

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved On: 15th December, 2010*
Judgment Delivered On: 22nd December, 2010

+ **W.P.(C) 10935/2009**

UOI THR. SECRETARY MINISTRY
OF LABOUR & EMPLOYMENT
GOVT. OF INDIA Petitioners
Through: Mr.H.K.Gangwani, Advocate

versus

DR.O.P.MAURYA Respondent
Through: Mr.Devender Pal Mann and
Mr.Atma Ram Gupta, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. The Directorate General of Employment and Training (hereinafter referred to as "DGET") is an attached office of Ministry of Labour. The organizational set up of DGET consists of three principal wings; namely, Directorate of Training, Directorate of Employment and Secretariat Wing.

2. The hierarchical structure of Directorate of Employment is as follows: - Director of Employment Exchanges ← Additional Director of Employment Exchanges ← Joint Director of Employment Exchanges ← Deputy Director of Employment Exchanges ← Assistant Director of Employment Exchanges.

3. Prior to the year 1996, there were 10 posts of Deputy Director of Employment Exchanges in the pay scale of ₹3000-4500, 3 posts of Joint Director of Employment Exchanges in the pay scale of ₹3000-5000 and 1 post of Additional Director of Employment Exchanges in the pay scale of ₹3700-5000. As evident from the afore-noted hierarchical structure, the post of Deputy Director of Employment Exchanges is the feeder post to the post of Joint Director of Employment Exchanges. In terms of Directorate of Employment (Directorate General of Employment and Training) Recruitment Rules, 1994 an officer who has put in 2 years regular service in the post of Deputy Director of Employment Exchanges is eligible to be considered for promotion to the post of Joint Director of Employment Exchanges.

4. In its report, 5th Central Pay Commission recommended that the pay scales of the posts of Deputy Director of Employment Exchanges and Joint Director of Employment Exchanges be upgraded from ₹3000-4500/₹3000-5000 to ₹10000-15200 and that the pay scale of the post of Additional Director of Employment Exchanges be upgraded from ₹3700-5000 to ₹12000-16500. The aforesaid recommendations of the Fifth Pay Commission were approved and implemented by the government. Reason why same pay scale was recommended as the replacement pay scale for the post of Deputy Director of Employment Exchange and Joint Director of Employment Exchange was that there was virtually complete identity in the nature of work and responsibilities of the two posts and hence the near parity in the pre-revised pay scales, which as noted hereinbefore was ₹3000-4500 and ₹3000-5000 for the two posts.

5. With regard to placement of the posts of Deputy Director of Employment Exchanges and Joint Director of Employment Exchanges in the same pay scale as a result of the implementation of the aforesaid recommendations of the 5th Central Pay Commission, the Secretary, Ministry of Labour issued a letter dated 15.12.1997 to the Department of Personnel and Training, the relevant portion whereof reads as under:-

“5. Three posts of JDX in the Employment Directorate have been filled up on the basis of promotion as per the recommendation of the DPC chaired by the Member, UPSC. However, after the implementation of the recommendations of the Fifth Pay Commission, the scale of pay for the post of JDX has been merged with the scale of pay corresponding to the post of DDX. This has nullified the promotion earned by the Joint Directors after working at the level of DDX for several years. With the merger of scales of pay, it would not be feasible to maintain the existing hierarchical difference between these posts. Besides, it will also disturb the existing channel of submission and the system of reporting in the Employment Directorate.

6. In order to remove the above anomaly, it is proposed that the posts of Joint Director of Employment Exchanges, which were having the pre-revised scale of pay of Rs.3000-5000 may be placed in the replacement scale corresponding to the scale of pay of Rs.3700-5000. It is also proposed to amend the R/Rules for the posts of JDX so that there is a minimum qualifying service of 5 years instead of existing qualifying service of 2 years for promotion from the grade of DDX to JDX. Further, the existing one post of Additional Director of Employment Exchanges in the pre-revised scale of Rs.3700-5000 should be merged with the existing posts of Joint Director, Employment Exchanges, with the exception of the existing incumbent who will continue as Additional Director till he holds office. However, his successor to the post will be a Joint Director.”

6. On 01.09.1998 the respondent, who was working on the post of Deputy Director of Employment Exchanges was promoted to the post of Joint Director of Employment Exchanges on an ad-hoc basis for a period of one year.

