

(2011) 08 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 124 of 2011

Abhinav Soni and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 30-08-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 39

Citation : (2011) 3 ShimLC 341

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Judgement

Deepak Gupta, J.—The questions which arise for decision in this writ petition are:-- 1. Whether Veterinary Officers (Veterinary Doctors) appointed on contract basis are entitled to grant of non-practicing allowance (NPA) like the regularly appointed veterinary officers or the medical officers (general and dental) appointed on contract basis?

2. Whether the Veterinary Officers appointed on contract basis are entitled to 24 days casual leave as is being granted to contract medical officers (general and dental)?

The undisputed facts are that the petitioners are all graduates in Veterinary Science and Animal Husbandry. They were eligible for being appointed as Veterinary Officers in the department of Animal Husbandry in the State of Himachal Pradesh. Pursuant to advertisement(s) issued by the State of Himachal Pradesh and selection(s) made by a Committee consisting of Director/Joint Director of the Animal husbandry department and two subject matter specialists and one representative of H.P. State Veterinary Council, the petitioners were appointed as Veterinary Officers on contract basis. It is not disputed that as per the terms of the contract the petitioners were to get fixed emoluments of Rs. 8000/- per month but it is the admitted case of the parties that as on date the fixed emoluments are Rs. 21,000/- per month. The terms of appointment prohibit the contract appointees from indulging in private practice. Similarly the

terms of appointment also lay down that the contract employee shall not be liable to transfer to any other institution. 2. At the outset, it may be stated that the petitioners are being paid the minimum of the pay scale, which is being paid to the regularly appointed Veterinary Officer, which is now termed as pay band plus grade pay. This is the practice being followed virtually in all the departments of the State of Himachal Pradesh. The grievance of the petitioners is that whereas the regularly appointed Veterinary Officers are granted 25% non-practicing allowance and such allowance is also being paid to the Medical Officers appointed on contract basis whether in general category or dental category, only the Veterinary Officers appointed on contract basis are being denied this allowance. They on the basis of doctrine of equal pay for equal work claim that the allowances which are payable, especially non-practicing allowance, which is being paid to other similarly situated doctors, whether veterinary or otherwise, should also be granted to them.

3. The case of the respondent-State is that the petitioners are contract employees. They had entered into an agreement and are bound by the terms of the contract. Further according to the State the petitioners cannot be transferred and have the advantage of being posted at one station. It is further contended that since the petitioners are ad hoc employees and have not undergone the regular and more stringent process of recruitment, they cannot claim parity in pay scales. It is lastly contended that the duties of the contract employees are qualitatively and quantitatively different from the doctors who deal with human beings and also the veterinary doctors who are appointed on regular basis.

4. The principle of equal pay for equal work is enshrined in Article 39 (d) of the Constitution of India, which lays down that the State shall direct its policy towards securing equal pay for equal work for both men and women. No doubt, this Article is part of the directive principles of the State policy in part - IV of the Constitution of India and is, therefore, not an enforceable right but by now the law is well settled that the principles enshrined in the directive principles can be taken note of and help can be taken from these principles while interpreting statutes and the doctrine of equal pay for equal work has virtually become a part of our service jurisprudence.

5. The Apex Court in *Randhir Singh Vs. Union of India (UOI) and Others*, was dealing with a matter in which a driver employed in the police department of Delhi administration claimed parity of pay with other drivers working in the Delhi Administration and it held that such drivers were entitled to the same scale of pay as were being paid to the other drivers working in other departments. This was the first judgement in which the principle of equal pay for equal work was recognized by the Apex Court. The principle was reiterated in *Dhirendra Chamoli and Another Vs. State of U.P.*, and *Surinder Singh and Another Vs. Engineer-in-chief, C.P.W.D. and Others*,

6. In *M.P. Singh and Others Vs. Union of India (UOI) and Others*, , the Apex Court was dealing with a case where persons directly recruited in the CBI were

getting lesser pay than their counterparts who came on deputation to the CBI. The Apex Court held that higher special pay on grounds of difference in rates of pay and DA of deputationists in their parent States and for attracting talent from the State services was not sufficient reason to pay different emoluments to persons performing the same duties.

7. In *Jaipal and Others Vs. State of Haryana and Others*, the Apex Court held that the doctrine of equal pay for equal work cannot be discarded and merely because one employee was temporary and other permanent was not by itself sufficient to hold that the temporary employee should be paid a lesser scale of pay.

