BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL AT NAINITAL

Present: Hon'ble Mr. Justice J.C.S.Rawat

------ Chairman

Hon'ble Mr. U.D.Chaube

-------Member(A)

Claim Petition No. 10/N.B./2012

Rajkumari Maria, W/o Sri Sushil Tappo, R/o Prayer House, Bageshwar, posted as Health Worker(Women)/Auxolary Nurse-cum Midwife (ANM) Sub Centre, Shama Kapkot District Bageshwar.

……Petitioner

Versus.

1. State Uttarakhand through Secretary Health & Family Welfare Services, Uttarakhand, Dehradun.
2. Director General, Medical Health & Family Welfare Services, State of Uttarakhand, Dehradun.
3. Chief Medical Officer, Bageshwar.

…….Respondents.

Present: Sri Yogesh Pandey, Ld. Counsel for the petitioner.

Sri V.P.Devrani, Ld. A.P.O. for the respondents.

JUDGMENT

DATED: 04 July , 2013.

(Delivered by Hon'ble Mr. Justice J.C.S. Rawat, Chairman

1. This petition has been filed by the petitioner for seeking the following reliefs:

"(i) Direct the respondents to consider and make payment to the petitioner from the entire arrears for the period 5.12.2006 to 11.5.2010 along with interest at the rate of 18% per annum for which the petitioner is entitled lawfully and also to give her other service benefits of the said period.

(ii) Grant any other relief, order or direction, which this Hon'ble Court deem fit and proper in the facts and circumstances of the case.

(iii) Award the cost of the petition to the petitioner. "

2. It is admitted case to the parties that the petitioner was initially appointed as Auxolary Nurse Midwife (herein after referred to as ANM) on 03.08.1982 and she worked till 8.7.1993. The petitioner has submitted her resignation on 8.7.1993, which was accepted by the Chief Medical Officer. Thereafter, petitioner served as a Midwife in the Indian Army w.e.f. 01.02.1997 to 31.12.2001. Thereafter, she was appointed as ANM on 01.08.2002 on contract basis by the Chief Medical Officer, Bageshwar for a period of 11 months and she had been continuing on contract basis till 09.01.2006 and her extension was granted each year till 9.1.2006. In the year 2005, the petitioner made a representation that she should be regularized on the post of ANM. The representation of the petitioner was duly considered on the basis of Govt. order and respondents issued an order dated 19.12.2005 appointing the petitioner on regular basis on the permanent vacancy under the U.P. Medical Health and Family Welfare, Department of Health Workers & Health Supervisors (Male/Female) Service Rules, 1997. Pursuant to the said appointment, a letter was issued on 6.1.2006 appointing her on the aforesaid post. The petitioner's services were dispensed with by an order dated 5.12.2006 on certain instructions being issued by the Director General, Medical Health. The petitioner being aggrieved by the said order, filed a writ petition bearing No. 1593 of 2006 (S/S) before the

Hon'ble High Court of Uttarakhand at Nainital and the Hon'ble High Court vide order dated 01.04.2010 set aside the impugned order of dispensing with all the services of the petitioner and the respondents were directed to take back the petitioner in service on the post of ANM. Pursuant to the said order, the petitioner joined her services on 11.5.2010 as ANM at Sub-centre, Shama Kapkot, Hospital, Bageshwar. Thereafter, she had been discharging her duties regularly.

3. It is alleged in the petition that after joining on the post of ANM, the petitioner was entitled for her salary and other service benefits since the date of her termination dated 5.12.2006 upto the date of her reinstatement in service on 11.5.2010. The petitioner made several representations to the authorities. Neither the representations were decided nor the payment of the salary with all consequential benefits were paid to her. Feeling aggrieved by the said inaction on the part of the respondents, the present petition has been filed by the petitioner for the payment of the entire arrears for the period w.e.f. 5.12.2006 to 11.5.2010 along with interest.

4. The respondents have only disputed the fact that the petitioner was regularized by the respondents on the basis of wrong documents submitted by the petitioner. The respondents have alleged that the services of the petitioner were regularized on the basis of documents and declaration on the basis of the training as she has obtained it in the year of 1991 as is disclosed as per Annexure-3 to the petition. As a matter of fact, she has obtained the health workers training in the year 1981(Annexure-1 to the W.S.). Finding this fact the respondent passed the dismissal order. It was further alleged that the petitioner has not claimed arrears in the said writ petition, so the petition is barred by the principle of constructive res-judicata. The petitioner has not worked, so she is not entitled to get the salary on the principle of 'No Work No Pay'. The petitioner has no right or cause of action to

claim the salary as claimed. At last, the respondents have prayed that the petition may be dismissed with cost.

