

[Supreme Court of Pakistan]

Present: Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**MUHAMMAD SHARIF and others---Petitioners****Versus****INSPECTOR GENERAL OF POLICE, PUNJAB, LAHORE and others---Respondents**

C.Ps. Nos. 517-L, 1019-L, 1062-L, 1232-L of 2016 and 1929-L of 2017, decided on 28th April, 2021.

(Against the judgment(s)/order(s) of Punjab Service Tribunal, Lahore dated 21.12.2015 passed in Appeal No. 494/2015 and 09.02.2016 passed in Appeal No. 3223/2015 and 01.03.2016 passed in Appeal No. 1025 of 2015)

(a) Civil service---

---Back benefits/back pay---Meaning.

10th Edition, Thomson Reuters, 2014, 166; Aguinaga v. United Food and Commercial Workers Int'l Union 993 F.2d 1463, 1473; Robinson v. Lorillard Corp. 444 F.2d 791, 804 and Smith v West 1999 U.S. App. Vet. Claims LEXIS 475, 6 ref.

(b) Civil service---

---Reinstate in service---Meaning and scope.

Black's Law Dictionary (10th Edition, Thomson Reuters, 2014) 1477; Black's Law Dictionary, (6th Edition, St. Paul, MINN., West Publishing Co., 1990) 1287 and Aiyar's Judicial Dictionary (10th Edition, 1988) 871 ref.

(c) Punjab Civil Servants Act (VIII of 1974)---

---S. 16, second proviso---Constitution of Pakistan, Arts. 4, 10A, 14 & 25---Fundamental Rules, R. 54--- Civil Service Rules (Punjab), R. 7.3---Civil servant---Reinstatement in service after order for removal or dismissal from service set-aside---Back benefits, entitlement to---Scope and principles---Civil servant on unconditional reinstatement in service was to be given all back benefits and the only exception justifying part withholding of back benefits could be that he accepted gainful employment/engaged in profitable business during the intervening period---In case, the dismissal/removal of a civil servant was declared illegal for a defect in disciplinary proceedings without attending to the merits of the case, the entitlement to back benefits may be put off till the inquiry was conducted in the matter finally determining the fault of the civil servant---In case, where there was some fault of the civil servant, including a situation where concession of reinstatement was extended to the civil servant while applying leniency or compassion or proportionality as standard and where penalty was modified but not wiped off in a way that the civil servant was restored to his position, he may be denied a portion of back benefits/back pay, while maintaining a proportion between the gravity of the fault of the civil servant and special/extenuating circumstances of the case.

A civil servant once exonerated from the charges would stand restored in service as if he were never out of it and would be entitled to back benefits. Chairman State Life v. Siddiq Akbar 2013 SCMR 752; Umer Said v. District Education Officer (Female) 2007 SCMR 296 and 2015 SCMR 77 = 2015 PLC (C.S.) 366 ref.

Civil servant, whose wrongful dismissal or removal had been set-aside goes back to his service as if he were never dismissed or removed from service. The restitution of employee, in this context, meant that there had been no discontinuance in his service and for all purposes he had never left his post. He was therefore entitled to arrears of pay for the period he was kept out of service for no fault of his own. No different was the position where an employee had been served with a penalty like reduction in rank or withholding of increment(s) or forfeiture of service, etc. and the penalty had been set-aside. The employee stood restored to his post with all his perks and benefits intact and would be entitled to arrears of pay as would have accrued to him had the penalty not been imposed on him. This general

principle of restitution fully met the constitutional requirements of fair trial and due process (Articles 4 & 10A of the Constitution) besides the right to life (Article 9) which included the right to livelihood ensuring all lawful economic benefits that came with the post. Reinstating an employee but not allowing him to enjoy the same terms and conditions of service as his colleagues was also discriminatory (Article 25). All this snowballed into offending the right to dignity (Article 14) of an employee for being treated as a lesser employee inspite of being reinstated or restored into service.

The "concept of reinstatement into service with original seniority and back benefits" was based on the established principle of jurisprudence that if an illegal action/wrong was struck down by the Court, as a consequence, it was also to be ensured that no undue harm was caused to any individual due to such illegality/wrong or as a result of delay in the redress of his grievance. If by virtue of a declaration given by the Court a civil servant is to be treated as being still in service, he should also be given the consequential relief of the back benefits (including salary) for the period he was kept out of service as if he were actually performing duties.