8. In *Dr. Ms. O.Z. Hussain Vs. Union of India and others*, the Apex Court held that even with regard to allowances, namely, book allowance, risk allowance and conveyance allowance there could be no discrimination between group "A" scientists who were working in the non medical wing and the scientists who were working in the medical wing. The Apex Court, however, did not decide the question whether the group "A" scientists working on non medical side could claim non practicing allowance or not.

9. This concept of equal pay for equal work held the field for a little more than a decade without any reservation but underwent some changes in the subsequent authorities delivered by the Apex Court.

10. In *State of Haryana Vs. Surinder Kumar and others*, the Apex Court held that the employees working on contractual basis did not have a right to hold a post until they were duly selected and appointed. The Apex Court held that when persons are not appointed by following a regular process of selection then they cannot claim equal pay for equal work.

11. Thereafter in *State of Haryana and Another Vs. Tilak Raj and Others*, , the Apex Court held that the concept of equal pay for equal work was not an abstract concept but to make it applicable it should be shown that there is wholesale identity between the group of employees claiming identical pay scales with the group of employees getting the higher pay scales. It was further held that it was for the claimant to establish a clear-cut basis of equivalence and resultant hostile discrimination. The following observations of the Apex Court are relevant for the decision of the present case:--

7. The principle of "equal pay for equal work" is not always easy to apply. There are inherent difficulties in comparing and evaluating the work done by different persons in different organisations, or even in the same organization. In *Federation of Federation of All India Customs and Central Excise Stenographers (Recognised) and others Vs. Union of India and others*, , this Court explained the principle of "equal pay for equal work" by holding that differentiation in pay scales among Government servants holding the same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation. The same amount of physical

work may entail different quality of work, some more sensitive, some requiring more tact, some less - it varies from nature and culture of employment. It was further observed that judgment of administrative authorities concerning the responsibilities which attach to the posts and the degree of reliability expected of an incumbent would be a value judgment of the authorities concerned which, if arrived at bona fide, reasonably and rationally, was not open to interference by the Court.

8. In *State of U.P. and Others Vs. J.P. Chaurasia and Others*, , it was pointed out that the principle of "equal pay for equal work" has no mechanical application in every case of similar work. In *Harbans Lal and Others Vs. State of Himachal Pradesh and Others*, it was held that a mere nomenclature designating a person as a carpenter or a craftsman was not enough to come to a conclusion that he was doing the work as another carpenter in regular service. A comparison cannot be made with counterparts in other establishments with different managements or even in the establishments in different locations though owned by the same management. The quality of work which is produced may be different, even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job requires may differ from job to job. It must be left to be evaluated and determined by an expert body. Same was of the view expressed in *Ghaziabad Development Authority v. Vikram Chaudhary*.

12. In *State of West Bengal and Others Vs. Pantha Chatterjee and Others*, , the Apex Court, however, took a slightly different view. This was a case where the persons engaged on voluntary basis as part time Border Wing Home Guards claimed parity of pay scales with the regularly appointed Border Wing Home Guards. The Apex Court held that the mere fact that these persons had continued for many years itself indicated that their services were not temporary in nature and were not a stopgap arrangement. The Court found that both the part time home guards and regular home guards were virtually doing the same duties. The Court went on to direct that the petitioners should be paid the same emoluments as their regularly appointed counterparts.

13. In *State of Haryana and Others Vs. Charanjit Singh and Others, etc. etc.*, , the Apex Court dealt with the entire law dealing with doctrine of equal pay for equal work and held as follows:--

19. Having considered the authorities and the submissions we are of the view that the authorities in the cases of *Jasmer Singh*, *Tilak Raj*, *Orissa University of Agriculture & Technology* and *Tarun K. Roy* lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a Court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and

grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities made a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ Court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regard. In any event the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a Court, the Court must first see that there are necessary averments and there is a proof. If the High Court, is on basis of material placed before it, convinced that there was equal work of equal quality and all other relevant factors are fulfilled it may direct payment of equal pay from the date of the filing of the respective Writ Petition. In all these cases, we find that the High Court has blindly proceeded on the basis that the doctrine of equal pay for equal work applies without examining any relevant factors.

