

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

OA-3491/2016

Reserved on : 13.11.2018.

Pronounced on : 04.12.2018.

Hon'ble Ms. Praveen Mahajan, Member (A)

Dr. Bharti Jain,
W/o Dr. Kuldeep Jain,
Aged about 45 years
R/o 23, 24 Gagan Vihar,
Delhi-51.

.... Applicant

(through Sh. Ramesh Rawat for Sh. Sudarshan Rajan, Advocate)

Versus

1. Union of India through
the Secretary,
Ministry of Labour,
Shram Shakti Bhawan,
New Delhi.
2. Director General,
ESIC Headquarters,
Panchdeep Bhawan,
CIG Marg, New Delhi-2.

.... Respondents

(through Ms. Nidhi Singh for Sh. Murari Kumar, Advocate)

ORDER

The applicant was appointed as Insurance Medical Officer (IMO) Grade-II in the Employees' State Insurance Corporation (ESIC), on 30.11.1987 on contract basis. Vide Memorandum dated 17.06.1991, the applicant was offered the post of IMO Grade-II in ESIC on regular basis. The applicant joined the post of IMO Grade-II

in ESIC on regular basis on 27.06.1991. Vide order dated 15.09.2003, the applicant was promoted to the post of IMO Grade-I. The applicant was granted NFSG Grade of GDMO sub cadre w.e.f. 30.06.2008. Upon the implementation of VIth Central Pay Commission recommendations, the applicant was duly placed in PB-IV with Grade Pay of Rs.8700/-.

2. ESIC issued advertisement for appointment to the post of Specialist Grade-II. The applicant applied for appointment to the said post. Vide letter dated 27.11.2008, the applicant was asked to appear before the respondents on 22.12.2008. The applicant appeared for interview on 22.12.2008 and was offered the post of Specialist Grade-II in the respondent Corporation.

3. It is submitted that as per O.M. No. 28016/5/85 dated 31.01.1986, the applicant could negotiate her salary in terms of Para-3 of the said O.M. Thus, the applicant negotiated her salary on the ground that she was already drawing Grade Pay of Rs.8700/- and should be continued to be in the same grade especially when the post of Specialist carried higher duties and responsibilities. The applicant submits that the respondents agreed to above but agreed to grant the pay scale as personal to her.

4. Thereafter, the respondents continued to pay the applicant the Grade Pay of Rs.8700/- from 2009 till she took voluntary

retirement in 2015. Copies of pay slips are available at Annexure A-10.

5. It is averred that all persons who were appointed as Specialist and opted to join there were absorbed in the higher Grade Pay which was made personal to them in case they were drawing a higher Grade Pay in the earlier post. The difference allowed was personal to them and was to be absorbed in future increase in pay. Therefore, the Grade Pay of the applicant did not undergo any further revision from 2009 till her VRS was accepted w.e.f. 15.02.2015.

6. The pension of the applicant was delayed for almost 07 months and then vide Office Order dated 22.09.2015, the applicant was granted pensionary benefits. However, the respondents directed recovery of excess payments made to the applicant from her terminal benefits.

7. The applicant represented against the illegal deduction and wrong fixation of pension but the same was rejected without any justifiable reason. The GPF of the applicant was also not released.

8. The applicant has placed reliance on the judgment of Hon'ble Supreme Court in the case of **State of Punjab Vs. Rafiq Masih**, 2015(4)SCC 334 wherein it has been held that recovery should not be effected from employees who are due to retire within one year. It

has further been held that no recovery could be made when the excess payment has been made for a period in excess of five years, before the order of recovery is issued. Since the applicant falls in the aforementioned categories, the recovery made is illegal.

9. The applicant mentions that a similarly placed person Dr. Sujata Gupta was also continued in the Grade Pay of Rs.8700/- which was personal to her when she was appointed to the post of Specialist.

