

Central Adminisrative Tribunal  
Principal Bench

O.A.No.273/2003

Hon'ble Shri Shanker Raju, Member (J)  
Hon'ble Shri S.K.Naik, Member (A)

New Delhi, this the <sup>th</sup> 29 day of August, 2003

Shri K.K.Khanna  
s/o Late Shri R.K.Khanna  
r/o C-229 Vikas Puri  
New Delhi - 110 018. ... Applicant

(By Advocate: Sh. Dhanesh Relan)

Vs.

1. Union of India through  
Secretary  
Ministry of Finance  
Department of Revenue  
North Block  
New Delhi.
2. Chairman  
Central Board of Excise and Customs  
North Block  
New Delhi.
3. Commissioner of Preventive Operations  
Directorate of Preventive Operations  
Customs and Central Excise  
4th Floor, Lok Nayak Bhavan  
Khan Market  
New Delhi. .. Respondents

(By Advocate: R.V.Sinha))

O R D E R

By Shri Shanker Raju, M(J):

Applicant impugns respondents' order dated 17.1.2003 whereby his pay scale has been reduced from Rs.18400-22400 to Rs.14300-18300 with consequent recovery w.e.f. 1.1.1996. Quashment of the above order has been sought.

2. By an interim order dated 5.2.2003 operation of the aforesaid order has been stayed.

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3. Applicant was earlier working as Joint Director (Communication), Group 'A' post in Customs and Central Excise.

4. Fifth Central Pay Commission in its recommendations contained in Para 66.137 while suggesting restructuring the cadre of Telecommunications Wing recommended upgradation of the post of Joint Director (Communication) to Director (Communication) along with the upgradation of one of the 7 posts of the Deputy Director (Communication) to be upgraded as Joint Director (Communication) in the pay scale of Rs.4500-5700 (Pre-revised) plus special allowance and 2 posts of Assistant Director, Computer Communications to be merged with the posts of Assistant Director (Communications), in the same pay scale, so as to become part of the cadre.

5. The above recommendations of Fifth Central Pay Commission were accepted by the Presidential Order on 29.7.1999.

6. The Ministry of Finance, Department of Expenditure vide Gazette Notification dated 15.9.1999 in Department of Revenue ordered redesignation of the post of Joint Director (Communication) as Director (Communication) in the revised pay scale of Rs.18400-22400. It is mentioned at Clause (i) in part 'D' of the Notification regarding pay scale of revised post it is decided that revised scale of pay notified where the conditions relating to change in recruitment, restructuring of cadre and redistribution of posts in higher grades necessitating changes in

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recruitment rules. It would be necessary for the Ministries to decide such issues before applying scales to these posts w.e.f. 1.1.1996. However, in Clause (ii) Part 'D' it is decided that whether the upgradation of posts involves only placement of existing incumbents in higher replacement scales without assumption of higher responsibility or changes in eligibility criteria, suitability of these incumbents need not be assessed afresh. Incumbents can be appointed to the post in higher pay scales, with applicability of higher placement scales w.e.f. 1.1.1996. Applicant, who was holding the post of Joint Director, assumed the charge of Director (Communication) on deeming basis w.e.f. 1.1.1996.

7. However, by a communication dated 2.8.1999 (Annexure-A/11) addressed to Dy. Director (Admn.) and also copy endorsed to the Joint Secretary (Administration), CBEC, communicated by Commissioner (PO) on examination of the issue, order of pay fixation has been kept in abeyance till communication is to be received from Ministry. However, by a DO letter dated 21.9.1999, written by the Commissioner addressed to Member (P&V), Central Board of Excise and Customs (CBEC) on the basis of discussions held, as the post of Joint Director (Communications) has been redesignated as Director (Communications), applicant was designated as Director (Communication) in the revised pay scale of Rs.18400-22400 w.e.f. 1.1.1996.

8. By an order dated 13.5.2002 pay scale allowed to the applicant from 1.1.1996 was reduced retrospectively.

9. Applicant preferred OA 1378/2002 before the Tribunal where the operation of the order is stayed. By an order dated 25.7.2002 the recovery ordered was set aside leaving liberty to the respondents to issue a fresh show cause notice. In pursuance thereof and a Contempt Petition filed, pay scale was restored to the applicant.