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24. Thus it is clear that persons employed on contract cannot claim equal pay on basis on equal pay for equal work. Faced with this situation it was submitted that all these persons were in fact claiming that their respective appointments were regular appointments by the regular process of appointment but that instead of giving regular appointments they were appointed on contract with the intention of not paying them regular salary. It was admitted that the Petitions may be badly drafted and such a contention was not put forth specifically. The High Court

has disposed of these petitions also on the footing that the principle of equal pay for equal work applied. We therefore set aside the impugned orders in these cases also and remit the matters back to the High Court for disposal. The High Court shall permit these petitioners to amend their petitions to make necessary averments and will also permit the Respondents in these cases to file replies to the amended Petitions.

14. In *State of Punjab and Another Vs. Surjit Singh and Others*, the Apex Court after referring to the entire law on the subject held as follows:--

16. In our constitutional scheme, the doctrine of "equal pay for equal work" has a definite place in view of Article 39(d) of the Constitution of India read with Article 14 thereof. Although as an abstract principle the existence of the applicability of the said doctrine cannot be ignored, the question which arises for our consideration is as to whether the said doctrine could have been mechanically applied as has been done by the High Court in the instant case.

17. We must also place on record the fact that in different phases of development of law by this Court, relying on or on the basis of the said principle, a clear cleavage of opinion has emerged. Whereas in the 1970s and 1980s, this Court liberally applied the said principle without insisting on clear pleadings or proof that the person similarly situated with others are equal in all respects; of late, also this Court has been speaking in different voices as would be evident from the following.

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35. The High Court noticed that this Court in several decisions had arrived at an opinion that the principle of "equal pay for equal work" cannot be applied blindly but chose to rely upon the decision of this Court in *Dhirendra Chamoli and Another Vs. State of U.P.*,

36. With utmost respect, the principle, as indicated hereinbefore, has undergone a sea change. We are bound by the decisions of large benches. This Court had been insisting on strict pleadings and proof of various factors as indicated hereto before. Furthermore, the burden of proof even in that case had wrongly been placed on the State which in fact lay on the writ petitioners claiming similar benefits. The factual matrix obtaining in the said case particularly similar qualification, interchangeability of the positions within the regular employees and the casual employees and other relevant factors which have been noticed by us also had some role to play.

37. This Court in *Gurcharan Singh Kahlon (supra)* although noticed the Constitution Bench decision of this Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, declined to interfere with the order of the High Court having regard to the fact that no order of stay having been passed, the State of Punjab had implemented the order of the High Court, Furthermore, a scheme of regularization had already been drawn up. It is of some significance to

notice that similar orders passed by some Benches of this Court relying on or on the basis of Paragraph 53 in Uma Devi vis-a-vis Para 43 and other paragraphs thereof, have been severally (sic severely) criticized by this Court in Official Liquidator. We are bound by the law laid down therein.

38. We, therefore, are of the opinion that the interest of justice would be subserved if the State is directed to examine the cases of the respondents herein by appointing an Expert Committee as to whether the principles of law laid down herein, viz., as to whether the respondents satisfy the factors for invocation of the decision in Charanjit Singh in its entirety including the question of appointment in terms of the recruitment rules have been followed.

15. A similar matter again came up for consideration before the Apex Court in State of Madhya Pradesh and Others Vs. Ramesh Chandra Bajpai, wherein it held as follows:--

15. In our view, the approach adopted by the learned Single Judge and the Division Bench is clearly erroneous. It is well settled that the doctrine of equal pay for equal work can be invoked only when the employees are similarly situated. Similarity in the designation or nature or quantum of work is not determinative of equality in the matter of pay scales. The Court has to consider the factors like the source and mode of recruitment/appointment, qualifications, the nature of work, the value thereof, responsibilities, reliability, experience, confidentiality, functional need, etc. In other words, the equality clause can be invoked in the matter of pay scales only when there is wholesale identity between the holders of two posts.

16. In Surender Nath Pandey and others v. Uttar Pradesh Cooperative Bank Ltd. and another, (2010) 12 SCC 400 the Apex Court held that the persons employed on stopgap and on ad hoc basis were not entitled to the benefit of pay scales with increments being granted to the regularly appointed counter parts. The Apex Court held as follows:--

9. We are of the view that the real issue is whether persons employed on stopgap or ad hoc basis were entitled to the benefit of pay scales with increments during the period of service on daily or stopgap or ad hoc basis. Unless the appellants are able to establish that either under the contract, or applicable rules, or settled principles of service jurisprudence, they are entitled to the benefit of pay scale with increments during the period of their stopgap/ad hoc service, it cannot be said that the appellants have the right to claim the benefit of pay scales with increments.

