

COURT NO. 1, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

OA 1611/2023

with

MA 2377/2023

(OA 32/2017 AFT RB Kolkata)

Ex Sgt Anadi Nandan Mukhopadhyay

... Applicant

Versus

Union of India & Ors.

... Respondents

For Applicant

:

Mr. V.S. Kadian, Advocate

For Respondents

:

Mr. Prabodh Kumar, Advocate

CORAM :

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON

HON'BLE LT GEN P.M. HARIZ, MEMBER (A)

ORDER

MA 2377/2023

Keeping in view the averments made in this application and finding the same to be bona fide, in the light of the decision in the case of Union of India and others Vs. Tarsem Singh [(2008) 8 SCC 648], the instant application is allowed condoning the delay in filing the OA.

2. The MA stands disposed of.

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3. Invoking the jurisdiction of this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has filed this application seeking condonation of shortfall to the extent of 07 months and 26 days in the matter of computing the qualifying

service for 15 years and thereby grant pension to the applicant as per the Pension Rules applicable along with arrears of Pension from the actual date of his discharge from service with interest @ 18% p.a.

4. Brief facts of the case indicate that the applicant was enrolled in the Indian Air Force on 17.11.1992 in the Radio Filter Trade. He has completed his training in the year 1994 and was classified as an Aircraftsman. He was thereafter posted in the Air Force Station, Jodhpur for Helicopter Training in Dec 1994. After completing the said training in 1995, he was posted to Air Force Station, Jammu in May 1995, was promoted to the rank of Corporal in Nov 1997 and was posted to Air Force Station, Hindan in Dec 1999. Subsequently, in Dec 2003, he was posted to Air Force Station, Guwahati and in May 2006 was promoted to the rank of Sergeant.

5. However, on account of continuous ongoing family problems which were beyond his control, the ailment of his mother and her health conditions were deteriorating, torture of applicant's sister by her in-laws and matrimonial dispute in the sister's family, the applicant's sister and mother were in distress condition and were living alone and, therefore, faced with these situations on 20.11.2006, the applicant requested the Commanding Officer of 118HU, AF C/o 99 APO for grant of release/discharge from

service on compassionate ground. The matter was processed and based on the recommendations made by the Commanding Officer, the applicant was discharged from service on 27.02.2007 which was made effective from 20.11.2007. Accordingly, the applicant was discharged from service on completing 14 years 04 months and 04 days of dedicated service with two years reserve liabilities. Annexure A-2 is the copy of the discharge order.

6. After his discharge in 2007, on 02.05.2008, looking to his family conditions and financial situation, the applicant applied for grant of service pension after condoning 08 months of shortfall in his service period in terms of Chapter-2 Service Pension Clause-4 which provided for a provision for condonation of shortfall in service. It is an admitted position that the qualifying period for grant of service pension is 15 years and the applicant was short of 07 months and 26 days in attaining the qualification for grant of service pension. However, in terms of Clause-4 of Service Pension Rule which reads as under, the applicant on 02.05.2008, requested for grant of pension after condoning the shortfall:

"Clause-4 :- As per Para 114 of Pension Regulation 1961 (Part-I) and Govt. of India, MOD letter no. 4684/Dir(Pen)/2001 dated 14th August, 2001 deficiency in service, for eligibility to service pension or reservist pension or gratuity in lieu may be condoned by AOC, AFRO upto six months and deficiency upto 12 months can be condoned by Air HQs in each case, under the provisions of Govt. of India MOD letter No. 4684/DIR(Pen) 2001 dated 14th August, 2001 except in the case of:-

- a) an individual who is discharge at his own request, or*
- b) An individual who is eligible for special pension or gratuity; or*
- c) An individual who is invalided out of service with less than 15 years of service."*

