

(2019) 03 CAT CK 0176

In the Central Administrative Tribunal

Case No : Original Application No. 170, 00763 Of 2017

Yasar Arafath

APPELLANT

Vs

Deputy Director (Admn) And Ors

RESPONDENT

Date of Decision : 22-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 309, 311

Citation : (2019) 03 CAT CK 0176

Hon'ble Judges : K.B. Suresh, J;C.V. Sankar, J

Bench : Division Bench

Advocate : Izzhar Ahmed, Vishnu Bhat

Final Decision : Allowed

Judgement

1. The case of the applicant is that he was appointed on 28.12.2010 to the post of 'Sister Grade-II' under the 2nd respondent on entry pay of Rs.12540-4600 vide offer of appointment dtd.29.11.2010(Annexure-A1) following the procedure of selection, written examination and interview with 2 years of the probationary period. He submits that there is no extension of probationary period and no termination on un-satisfactory work of the applicant as on 27.12.2012 or after expiry of the probationary period issued by the 2nd respondent. The 1st respondent vide advertisement dtd.08.01.2013 (Annexure-A2) invited applications for the recruitment of various Para Medical Posts, ESIC, Model Hospital, Bangalore for which the applicant applied for 'Staff Nurse' post and appeared in the written and interview. The 2nd respondent issued no objection certificate dtd.19.01.2013 (Annexure-A3) with the condition that 'if the applicant is selected, he will have to tender his resignation from the service of the institute with at least one/three month's prior notice(one month prior notice for who has not completed 2 years probationary period and three months prior notice for who have completed). They would be relieved only after the expiry of the notice period or till their substitute is appointed, whichever is later'. The 2nd respondent has not declared the probationary period successful as on

27.12.2012 but there is no dispute that his probationary period was satisfactory by the 2nd respondent. The 1st respondent issued offer of appointment dtd.22.6.2013(Annexure-A5) granting initial pay of Rs.17,140(Rs.12,540+4600) with the terms of appointment that it is on temporary basis confirmation subject to the satisfactory completion of probationary period which is for 2 years. The 2nd respondent issued memorandum dtd.12.8.2013 (Annexure-A6) regarding technical resignation in case of the applicant. The applicant filed application on 19.7.2013 and the technical resignation was accepted w.e.f. 18.10.2013 and he was permitted to relieve on the same day. Therefore, the technical resignation was accepted by the 2nd respondent having completion of probationary period following three months notice from 19.7.2013 to 18.10.2013. The competent authority approved the appointment of the applicant vide office order dtd.24.10.2013(Annexure-A7) on initial pay of Rs.17,140 on temporary basis with two years of probationary period. Then the applicant filed representation dtd.11.2.2015(Annexure-A8) to the 1st respondent for pay protection considering pay of the 2nd respondent but the same was rejected vide order dtd.28.1.2016(Annexure-A9) on the ground that completion of probationary period in previous dept. is a mandatory criterion to grant pay protection and cannot be granted in terms of DoP&T OMs dtd.10.7.1998 and 30.3.2010 and due to resignation w.e.f. 18.10.2013, he is not considered for confirmation of his service.

2. The applicant submits the order dtd.28.1.2016 is against the rule and said OMs are not applicable in his case. The 2nd respondent has not verified the records of the applicant in his letter dtd.18.11.2015 and it is also not correct that the probationary period was not confirmed due to acceptance of technical resignation on the facts that when he was appointed on 28.12.2010 with the 2nd respondent, he was granted the initial pay of Rs.17,140/- and thereafter he was granted Rs.18,190 adding increments after completion of probationary period and his last pay drawn is Rs.18,740 for the month of August 2013. Therefore, the applicant has completed the probationary period satisfactorily but the 2nd respondent has not taken decision on time as per rules. Therefore, the respondents have violated Articles-14, 16, 309 and 311 of the Constitution of India and failed to comply the order of the Hon'ble Apex Court in Civil Appeal No.596/2007 in the case of Khazia Mohammed Muzammil vs. State of Karnataka vide dtd.8.7.2010 as automatic/deemed confirmation after expiry of the probationary period.

2. The applicant further submits that the OM dtd.10.7.1998(Annexure-A10) is not applicable to him as he was not selected by the UPSC. And OM dtd.30.3.2010(Annexure-A11) is wrongly applied that the selection under the 1st respondent is not by interview. The impugned order is without facts on records. The 2nd respondent has not considered the DoP&T OM dtd.21.7.2014(Annexure-A12) while rejecting the case of the applicant vide letter dtd.18.11.2015 in the impugned order. The applicant had successfully completed probationary period as no shortcomings, no termination and no warning was issued before expiry of

probationary period and it was not extended further. The technical resignation was accepted on 18.10.2013 after 9 months and 21 days from the expiry of the probationary period dtd.27.12.2012 and hence he prays that the impugned order dtd.28.1.2016 & DoP&T OM dtd.10.7.1998 read with OM dtd.30.3.2010 (Annexures-A9, A10 & A11 respectively) should be set aside as being illegal and without facts on record and the respondents are directed to consider his case for pay protection on past service in the new post under the 1st respondent with all consequential benefits in terms of the guidelines prescribed by the DoP&T.