5. We have heard learned counsel for the parties and perused the record.

6. The learned counsel for the petitioner Mr. Yogesh Pandey contended that the petitioner was regularized and appointed on 19.12.2005 and a formal order was issued for appointing the petitioner on temporary basis on 6.1.2006. Thereafter, her services were terminated on 5.12.2006 by the respondents. The order of termination dated 5.12.2006 has already been quashed by the Hon'ble High Court of Uttarkahand at Naintial considering all the aspects of the case and pursuant to the said order, the petitioner was reinstated in service on 11.5.2010, so after the reinstatement, the petitioner preferred the representations to the authorities to pay the arrears which have accrued after her instatement, but the said request remained in vain. So, a fresh cause of action arose to the petitioner for claiming the salary during the period of her termination. The learned counsel for the petitioner contended that the petitioner had no fault and her services were dispensed with no valid reasons, so she is entitled for arrears along with interest.

7. Learned counsel for the respondents contended that the petitioner is not entitled to get the salary as she had not worked in the department during the aforesaid period. There is a settled principle of law that if a person who had not worked, he is not entitled to get the salary for that period. He further contended that the petitioner would have claimed the said relief in the petition, which was filed before the Hon'ble High Court.

8. The respondents have not preferred any special appeal against the judgement of the Hon'ble High Court and the said judgment has attained finality. It is settled law that any finding of the court, which had attained finality cannot be challenged before any court of law.

Now we have to only determine as to whether the petitioner is entitled to get arrears of pay or not.

9. It is worth to mention here that the order of dismissal of the petitioner from the service was quashed by the Hon'ble High Court on 01.04.2010, but not given the benefits of arrears of salary from the date she was removed till the date of reinstatement. The petitioner though joined her services as ANM in District Bageshwar pursuant to the order of the Hon'ble High Court on 11.5.2010 and has not been paid the arrears of salary during the period of removal. She made several representations to claim the arrears of salary and other benefits. She has not pleaded in her petition that she was not employed or she did not earn any amount during the period from removal to reinstatement.

10. Learned counsel for the petitioner strenuously urged that once the termination of services of the petitioner was held to be illegal and quashed, she is entitled for reinstatement with continuity of service and full pay and the respondents are not justified in not granting her the salary for the period she was out of service. Ld. A.P.O. refuted contentions. So far as the situation with regard to the monetary benefits i.e. arrears of salary from the date of removal to the date of reinstatement is concerned, it depends upon the case to case. There are very facets, which have to be considered. Some times, in a case of departmental enquiry, it depends upon the authorities to grant full back-wages/arrears of salary or 50% back-wages/arrears of salary or less than 50% back wages/arrears of salary looking into the nature to the facts of each case. It is also well established that there is also a misconception that whenever reinstatement is directed "continuity of service" and "consequential benefits" should follow, as a matter of course. But this principle of automatic removal of the service or consequential benefits, is not fall out of the reinstatement of the

employee. Whenever, courts or Tribunal direct reinstatement, the court should apply its judicial mind to the facts and circumstances to decide whether 'continuity of service' or 'consequential benefits' should also be directed. At the same time, the principle of 'No work No pay' cannot be accepted as a rule of thump. There are exceptions whether courts have granted monetary benefits also. It is true that earlier there was a trite of law articulated in many decisions by the Hon'ble Supreme Court reflected the legal preposition that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, the Hon'ble Apex Court has shifted the legal propositions. The Hon'ble Apex Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. The **Hon'ble Supreme Court in the case of Uttaranchal Forest Development Corporation Vs. M.C.Joshi, 2007(9) SCC, 353** has held that relief reinstatement will full back wages were not being granted automatically only because it would be lawful to do so and even several factors have to be considered, few of them being as to whether appointment of the employee had been made in terms of the statue/rules and the delay in raising the dispute.

11. In the case of **Kendriya Vidyalaya Sangathan & another Vs. S.C.Sharma (2005) 2 Supreme Court Cases, 363**, the petitioner in the said case was a Principal of Kendriay Vidyalaya and his application for leave as well as permission to go abroad was rejected by the authorities on the ground that disciplinary proceedings were to be contemplated against him. Thereafter, the Principal did not report the duties, the departmental proceedings were initiated against him, his services were terminated. Thereafter, he preferred a petition

before the Central Administrative Tribunal and the Central Administrative Tribunal quashed the order of punishment and the Hon'ble High Court concurred with the view taken by the C.A.T. The Hon'ble High Court directed that back wages to be paid to the Principal from the date of dismissal. The Hon'ble High Court though held the Principal had neither pleaded nor placed any material that he was not gainfully employed, back wages cannot be denied because it was not necessary to place any material as payment of back wages was natural and consequential corollary whenever a termination is set aside. In this matter, a question regarding to a direction for payment of back wages from the date of his termination to the reinstatement came before the Hon'ble Apex Court. Hon'ble Apex Court came to the conclusion that the petitioner was not entitled to full back wages because the reinstatement is not the natural consequences of the reinstatement and set aside the order of the Hon'ble High Court to the extent allowing the full salary during the termination period. The Hon'ble Apex Court has held as under:

"13. The residual question relates to direction for back wages.

