e., in an analogous grade of a cadre / post in other attached/subordinate offices of respondent No.1.

6. The applicant has filed a rejoinder to the reply filed on behalf of respondents, in which he has, more or less, reiterated his averments in the O.A.

7. On completion of pleadings, the case was taken up for hearing the arguments of learned counsel for the parties on 23.10.2017. Arguments of Mr. H S Dahiya, learned counsel for applicant and that of Mr. Ashok Kumar, learned counsel for respondents were heard. We have considered

the arguments of the parties and perused the pleadings and documents annexed thereto.

8. The applicant was granted second financial upgradation on completion of 24 years of service vide office order dated 03.01.2000 (Annexure A-12) w.e.f. 24.11.1999. Under ACP Scheme, the financial upgradation was to be given in the next promotional grade, as there was no concept of Grade Pay at that time. The applicant has not secured this financial upgradation by means of any misrepresentation.

9. The sole ground, on which the applicant has been denied second ACP in the pay scale of ₹8000-13500 following an Audit objection, is that there was no promotional grade available in his cadre/hierarchy carrying the said pay scale. Reliance in this regard has been placed on Clarification No.32 of DoPT OM dated 10.02.2000, according to which, in case where cadre/hierarchy is limited to two Grades only, then the second ACP is to be given in an analogous grade available in other attached/subordinate offices of respondent No.1. Accordingly, the applicant has been granted the second ACP subsequently in the pay scale of ₹6500-10500.

10. Admittedly, after introduction of FCS in the year 1987, several posts of NMNH were re-designated as Scientist posts vide Annexure A-8 dated 31.10.1987. The post of Assistant Curator (Exhibit Preparator) was re-designated as Scientist 'SC' by the said order and has been subsequently re-designated as Scientist B. In view of this order, the post of Assistant Curator (Exhibit Preparator) was not available to the applicant in his promotional hierarchy. It is also noticed that before issuing the Annexure A-8 office

order 31.10.1987, the respondents have notified the Department of Environment, Forests & Wildlife Scientific Group 'A' posts Rules, 1987, which are *akin* to new Recruitment Rules. These Rules also cover the post of Scientist 'SC'. As noted hereinabove, the post of Assistant Curator (Exhibit Preparator) has been re-designated as Scientist 'SC' vide Annexure A-8 order dated 31.10.1987. From Annexures A-6 & A-8 documents, it is quite clear that the post of Assistant Curator (Exhibit Preparator) was not in existence after 31.10.1987, i.e., after issuance of Annexure A-8 office order. Therefore, the contention of the applicant that the post of Assistant Curator (Exhibit Preparator) continued up to the year 2003 is found to be without any substance. The applicant has not made any averment in the O.A. also to the effect that the post indeed existed up to the year 2003.

11. In view of the factual position explained in paragraph (10) above, the respondents were well within their powers to bring down the second financial upgradation under ACP Scheme of the applicant from the pay scale of ₹8000-13500 to ₹6500-10500 in terms of DoPT O.M. dated 10.02.2000 and Clarification No.32 contained in it. However, it is to be noted that the applicant was granted second ACP in the pay scale of ₹8000-13500 by the respondents vide Annexure A-12 order dated 03.01.2000, i.e., much before the DoPT O.M. dated 10.02.2000 came into existence. It is also not in dispute that the applicant has not indulged in any act of misrepresentation for securing this financial upgradation. On the issue of recovery, the Hon'ble Apex Court in the case of **State of Punjab & others v. Rafiq Masih (White Washer) & others** (2015) 4 SCC 334 has laid down the ratio of law as under:-

“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 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.”

12. Considering the fact that the applicant has not indulged in any misrepresentation for securing 2nd ACP in the pay scale of ₹8000-13500 and keeping in view the fact that the applicant has since retired from service, we are of the view that the applicant is entitled for the benefit of ratio of law laid down in the aforesaid case by the Hon'ble Apex /Court.

13. In the conspectus of discussions in the pre-paragraphs, this O.A. is disposed of in the following terms:-

a) The respondents are directed not to effect any recovery from the applicant pursuant to the order dated 15.09.2009 and subsequent Annexures A-2 & A-1 orders dated 30.10.2010 and 16.05.2012 respectively.

b) Grant of second financial upgradation in terms of ACP Scheme to the applicant in the pay scale of ₹6500-10500 is upheld. Since the replacement pay scale of this scale under 6th CPC is PB-2 – ₹9300-34800 + G.P. ₹4200/-, the applicant has rightly been given the next financial upgradation under Modified Assured Career Progression (MACP) Scheme in the Grade Pay of ₹4200/- in PB-2 w.e.f. 01.09.2008.

(K.N. Shrivastava)
Member (A)

/sunil/

(Justice Permod Kohli)
Chairman