Federation of Pakistan v. Sindh High Court Bar Association PLD 2012 SC 1067; *Pakistan v. Mrs. A. V. Issacs* PLD 1970 SC 415; *Muhammad Bashir v. Government of the Punjab* 1994 SCMR 1801 and *Inspector-General of Police, Punjab v. Tariq Mahmood* 2015 SCMR 77 = 2015 PLC (C.S.) 366 ref.

Where the order of dismissal, removal or reduction in rank was set aside unconditionally, back benefits were to be paid necessarily. The grant of back benefits to an employee who had been illegally kept away from his employment was a rule and denial of service benefits to such reinstated employee was an exception. When a civil servant was reinstated in service and his dismissal from service was held to be illegal and for no fault of his, then his reinstatement in service would mean that he had always been in service and as a consequence be paid salary from the day he was illegally removed or dismissed from service. One of the exceptions of not granting full back benefits was that if the reinstated employee had accepted another employment or engaged in any profitable business during the intervening period; in such a case, the said amount would be set off against the salary. This concept was now available as an instruction under Sl. No. 155, Vol-II, Esta Code, 2007 edition.

Qadeer Ahmad v. Punjab Labour Appellate Tribunal PLD 1990 SC 787; *General Manager v. Mehmood Ahmed Butt* 2002 SCMR 1064; *Muhammad Hussain v. E.D.O. (Education)* 2007 SCMR 855; *Umer Said v. District Education Officer (Female)* 2007 SCMR 296; *Sohail Ahmed Usmani v. DG CAA* 2014 SCMR 1843; *Chairman State Life v. Siddiq Akbar* 2013 SCMR 752; *Pakistan v. Mrs. A.V. Issacs* PLD 1970 SC 415; *Muhammad Bashir v. Government of the Punjab* 1994 SCMR 1801 and *Inspector General of Police, Punjab v. Tariq Mahmood* 2015 SCMR 77 = 2015 PLC (C.S.) 366 ref.

The reinstatement or restoration of an employee to the post may be due to the following different reasons: (a) purely on merits; (b) on technical grounds without touching the actual merits of the case and (c) on the ground of leniency where the actual order was either converted into a lesser penalty or totally set-aside.

An employee on reinstatement on merits could not be deprived of back benefits. Any such deprivation would be against his constitutional rights guaranteed to an employee. Besides, Rule 7.3(a) of Civil Service Rule (Punjab) also pointed in this direction. In case of reinstatement or restoration to a post on merits, the employee was entitled to full back benefits and there was no discontinuity of service, thus the question of intervening period did not arise in such a case. The discretion (as to awarding arrears/back benefits) under the second proviso to section 16 of the Punjab Civil Servants Act, 1974 ('the 1974 Act') was to be exercised in favour of the employee by granting him all the back benefits. However, the said principle of grant of back benefits was qualified by a situation where the order of reinstatement was conditional; either civil servant's dismissal from service was declared illegal for a defect in disciplinary proceedings or the penalty was modified to be on the lower side with the result that the civil servant was reinstated. In the former situation, the merits of the case and the

determination of the fault of the employee went untouched, even though he stood reinstated. Here, an inquiry could still be made into the employee's conduct or his conduct may be considered such as to call for a departmental inquiry. The de novo proceedings could be initiated from the stage where the defect had crept in. In such a situation, the entitlement with regard to back benefits was put off till the final determination with regard to the civil servant's conduct. If he was found at fault, the competent authority could justifiably deny him part of the back benefits. And, in the latter situation, the civil servant was not declared blameless; rather, his penalty was reduced and, therefore, part of back benefits, as necessitated by the implications of reduced penalty, may justifiably be denied to him.

Muhammad Arif Khan v. Dy. Enc. E'in'C's Branch, GHQ 1991 SCMR 1904 and Qadeer Ahmad v. Punjab Labour Appellate Tribunal PLD 1990 SC 787 ref.

Appellate authorities, often, without saying a word about the charge, reinstated a civil servant taking a lenient view or on compassionate ground or on the ground of proportionality. In such a case the charge stood established yet the authority or the court, applying leniency or compassion or proportionality as standard, felt inclined to extend concession of reinstatement to the civil servant. Notably the civil servant in such a case was not reinstated unconditionally and, therefore, he may be denied a portion of pay - while maintaining a proportion between the gravity of the fault of the civil servant and special/ extenuating circumstances of the case - he would otherwise get on reinstatement. Such treatment would be in step with the second proviso to section 16 of the 1974 Act and would also be consistent with the spirit of Fundamental Rule 54 ("FR") and Civil Service Rules (Punjab) 7.3(b) ("CSR"). If an employee was reinstated in such an eventuality, the authority or the court needed to clearly state that though the charge ascribed to the employee stood proved, concession was being shown to him to avoid the rigors of major penalty, which would otherwise be unwarranted in view of peculiar circumstances of the case.