7. On 24.11.2000 the Ministry of Finance issued an Office Memorandum regarding the placement of feeder and promotion posts in the same pay scale in certain departments as a result of the implementation of the recommendations of the 5th Central Pay Commission, which reads as under:-

“The Fifth Central Pay Commission had, as a measure of rationalization, merged some of the pre-revised pay scales and had recommended single replacement pay scale (s) in such cases. These recommendations had been accepted by the Government and have been duly notified. This has necessitated the placement of feeder and promotion posts in certain Ministries and Departments in an identical revised pay scale notwithstanding the fact that such posts were in separate and distinct pay scales earlier.

2. This Department has been receiving a number of proposals from various Ministries and Departments requesting appropriate upward revision of the pay scales of the promotion posts concerned so as to restore the earlier relativities. It is clarified that in this context that mere fact that the feeder and promotion posts in certain Ministries and Departments have been placed in an identical revised pay scale cannot by itself be adequate justification for placing the promotion posts in the hierarchy in a higher pay scale. Upward revision of the pay scale of posts on this consideration alone is not being accepted as a general policy unless there are extenuating circumstances that might justify the adoption of such a course of action. What is envisaged in such a situation is that, the affected cadres themselves should be appropriately restructured and the relevant recruitment rules amended so as to reduce the number of levels in the hierarchy. This is also the spirit underlying the V CPC

recommendations relating of merger of different pay scales.

3. Therefore, Ministries/Departments should, in the first instance, examine in depth the feasibility of appropriately restructuring the cadres in question. Only in cases where this is not found to be feasible on functional, operational and administrative considerations, only extension of the benefit of fixation of pay under FR 22(l)(a)(1) could be considered on the merits of each case and provided that all the conditions precedent for the grant of this benefit are fully satisfied and promotion to the posts in question actually involves the assumption of higher responsibilities. All cases for extension of the pay fixation benefit in such cases should be referred to the Department of Expenditure for prior approval.

4. Ministries and Departments of the Government of India are accordingly requested to review all such cases on a priority basis in consultation with their Financial Advisors and make available specific proposals for the consideration of this Department, in case this has not already been done. The proposals should contain detailed justification indicating the reasons for the inability of the Ministries and Departments to restructure the cadres, the nature of functions and responsibilities and establish conclusively that the assumption of higher responsibilities is actually involved.”
(*Emphasis Supplied*)

8. From time to time the department extended the period of ad-hoc promotion of the respondent to the post of Joint Director till on 31.01.2003 when the respondent retired from the service.

9. Nearly 3 months after the retirement of the respondent, on 02.04.2003, the Ministry of Finance approved the proposal of the Ministry of Labour for restructuring of the posts. As per the proposal approved by the Ministry of Finance, 3 posts of Joint Director of Employment Exchanges were to be merged with the post of Additional Director of Employment Exchanges

and 1 out of 10 posts of Deputy Director of Employment Exchanges was to be abolished. Vide Office Order dated 06.05.2003 the Ministry of Labour implemented the aforesaid proposal of restructuring of the posts and provided that henceforth the post of Joint Director of Employment Exchanges shall be in the revised pay scale of ₹12000-16500

10. On 28.01.2004 the respondent made a representation to the department inter-alia stating that (i) initial pay of the respondent in the post of Joint Director of Employment Exchanges be fixed in terms of clause (I)(a)(1) of FR 22 for the period from the date of his promotion to the said post i.e. 01.09.1998 to the date of his retirement i.e.31.01.2003 and (ii) order issued by the department for restructuring of the posts be given a retrospective effect and as a necessary corollary thereof the respondent be granted the revised pay scale of ₹12000 – 16500 prescribed for the post of Joint Director of Employment Exchanges after the restructuring of the posts.

11. Vide Office Order dated 18.07.2005 the department rejected the afore-noted representation dated 28.01.2004 made by the respondent.

12. Aggrieved by the rejection of his representation, the respondent filed an application under Section 19, Administrative Tribunals Act, 1985 before the Principal Bench, Central Administrative Tribunal, New Delhi. Vide order dated 10.05.2007 the Tribunal allowed the application filed by the respondent and directed the department to examine the case of the respondent for grant of revised pay scale ₹12000-16500 and pass a speaking order in said regard. The Tribunal further directed that while examining the case of the respondent for grant of revised pay scale, the department should also

consider giving retrospective effect to the order issued by the department for restructuring of the posts. The relevant portion of the order dated 10.05.2007 passed by the Tribunal reads as under:-

“6. As applicant, while functioning for than 14 years, the requisite eligibility period on the post of Joint Director, had been appointed on ad hoc basis w.e.f. 01.09.1998, the aforesaid was continued from time to time till 31.01.2003. Applicant preferred several representations to either regularize his services in Joint Director or to consider him for Joint Director in accordance with law.