17. From a perusal of the aforesaid authorities, which have been cited before me, it can be now taken to be well established that the doctrine of equal pay for equal work is a recognized principle of our service jurisprudence. However, the doctrine is not abstract in its application and the persons claiming the benefit of equal pay for equal work must show that qualitatively and quantitatively their work is identical to that of the persons with whom they claim parity of pay

scales. The recruitment should have been made by legal means and not through the back door. It should also be proved that there is no difference in the educational qualification. It would be pertinent to mention that in Charanjit Singh's case (supra) when the point was raised that the State with a view to avoid making payment of higher salary was indulging in making appointments by way of contract, the Apex Court found that such pleadings were not made in the petition and therefore, remanded the case and permitted the petitioners to amend their petition to make necessary amendments in this behalf.

18. In the present case, the petitioners in para 4 of the petition have stated as follows:--

4. That for the completion of facts it is necessary to mention that the respondent state has not made any appointment to the post of veterinary officer through Himachal Pradesh Public Service Commission since the year 1998. In between 1998 and 2003, appointments were made by the respondent state to the said post on ad hoc basis the year 1993. Such ad hoc appointees were thereafter regularized as veterinary officers on completion of five years of service. The respondent state after the year 2003 has been making appointment to the post of veterinary officer on contract basis only.

19. Reply of this para given by the State reads as follows:--

That in reply to this para it is submitted that the respondent State has decided to appoint the employees in the State on contract basis. It is pertinent to mention here that the Department of Animal Husbandry has appointed 37 veterinary officers on contract basis through H.P. Public Service Commission, Shimla in the year 2010.

20. From the aforesaid pleadings it is apparent that the State, right from 1998 till date, has not made any regular appointments to the post of Veterinary Officer. It is not disputed that there are vacant posts and a large number of veterinary officers have been appointed on contract basis. Even in the reply by the State it is specifically admitted that as many as 37 veterinary officers were appointed on contract basis through the H.P. Public Service Commission in the year 2010. The State has now found a novel method of avoiding to pay the regular wages to its employees. The method being adopted is of making appointment on contract basis. The system being followed is that these contract employees are placed at the bottom of the pay scales (now termed as pay band and grade pay). Resultantly, the contract employees get the minimum of pay band and grade pay. Earlier even increments were not being paid but now 3% increment is being paid by the State. It is not disputed that these contract employees have been appointed against posts which are duly sanctioned. It is not disputed that these contract employees have been appointed after selection. True it is, that some of the contract employees have not been selected by the Public Service Commission as required under the Rules but have been appointed by a duly constituted Committee as detailed hereinabove. Who constituted the

Committee? It was the State Government itself which constituted the Committee. Does it lie in the mouth of the State to argue that these employees are ad hoc contractual employees and hence are not entitled to the regular scales and at the same time take no steps for as many as 13 years to fill up the sanctioned post on regular basis? In my considered view when contractual employment is a regular mode of employment then though the contract employees may be placed at the bottom of the pay scale they cannot be denied equality of pay and allowances when there is no difference in the quantitative and qualitative services rendered by these employees. The qualifications are the same, the service rendered are the same, the contractual employees also face the recruitment process and therefore, they cannot be denied equality in pay.

21. The observations made by the Apex Court that contract employees and ad hoc employees are not entitled to parity of pay scales have been made in the context that this is a stopgap arrangement and not where the State in its wisdom chooses not to make any appointment by the regular mode of recruitment and only makes ad hoc appointments. In this case the petitioners are not even demanding pay equal to that paid to the regular employees. They are satisfied with the salary which they are getting at the minimum of the pay band and grade pay. Their grievance is that they should be granted non-practicing allowance which is being paid to the regularly appointed Veterinary Officers as well as the regularly appointed Medical Officers (general and dental) and the doctors (general and dental) employed on contract basis.

