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CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

Original Application No.3060/2003

New Delhi, this the **26th** day of **July**, **2005**

Hon'ble Mr. Justice V.S. Aggarwal, Chairman
Hon'ble Mr. S.A.Singh, Member (A)

Dr. (Mrs.) Urmil Rehni
W/o Dr. P.K. Rehni
475, Sector 4, R.K. Puram
New Delhi – 110 022. ... Applicant

(By Advocate: Sh. Rajeev Bansal)

Versus

1. Union of India through
Its Secretary
Ministry of Health & Family Welfare
Department of ISM & H
Red Cross Annexe Building
Red Cross Road
New Delhi – 110 001.

2. The Director
Central Council for Research in Indian
Medicine & Homeopathy
61-65, Institutional Area, Opp. D Block
Janak Puri
New Delhi – 110 058.

3. The Secretary
Department of Personnel & Training
North Block
New Delhi. .. Respondents

(By Advocate: Sh. Madhav Panikar)

O R D E R(Oral)

By Mr. Justice V.S.Aggarwal:

Central Council for Research in Indian Medicine & Homeopathy (in short 'CCRH') employed/appointed the applicant as Research Assistant on 29.12.1977. In January 1980, he was

promoted as Assistant Research Officer and further promoted as Research Officer in June 1983. As a Research Officer, she was placed in the scale of Rs.700-1300. All this happened before she joined Respondent No.1.

2. On 14.2.1985, the applicant applied through UPSC for the post of Medical Officer (Homoeopathic Physician) in the scale of Rs.650-1200. Though at that time she was working in the higher scale as already referred to above, she was declared successful and she joined as Medical Officer under the Central Government Health Scheme on 31.10.1986. She had been representing for protection of her pay but her claim had been refused holding:

> "The proposal for protection of pay of Dr. (Smt.) Urmil Rehni in terms of this Department's O.M. dated 7th August, 1989, on her appointment in the Central Government prior to issuance of the O.M. has been considered in this Department. Since the above mentioned O.M. is effective in the cases, where the appointment in the Central Government has been made on or after 1st August, 1989, the benefit of pay protection in terms of the O.M. cannot be allowed to Dr. Rehni.
>
> Thus, it is regretted that it is not possible to accede to your request for protection of your pay as you had joined CGHS prior to issue of DOPT O.M. dated 07.08.89. A copy of DOPT O.M. dated 7.08.89 which is self explanatory is also enclosed. You may further be informed that pay protection has also not been allowed to Dr. Kishori Lal, CMO (Ay.) who was working in ESI prior to joining of CGHS as he had also joined prior to issue of DOPT O.M. dated 7.8.89.
>
> As regards, your promotion as SMO, CMO, etc. consequent on protection of your pay, it may be informed that protection of pay has no relevance to the promotion of Govt. Servant.

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On the recommendation of Fifth Central Pay Commission relating to career progression of physicians of ISM&H, an order regarding time bound promotion of ISM&H Physicians possessing medical qualification approved by Central Council of Indian Medicine/Central Council of Homoeopathy was issued on 25.1.99 providing inter-alia as under:-

1) The first time-bound promotion from the level of Medical Officers (Rs.8000-13,500) to the level of Senior Medical Officers (Rs.10,000-15,200) shall be on completion of 4 years of regular service on seniority-cum-fitness basis.

2) The second time-bound promotion from the level of Senior Medical Officer (Rs.10,000-15,200) to Chief Medical Officer (Rs.12,000-16,500) shall be on completion of 6 years of regular service as Senior Medical Officer or on completion of 10 years of combined regular service as Medical Officer of which atleast two years shall be as Senior Medical Officer on the basis of Seniority-cum-fitness subject to their clearing the bench mark of `Good' with no zone of selection and without linkage to vacancies.

You have already been promoted as SMO (H) w.e.f. 25.1.99 & CMO (H) with effect from 25.1.2002."

3. By virtue of the present application, the applicant seeks quashing of the above said impugned order of 13.11.2002 and also the Office Memorandum of 07.8.1989 which does not give protection of her pay.

4. Respondents' learned counsel did not want to file any fresh counter.

5. The application has been contested contending that the applicant had voluntarily accepted the post ~~of~~ in the scale knowing fully well that her pay would be fixed at the minimum of the scale

of Rs.650-1200. It is denied that the Office Memorandum, which is being assailed, is invalid.

6. We have heard the parties' counsel and have seen the relevant record.

7. Our attention has been drawn towards the offer of appointment given to the applicant. It clearly stipulated that she is being appointed in the scale of Rs.650-1200 and her pay will be fixed at the minimum of the scale. The said offer was accepted. The offer reads:

> "(ii) The scale of pay of the post is Rs.650-30-740-35-810- EB-35-880- 40-1000-EB-40-1200 plus N.P.A. according to rules with dearness and other allowance as admissible to the Central Govt. Servants of corresponding status stationed at the place of duty. Her pay will be fixed at the minimum of the scale."