(d) Civil service---

---Period spent by a civil servant away from duty due to dismissal from service or absence from duty, etc.---"Leave without pay" or "leave of the kind due" granted to a civil servant---Purpose and meaning.

In case back benefits as of right were not awarded to the civil servant and he was served with any other penalty after reinstatement in service, the intervening period had to be counted for, otherwise the interruption in the service of a civil servant may entail forfeiture of his service, therefore, the intervening period had to be regularized by treating it as an extraordinary leave without pay or leave of the kind due or leave without pay, as the case may be. The regularization of the intervening period was a totally separate matter and had no bearing on the penalty imposed upon the civil servant. The competent authority may condone interruptions in service provided that the gaps were not due to any fault or willful act of the employee. The service gaps were usually regularized as extraordinary leave without pay or leave of the kind due. Terming absence period as extraordinary leave without pay was not a punishment, rather, a treatment given to regularize the period spent away from duty. Nor could a concession given to a civil servant that his absence from duty be treated as extraordinary leave without pay mean that major penalty imposed in the same order was wiped off. Nevertheless, the powers given to treat the period of absence as extraordinary leave without pay or leave of the kind due were to be exercised after due application of mind and considering the facts and circumstances of a case.

National Bank of Pakistan v. Zahoor Ahmed Mengal 2021 SCMR 144; NAB v. Muhammad Shafique 2020 SCMR 425; Federation of Pakistan v. Mamoon Ahmed Malik 2020 SCMR 1154 and DIG, NH & MP, Karachi v. Ghulam Mustafa Mahar 2019 SCMR 95 ref.

Khan Muhammad Vehniwal, Advocate Supreme Court for Petitioners (in C.P. No. 517-L of 2016).

Rana Shamshad Khan, Additional A.G., Ch. Zafar Hussain Ahmad, Additional A.G. along with Shaukat Ali, DSP, Munir Hussain, DSP, Naeem Cheema, Law Officer, Imran Ashraf, S.P., Muhammad Ijaz Khan, Lit. Officer and Muhammad Anwar Yasir, Lit. Officer for Petitioners (in C.Ps. Nos. 1019-L, 1062-L, 1232-L of 2016 and C.P. No. 1929-L of 2017).

Mahmood Ahmad Qazi, Advocate Supreme Court for Respondents (in C.P. No. 1929-L of 2017).

Hasan Riaz, Research Officer-Civil Judge, SCRC, Islamabad for Research Assistance.

Date of hearing: 11th February, 2021.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---We consider in these petitions the scope of entitlement of a civil servant to back benefits on his reinstatement in service after his wrongful removal or dismissal has been set-aside or on his being restored to his post after the penalty imposed on him has been set-aside. We also consider the treatment of the period spent by a civil servant away from duty (due to dismissal from service or absence from duty, etc.) and the purpose and meaning of the terms leave without pay or leave of the kind due granted to a civil servant.

Brief facts of the petitions

2. In C.P. 517-L of 2016, the petitioner, Muhammad Sharif, Sub-Inspector in Punjab Police, was compulsorily retired from service by the departmental authority. He preferred a departmental appeal and on expiry of the period stipulated for its decision, moved an appeal before the Punjab Service Tribunal ("Tribunal"). The Tribunal reinstated him in service though the period since the onset of compulsory retirement till reinstatement in service was directed to be treated as leave without pay. He now prays that this intervening period be treated with pay. The department has also called in question the order of reinstatement of Muhammad Sharif in CP 1062-L of 2016.

3. In C.P. 1019-L of 2016, the respondent, Roqyya Khushnood, Lady Traffic Warden, was dismissed from service by the Chief Traffic Officer, Lahore. The appellate authority taking a lenient view reinstated her in service but the period spent away from duty was treated as leave without pay. The Tribunal accepted her appeal and the period during which she remained out of service was adjudged to be considered as leave of the kind due. The department now prays that the Tribunal's interference with the departmental proceedings be overturned.

