

Central Administrative Tribunal
Principal Bench: New Delhi

OA No. 535/2016

Reserved on: 23.05.2018
Pronounced on: 29.05.2018

Hon'ble Sh. Raj Vir Sharma, Member (J)
Hon'ble Ms. Nita Chowdhury, Member (A)

1. ESIC(M) Employee's Union (Delhi/Noida)
Through its President Sh. Raj Kumar (age 52 yrs)
ESIC Hospital, Basai Darapur,
New Delhi-110015
2. Surender Kumar (age 34 years)
S/o Sh. Jaipal Singh,
180, VPO Katewara,
Delhi-110039
(working as Nursing Orderly with ESIC)
3. Rohtas Dabas (age 34 years)
S/o Sh. Suraj Bhan,
House No.63, Vill. Rasulpur,
Post-Ranikheda, Delhi-110081
(working as Nursing Orderly with ESIC)

(By Advocate: Sh. Avadh Kaushik)

Versus

1. Union of India,
Through the Secretary,
Ministry of Labour & Employment,
Government of India,
Rafi Marg, Sansad Marg Area,
New Delhi-110001
2. Ministry of Health & Family Welfare,
(Through the Secretary)
Government of India,
Nirman Bhawan,
New Delhi-110001

3. Employees State Insurance Corporation,
(Through the Director General)
Panchdeep Bhawan)
Kotla Road, New Delhi-110002 - Respondents

(By Advocate: Shri Piyush Gaur)

O R D E R

By Ms. Nita Chowdhury, Member (A):

This Original Application (OA) has been filed by the applicants, claiming the following reliefs:-

“(i) The Hon’ble Tribunal may graciously be pleased to pass an order and directions thereby directing the respondents to declare that the post of the Nursing Orderlies and Stretcher Bearers working in ESIC’s Hospitals and Dispensaries is a Technical Post’ and thereafter, they may please be directed to allow the Technical Grade Pay accordingly;

(ii) The Hon’ble Tribunal may graciously be pleased to pass an order thereby directing the respondents to bring and implement a comprehensive ‘Time Bound Promotional Scheme’ for the Nursing Orderlies and Stretcher Bearers working in ESIC’s Hospitals and Dispensaries and they may please be directed to award and allow the promotions at a specific time and after a specific period of service, and at least notional, in case of non-availability of vacancies.

(iii) Any other relief, order or directions which this Hon’ble Tribunal considers just and fit may also be passed in the interest of justice.”

2. The brief facts of the case are that the applicant no.1 herein is the Union of ESIC Medical Staff including Nursing Orderlies (NOs) and Stretcher Bearers working with various Hospitals run by the Union of India through ESIC. It is

submitted that NO is a technical post created to help the nursing staff and other para-medical and medical staff and has now become a necessity of all the medical staff inasmuch essential and primary medical works are being done by the NOs. Even, for the recruitment of NOs, the question papers are set in the manner which requires high level of technical knowledge. It is further averred that as per the new RRs notified on 21.05.2011, the essential qualification for the said post has been required to be matriculate or equivalent qualification with one year experience in dressing of wounds and taking care of the patients from Government recognised hospitals apart from First Aid Course.

3. It is also submitted that with a view to give effect to the recommendations of the 5th Central Pay Commission, the word 'technical' and 'technician' have been defined in the revised CCS Rules 1997 vide Resolution dated 30.09.1997, which reads as under:-

"XXIL. OTHER TECHNICIANS

- (a) Posts requiring Matriculation with some experience as minimum qualification for direct recruitment 4000-100-6000 52.111"*

In this context, the applicants have also relied upon the decision of the Hon'ble Supreme Court in **Dean, Goa Medical College vs. Dr. Sudhir Kumar Solanki**, (2001)7 SCC 645) clarifying that 'the dictionary meaning of the word 'technical' is also 'professional' and is used in contradiction with pure sciences to prepare professionals in applied sciences. Even in the RRs for Nursing Staff prepared by ICMR, the post of NO has been classified as "Group 'C' Technical". Even otherwise, the post of NO/Stretcher Bearers is a Group 'C' post and there cannot be any dispute on the point that the said post is a technical one, keeping in view its function of job content, degree of hardship, regular involvement, skill required as well as academic qualifications and experience. It is also evident from the duty rosters and circulars being issued by various ESIC hospital that the NOs are being assigned the duties in substitute to the technical post and perusal of the said circulars assigning jobs to the NOs leave no doubt that the post of NO is nothing but a Technical one.