10. In pursuance of the directions supra, a show cause notice was issued to the applicant on 3.10.2002 which was responded to by reply dated 7.10.2002. By an order dated 17.1.2003 applicant pay scale has been reduced with consequent recovery w.e.f. 1.1.1996, giving rise to the present OA.

11. Shri Dhanesh Relhan, learned counsel for applicant, assails the impugned order on the ground that the order passed after show cause notice is merely an eyewash. In the aforesaid backdrop, it is stated that post of Director (Communication) had never existed in the cadre and on redesignation as Director (Communication), the applicant had neither been given any higher responsibility nor there had been any change in the eligibility criteria. Redesignation of post of Joint Director has not bestowed the applicant with any additional power and the only difference which has been made is of nomenclature.

12. Referring to Ministry of Finance, Gazette Notification dated 15.9.1999, it is contended that post of Director (Communication) has been shown to be redesignated. Moreover, in case assuming that the

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same was upgraded there is no assumption of existing incumbents getting higher placement pay scales, and any assumption of higher responsibility was changed in the eligibility criteria in such an event, there is no requirement of fresh assessment as to the suitability of incumbents and they have to be appointed to the post in higher pay scales with effect from the date notified by the Government giving effect to the Pay Commission recommendation i.e. 1.1.1996.

13. It is stated that assumption of charge by the applicant as Director (Communication) w.e.f. 1.1.1996 was in pursuance of Ministry's order dated 27.9.1999, the decision was kept in abeyance but on consultation with the Board, the redesignation had attained finality.

14. As regards non-consultation of CBEC is concerned, the letter dated 21.9.1999 addressed to by CPO to Member, CBEC clearly indicates that the matter was in consultation with Member, CBEC and as per the discussion held applicant was designated as Director.

15. Shri Relhan further contended that the impugned order had altered the conditions of service to the prejudice of applicant and recovery with retrospective effect cannot be sustained.

16. Referring to the legitimate expectation, it is stated that the doctrine of legitimate expectation imposes in essence a duty on public authority to act fairly by taking into consideration all relevant factors.

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17. It is also stated that there are no recruitment rules for promotion to the post of Director (Communication). As the post has been only redesignated, there is no question of any promotion or upgradation requiring either consent of cadre controlling authorities or following the usual procedure under the rules for such upgraded post regarding assessment of suitability.

18. In nutshell, what has been contended is that for the applicant to be redesignated as Director there was no requirement of following any procedure which is meant for Group 'A' posts. Applicant has never been promoted but was redesignated without assumption of higher responsibility. As the factum of orders passed on 2.8.1999, 16.9.1999 and 21.9.1999 have not been taken into consideration, it shows mala fide intentions of the applicant to prejudice his rights.

19. Shri R.V.Sinha, learned counsel for respondents, contested the OA and vehemently opposed the contentions of the applicant. It is contended by Shri Sinha that pay of the applicant was wrongly fixed in the promotion post of Director (Communication) and when it had come to the notice of controlling authority fixation in the higher grade was withdrawn. According to him, the laid down procedure for promotion to Group 'A' posts includes selection by merit by a duly constituted DPC and UPSC is also associated, and on the recommendations of which and with the approval of the competent authority a

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Government servant can assume a charge of higher post. As Ministry of Finance, Department of Revenue is the cadre controlling authority for promotion of Group 'A' post, Telecommunication being under Customs and Central Excise Department, in absence of any laid down procedure and orders passed, regarding promotion of the applicant, the same is not in order.

20. Shri R.V.Sinha further contended that in upgradation, incumbent of the post has no vested right for promotion to the upgraded post without being subjected to assessment process and eligibility. A duly constituted DPC can decide these parameters. As the over payment is on the basis of wrong assumption of charge to the higher post, the recovery is valid in law.

21. Referring to the order passed on 17.1.2003, it is contended that the same is reasoned dealing with all the contentions of the applicant. Shri Sinha denies redesignation of the post of Joint Director. It is contended, in pursuance of Fifth Central Pay Commission recommendations, Government has approved and accepted the same vide order dated 29.7.1999, that applicant cannot take benefit of redesignation used in the notification, as upgradation would not automatically has an effect of promotion of the applicant to the post of Director (Communication).