10. Aggrieved, the applicant has filed the current O.A. seeking the following reliefs:-

- “(a) Quash the impugned order dated 13.01.2016 passed by the Respondents.
- (b) Direct the respondents to recalculate the pension of the Applicant by taking her last drawn pay in the Grade pay of Rs.8700/-.
- (c) As a consequence to prayer(b) above direct the respondents to pay the higher pension to the Applicant in the future.
- (d) Direct the Respondents to pay the Applicant the arrears of pension due to the payment of the lower pension to the Applicant on the basis of the wrongful calculation made by the respondents.
- (e) Direct the Respondents to refund the allegedly excess amount paid to the applicant which has been illegally recovered from the terminal benefits of the Applicant.
- (f) Direct the respondents to accord the applicant all consequential benefits on the basis of grant of the above said prayers.
- (g) Direct the respondent to pay the GPF to the Applicant which has been illegally withheld by them
- (i) Direct the respondents to pay interest to the Applicant for the delayed payment of pension and further to pay the applicant

interest on the arrears of pension paid to her on the basis of the above calculation.

- (j) Direct the respondents to pay exemplary costs to the applicant for constraining her to approach this Hon'ble Court for the relief sought."

11. Without disputing the facts of the case, the respondents submit that the applicant was erroneously paid in PB-4 + GP-8700 till her voluntary retirement on 15.02.2015. The applicant was only entitled to pay @39100 + 7600 as on 15.02.2015, and was inadvertently paid extra payment of Rs.7,27,499/-. Therefore, the same has been deducted from the gratuity of the applicant.

12. It is contended that as per DoP&T O.M. 18/26/201/Estt./Pay-I dated 06.02.2014 excess payments/Govt. dues terms as "Tax Payers Money" can be recovered from government employee except in few cases of extreme hardship where waiver of recovery is to be allowed by the department.

13. I have carefully gone through the record and considered rival submissions.

13.1 It is not disputed that the applicant had applied for the post of Specialist Grade-II, Jr. Scale (Radiology) and after due process of selection was appointed to the said post on 24.03.2009. The applicant was working in PB-IV with Grade Pay of Rs.8700/- when she applied for the post of Specialist Grade-II. The applicant has submitted that at the time of joining, she negotiated her salary in

terms of Para-3 of the O.M. issued by Department of Personnel & Training on 31.01.1986, which states that:-

"Pay Fixation:

A Government servant selected for a post in a Central Public Enterprise will be free to negotiate his emoluments with the enterprise. On appointment to a post in a public sector enterprise on immediate absorption basis, a Government servant will be at par with other employees of the enterprise and will be governed by the rules of the enterprise in all respects."

Due to her negotiation, the respondents agreed that she could draw Grade Pay of Rs. 8700/- (which she was already drawing when she joined the respondents Corporation) which would be personal to her. This fact has been denied by the respondents, who state that such an agreement never took place between the applicant and the respondents.

13.2 The respondents in their counter affidavit admit that the applicant was wrongly paid in PB-IV + Grade Pay Rs.8700/- from the date of her joining till her voluntary retirement i.e. 15.02.2015, whereas the pay of the applicant was to be fixed at Rs.37400+6600 w.e.f. 31.03.2009, hence the excess payment made erroneously to the applicant is due to be recovered from her.

13.3 The applicant has placed reliance on the decision of Hon'ble Supreme Court in the case of State of Punjab and Ors. Vs. Rafiq Masih (White Washer), 2015 (4) SCC 334. In the said judgment, a few situations have been postulated where recoveries from the

employees have been held impermissible in law. The said para is reproduced below:-

“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.”

13.4 The case of the applicant, in my view, is squarely covered by the protection provided in situations (ii) & (iii) above in the case of **Rafiq Masih** (supra). Hence, I am convinced that the recovery of Rs. 7,27,499/- recovered from the gratuity of the applicant is not tenable.

14. The respondents have not filed any response regarding the allegation of the applicant that a similarly placed person Dr. Sujata Gupta had been extended similar benefit of pay protection. The

contention of the applicant that the terms of her salary were negotiated at the time of her joining is not supported by any document annexed with the O.A., hence it is not possible to adjudicate the down gradation of pay on merit. However, it is seen that before down grading the pay of the applicant from Rs.8700/- to Rs.6600/-, no show cause of notice was issued to the respondents, which tantamount to denial of principles of natural justice. In view of the same, the respondents are directed to issue a show cause notice to the applicant to enable her to avail the opportunity of presenting her side of the picture, and then take necessary action as per law.

14.1 The respondents are directed to refund the amount of Rs.7,27,499/- to the applicant within three weeks from the date of receipt of a certified copy of this order. The O.A. is disposed of with these directions. No costs.

(Praveen Mahajan)
Member (A)

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