4. The respondent No.1 & 3 have filed their reply statement wherein they submit that this matter is between the applicant and his previous employer/organisation(AIIMS), (R2). The fixation of pay is governed by the DoP&T OM dtd.10.7.1998 followed by subsequent instructions which were issued from time to time whenever pay is revised as per the recommendations of the respective Pay Commission. The respondents submit that their office has forwarded a letter dtd.16.02.2015 addressed to the administrative office, AIIMS to confirm and forward the copy of the Probation Completion Order issued in respect of the applicant, for the recordal purpose(Annexure-R1), in response to which, the respondent No.2 vide his letter dtd.18.11.2015(Annexure-R2) informed that the name of the applicant was not considered for confirmation of service since he had tendered resignation from their institute w.e.f. 18.10.2013. The 2nd respondent submits that they have not considered his name for confirmation of service. Hence the claim of the applicant that he has completed the probationary period satisfactorily is not correct. As per the DoP&T OM dtd.10.7.1998, issue of probation confirmation order is a mandatory condition for granting pay protection. Since the applicant failed to fulfill one of the condition for granting pay protection i.e. confirmation of probation by the parent organisation, 1st respondent had issued a letter dtd.28.1.2016 to the applicant in response to his request dtd.11.2.2015 on the basis of the letter dtd.18.11.2015 of 2nd respondent. Hence, the office order dtd.28.1.2016 is found to be in order. Further the DoPT OM dtd.30.3.2010 clearly states that the conditions for admissibility of pay protection shall be the same as stipulated in the Dept.'s OMs dtd.7.8.89 and 10.7.98. They submit that in a similar case, the office of ESIC has issued a letter dtd.6.2.2013 (Annexure-R3) wherein it is clearly stated that probation completion certificate is mandatory for considering the request of pay protection. Unless the applicant gets the probation completion certificate/order from his parent organisation in support of having completed the probation period successfully, the 1st respondent cannot grant the applicant pay protection and fix his revised pay. If the applicant is able to get an order confirming his probation issued from his previous organisation, the respondents are ready to consider his case in accordance with rules. Hence, there is no error or fault on their part.

5. The applicant has filed rejoinder reiterating the submission already made in the OA and submits that in a similar case of Shri Ajin Ramadas R who was appointed on 29.11.2010 by the same offer of appointment by the 2nd respondent to the post of Sister Grade-II, the 2nd respondent has regularised

him immediately after completion of 2 years. In the list of selected candidates dtd.24.10.2013 prepared by the 1st respondent, the applicant as well as Shri Ajin Ramdas R were appointed to the same post of Staff Nurse on 20.10.2013 & 15.10.2013 respectively after completion of 2 years of service with the 2nd respondent. The 2nd respondent issued letter dtd.11.10.2013 in case of Shri Ajin Ramdas R regarding his regular service to the date of acceptance of technical resignation and the 1st respondent issued office order dtd.27.7.2015 regarding pay protection in the case of Shri Ajin Ramdas R. The applicant made averment regarding inaction of the 2nd respondent only and the 1st and 3rd respondents are not entitled to state that the OM dtd.10.7.1998 is not correct. 1st respondent is the cadre controlling authority and the 3rd respondent is administrative control of the 1st and 2nd respondents. The 2nd respondent is sitting over the matter for the last one year without any reason. The 3rd respondent has not taken any action against the 2nd respondent on the inaction in the case of the applicant. The 2nd respondent has not filed reply till date after lapse of more than a year. The applicant is suffering due to the fault on the part of the 2nd respondent.

6. We have heard the Learned Counsel for both the parties and perused the materials placed on record. The issue is in a very short compass. Vide Annexure-A3, the 2nd respondent organisation have given no objection to the applicant for applying to the vacant post in the 1st respondent organisation. Vide Annexure-A6, the 2nd respondent has also accepted the applicant's technical resignation from the service of the institute following which the applicant has joined the 1st respondent organisation. Vide Annexure-R2, the 2nd respondent has stated that on completion of two years period on probation, the cases of incumbents were processed and the vigilance clearance, Grading of ACRs for 2010-2011 & 2011-2012 as well as work and conduct were called for from the concerned department. They have stated that the applicant's name was not considered for confirmation of service at their institute as he has tendered resignation from the institute w.e.f. 18.10.2013. They have also stated that the Vigilance/ACR/Work & conduct report of the applicant was as under:

Grading of ACRs

Work & Conduct

Whether cleared from Vigilance angle

2010-2011=Good

2011-2012=Good

Good

Yes

It is very clear that there was no impediment in confirming the probation of the applicant by the 2nd respondent but for his resignation to join a post which has also been done with a due process with the no objection of the 2nd respondent.

Therefore, there shall be a mandate to the 2nd respondent institute to issue an order of confirmation of probation to the applicant forthwith within a period of two(2) months from the date of issue of this order. The 1st respondent institute shall take action thereafter to grant pay protection and other consequential benefits to the applicant within a period of one(1) month from receipt of the confirmation of probation from the 2nd respondent organisation. The OA is allowed. No costs.