22. In so far as the plea of consultation before fixation of pay in the grade of Director (Communication) that the then Member of Board, it is stated that discussion had taken place between Member

(P & V) with the then Commissioner but it was purely informal whereas such administrative decisions are to be examined by the concerned Ministry. Therefore, it is stated that the orders of pay fixation were rightly resented by the Ministry on approval by the concerned Ministry.

23. In the rejoinder, applicant reiterated his pleas taken in the OA.

24. We have carefully considered the rival contentions of the parties and perused the material on record.

25. Fifth Central Pay Commission in its recommendation contained in Para 66.137 pertaining to Telecommunication Wing recommended post of Joint Director (Communication) to be upgraded as Director (Communication). With this upgradation, Director (Communication) is to be placed in over all charge instead of Director (Preventive Operation). Simultaneously that upgradation of Joint Director one of the 7 posts of Deputy Director (Communication) was also upgraded as Joint Director. The aforesaid recommendation was approved by an order dated 29.7.1999 wherein post of Joint Director was upgraded as Director (Communication) in the pay scale of Rs.18400-22400 w.e.f. 1.1.1996. With the result, the revised sanction strength of Group 6'A' of the Telecommunication Wing of CBEC Department, one post of Director has been created. It has been not disputed that earlier no post of Director (Communication) was in existence.

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26. However, Ministry of Finance on 15.9.1999 promulgated through notification Revised Pay (Amendment) Rules, 1999 wherein in the Department of Revenue, Joint Director (Communication) being of CBEC has been shown to be redesignated as Director (Communication) in the light of Fifth Central Pay Commission's recommendations contained in Para 66.137.

27. Before deliberating on the issue, decision in para 'D' of Revised Pay (Amendment) Rules ibid are reproduced as under:

"The revised scales of pay mentioned in column 4 of this part of the Notification for the posts mentioned in column 2 have been approved by the Government. Extension of the specified higher replacement pay scales for all these posts shall be governed by the following conditions:-

(i) In certain cases, the recommendations of the Fifth Central Pay Commission in respect of the scales of pay mentioned in column 4 are subject to fulfilment of specific conditions. These conditions relate inter alia to changes in recruitment rules, restructuring of cadres. Redistribution of posts in higher grades etc. Therefore, in those cases where conditions such as changes in recruitment rules etc. which are brought out by the Pay Commission as the rationale for the grant of these upgraded scales, it will be necessary for the Ministries to decide upon such issues and agree to the changes suggested by the Pay Commission before applying these scales to these posts w.e.f. 1.1.1996. In certain other cases where conditions such as cadre restructuring, redistribution of posts etc. have been prescribed by the Pay Commission as pre-requisite for grant of these scales to certain posts,, it will be necessary for the Ministries/Departments concerned to not only accept these

preconditions but also to implement them before the scales are applied to those posts. It would, therefore, be seen that it is implicit in the recommendations of the Pay Commission that such scales necessary have to take prospective effect and the concerned posts will be governed by the normal replacement scales until then.

(ii) According to the instructions issued by the Department of Personnel and Training in their O.M. No.22011/10/84-Estt.(D) dated February 14, 1992, where the upgradation of posts involves only the replacement of existing incumbents in higher replacement scales without the assumption to occupy such posts in the higher pay scales is not required to be assessed afresh. They can therefore be appointed to the posts in the higher pay scales with effect from the date notified by the Government giving effect to the recommendations of the Pay Commission. Accordingly, the applicable higher replacement scales of pay will be extended retrospectively w.e.f. January 1, 1996 only in respect of those posts not involving the assumption of higher responsibility or changes in the eligibility criteria.

(iii) Implementation of the FCPC recommendations relating to posts which are to upgraded and placed in higher pay scales will, however, necessitate the redistribution of posts presently in lower pay scales in the recommended higher scales, involving restructuring of the cadres. Besides, incumbents of posts in identical scales of pay being interchangeable, it is not unlikely that juniors may be presently occupying posts that are to be placed in higher scales of pay in terms of the FCPC recommendations. The recommended higher pay scales cannot therefore be extended in situ to the present incumbents of such posts without duly observing the prescribed selection processes. In the circumstances, upgradation of posts involving the redistribution of posts or cadre restructuring will be effective only prospectively. Eligible officers

will also be placed in the higher scales of pay only on completion of the formalities prescribed by the Department of Personnel and Training for appointments to posts in the applicable higher replacement pay scales and on their fulfilling the prescribed residency requirements. Financial benefits will consequently accrue to those appointed against these posts only from the date(s) that they are so appointed on observance of the prescribed selection process."