8. It clearly shows that the applicant had consciously accepted and applied for the post at a lower scale. Thus, it is too late in the day for the applicant now to retrace the steps and seek that her pay should be protected.

9. In that event, the learned counsel for the applicant urged that the Office Memorandum, in pursuance of which the pay of the applicant had been fixed dated 7.8.1989, is illegal and discriminatory. According to the learned counsel, since the applicant had joined service before that date, the benefit should be given to her. The said OM reads:

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"Subject: - Guidelines for fixing pay of candidates working in Public Sector Undertakings, etc. recommended for appointment by the Commission by the method of recruitment by selection – regarding:

The undersigned is directed to say that as per extent rules orders on the subject, pay protection is granted to candidates who are appointed by the method of recruitment by selection through the U.P.S.C. if such candidates are in Government service. No such pay protection is granted to candidates working in Public Sector Undertakings, Universities, Semi-Government Institutions or Autonomous Bodies, when they are so appointed in Government. As a result of this, it has not been possible for Government to draw upon the target that is available in non-Government organizations.

2. The question as to how pay protection can be given in the case of candidates recruited from Public Sector Undertakings, etc. has been engaging the attention of the Government for sometime. The matter has been carefully considered and the President is pleased to decide that in respect of candidates working in Public Sector Undertakings, Universities, Semi-Government Institutions or Autonomous Bodies, who are appointed as direct recruits on selection through a properly constituted agency including departmental authorities making recruitment directly, their initial pay may be fixed at a stage in the scale of pay attached to the post so that the pay and D.A., as admissible in the Government will protect the pay + D.A. already being drawn by them in their parent organizations. In the event of such a stage not being available in the post to which they have been recruited, their pay may be fixed at a stage just below in the scale of the post to which they have been recruited, so as to ensure a minimum loss to the candidates. The pay fixed under this formulation will not exceed the maximum of the scale of the post to which they have been recruited. The pay fixation is to be made by the employing Ministries/Departments after verification of all the relevant documents to be

produced by the candidates who were employed in such Organisations.

In so far as persons serving in the Indian Audit and Accounts Department are concerned, these orders are issued with the concurrence of the Comptroller and Auditor General of India.

These orders take effect from the first of the month in which this O.M. is issued."

10. It clearly shows that in certain cases the pay had been protected but it is to take effect from the first day of the month in which the Office Memorandum had been issued. Thus, it is applicable from 01.8.1989.

11. To contend that it is discriminatory, in our considered opinion, is not correct.

12. Reliance has been placed on the decision of the Supreme Court in the case of **D.R. NIM, I.P.S.** v. **UNION OF INDIA**, [1967] 2 S.C.R. 325. The Supreme Court held that the date that was fixed was arbitrary and artificial and, therefore, Government cannot pick out a date at its own choice.

13. Reliance has further been placed on the decision of the Supreme Court in the case of **D.S. NAKARA AND OTHERS** v. **UNION OF INDIA**, (1983) 1 SCC 305. In the cited case, it was held that making of classification and further classification must be for a valid purpose and Article 14 would hit over-classification. That was the case for revised Scheme that had been framed and the Supreme Court had held:

> "9. Is this class of pensioners further divisible for the purpose of `entitlement' and `payment' of pension into those who retired by certain date and those who retired after that date? If date of retirement can be accepted as a valid criterion for classification, on retirement each individual government servant would form a class by himself because the date of retirement of each is correlated to his birth date and on attaining a certain age he had to retire. It is only after the recommendations of the Third Central Pay Commission were accepted by the Government of India that the retirement dates have been specified to be 12 in number being last day of each month in which the birth date of the individual government servant happens to fall. In other words, all government servants who retire correlated to birth date on attaining the age of superannuation in a given month shall not retire on that date but shall retire on the last day of the month. Now, if date of retirement is a valid criterion for classification, those who retire at the end of every month shall form a class by themselves. This is too microscopic a classification to be upheld for any valid purpose. Is it permissible or is it violative of Article 14?"

14. The decision in the case of **D.S.Nakara (supra)** had been considered by another Constitution Bench of the Supreme Court in the case of **KRISHENA KUMAR** v. **UNION OF INDIA & OTHERS**, (1990) 4 SCC 207. The Supreme Court held that it was not the ratio in respect of ***Nakara*** that the State's obligation must be the same as that towards the pension retirees. An imaginary definition of obligation to include all the government retirees in a class was not decided. The findings of the Supreme Court in this regard are:

