

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN**

Present: Hon'ble Mr. Justice U.C.Dhyani

----- Chairman

Hon'ble Mr. Rajeev Gupta

-----Vice Chairman (A)

CLAIM PETITION NO. 92/DB/2020

Rajeev Kumar Agarwal, r/o 492/4, Street No. 10, Rajendra Nagar, Kaulagarh Road, Dehradun, presently posted as Upper Assistant Engineer, in the office of Project Division Department of Irrigation, Uttarakhand at Yamuna Colony, Dehradun.

.....Petitioner

vs.

1. State of Uttarakhand through Secretary Department of Irrigation, Uttarakhand Secretariat, Subhash Road, Dehradun.
2. Principal Engineer & Head of the Department (*Pramukh Abhiyanta Evam Vibhagadhyaksh*) Irrigation, Yamuna Colony, Dehradun.
3. Executive Engineer, Priyोजना Khand, Department of Irrigation, Yamuna Colony, Dehradun.

.....Respondents.

Present: Sri B.B.Naithani, Advocate for the Petitioner
Sri V.P.Devrani, A.P.O., for the Respondents

JUDGMENT

DATED: OCTOBER 21, 2021

Rajeev Gupta, Vice Chairman (A) (Oral)

By means of the present claim petition, the petitioner seeks the following reliefs:

1. *The impugned order No. 677/PKh/dated 30.05.2020 (Annexure No. A-1) and impugned order No.647/II(1)-2019-01(06)/2018 dated 22.07.2019 (Annexure No. A-2) be directed to be quashed along with their effects and consequence.*

2. *The respondents may kindly be directed to maintain the grant of ACP II already sanctioned as pay band 15600-39100 Gd pay 6600 in the department of Technical Education vide its order no. 187-192/Ni.Pra.Shi./Stha./47/2015-16 dated 12.04.2017 w.e.f. 01.09.2008 along with its all consequences like arrears of salary on the basis of the same grant of ACP II.*

3. *This Hon'ble Tribunal may further be pleased to issue any order or direction which this Hon'ble Tribunal may deem fit and proper under circumstances of the case under consideration.*

4. *This Hon'ble Tribunal may kindly be further pleased to award cost to the petitioner.*

2. Brief facts of the case are as below:

The petitioner was initially working in Polytechnic, Gaucher under Technical Education Department of the State. Subsequently, he applied for the post of Junior Engineer in the Irrigation Department in the State of Uttarakhand, for which, an advertisement was issued in the year 2001. He was selected and appointed as Junior Engineer in Irrigation Department in the year 2012, but his pay was not fixed at that time, as his service record was not available in the Irrigation Department. In the previous Technical Education Department, he had got two Assured Career Progressions (ACPs). With the second ACP, he was in the pay band-3 of Rs. 15600-39100, Grade Pay of Rs. 6600/- before joining the Irrigation Department. *Vide Annexure-A1* dated 30.05.2020, the Executive Engineer of the Irrigation Department on the directions of the Govt. contained in Annexure No. A2 dated 22.07.2019 has fixed the salary of the petitioner in the Pay Band-II of Rs. 9300-34800 with Grade Pay of Rs.4600 while protecting his pay of the earlier department as on the date of the appointment in the Irrigation Department, i.e. 20.04.2012 and subsequently increments and pay revision according to the 7th Pay Commission has been done in this order at Annexure: A1. While protecting the petitioner's pay, the extra pay given to him, has been kept as personal pay but his pay scale has been kept as Pay Band-II with Grade Pay of Rs. 4600 only. The direction given by the Secretary, Irrigation Department *vide Annexure: A2* states that the last salary of the petitioner in the earlier

department can be protected but instead of the earlier Grade Pay of Rs. 6600, which he was getting in earlier department, only the Grade Pay of Rs. 4600 which is Grade Pay of the post held by him at present, is admissible to him. It is further mentioned that the extra pay, as a result of the pay protection, shall be given to him as personal pay. No reference of any G.O. or the Financial Handbook is given in Annexure: A2.