7. Annexure A-3 is the letter dated 02.05.2008. On 22.05.2008, the Competent Authority informed the applicant that he was enrolled in the Indian Air Force on 17.11.1992 and was discharged after completing 14 years and 124 days of service. As per Regulation 121 of Pension Regulation for the Air Force, 1951, the minimum qualifying service required to earn a service pension is 15 years and as the applicant has not completed the qualifying service, he was not eligible for grant of service pension. The communication in this regard rejecting his claim is filed as Annexure A-4 dated 22.05.2008. The applicant again pointed out cases where delay was condoned and benefit was granted and so also invited our attention to certain judgments of the Regional Benches of this Tribunal at Kochi and Chennai in the matter of condonation of shortfall and applied for service pension. This was also rejected and finally on 09.02.2011, the applicant has sent a representation to the Chief of the Air Staff and after exhausting all remedies, he invoked the jurisdiction of this Tribunal by filing OA No.311/2012. The application was heard and order was passed on 02.02.2012. Vide

Annexure A-8, the application was disposed of with certain directions which read as under:

"Be that as it may, respondents have power to condone the shortfall. We feel that petitioner may make a representation to the authority and authority may consider sympathetically for condonation of shortfall of 07 months and 26 days in computing the qualifying service for 15 years and for grant of pension to the petitioner. Petitioner may make a representation to the authority which will be disposed of expeditiously as far as possible within three months from the date of filing of representation. However, petitioner will not be entitled to any arrears thereof."

8. Based on the aforesaid order, the applicant again represented vide Annexure A-9 dated 21.02.2012. This was disposed of vide letter dated 23.05.2012 (Annexure A-10), rejecting the prayer for grant of condonation of shortfall. It was the case of the applicant that mechanically and in an arbitrary manner without application of mind, the representation was rejected. However, the applicant was given a sum of Rs.3,07,785/- (Rupees three lakh seven thousand seven hundred eighty five only) as Gratuity, Rs.2,05,190/- (Rupees two lakh five thousand one hundred ninety only) as Service Gratuity and Rs.1,02,595/- (Rupees one lakh two thousand five hundred ninety five only) as Death Cum Retirement Gratuity. Finding the claims of the applicant to have been rejected in an arbitrary manner, the applicant again invoked the jurisdiction of this Tribunal by filing OA No.369/2012 and made the same prayer. However, when the matter came up for hearing before this Tribunal on 06.11.2012, the case was transferred to the Kolkata Bench and they allowed the

application vide order passed on 13.04.2015 (Annexure A-12) and in Para 24 and 25 issued the following directions:

"24. The impugned order suffers from vice of arbitrariness since no justified reason has been assigned. Merely reference to policy decision of the Air Force without discussing the grounds does not seem to justify the impugned order. The authority should have applied their mind to the compelling circumstances because of which the applicant had obtained premature discharge from the Air Force. While considering the representation also it shall be necessary for the authority to take into account that paramateria provisions contained in other Regulations which has been struck down by court (Supra). Since paramateria provision has been struck down by the Hon'ble Bombay High Court and by virtue of dismissal of the SLP by the Hon'ble Supreme Court it attains finality.

25. The Application is allowed. The order dated 23 May 2012 is set aside. The respondents / competent authority is directed to reconsider the applicant's representation for condonation of shortfall in service keeping in view the observation in the body of the present order expeditiously say within a period of three months from the date of the receipt of the certified copy of the order."

9. It is now the grievance of the applicant that finally by the impugned order dated 15.01.2016 (Annexure A-13) the respondents have again rejected the claim of the applicant and in Para 11 the following reasons are given for rejecting the application:

"11. NOW, THEREFORE, after taking in consideration the direction of the MoD and with utmost regard to the observations made by Hon'ble AFT in the order dated 13 Apr 15, it is decided that:-

(a) Service personnel are enrolled for an initial period of 20 years but qualifying service for pension is 15 years.

(b) Service expends considerable time and expenditure to train the individual to ensure combat readiness.

(c) Applications are received from personal at various levels for discharge from service at varying length of service on diverse grounds.