7. The only impediment for such a consideration is the anomaly created by revising the pay scale, whereby feeder category of Deputy Director and erstwhile post of Joint Director have come into identical pay scale. However, this anomaly was corrected and has been given effect to. The approval was sought in April 2003 by the time applicant had retired on superannuation.....We find that non-consideration of the applicant for promotion on regular basis despite he had continued uninterruptedly on approval of the President on ad-hoc basis as Joint Director has prejudiced his right to get pension of a substantive post of Joint Director. This omission has taken place without any fault of the respondent and is squarely imputed to the inordinate delay on part of the respondents. Applicant should not suffer for the mistake of the Government. This may be on account of anomaly created at their behest on equating the feeder cadre in the same pay scale. However, when an administrative order is approved by the Government, no decision is taken either to operate it prospectively or retrospectively. However, taking harmonious construction a welfare piece of decision, we could rule that such a proposal would extend retrospectively even to the persons who had held the post on ad hoc basis. However, this is within the domain of the Government and prerogative to be considered in the interest of the employee and also in the wake of the fact that the rightful-claim of

employee should not be deprived of on the *ipsi dixit* of the authorities.

8. In the result, for the foregoing reasons, OA is disposed of taking cue from the decision of the Apex Court in **Ram Sewak Prasad** (supra) directing the respondents to take a decision to grant the revised pay scale to the applicant from 01.09.1998 when it was due to him till 31.1.2003, i.e. when he retired on superannuation....”

13. Pursuant to the order dated 10.05.2007 passed by the Tribunal, the department passed a speaking order dated 24.08.2007 to the effect that there is no ground to grant revised pay scale of ₹12000-16500 to the respondent w.e.f. 01.09.1998 or to fix the initial pay of the respondent in the post of Joint Director of Employment Exchanges in terms of clause (I)(a)(1) of FR 22. The relevant portion of the speaking order passed by the department reads as under:-

“3. Whereas this recommendation of the Vth CPC had created an anomalous situation and therefore Dr.Maurya represented for considering his case for giving him benefit of pay fixation under FR 22(1)(a)(i) from the date of his promotion to the post of JDX on ad-hoc basis w.e.f. 01.09.98. The Govt. did not agree to grant him the benefit under FR 22(1)(a)(i) and advised the Department to appropriately restructure the cadre in terms of the Ministry of Finance instruction dated 24.11.2000.

4. Whereas this department took up the matter with the Ministry of Finance for upgradation of the pay scales of Joint Director of Employment Exchanges. The Ministry of Finance did not agree to the proposal of upgradation but agreed for restructuring the post of Joint Director of Employment Exchanges in the scale of Rs.12,000-16,500/- by merging the post of Additional Director of Employment Exchanges and abolition of one post of Deputy Director of Employment Exchanges (being matching savings). Accordingly, the restructuring orders were given prospective effect from 06.06.2003.

.....

6. Therefore, in compliance of the above orders of the CAT, upon considering all the above facts & circumstances of the case, the following decisions are conveyed:-

I. After the recommendations of the Vth CPC the scales of DDX and JDX has been merged. This resulted in a situation where the promotional post and feeder grade were in the same grade. At that time, efforts were made to remedy this situation in consultation with the Ministry of Finance. During this process, Dr.Maurya was granted ad-hoc promotion from DDX to JDX due to the reason that the proposal for up gradation of three posts of JDX was under consideration of the Ministry of Finance and also to save the post from coming under the purview of general economy ban. Dr.Maurya was not given any benefit as the pay scales for both the posts has been placed in the same scale on the recommendation of the Vth CPC. Since cadre restructuring of the posts of JDX, by merging the post of Additional Director of Employment Exchanges and abolishing of one post of Deputy Director of Employment Exchanges has taken prospective effect w.e.f. 06.05.2003 hence there is no ground for grant of revised pay scale of Rs.12,000 – 16,500/- to Dr.Maurya retrospectively w.e.f. 01.09.1998 till 31.1.2003.