3. During arguments, learned A.P.O. has stated that Annexure: A2 is according to the provisions of Financial Handbook, Vol-II, Part- II to IV, Rule 22B and there is no provision of protection of Grade Pay or Pay Band in the Financial Handbook. Learned Counsel for the petitioner has argued that the Financial Handbook is very old document, when the concept of ACP was not there and the G.Os. regarding ACP should be implemented in the right spirit in such cases, when service transfer from one department to other department is involved. Learned A.P.O. pointed out that it was not a case of service transfer but was a case of fresh appointment through Public Service Commission, for which petitioner had voluntarily applied. Learned Counsel for the petitioner asserts that even then, the petitioner cannot be deprived of the benefit of earlier services rendered in the earlier department and there are specific provisions for the same in the G.Os. of the ACP also. He has pointed out that the Finance Department's G.O. dated 08.03.2011 about ACP (Annexure: A3) envisages such situation and the services done in the earlier departments have to be accounted for. Sub para (10) of Para 1 on page 5 of this G.O. (Annexure: A3), states that Govt. servants on deputation/service transfer will have the option to choose ACP as admissible in the parent department or as admissible after deputation/service transfer. Learned A.P.O. pointed out that as per clause (vi) of sub para (2) of Para 1 of this G.O., the regular services done in other Govt. Department of the State in the **same Grade Pay** only shall be counted for financial upgradation. Learned Counsel for the petitioner pointed out that sub para (5) of Para 1 of this G.O. states that on the basis of financial upgradation, the employees' post, category or status will not be changed. This implies that the status of the

employee which includes pay, pay scale and pay band etc. will also be protected/maintained in the case of service transfer to other department.

4. Learned Counsel for the petitioner has also placed certain rulings in support of his contentions. Extracts of the judgment of Hon'ble Punjab and Haryana High Court, passed in CWP No. 24742 of 2014, Harpreet Kanwar vs. State of Punjab and another, 2017(4) RSJ, decided on 10.02.2016, are reproduced herein below:

“24. The statutory definitions of 'grade pay', 'pay in the pay band', 'basic pay' and 'existing emoluments', 'revised emoluments' and 'Schedule' are expressions which to the mind of the Court form a basket containing pay package representing the total salary that employee will take home or in compulsory investments. I should think that when pay is protected all incidents which go into the basket or package are to be protected to avoid and prevent sudden loss of pay. The Industries Department must have been conscious when it appointed the petitioner by way of transfer that she was coming from higher pay to lower pay and therefore they must accept the petitioner with a right to preservation of all her conditions of service including pay in the previous department protected except for seniority which right she surrendered to take up the appointment in the Industries Department. Had she been informed in the beginning of the situation she might have to face as she now does she may have had second thoughts in accepting the offer. It is too late now to alter conditions to her disadvantage on the feeble advice of the Finance Department which appears to this Court an incorrect construction/ interpretation of the instructions dated January 10, 2013 blowing it out of proportion with a set mind to defeat the claim for wholesome pay protection. When the premise on which the Government action is based [Finance Department advise] is gravely suspect and bereft of reasons, the orders passed on misinterpretation of the circular instructions and wrong advise tendered, the impugned decision/s become/s flawed and open to severe criticism. By this process the Grade Pay of the petitioner stands reduced to Rs. 1900 from Rs. 3600. Even a plain reading of the instructions dated January 10, 2013 would bear this out that all that the Government resolved while issuing clarification on the issue or protection of pay on appointment was to take care of problematic situations and exigencies arising from appointments from higher post to lower

post. It was only in that context as contemplated had the Government after careful consideration decided that on appointment to the lower post/scale carrying lower grade pay on one's own request, the pay in the pay band shall be fixed at the stage equal to the pay in the pay band drawn by him in the higher post. However, grade pay of the lower post will be granted. Much of the dispute in this case has revolved around grade pay and what that means. There are no instructions direct on the point shedding clear light on the subject matter to be guided by. If there is a gap somewhere in the scheme of things then I fail to see how it can be filled by the 2013 instructions.