(d) *Based on certain compelling and compassionate circumstances as an exception to the rule, a small number of individuals are permitted to proceed to discharge before fulfilling their term of engagement.*

(e) *Grant of service pension is a major motivating factor and positively impacts a person's will to overcome adverse family circumstances and to serve the initial term of engagement; and*

(f) *Grant of pension by condonation of shortfall in a case where the individual has voluntarily proceeded on discharge may adversely impact the moral of others and capable of setting a undesirable practice/precedence which will defeat the purpose of the laid down engagement period. On the contrary, condoning short fall in the qualifying service in certain case of discharge due to service grounds may positively impact the moral of personnel."*

10. It is the argument of learned counsel for the applicant that in spite of directions issued by the Tribunal on two occasions on the same ground without taking note of the statutory rules governing the condonation of shortfall in an arbitrary and mechanically manner, consistently the claim of the applicant has been rejected. Inviting our attention to the two judgments rendered by this Tribunal in the case of Ex Sgt Aseem Prakash Vs. Union of India and Ors., (MA 1861/2023 in OA 1473/2019 dated 10.05.2023) and in the case of Ex Cpl Nishant Kumar Vs. Union of India and Ors., (OA 363/2019 dated 03.05.2023), it is the case of the applicant that on consideration of the facts and circumstances of a particular case, when hardship and family conditions compelled an employee in uniform to seek discharge on voluntary ground, the competent authority of the Air Force should have considered the matter

sympathetically and the discretion for condonation of the shortfall should have been exercised in favour of the applicant as the circumstances created on account of his family problems had left him with no other option but to seek voluntary retirement and having served the organization with full dedication and when there is a provision for condoning the shortfall which is less than one year. In the peculiar facts and circumstances of the case it is a fit case where the delay should have been condoned and the benefits should have been granted to the applicant.

11. The respondents have filed a detailed counter affidavit and it is their objection that the applicant as per rules has already been granted the benefit of Service Gratuity, Death Cum Retirement Gratuity and other benefit. It is the case of the respondents that as per Pension Regulations for the Air Force, 1961 (Part 1), Regulation 121, the minimum qualifying regular service required to earn Service Pension is 15 years and as the applicant had only served for 14 years and 124 days, in terms of Regulation 121 he was not entitled for pension and was only entitled for Service Gratuity and Death Cum Retirement Gratuity which has already been paid to him. The respondents further submitted that the case of the applicant was again examined after orders passed both by the AFT, Principal Bench, New Delhi and the Regional Bench, Kolkata and on re-examination it

was found that under Regulation 114, it has been stipulated that even though there is a provision for grant of pension by condonation of deficiency in qualifying service but when discharge is sought by a person on his own request, the competent authority can deny the condonation of shortfall.

12. It is the case of the respondents that condonation of deficiency in qualifying service can be allowed under Regulation 114 only in case the personnel is discharged compulsorily from service due to service obligations like unsuitability, incompetency, inefficiency, etc., and not in case of unscheduled discharge on one's own request. It is, therefore, the case of the respondents that the case of the applicant having been evaluated in the backdrop of the requirement of the Rules, no interference into the matter is called for.

13. We have heard learned counsel for the parties and perused the records. The only issue warranting consideration in the matter is as to whether the claim of the applicant for condoning the shortfall is justified and whether the exercise of the powers available for condonation of shortfall even in the case where the discharge was sought on compassionate ground, condonation of service for less than one year can be condoned.

14. Identical issue has been considered by a Co-ordinate Bench of this Tribunal in the case of Ex Sgt Aseem Prakash (supra) and that

was a case where the employee like the present applicant was a Sgt in the Indian Air Force and he was not granted pension as the shortfall or deficiency in service in his case for completing 15 years of qualifying service was 09 months and 15 days. When pension was denied to him he approached this Tribunal invoking its jurisdiction under Section 14 of the Armed Forces Tribunal Act, 2007, and sought for condonation of the shortfall and reliance was placed on Regulation 121 of the Pension Regulation for the Air Force, 1961 (Part 1) and Regulation 114 for condonation of shortfall and Government of India, Ministry of Defence letter dated 14.08.2001. The respondents contested the matter and it was their contention that as the applicant in the said case also had sought a discharge on his own request after completing 14 years and 75 days of service, he was not entitled for condonation of shortfall. The matter was considered by the Co-ordinate Bench in the case of Ex Cpl George V.G Vs. Union of India and Ors. (OA 1260/2017) decided on 14.11.2017 and the issued has been considered in Para 5, 6 and 7 in the following manner:

"5. We have heard the learned counsel for the parties and perused the judgments produced by them. We find that this case is fully covered by Order dated 10.07.2017 given in OA No. 209 of 2016 in the case of Om Prakash Nibhoria vs Union of India and Ors., where the petitioner retired on 14.08.1978 after rendering 14 years and 23 days of service at his own request and the shortfall of 342 days for earning pension has been condoned by this Tribunal. The operative paragraphs of the order reads as follows: -

"In view of the above, it is held tht the petitioner is entitled for condonation of shortfall in service, which is less than one yer, for the purpose of pension and, thus, is entitled to get pension for the service rendered by the applicant in the Army. The impugned order, Annexure A-1, is hereby quashed and set aside and the respondents are directed to grant service pension to the petitioner from the date ie. 15.08.1978. However the arrears are restricted to three years prior to the date of filing this application ie. 02.02.2016."

6. *Since this case is fully covered by above judgment of this Tribunal, we condone the shortfall of 157 days for earning the pension by the applicant the respondents are directed to grant service pension to the applicant from the due date ie. 16.10.1977. However, the arrears are restricted to three years prior to the date of filing this application ie. 18.07.2017.*

7. *The respondents are further directed to work out the arrears admissible to the petitioner by virtue of the present order and pay the same to him within a period of three months from the date of receipt of a certified copy of this order, failing which, the amount shall carry interest at the rate of 8% per annum from the date of this order, till actual payment thereof."*

15. After taking note of a judgment of the AFT, Regional Bench, Chandigarh in the case of Om Prakash Nibhoria Vs. Union of India and Ors., (OA 209/2016) decided on 10.07.2017 and various provisions of the Rules and another judgment of the AFT, Principal Bench in OA 60/2013, Bhani Devi Vs. Union of India and Ors., decided on 07.11.2013 and the discussions made in the Para 8-10 thereof, the issue was considered in Para 7 in the following manner and the shortfall under similar circumstances condoned:

"7. If we take other view for DSC Service, then that will be taking two views of same provision of law for two services covered by the same regulation and i.e. Pension Regulations for the Army 1961. We find support to our view from the judgment of Hoshiar Singh's case which has been relied upon by the learned counsel for petitioner wherein one of us (Lt. Genl. M.L. Naidu) was Member."

16. It may be seen from the aforesaid judgment rendered by a Co-ordinate Bench very recently on 10.05.2023 in the case of Ex Sgt Aseem Prakash (supra) that condonation of shortfall, even in cases where the employee has sought discharge on his own ground has been allowed by this Tribunal. Similar is the position in the case of Ex Cpl Nishant Kumar (supra), wherein, the employee after rendering 14 years 06 months and 07 days of service was discharged at his own request and similar submissions were made. The Coordinate Bench in that case considered various aspects of the matter including the law laid down by the Hon'ble Supreme Court in the case of Union of India and Anr. Vs. Surender Singh Parmar [(2015) 3 SCC 404] and after evaluating the principles in the backdrop of applicable Rules and Regulations so also the judgment in the case of Ex AC Hemraj Singh Vs. Union of India and Ors., (OA No.396/2014) decided on 10.04.2015 by the AFT, Principal Bench and various other principles from Para 11 onwards analyzed the legal provisions, the rules and regulations in various judgments and came to the conclusion that the shortfall in service can be condoned even in a case where at his own request before fulfilling the condition of enrollment the employee seeks discharge. It was found that the provisions of Regulation 114 have been partially amended vide order passed by the department on 14.08.2001 and

administrative powers have been delegated to the Service HQrs to condone the deficiency of shortfall and it was observed by the Benches of this Tribunal that when on great hardship and based on conditions which are beyond the control of the employee, if discharge is sought for, a sympathetic and pragmatic approach should be adopted and delay be condoned.