14. In P.G.I. of Medical Education and Research Vs. Raj Kumar this court found fault with the High Court in setting aside the award of Labour Court which restricted the back wages to 60% and directing payment of full back wages. It was observed thus (SCC p. 57, para9)

"9. The Labour Court being the final court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect."

Again at para 12, this court observed: (SCC p. 58)

"12. Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straitjacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety."

15. The position was reiterated in Hindustan Motors Ltd. V. Tapan Kumar Bhattacharya, Indian Rly. Construction Co. Ltd. V. Ajay Kumar and M.P. SEB Vs. Jarina Bee.

16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was a natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

12. Now it is well settled that both the principles either of the payment of salary or back wages are concerned from the date of termination to the date of reinstatement or 'No work No pay' are not absolute principles or they cannot be accepted as a rule of thump and each case has to be examined in its entirety. The above Kendriya Vidyalaya case (Supra) has been considered by the Hon'ble Apex Court upholding the above principle of law in **Metropolitan Transport Corporation Vs. V.Venkatesan, 2009(5) SLR, 775**.

13. When the question of determining the entitlement of a person to back wages or arrears of salary is concerned, the employee has to show that he was not gainfully employed during such period. The initial

burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondents had neither pleaded nor placed any materials in this regard. The above proposition of law has been laid down in G.M. Haryana Roadways Vs. Rudhan Singh. The above judgment has been considered and affirmed by the **Hon'ble Apex Court in Metropolitan Transport Corporation's case.** The Hon'ble Apex Court has held as under:

45 . The Court, therefore, emphasized that while granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages, therefore, cannot be the natural consequence."

8. In the case of J.K. Synthetics Ltd. V. K.P.Agarwal and Another, (2007) 2 SCC 433: [2007(2) SLR 42(SC)] while dealing with the question whether an employee is entitled to back wages from the date of termination to the date of reinstatement when the punishment of dismissal is substituted by a lesser punishment (stoppage of increments for two years), this Court held:

"15. But the manner in which "back wages" is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement."

We may refer to the latest of a series of decisions on this question. In U.P. State Brassre Corpn.Ltd. v. Uday Narain Pandey (Supra), this Court following Allabahad Jal Sansthan V Daya Shankar Rai, (2005) 5 SCC 124 and Kendriya Vidyalaya Sangathan V.S.C.Sharma, (2005) 2 SCC 363: [2005 (2) SLR 1(SC)] held as follows: (Uday Narain Pandey case, SCC P. 480d-g)

"A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the court releasing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent upproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalization, privatization and outsourcing, is evident.

No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act. While granting relief, application of mind on the part of the Industrial Court is imperative, Payment of full back wages cannot be the natural consequences."

16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In Kendriya Vidyalaya Sangathan this Court held: (SCC p. 366, para 16)

"When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

In U.P. State Brassware Corp. Ltd. this court observed: (SCC p. 495, para 61)

"61. It is not in dispute that the Respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well-settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Indian Evidence Act or the provisions of analogous thereto, such a plea should be raised by the workman.

17. There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" t a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualized while granting consequential benefits automatically. Whenever, courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential

benefits " should also be directed. We may in this behalf refer to the decisions of this Court in ***A.P.SRTC Vs. Rarasagoud, (2003)2 SCC 212, Shyam Bihari Lal Gupta , (2005)7 SCC 406****.*

18. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant fact to be taken note of while awarding back wages, in addition to the several factors mentioned in Rudan Singh and Uday Narain Pandey. Therefore, it is necessary for the employee for the employee to plead that he was not gainfully employed form the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may."

9. In J.K. Synthetics Ltd.2, the Court extensively considered U.P. State Brassware Corporation 1 and G.M.Haryana Roadways V. Rudhan Singh (Supra). Pertinently, it has been held that any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages in addition to several other factors."