> "32. In *Nakara* it was never held that both the pension retirees and the PF retirees formed a homogeneous class and that any further classification among them would be violative of Article 14. On the other hand the court clearly observed that it was not dealing with the

problem of a "fund". The Railway Contributory Provident Fund is by definition a fund. Besides, the government's obligation towards an employee under CPF Scheme to give the matching contribution begins as soon as his account is opened and ends with his retirement when his rights qua the government in respect of the Provident Fund is finally crystallized and thereafter no statutory obligation continues. Whether there still remained a moral obligation is a different matter. On the other hand under the Pension Scheme the government's obligation does not begin until the employee retires when only it begins and it continues till the death of the employee. Thus, on the retirement of an employee government's legal obligation under the Provident Fund account ends while under the Pension Scheme it begins. The rules governing the Provident Fund and its contribution are entirely different from the rules governing pension. It would not, therefore, be reasonable to argue that what is applicable to the pension retirees must also equally be applicable to PF retirees. This being the legal position the rights of each individual PF retiree finally crystallized on his retirement whereafter no continuing obligation remained while, on the other hand, as regard Pension retirees, the obligation continued till their death. The continuing obligation of the State in respect of pension retirees is adversely affected by fall in rupee value and rising prices which, considering the corpus already received by the PF retirees they would not be so adversely affected *ipso facto*. It cannot, therefore, be said that it was the ratio decidendi in *Nakara* that the State's obligation towards its PF retirees must be the same as that towards the pension retirees. An imaginary definition of obligation to include all the government retirees in a class was not decided and could not form the basis for any classification for the purpose of this case. *Nakara* cannot, therefore, be an authority for this case."

15. Thus, in the present case, the said ratio would also not be attracted.

16. It has further been explained in the case of **UNION OF INDIA** v. **P.N. MENON AND OTHERS**, (1994) 4 SCC 68. The Supreme Court held that no Scheme can be held to be foolproof, so as to cover and keep in view all persons who were at one time in active service. Whenever a Scheme is prepared, cut off date necessarily has to be fixed. Unless it is arbitrary, it cannot be quashed. In Paragraph 8, the Supreme Court held:

> "8. Whenever the Government or an authority, which can be held to be a State within the meaning of Article 12 of the Constitution, frames a scheme for persons who have superannuated from service, due to many constraints, it is not always possible to extend the same benefits to one and all, irrespective of the dates of superannuation. As such any revised scheme in respect of post-retirement benefits, if implemented with a cut-off date, which can be held to be reasonable and rational in the light of Article 14 of the Constitution, need not be held to be invalid. It shall not amount to "picking out a date from the hat", as was said by this Court in the case of *D.R.Nim v. Union of India* [AIR 1967 SC 1301] in connection with fixation of seniority. Whenever a revision takes place, a cut-off date becomes imperative because the benefit has to be allowed within the financial resources available with the Government."

Thereafter, it was further explained that:

> "14. According to us, for the reasons disclosed on behalf of the appellant – Union of India for fixing 30-9-1977 as the cut-off date, which date was fixed when the price index level was 272, cannot be held to be arbitrary. The decision to merge a part of the dearness allowance with pay, when the price index level was at 272, appears to have been taken on basis of the recommendation of the Third Pay Commission. As such it cannot be held that the cut-off date has been selected in an arbitrary

manner. Not only in matters of revising the pensionary benefits, but even in respect of revision of scales of pay, a cut-off date on some rational or reasonable basis, has to be fixed for extending the benefits. This can be illustrated. The Government decides to revise the pay scale of its employees and fixes the 1st day of January of the next year for implementing the same or the 1st day of January of the last year. In either case, a big section of its employees are bound to miss the said revision of the scale of pay, having superannuated before that date. An employee, who has retired on 31st December of the year in question, will miss that pay scale only by a day, which may affect his pensionary benefits throughout his life. No scheme can be held to be foolproof, so as to cover and keep in view all persons who were at one time in active service. As such the concern of the court should only be, while examining any such grievance, to see, as to whether a particular date for extending a particular benefit or scheme, has been fixed, on objective and rational considerations."

17. More recently, in the case of **STATE OF WEST BENGAL AND ANOTHER** v. **W.B. GOVT. PENSIONERS' ASSOCIATIONS AND OTHERS**, (2002) 2 SCC 179, the same question was again under consideration. Once it was held that there cannot be a totally perfect Scheme, a cut off date, unless totally arbitrary, cannot be held to be illegal.

18. In the present case, when the Scheme was made applicable which is under the gaze of this Tribunal, the applicant had already joined service accepting the terms to which we have referred to above. She cannot, in these circumstances, now claim that it should be made applicable to every person. The Scheme is prospective in nature. The Government had already pointed that it will give financial constraints. Therefore, there is a rationale

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behind giving the benefit only from a particular date when the Scheme is enforced. It cannot be taken to be arbitrary keeping in view the decision of the Supreme Court in the cases of **P.N. Menon** and **State of West Bengal and Another**, to which we have referred to above.

19. Resultantly, the Original Application being without merit must fail and is accordingly dismissed.

(S.A.Singh)
Member (A)

(V.S.Aggarwal)
Chairman

/NSN/