17. In our considered view in the facts and circumstances of the present case also we find that the applicant had made substantial ground to seek condonation of shortfall. Even while deciding his claim on 02.02.2012, the Principal Bench had observed that the respondents have the power to condone the shortfall on account of family circumstances and, therefore, the representation of the applicant should be considered sympathetically and a decision taken. Thereafter, when the matter again travelled to the AFT, RB, Kolkata, after the order rejecting his claim was passed on 23.05.2012, the Kolkata Bench while disposing of the TA No.60/2012 on 13.04.2015 observed hereinabove in Para 24 and 25, has clearly found that the respondents have not applied their mind into the compelling circumstances because of which the applicant had obtained a premature discharge from service. They only went by the statutory provisions and rejected the claim. Once in the case of the applicant itself an observation was made to consider

the claim in the backdrop of the family circumstances and when the discretion available to the employee has to be exercised in the backdrop of the family circumstances, the respondents should have applied the mind on the situation created. In the case of the applicant when the applicant has submitted his first representation on 20.11.2006 vide Annexure A-1 and explained the family circumstances, after interviewing him on 20.11.2006, the then Commanding Officer had made the following observations:

"1. The SNCO has been interviewed. At the time of interview, the SNCO was at the point of an emotional breakdown and under severe depression. The condition of his mother suffering from neurosis with tendency to harm her own life, the physical and mental trauma his sister has been undergoing during her unsuccessful marriage and subsequent court cases which are continuing, has been affecting the SNCO severely.

2. He has fourteen years of service. He is very sincere, hardworking and dedicated and has not let this problem affect his work. He has refused an UN assignment and is ready to sacrifice his pension, which will be due in case he leaves service after one year. It is felt that his presence with his mother and sister is genuinely required without any delay. The discharge is recommended."

18. After interviewing him and taking note of his circumstances and the service rendered by him for 14 years and 124 days, the recommendation clearly indicates that looking into the circumstances when he is willing to sacrifice his service pension, the recommendation was for discharge. The circumstances created by the family situation may have compelled the employee to seek discharge but once he realized that there is a provision for

condonation of shortfall and when he has sought for condonation of shortfall merely by applying the rules in a mechanical and without considering the situation in which the employee was put when he sought discharge, rejection of the claim, in our considered view was not proper. Even when on two earlier occasions, when the claim of the applicant was rejected, on both occasions the matter was remanded back for consideration sympathetically after evaluating the family circumstances. Instead of doing so, the respondents again mechanically rejected the claim by taking note of the statutory rules alone. Neither the recommendations of the Commanding Officer nor the family circumstances of the applicant were evaluated and a decision taken.

19. Considering the totality of the circumstances, we are convinced that on two earlier occasions instead of remanding the matter back to the respondents, they have not considered the case of the applicant in accordance with the requirement of law. We have no hesitation in allowing this application and grant relief to the applicant as we are satisfied that a case has been made out in the peculiar facts and circumstances of this case to grant benefit to the applicant.

20. Accordingly, taking note of all the judgments mentioned hereinabove and particularly the law laid down in the case of Ex Cpl

George V.G (supra), we allow this OA and issue the following directions:

(a) The Speaking Order No. Air HQ/99798/747221/40/SP/DAV dated 15.01.2016 is quashed.

(b) The shortfall of 07 months and 26 days of qualifying service is directed to be and is hereby condoned.

(c) We direct the respondents to verify the records and thereafter in case they are satisfied, after evaluating all the records, that the shortfall is less than one year, the same be condoned and an appropriate order of condonation be issued.

(d) Subject to verification of the records, the respondents are directed to issue a corrigendum PPO to the applicant granting service pension for the service rendered by him from the date of discharge and the arrears shall be paid to the applicant w.e.f the date his representation dated 02.05.2008 impugned in this application was rejected.

(e) The arrears shall be paid within a period of four months from the date of receipt of a copy of this order. In

default, the applicant will be entitled to interest @ 6% per annum till payment.

21. No order as to costs.
22. Pending miscellaneous application(s), if any, stands closed.

Pronounced in open Court on this 17th day of October, 2023.

[RAJENDRA MENON]
CHAIRPERSON

[P.M. HARIZ]
MEMBER (A)

Ncha