4. The applicants have also attempted to draw parity with the technical posts of Respiratory Assistants in ESIC itself and with the orderlies working in Courts and Armies, who

are drawing Grade Pay of Rs.2400/- on the basis of the work field and duties assigned to NOs issued by various ESICs. The applicants, thus, submitted that non-grant of Grade Pay of Rs.2400/- to them is unjust and discriminatory.

5. It is submitted that insofar as promotional schemes for NOs/Stretcher Bearers are concerned, it is a basic feeder cadre post and its promotional posts are OT assistants, Laboratory Assistants, CST assistants, Dark Room assistants, Dental Chair side Assistants and Junior MRT, ECG/EEG endoscope assistant etc. but the fact is that they rarely get any promotion and that too after about 18 to 20 years of their service life due to non-availability of vacancy. This problem can be eradicated if all (100%) promotional posts are filled with the promotion of the NOs/Stretcher Bearer and thus, there should be no direct recruitment for the said promotional posts.

6. It is also contended that the presently prevailing Modified Assured Career Progression (MACP) Scheme under which the grade pay is increased hardly few rupees and that too after a long period is absolutely insufficient and inadequate and therefore, a rationale time bound promotional scheme is required to be implemented in the

NO/Stretcher Bearer Cadre. Thus, the applicants have prayed that they be given Pay Grade of Technical Category Staff. In this regard, the applicants made several representations to respondents on different dates, i.e. 12.08.2015, 16.09.2015 and 04.12.2015 but of no avail. Hence the present OA.

7. The respondents have filed their reply and raised a preliminary objection that the OA is barred by principle of limitation. In this regard, they have relied upon a judgment of the Hon'ble Supreme Court in **State of Karnataka and Ors. v. SM Kotrayya & Ors.**, (1996)6 SCC 267 and in particular, para 9 which reads as under:-

"Thus considered, we hold that it is not necessary that the respondents should give an explanation for the delay which occasioned for the period mentioned in sub-sections (1) or (2) of Section 21, but they should give explanation for the delay which occasioned after the expiry of the aforesaid respective period applicable to the appropriate case and the Tribunal should be required to satisfy itself whether the explanation offered was proper explanation. In this case, the explanation offered was that they came to know of the relief granted by the Tribunal in August 1989 and that they filed the petition immediately thereafter. That is not a proper explanation at all. What was required of them to explain under sub-sections (1) and (2) was as to why they could not avail of the remedy of redressal of their grievance before the expiry of the period prescribed under sub-section (1) and (2). That was not the explanation given. Therefore, the Tribunal is wholly unjustified in condoning the delay."

8. They have further pleaded that as per Section 17(2) of the ESI Act, 1948, the nomenclature of post, recruitment regulation and qualification required in ESIC are similar as referred to in the recruitment regulation of Indian Council of Medical Research, New Delhi wherein the post is classified as "Group 'C' Technical". However, scale of pay is same with Grade Pay of Rs.1800/- as being given to the NOs in ESIC. So mere mention of Technical word in classification of post but having same Grade Pay and Scale given to other posts of Technical nature is not at all maintainable.

9. The respondents further submitted that the recruitment regulation of all posts in ESIC is duly approved by the Central Government with consultation of Ministry of Law & Justice. Hence, RRs for NOs/Stretcher Bearer cannot be challenged with that of another post in Central Government Hospitals having different nomenclature and RRs.

10. The respondents, in response to contention of the applicants that no promotional avenues are available to the applicants, submit that the NOs are having the following promotional channels available to them:-

<i>Sl. No.</i>	<i>Name of the Post</i>	<i>Method of Rectt.</i>	<i>Eligibility of Promotion</i>	<i>Grade Pay</i>
1.	<i>Nursing Orderly</i>	<i>100% by Direct Recruitment</i>	<i>NA</i>	<i>1800</i>
2.	<i>CSR/CSSD Assistant</i>	<i>100% by promotion failing which by DR</i>	<i>Nursing Orderly within 6 years regular service for matriculates and 8 years service for non-matriculates</i>	<i>2000</i>
3.	<i>CSR/CSSD Technician</i>	<i>100% by promotion failing which by DR</i>	<i>CSR/CSSD Assistant/OT Assistant with 5 years regular service in either or both grades</i>	<i>2400</i>
4.	<i>Sr. CSR/CSSD Technician</i>	<i>100% by promotion</i>	<i>CSR/CSSD Technician/OT Technician with 5 years regular service in either or both grades</i>	<i>2800</i>
5.	<i>Sr. Technician Assistant (CSR/CSSD)</i>	<i>100% by promotion</i>	<i>Sr.CSR/CSSD Technician/OT Technician with 6 years regular service in either or both grades</i>	<i>4200</i>

The respondents have further averred that it is apparent from the above chart that the NOs are entitled to promotional avenues up to Grade Pay of Rs.4200/-. Moreover, as per RRs, most of the promotional posts are to be filled up by promotion. However, in case, the vacancies are not filled through promotion, the same be filled up by

direct recruitment. The respondents have thus prayed the OA deserves to be dismissed.