25. The nature and character of the petitioner's appointment by way of transfer as Clerk in the department of migration can only be viewed as a case of "transfer by selection" which the instructions dated November 15, 2000 speak directly on, when they deal with the subject of protection of pay, which is what this case is about....."

5. Learned Counsel for the petitioner has also placed a decision of Hon'ble Supreme Court in State of U.P. & others vs. Maqbool Ahmad, 2007(1) SC-SLR 272, which held that *continuous service either in Irrigation department or PWD is sufficient to grant the selection grade and supertime pay scale.* Observations of the Hon'ble Supreme Court in this case are as below:

Pursuant to common selection held by the Uttar Pradesh Public Service Commission ("U.P.P.S.C." for short) in 1970, several persons were selected for appointment to the post of Assistant Engineer in various departments. The respondent herein opted for Irrigation Department whereas some selectees preferred to go to other departments including Public Works Department (PWD). The respondent joined the Irrigation Department on September 30, 1970. He initially worked at Lucknow and thereafter at Jaunpur. He continuously remained in Irrigation Department upto 1977. On November 4, 1977, with the approval of U.P.P.S.C., he was relieved from the Irrigation Department and joined Public Works Department without any break in service. In these circumstances, in our opinion, the respondent was right in submitting before the High Court as well as before us that there was no reason to deprive him of the selection grade or supertime scale as per the Government Order. Ultimately, the policy decision is based on equitable

principle that if an employee does not get promotion, not because of his fault, but because there were no sufficient vacancies available which resulted in his stagnation in the cadre to which he was initially appointed, it would be reasonable that he should not suffer and is allowed certain additional benefits. In such cases, an employee is deprived of promotion as the employer is unable to promote him due to limited posts/vacancies in the higher cadre. To avoid stagnation, heart-burning, demoralization of employees and to provide boosting, a policy decision has been taken by the Government. Keeping in view, the said object, it was decided by the State Government that if an employee has to remain in one and the same cadre for 16 and 18 years, he would be granted selection grade as also supertime scale. In our opinion, therefore, the High Court was right in holding that it would be totally immaterial whether the employee continuous to work in the cadre of Assistant Engineer either in Irrigation Department or in Public Works Department. The fact remains that he could not be promoted because of non availability of promotional avenue and hence there was no reason to deprive him of selection grade or supertime scale to which he was otherwise entitled. Held, on completing 16 years and 18 years the respondent was entitled to get the selection grade and supertime scale.

6. Learned Counsel for the petitioner also drew our kind attention to the judgment of this Tribunal, passed Claim Petition No. 27/DB/2019. Smt. Pratibha Pant, State Tax Officer vs. State of Uttarakhand & others, decided on 19.11.2019. In this case, petitioner, initially appointed on 25.01.2006, as Pharmacist, Medical & Health Department was subsequently selected on the post of Commercial Tax Officer through Public Service Commission where she joined on 03.03.2015. Relevant extracts of this judgment are quoted as hereunder:

“9. In Dwijen Chandra Sarkar and another vs. Union of India and another, [1999 SC- SLR 278], it was held by Hon’ble Apex Court, on the basis of various earlier decisions, that the past services of the employee are to be counted for limited purposes of eligibility for computing the number of years of qualifying service to enable him to claim the higher grade under the scheme of time bound promotion. In Union of India and another vs. V.M.Bhat, [2003 (99)FLR 1053], it was observed by

Hon'ble Apex Court that the well settled principle of law is that even in the case where the transfer has been allowed, on request, the concerned employee merely loses his seniority, but the same, by itself, could not lead to a conclusion that he should be deprived of all other benefits including his experience and eligibility for promotion.