28. If one has regard to the above, though recommendations of Fifth Central Pay Commission are subject to certain conditions in recruitment rules, where the posts are upgraded and placed in higher pay scales involve restructuring of cadres recommended higher pay scale shall not be extended in duly to the present incumbents of such posts without duly observing the prescribed selection process. However, an exception to it is that when the upgraded post does not involve placement of existing incumbents, in higher replacement scales without assumption of any higher responsibilities or changes in eligibility criteria. In such an event, suitability of incumbents to occupy such posts in the higher pay scales is not required to be assessed afresh.

29. The net result would be that those are to be appointed in the higher pay scale from the affected date notified by the Government given effect to the recommendations of Fifth Central Pay Commission which is as per the orders dated 29.7.1990, 1.1.1996.

30. In the conspectus of above, it is also not disputed that on upgradation of the post of Joint Director to Director, the incumbent has not assumed

any higher responsibility or changes in eligibility criteria. Applicant, who had been working as Joint Director earlier, continued to perform similar duties. It is also not disputed that the post of Director was not in existence earlier as such and as the recruitment rules are not framed there is no eligibility criteria laid down. In such an event, the contention raised by the respondents that the DPC for Group 'A' post is to be held associated with UPSC and its recommendations are to be approved by the concerned Ministry shall not be applicable.

31. In our considered view, though the post has been upgraded and referred as redesignated vide order dated 15.9.1999 yet this upgradation does not require fresh assessment.

32. As regards the issue of assumption of charge w.e.f. 1.1.1996, and payment of pay scales without approval of CBEC is concerned, we find that the earlier when the applicant has assumed the charge on deemed basis the matter was re-examined and was kept in abeyance. Latter on one of the Members of Board had been consulted by the Commissioner (Preventive Operations) and thereafter orders have been issued to redesignate the applicant. In any event,, the orders have been issued by the competent authority and cannot be found fault with as the same are in consonance with the decision already taken vide notification dated 15.9.1999.

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33. We also find that in the event, the applicant is reduced to the scale of Joint Director virtually he would be put with Deputy Director post which has been upgraded to the Joint Director in the same pay scale.

34. We have no hesitation to hold that though the Fifth Central Pay Commission has recommended upgradation of the post of Joint Director as Director yet which has been accepted by the Government on 27.9.1999 in view of notification issued on 15.9.1999 as the upgraded post of Director does not envisage incumbent assumption of higher responsibility or change in the eligibility criteria and hence incumbents of the post occupying it is not required to be assessed afresh.

35. Now the only question which is disputed is assumption of the charge by the applicant w.e.f. 1.1.1996 and the pay scale without the approval of the competent authority, i.e., cadre controlling authority, by the Ministry is concerned, though we find that by a sanction order dated 27.9.1999 a conscious decision has been taken by the Government to upgrade the post of Joint Director and the pay scale is to be given effect from 1.1.1996 and subsequently the same has been kept in abeyance. However, CPO on consultation with the Member, CBEC redesignated the applicant as Director in the revised pay scale. This, to our considered view is the valid approval in the light of the fact that on upgradation by notification dated 15.9.1999 the incumbents on upgraded post, who

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continue to perform same duties and responsibilities, are to be accorded pay scale from 1.1.1996 and this has the tacit approval of the concerned.

36. From the aforesaid discussion, we hold that for upgradation of applicant as Joint Director, there was no necessity of issuance of formal promotion order and the charge assumption report submitted by the applicant w.e.f. 1.1.1996 on deemed basis is in accordance with the notification issued by the Government, we do not see any mistake on the part of the CPO, to order pay fixation, as CBEC has been consulted. Apart from it, we are of the considered view that even assuming CBEC has not been consulted the incumbents have deemed to have been in the pay scale from 1.1.1996 of upgradation in the light of the notification dated 15.9.1999.

37. In the result, for the reasons recorded, the impugned order is unfounded and is not sustainable in law.

38. Accordingly, OA is allowed. Impugned orders are quashed and set-aside. Applicant shall be entitled to all consequential benefits. No costs.

Naik  
(S.K.Naik)

Member (A)

S. Raju  
(Shanker Raju)  
Member (J)