11. We have heard the learned counsel for the parties and perused the pleadings available on record.

12. On the pleadings of the parties, following issues arise for our consideration:-

- (a) Whether the OA is barred by the principle of limitation;
- (b) Whether the posts of Nursing Orderlies and Stretcher Bearers are technical posts in Group 'C' and should carry PB-1 with Grade Pay of Rs.2400/-; and
- (c) Whether the applicants are entitled to seek a direction to the respondent – ESIC to bring in and implement a comprehensive Time Bound Promotion Scheme for the NOs and SBs working in ESIC and to grant them consequential service/benefits on a notional basis.

13. Insofar as first issue is concerned, it is seen that the applicant no.1, on behalf of all the applicants, made first representation on 12.08.2015 to the respondents seeking to

categorise the posts of NOs and SBs as 'technical posts'. The said representation was followed by reminders on 16.09.2015 and 04.12.2015. Finding no response from the respondents, the present OA has been filed on 01.02.2016. Therefore, we do not find any force in the plea of limitation raised by the respondent - ESIC. Accordingly, issue no.1 is decided in favour of the applicants and against the respondents.

14. As regards issue nos. (ii) and (iii), we take note of Section 17(2)(a) of ESI Act 1948, which reads as under:-

"The method of recruitment, salary and allowances, discipline and other conditions of service of the members of the staff of the Corporation shall be such as may be specified in the regulations made by the Corporation in accordance with rules and orders applicable to the officers and employees of the Central Government drawing corresponding scales of pay:

Provided that where the Corporation is of the opinion that it is necessary to make a departure from the said rules or orders in respect of any of the matters aforesaid, it shall obtain the prior approval of the Central Government."

Accordingly, the respondent - ESIC Corporation, by implication of the above section, have followed the recruitment regulations, nomenclature of post and qualifications prevalent in Indian Council of Medical Research for the post of NOs/SBs where the said posts are classified as "Group 'C' Technical' drawing the pay scale of

Rs.1800/-. It is also seen that the Recruitment Regulation for all posts in ESIC are duly approved by the Central Government with consultation of Ministry of Law and Justice and as such, recruitment rules for NOs/Stretcher Bearers cannot be compared with other posts in Central Government having different nomenclature and RRs. As regards the grant of pay scale at par with their counterparts working in other organisations, in a catena of judgments, it is held that pay scale cannot be granted by the courts and it is for the expert body to consider the same. In this regard, the Apex Court in the case of **State of Haryana & Anr. V. Haryana Civil Secretariat (Civil Appeal No. 3518/1997)** decided on 10.07.2002, has held as under:-

*"This Court in the case of **Secretary, Finance Department v. West Bengal Registration Service Association and Ors.**, [1993] Supp I SCC 153, dealing with the question of equation of posts and equation of salaries of government employees, made the following observations :*

"We do not consider it necessary to traverse the case law on which reliance has been placed by counsel for the appellants as it is well settled that equation of posts and determination of pay scales is the primary function of the executive and not the judiciary and, therefore, ordinarily courts will not enter upon the task of job evaluation which is generally left to expert bodies like the Pay Commissions, etc. But that is not to say that the Court has no jurisdiction and the aggrieved employees have no remedy if they are unjustly treated by arbitrary State action or inaction. Courts must, however, realize that job evaluation is both a difficult and

time consuming task which even expert bodies having the assistance of staff with requisite expertise have found difficult to undertake sometimes on account of want of relevant data and scales for evaluating performances of different groups of employees. This would call for a constant study of the external comparisons and internal relativities on account of the changing nature of job requirements. The factors which may have to be kept in view for job evaluation may include (i) the work programme of his department