14. In the instant case, the learned counsel for the petitioner could not demonstrate us from the record that the petitioner has pleaded that

she had not been employed anywhere from the date of the dismissal to the date of reinstatement and any other material in this regard from the record. According to the above settled position of law, if the petitioner did not plead this fact, it cannot be held that she is entitled full wages or the salary as claimed. On the other hand, the petitioners' pleading clearly indicates that she is entitled for her salary and other service benefits on the ground that her reinstatement only. Thus, as we have disclosed above, it is not an automatic right to get the salary on the reinstatement.

15. Now we have to consider a number of factors apart from the above to decide whether the employee who has been reinstated is entitled to get the back wages, the court has to consider the employee was adhoc or he had been appointed for a short term, or on daily-wages and temporary or permanent in character, any special qualification is required for job and like should be weighed and balanced in taking a decision regarding award of back wages. Secondly, the length of the service, which the employee had rendered with the department. If the employee had rendered a considerable period of service and his services are wrongly terminated, the payment of full salary can be considered or partial back wages keeping in view the fact that at his age and the qualification possessed by him, he may not be in a position to get another employment. Thirdly, there was a short span of service when he was terminated would be wholly inappropriate. Fourthly, it has also to be seen the nature of employment of the employee. A regular service of permanent character cannot be compared to a daily- wagers who have completed 240 days in a calendar year as provided under Labour Laws.

16. The Hon'ble Apex Court in the **Metropolitan Transport Corporation's case (Supra)** as under:

In G.M. Haryana Raodways Vs. Rudan Singh, (2005…5 SCC 591: [2005(5) SLR 51(SC)] this Court observed: (SCC p. 596, para 8)

“”8. There is no rule of thump that in every case where the Industrial Tribunal give a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy on inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he maybe awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, whether the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important fact, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year. ”

17. In the backdrop of the above, now we have to consider that how the petitioner was appointed? It is admitted case to the parties that the

petitioner worked with the respondents w.e.f. 3.8.1982 to 8.7.1993 as ANM. Thereafter, she resigned from the services. Thereafter, she submitted her resignation to the respondents. Thereafter, the petitioner served as a Midwife in the Indian Army w.e.f. 01.02.1997 to 31.12.2001. Thereafter, the petitioner was appointed as ANM on 01.08.2002 on contract basis by Chief Medical Officer, Bageshwar for a period of 11 months and she had been continuing on contract basis till 09.01.2006. The petitioner has worked about 10 years with the respondents and thereafter, she served in Indian Army for about 4 years as Midwife. Thereafter, she had appointed again on contract basis in the year of 2002 and remained on service on contract basis till 09.01.2006. Meanwhile, the services of the petitioner was regularized vide order dated 19.12.2005 and as such she joined on 06.01.2006 and after about one year, her services were terminated on 5.12.2006. The petitioner is a qualified ANM and according to the petition, she is about to complete 53 years of age. The **Hon'ble Supreme Court in G.M. Haryana Roadways Vs. Rudhan Singh (Supra)** has held that if the employee has rendered a considerable period of service and his services have wrongly been terminated, he may be awarded full or partial back wages keeping in view of the fact that at his age and the qualification possessed by the employee, he may not be in a position to get another employment. Keeping in view of the above fact that the petitioner has only alleged that the order of termination was illegal and it has not been alleged that it was equated with any malice. We find that in the above circumstances, it would be just and proper to award 30% of the salary and proportionate D.A. to that extent from the date of dismissal to the date of reinstatement. In this regard, the Hon'ble Apex Court in **Rajesh Gupta Vs. State of Jammu and Kashmir, 2013(3), SLR 11 (S.C.)** has held as under:

"Consequently, the appeal is allowed, the impugned order of premature retirement of the appellant dated 26th April, 2005 is quashed and set aside. It is brought to our notice that the appellant has still not reached the age of superannuation. He is, therefore, directed to be reinstated in service. In view of the fact that the appellant has not challenged the order of premature retirement on the ground that the action taken by the Government was malafide, it would not be appropriate in this case, to follow the normal rule of grant of full back wages on reinstatement. We, however, direct that the appellant shall be paid 30% of the backwages from the date of order of premature retirement till reinstatement. He shall not be entitled to any interest on the back wages. "

18. In the above matter, the Hon'ble Apex Court allowed only 30% of the salary of the back wages to the petitioner. Keeping in view of the overall considerable of facts as well as legal position and as we have discussed above, we find that the petitioner is only entitled for 30% of her total salary and the proportionate allowances on the said amount from the date of termination to the date of reinstatement.