10. *Therefore, in view of consistent approach of the Hon'ble Apex Court, this question is no more res integra that the incumbent, even on transfer, to the new department, may not get the seniority, but his experience of the past services rendered, will be counted for the purposes of other benefits, like, higher pay scale, as per scheme of the Government.*

11. *In State of Maharashtra and others vs. Uttam Vishnu Panwar, [2008 (116) FLR 788], the Tribunal had held that the services rendered by incumbent, in previous department, shall be counted for the purpose of Time Bound Promotion Scheme. Hon'ble Supreme Court held that, the view taken by the Tribunal was correct and found no ground to interfere with the same.*

15. *At internal page No. 3 of the G.O. dated 08.03.2011 (Annexure: A6), it is clearly mentioned that service in the same grade pay of other Government Department of the State shall be taken into account for financial upgradation but in such cases, the consideration of the benefit of ACP shall be done only after satisfactory completion of the probation period, but shall be given from the due date. Presumably, the petitioner has already completed her probation period and, therefore, her past services as Pharmacist were to be added for consideration of ACP. The question is, whether they should be added from 25.01.2006 or two years thereafter, when she got the present pay scale and grade pay. The service rendered prior to her joining the State Tax Department has to be considered at par with the services of other similarly placed Pharmacists in the Medical, Health and Family Welfare Department. If those services qualified the other Pharmacists, appointed in January, 2006 to be granted ACP from January, 2016, the mere transition of the petitioner in another department of the State Government in the same pay scale and grade pay, does not disqualify her from getting ACP in January 2016. The State Tax Department cannot apply their own perspective to the past services rendered in previous department, when the previous department counts the entire period as qualifying period for consideration of ACP.*

16. *Similarly placed Pharmacists have got the grade pay of Rs. 5400 after ACP in January 2016 and the same would have been given to the petitioner by the State Tax Department w.e.f. 25.01.2016 had she initiated her services as C.T.O. on 25.01.2006. An argument has also been advanced by the respondent department that granting ACP to her in January 2016 would be unfair to the other C.T.Os., who were directly recruited along with the petitioner in 2015. This Tribunal does not find any force in this argument because the petitioner is already getting higher salary as compared to other contemporary CTOs by way of her pay protection and the inter-se seniority of the CTOs is also not going to be affected in any manner. The petitioner had an accrued right to be considered for ACP on the basis of the past length of her service which should be viewed from the lens of the previous department and as analyzed in the preceding paras, the same should have been granted to her w.e.f. 25.01.2016.”*

7. In the case of Pratibha Pant (*supra*), the service in the previous department was in the same Grade Pay which clearly falls under clause (vi) of sub para (2) of Para 1 of the G.O. dated 08.03.2011 (Annexure: A3). *Prima facie*, there should be no disqualification of adding services of the earlier department which were rendered in a higher grade pay but the same has not been explicitly mentioned in this G.O. at Annexure: A3. As per the above rulings, it is also worth considering that pay protection does not include only protection of pay but also protection of pay scale and grade pay which have not been explicitly mentioned in the Financial Handbook. Had the pay band and grade pay of the petitioner been protected while fixing his salary in the Irrigation Department, he would be deemed to have been granted two ACPs in service which would have been the due consideration of the long Govt. services rendered by him earlier. It is unfair to treat him as a fresh employee of the Irrigation Department, appointed in 2012 and to compensate him for his earlier services by merely protecting his earlier pay. It is also worth pointing out that if he had been in the same grade pay in Technical Education Department, his earlier services would have been counted as per the Finance Department's G.O. dated 08.03.2011 (Annexure: A3) but since this G.O. is silent about such cases where the earlier services

are in higher grade pay, the petitioner's case is being unfavourably considered by the respondent department.

8. We understand that these aspects require thoughtful consideration at the level of the Government which has not been done so far. Therefore, we direct the respondents to consider the case of the petitioner to protect his Pay Band and Grade Pay at the time of his joining the Irrigation Department in consultation with the Finance Department of the Govt. in view of various judicial pronouncements as have been quoted above and in the spirit of the scheme of ACP. The impugned pay fixation order at Annexure: A1 and the directions contained in the Govt.'s letter dated 22.07.2019 (Annexure: A2) are hereby set aside.

9. Claim Petition is, accordingly, disposed of. No order as to costs.

(RAJEEV GUPTA)
VICE CHAIRMAN (A)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: OCTOBER 21, 2021.
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