(ii) the nature of contribution expected of him (iii) the extent of his responsibility and accountability of the discharge of his diverse duties and functions (iv) the extent and nature of freedoms/ limitations available or imposed on him in the discharge of his duties (v) the extent of powers vested in him (vi) the extent of his dependence on superiors for the exercise of his powers (vii) the need to co-ordinate with other departments, etc. We have also referred to the history of service and the effort of various bodies to reduce the total number of pay scales to a reasonable number. Such reduction in the number of pay scales has to be achieved by resorting to broadbanding of posts by placing different posts having comparable job charts in a common scale. Substantial reduction in the number of pay scales must inevitably lead to clubbing of posts and grades which were earlier different and unequal. While doing so care must be taken to ensure that such rationalization of the pay structure does not throw up anomalies. Ordinarily a pay structure is evolved keeping in mind several factors, e.g., (i) method of recruitment, (ii) level at which recruitment is made, (iii) the hierarchy of service in a given cadre, (iv) minimum educational/technical qualifications required, (v) avenues of promotion, (vi) the nature of the duties and responsibilities, (vii) the horizontal and vertical relativities with similar jobs, (viii) public dealings, (ix) satisfaction level, (x) employer's capacity to pay, etc. We have referred to these matters in some detail only to emphasise that several factors have to be kept in view while evolving a pay structure and the horizontal and vertical relativities have to be carefully balanced keeping in mind the hierarchical arrangements, avenues for

promotion, etc, Such a carefully evolved pay structure ought not to be ordinarily disturbed as it may upset the balance and cause avoidable ripples in other cadres as well. It is presumably for this reason that the Judicial Secretary who had strongly recommended a substantial hike in the salary of the Sub-Registrars to the Second (State) Pay Commission found it difficult to concede the demand made by the Registration Service before him in his capacity as the Chairman of the Third (State) Pay Commission. There can therefore, be no doubt that equation of posts and equation of salaries is a complex matter which is best left to an expert body unless there is cogent material on record to come to a firm conclusion that a grave error had crept in while fixing the pay scale for a given post and Court's interference is absolutely necessary to undo the injustice.

(emphasis supplied)

It is to be kept in mind that the claim of equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the Government. Fixation of pay and determination of parity in duties and responsibilities is a complex matter which is for the executive to discharge. While taking a decision in the matter several relevant factors, some of which have been noted by this Court in the decided case, are to be considered keeping in view the prevailing financial position and capacity of the State Government to bear the additional liability of a revised scale of pay, It is also to be kept in mind that the priority given to different types of posts under the prevailing policies of the State Government is also a relevant factor for consideration by the State Government. In the context of complex nature of issues involved, the far reaching consequences of a decision in the matter and its impact on the administration :of the State Government courts have taken the view that ordinarily courts should not try to delve deep into administrative decisions pertaining to pay fixation and pay parity. That is not to say that the matter is not justiciable or that the courts cannot entertain any proceeding against such administrative decision taken by the government. The courts should approach such matters with restraint and interfere only when they are satisfied that the decision of the government is patently irrational unjust and prejudicial to a section of employees and the government while taking the

*decision has ignored factors which are material and relevant for a decision in the matter. Even in a case where the court holds the order passed by the government to be unsustainable then ordinarily a direction should be given to the State Government or the authority taking the decision to reconsider the matter and pass a proper order. **The court should avoid giving a declaration granting a particular scale of pay and compelling the government to implement the same.***"

15. In **Mallikarjuna Rao v. State of A.P.**, (1990)2 SCC 707, the Hon'ble Supreme Court has held that Courts cannot usurp the functions assigned to the executive under the Constitution and cannot even indirectly require the executive to exercise its rule making power in any manner. The Courts cannot assume to itself a supervisory role over the rule-making power of the executive under Article 309 of the Constitution of India.

16. It has been held by the Hon'ble Supreme Court in **Technical Executive (Anti-Pollution) Welfare Association v. Commissioner of Transport Department and another**, (1997)9 SCC 38, that it would be for the appropriate Government to take policy decision. The Tribunal is not competent to give any direction to the Government to lay down any policy. Such a direction would amount to encroaching upon area of policy-making which is exclusively within the purview of the Government.

17. After having given our anxious consideration to the facts and circumstances of the case in the light of the decisions of the Hon'ble Apex Court, we have no hesitation in holding that the applicants are not entitled to seek a direction from this Tribunal to the respondent – ESIC for declaring that the posts of NOs/SBs as 'Technical Posts', and also for bringing in and implementing a comprehensive Time Bound Promotional Scheme for the NOs and SBs working in ESIC and for granting promotions with retrospective effect on notional basis.

18. Resultantly, the OA being devoid of merit is dismissed with no order as to costs.

(Nita Chowdhury)
Member (A)

(Raj Vir Sharma)
Member (J)

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