II. Since there was only a marginal difference between the pre-revised scale of Rs.3000-4500 and Rs.3000-5000 and therefore their merger after Vth CPC to one common scale of Rs.10,000-15,2000/- would connote that the duties and responsibilities of both the posts would be on the same footing. Accordingly, there is no ground/merit for grant of benefit of pay fixation under FR 22(1)(a)(i)."

14. Subsequent thereto, the respondent filed a contempt petition before the Tribunal inter-alia stating that by denying the grant of revised pay scale of ₹12000-16500 to the respondent in the speaking order dated 24.08.2007 the department has disobeyed the order dated 10.05.2007 passed by the Tribunal wherein the Tribunal had categorically directed

the department to grant said pay scale to the respondent. After holding that the only direction issued to the department by the Tribunal in its order dated 10.05.2007 was to consider the case of the respondent for grant of revised pay scale and pass a speaking order in said regard, vide order dated 13.12.2007 the Tribunal dismissed the contempt petition filed by the respondent.

15. After the dismissal of the contempt petition passed by him, the respondent filed an application under Section 19 of the Administrative Tribunals Act, 1985 before the Tribunal assailing the speaking order dated 18.05.2007 passed by the department. Vide order dated 25.03.2009 the Tribunal allowed the application of the respondent, relevant portion whereof reads as under:-

“8. We have heard both the learned counsels and also perused the materials on record.

9.1 Since various aspects of this issue have already been elaborated in the earlier order of the Tribunal in OA 2187/2006, it would not be necessary for us to go over them again. Suffice it is to say that the fact of an anomaly having been created by grant of the same revised pay scale, after the 5th CPC, to the feeder post of DDX and the promotional post of JDX is admitted by the respondents. They have also sought to remedy the anomalous situation by the decision of restructuring under which, out of the three existing posts of Joint Directors, one was abolished and the remaining ones were merged in the Additional Director's higher pay scale of Rs.12000-16500/-.

9.2 The claim of the applicant to be promoted against this post is not disputed by the respondents. The order of the Tribunal dated 10.5.2007 mentions in para-6 about the applicant while functioning for more than 14 years, and having the requisite eligibility period on the post of Joint Director being appointed on ad hoc basis against that post. Para-7

of this order also mentions that this had been done with the approval of the President and the applicant had continued against this post uninterruptedly till his superannuation.

9.3 The department's proposal for regular promotion of the applicant against this post was not concurred with by the UPSC on the ground that after the 5th CPC, both the DDX and JDX posts carry the same pay scale. It is however, surprising that despite the restructuring was decided, they left out of consideration the legitimate claims of the persons who had been working against this post on a scale admittedly not justified since 1998. We also find no apparent justification as to why the department did not choose to take up the case with the Ministry of Finance as also with the UPSC in order to see that justice was done to the applicant.

....

11. To conclude, we find it to be an appropriate case warranting judicial intervention. The OA is allowed, the impugned order dated 24.8.2007 is quashed and set aside. The respondents are directed to grant the applicant the revised pay scale of Rs.12000-16500 from the date he was promoted on ad hoc basis with all consequential benefits including re-fixation of pay as per Rule FR22(1)(a)(i) by adopting appropriate methodology. We also direct for revision of the retiral benefits of the applicant consequently...." (*Emphasis Supplied*)

16. Feeling aggrieved by the impugned judgment and order dated 25.03.2009 passed by the Tribunal, the petitioner has filed the present petition under Articles 226 and 227 of Constitution of India.

17. From the afore-noted conspectus of facts, it is clear that that the two questions arise for consideration in the present case namely, (i) whether the initial pay of the respondent in the post of Joint Director of Employment Exchanges was required to be fixed in terms of clause I)(a)(i) of FR 22; and (ii) whether the department was justified in not giving

retrospective effect to the order issued by it for restructuring of the posts.

In Re: Question (i)

18. As already noted herein above, the Tribunal has answered the first question in the affirmative. Is the Tribunal correct in holding so?

19. No reasoning whatsoever is forthcoming from the impugned judgment in support of the decision of the Tribunal in respect of the first question. Be that as it may, we proceed to examine the correctness of the decision of the Tribunal.

20. The relevant portion of FR 22 reads as under:-

“F.R. 22. (I) The initial pay of a Government servant who is appointed to a post on a time-scale of pay is regulated as follows:-

(a)(1) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage which such pay has accrued or rupees one hundred only, whichever is more.