19. It was further contended on behalf of Ld. A.P.O. appearing on behalf of the respondents that the petitioner has not been granted arrears of the salary and back wages by the Hon'ble High Court and the petitioner should have claimed the said relief before the Hon'ble High Court. The petitioner did not claim the said relief before the Hon'ble High Court, so the petitioner is barred by the principle of 'constructive res-judicata'. The learned counsel appearing for the petitioner contended that the petitioner has sought quashing of the order of dismissal from the Court and the reinstatement of the petitioner. The cause of action though arose only after the petitioner joined the services in the respondent/department. After joining the department, the petitioner made several representations which have

been mentioned in para 4.20 of the petition. The respondents have only replied in the W.S./C.A. that there was no necessity to reply or to pass an order on the said representations. It is revealed from the record that the petitioner has made representations before the respondents, but no representation has been decided by the authorities. The learned counsel appearing on behalf of the parties could not demonstrate us that the representation was decided by the respondents. The learned counsel for the parties could not demonstrate that the relief which has been claimed in this petition has already been claimed in the writ petition, which was filed before the Hon'ble High Court. The Hon'ble High Court has only held that allowing the petition directed the respondents to take the petitioner in on the post of ANM. There is no order regarding the arrears of salary. The cause of action arose to the petitioner when her representations were not decided by the authorities. After joining of the services, the petitioner made representations to the authorities but the authorities neither decided the representations nor made the payment of the arrears of salary as claimed by the petitioner, it cannot be held that the petition is barred by the principle of 'constructive res-judicata'.

20. To sum-up our the finding, we conclude as follows:

i. That if the termination/removal of the employee was found to be illegal and the employee was reinstated, and the back wages by way of reinstatement from the date of dismissal to the reinstatement, is not automatic.

ii. The court has to examine several facets while granting the back wages or arrears of salary to the employee. The court or tribunal while directing the reinstatement should apply its judicial mind to the facts and circumstances to decide whether the continuity of service or consequential benefits should also be given to him or not.

iii. At the same, the principle of 'No work No Pay' cannot be accepted as a rule of thump. There are exceptions where courts can grant the monetary benefits to the petitioner.

iv. While determining the entitlement of an employee to the arrears of salary or back wages, the employee has to show that he was not gainfully employed. The initial burden is on him. After he pleads the above facts in his pleadings and gives an affidavit to that effect in support of the above facts, it is the respondent who can bring on record the material to rebut the claim though the petitioner cannot be asked the negative facts to prove his pleadings. The petitioner had neither pleaded nor placed any material on record.

v. The court has to consider the manner and mode of selection of appointment; nature of employments (Adhoc, Daily wagers, Contract Labour, Temporary, Permanent). The petitioner was appointed as an employee from 3.8.1982 to 8.7.1993. Thereafter, she submitted her resignation and left the respondent department. She served as Midwife in the Indian Army w.e.f. 01.02.1997 to 31.12.2001. Thereafter, she left the Army Services. Again, she was appointed as ANM in the respondent department w.e.f. 01.08.2002 till 09.01.2006 on contract basis. The petitioners' services were regularized as ANM on 19.12.2005 and she was removed from service on 5.12.2006.

vi. The court has to consider the length of service of the employee rendered in the department. If the workman has rendered a considerable period of service, he may be awarded full or partial back wages keeping in view of the age and qualification possessed by him. As the petitioner need not be in position to get another employment. The length of service of the petitioner

has already been discussed in the preceding points, the age of the petitioner is 53 years according to the petition.

vii. Keeping in view of the above facets and keeping in view of the judgment of the Hon'ble Apex Court in **Rajesh Gupta Vs. State of Jammu and Kashmir (Supra)**, we hold that the petitioner is entitled to get 30% of the back wages from the date of termination till reinstatement.

21. In view of the above, the petitioner is entitled to get 30% of the salary and proportionate D.A. to that extent from the date of termination till reinstatement. She shall not be entitled to any interest on the back wages However, the petitioner will be entitled for the other consequential benefits except the salary namely, notional increment, pay fixation, seniority and other benefits except monetary benefits, as if she had been continuing in service from the date of the dismissal to the date of reinstatement. The above amount of arrear be paid to the petitioner within four months from the date of presentation of this order to the respondents. In case, the respondents did not pay the said amount within stipulated period the petitioner will be entitled 6% interest on the said amount after expiry of four months till the date of payment.

22. The petition is disposed of accordingly. No order as to costs.

Sd/- Sd/-

(U.D.CHAUBE) (JUSTICE J.C.S.RAWAT)
MEMBER (A) CHAIRMAN

DATE: 04 July, 2013
NAINITAL