22. This brings us to the question as to what is the concept of non practicing allowance. It is obvious that non practicing allowance is an incentive given to the employees to ensure that they work in government institutions and do not indulge in private practice. As stated above, the Veterinary Officers appointed on contract basis are also debarred from private practice. The rationale behind this allowance is to compensate those who could conduct private practice but are debarred under the rules made by the Government from private practice. As far as non practicing allowance is concerned no rational or intelligible differentia can be made between Veterinary Officer appointed on contract basis and medical doctors treating human beings whether general or dental category. They are to be compensated for the reasons that they are being debarred from practice. Doctors whether they are veterinary doctors or general doctors can do private practice. The Government has debarred all such doctors from indulging in private practice. It is not disputed that non practicing allowance is being given to Allopathic doctors, Ayurvedic doctors and Veterinary doctors. Therefore, they are all being treated at par as far as grant of non practicing allowance is concerned. In my opinion doctors who are employed on contract basis are also entitled to non practicing allowance and merely because they are employed on contract basis is not by itself a sufficient reason to hold that these contractual employed veterinary doctors are not entitled to grant of non practicing allowance. Contractual employees stand on the same footing as regular employees as far as debarring them from private practice is concerned and they also have to be

compensated for not being able to practice in the same terms.

23. A faint argument has been raised that the medical officers employed on contract basis whether general or dental are not being paid the non practicing allowance. It is not disputed that as per the initial notification dated 31st December, 2009 the pay of the medical officers appointed on contract basis was revised to the fixed amount equal to the minimum of pay band plus grade pay plus 25% non practicing allowance applicable to the doctors on regular basis in the relevant pay band which works out to Rs. $15600+5400=21000+5250=26250/-$. A Division Bench of this Court directed the State to file an affidavit behind the principle of non practicing allowance and whether there are any guidelines in that regard. The affidavit which has been filed does not give reason or the guiding principle for grant of non practicing allowance but now it is stated that non-practicing allowance is not being paid to any doctors of any category. Alongwith this affidavit notification dated 25th April, 2011 has been annexed. This notification has been issued in supersession of the notification dated 1.12.2009 referred to above. The only difference is that now the emoluments payable to contract employees have been shown to be Rs. 26,250/- in total. To say the least, this is a very unethical practice on the part of the State. When the petition was filed claiming parity and the State was asked to file an affidavit stating therein the principle behind the grant of non practicing allowance instead of complying with the directions of this Court and making reference to the principle the State superseded the notification in which there was specific reference to the non practicing allowance and now has fixed total emoluments. Surprisingly, the total emoluments are the same i.e. the amount paid earlier including the non practicing allowance. The only following reason is given by the respondent-State in para 3:--

That originally the State Government only gave NPA to Allopathic Doctors due to a historically practice of compensating them for not carrying out private practice, as in the Central government. Over time because of pressure from Veterinary and Ayurvedic Doctors, this allowance has been extended to these categories despite no tradition of private practice for these doctors in Himachal Pradesh. However, NPA is not given to any contractual doctors of any category. The contractual employees are paid a lump sum contractual amount. State Government calculates all that is considers relevant in calculating this lump sum contractual amount for different categories of employees working in different context.

24. To say the least, this does not deal with the principle of grant of allowance. From the perusal of the averments quoted above, it is apparent that this allowance is being paid to compensate them for not being permitted to practice. The assertion made that non practicing allowance is not being given to the contractual doctors is on the face of it an attempt to mislead the Court if not a total falsehood. Now by amalgamating the non practicing allowance in the total emoluments of the doctors the State would have this Court believe that the

contractual Allopathic doctors are not being given any non practicing allowance. This plea being patently false cannot be accepted.

25. As held above, there is no rationale behind differentiating contractual doctors and regular appointed doctors especially when the State has failed to make any appointments on regular basis for almost 13 years and especially when it is the avowed practice of the State to make appointments only on contract basis. Under the garb of making contractual appointments the State cannot be permitted to fill up the vacant posts and pay lesser emoluments to these employees.

26. However, as far as the second claim is concerned in my view the veterinary doctors are not entitled to 24 days casual leave as is being paid to the contractual medical officers. The medical officers have to work at odd hours because human beings come as patient at any time. The veterinary doctors would rarely be asked to work outside the office hours and therefore, they cannot seek parity as far as grant of casual leave is concerned. In view of the above discussion, the writ petition is partly allowed and the petitioners and all other contractual veterinary officers are held entitled to non practicing allowance on the same and similar fashion as is being paid to the veterinary doctors and to the contract medical officers vide notification dated 31st December, 2009. However, since the petition has been filed only in January, 2011 the arrears shall be restricted from 1st January, 2011. The petition is disposed of in the aforesaid terms. No order as to costs.