Save in cases of appointment on deputation to an ex cadre post, or to a post on *ad hoc* basis or on direct recruitment basis, the Government servant shall have the option, to be exercised within one month from the date of promotion or appointment, as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment

or to have the pay fixed initially at the stage of the time-scale of the new post above the pay in the lower grade or post from which he is promoted on regular basis, which may be refixed in accordance with this rule on the date of accrual of next increment in the scale of the pay of the lower grade or post. In cases where an *ad hoc* promotion is followed by regular appointment without break, the option is admissible as from the date of initial appointment/promotion, to be exercised within one month from the date of such regular appointment:

Provided that where a Government servant is, immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage above the pay notionally arrived at by increasing his pay in respect of the lower post held by him on regular basis by an amount equal to the last increment in the time-scale of the lower post or rupees one hundred, whichever is more.

(2) When the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of time-scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis:

....

(III) For the purposes of this rule, the appointment shall not be deemed to involve the assumption of duties and responsibilities of greater importance, if the post to which it is made is on the same scale of pay as the post, other than tenure post, which the Government servant holds on a regular basis at the time of his promotion or appointment or on a scale of pay identical therewith...."

21. A plain reading of the above Rule shows that two distinct situations are envisaged when a government servant is promoted or appointed in a substantive, temporary or

officiating capacity to another post. Where such appointment involves higher duties and responsibilities, the initial pay of such Government servant in higher post shall be fixed at the stage "next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or rupees one hundred only, whichever is more.". This is otherwise called stepping up of the pay at the initial stage. However, where the appointment to the new post does not involve duties and responsibilities of greater importance there would be no stepping up of the pay at the initial stage and the initial pay would be "equal to his pay in respect of the lower post held by him on regular basis." Therefore, in each case, it would be a question of fact whether the appointment to the new post is one which has higher duties and responsibilities than the old post.

22. Clause (III) of the above Rule creates a "deeming fiction" by providing that where the new and the old posts have same or identical scales of pay it would be deemed that the new post does not involve higher duties and responsibilities. As a necessary corollary thereof, clause (I)(a)(i) of FR 22 shall have no application in the cases where the new and the old posts have the same or identical scales of pay for the involvement of higher duties and responsibilities in the new post is a sine qua non for the application of said clause in a given case.

23. In the instant case, the posts of Deputy Director of Employment Exchanges and Joint Director of Employment Exchanges were having the same scales of pay after the implementation of the recommendation of the Fifth Pay Commission and that the respondent was promoted to the

post of Joint Director of Employment Exchanges after the implementation of the said recommendations. Therefore, by virtue of clause (III) of FR 22, clause (I)(a)(i) of FR 22 has no application in the present case and thus the department was not required to fix the initial pay of the respondent in the post of Joint Director of Employment Exchanges in terms of clause (I)(a)(i) of FR 22.

In Re: Question (ii)

24. In the first round of litigation between the parties, the Tribunal categorically directed the department to consider giving retrospective effect to the order issued by it for restructuring of the posts. (See the underlined portion of the order dated 10.05.2007 passed by the Tribunal, noted by us in para 12 above). Vide speaking order dated 24.08.2007, the department considered the same and concluded that there is no justification to give retrospective effect to the said order. In that view of the matter, it was imperative upon the Tribunal to examine whether the action of the department of not giving retrospective effect to the order issued by it for restructuring of the posts is legal or not. However, a perusal of the impugned judgment, contents whereof have been noted in foregoing paras, shows that the Tribunal has completely misdirected itself and has not even touched upon this aspect of the matter. A reading of the impugned judgment gives an impression as if the Tribunal is wandering in woods and has not understood the issues involved in the present case.

25. In such circumstances, we have no option but to remand the present case to the Tribunal for deciding the question whether the action of the department of not giving

retrospective effect to the order issued by it for restructuring of the posts is legal or not.

26. In view of above discussion, we set aside the impugned judgment dated 25.03.2009 passed by the Tribunal insofar it has held that the department is directed to fix the initial pay of the respondent in the post of Joint Director of Employment Exchanges in terms of clause (I)(a)(i) of FR 22 and remand the matter to the Tribunal for deciding the question whether the action of the department of not giving retrospective effect to the order issued by it restructuring of the posts is legal or not

27. The aforesaid petition is disposed of in the above terms.

28. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

December 22, 2010
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