4. In C.P. 1232-L of 2016, the respondent, Riasat Ali, Constable, was dismissed from service by the departmental authority. The appellate authority taking a lenient view reinstated him in service. Nevertheless, minor penalty of censure was imposed and the period between dismissal and reinstatement was directed to be treated as leave without pay. The Tribunal accepted the civil servant's appeal and held that the period during which he was kept away from duty be treated as leave of the kind due. The penalty of censure was, however, maintained. The department now prays that the order of the Tribunal be reversed.

5. In C.P. 1929-L of 2017, the respondent, Dr. Muzaffar Nasrullah Chattha, Consultant Orthopedic Surgeon, was awarded major penalty of forfeiture of two years of service for absence which was reduced to forfeiture of one year in departmental appeal. The period of absence was to be treated as extraordinary leave without pay. The Tribunal accepted his appeal and decided that the period of absence be treated as earned leave.

6. The petitioners have sought leave of this Court under Article 212(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") to appeal against the decisions of the Tribunal.

Back Benefits

7. At the very outset, it is important to underline that the term back benefits has not been mentioned in the service laws of Punjab or Pakistan, however, the term has a wide usage in the sub-continental jurisprudence, including ours, for a longtime. According to Black's Law Dictionary¹, Back Pay is the salary that an employee should have received but did not because of an employer's unlawful action. Back Pay Award² is a judicial decision that an employee or ex-employee is entitled to an accrued but uncollected salary or benefits. The purpose of a back pay award is to make the employee whole i.e., restore the economic status quo that would have obtained but for the wrongdoing on the part of the employer.³ Back pay is a compensation for the tangible economic loss resulting from an unlawful employment practice.⁴ Back pay largely translates into back benefits under our jurisprudence. "Back

benefits" are, therefore, retroactive payments.⁵ Even though the term back benefits is wider than back pay as it includes other benefits but for the purposes of this case we restrict the meaning of back benefits to arrears of pay or back pay.⁶

8. Reinstate in service means to place again in a former state or position⁷ from which the person had been removed.⁸ Reinstatement is effected from the date of dismissal with back pay from that date.⁹ A reinstated employee is to be treated as if he had not been dismissed and is therefore entitled to recover any benefits (such as arrears of pay) that he has lost during his period of unemployment. However, pay in lieu of notice, ex gratia payments by the employer, or supplementary benefits, and other sums he has received because of his dismissal or any subsequent unemployment will be taken into account.¹⁰

9. An employee, i.e. civil servant in this case, whose wrongful dismissal or removal has been set-aside goes back to his service as if he were never dismissed or removed from service. The restitution of employee, in this context, means that there has been no discontinuance in his service and for all purposes he had never left his post. He is therefore entitled to arrears of pay for the period he was kept out of service for no fault of his own. No different is the position where an employee has been served with a penalty like reduction in rank or withholding of increment(s) or forfeiture of service, etc. and the penalty has been set-aside. The employee stands restored to his post with all his perks and benefits intact and will be entitled to arrears of pay as would have accrued to him had the penalty not been imposed on him. This general principle of restitution fully meets the constitutional requirements of fair trial and due process (Articles 4 and 10-A¹¹) besides the right to life (Article 9¹²) which includes the right to livelihood ensuring all lawful economic benefits that come with the post. Reinstating an employee but not allowing him to enjoy the same terms and conditions of service as his colleagues is also discriminatory (Article 25¹³). All this snowballs into offending the right to dignity (Article 14¹⁴) of an employee for being treated as a lesser employee inspite of being reinstated or restored into service.

10. The "concept of reinstatement into service with original seniority and back benefits" is based on the established principle of jurisprudence that "if an illegal action/wrong is struck down by the Court, as a consequence, it is also to be ensured that no undue harm is caused to any individual due to such illegality/wrong or as a result of delay in the redress of his grievance."¹⁵ If by virtue of a declaration given by the Court a civil servant is to be treated as being still in service, he should also be given the consequential relief of the back benefits (including salary) for the period he was kept out of service as if he were actually performing duties.¹⁶ A civil servant once exonerated from the charges would stand restored in service as if he were never out of it and would be entitled to back benefits.¹⁷ A five Member Bench of this Court in *Inspector-General of Police, Punjab v. Tariq Mahmood*¹⁸ authoritatively reiterated:

"[T]he grant of back benefits to an employee who was reinstated by a Court/Tribunal or the department is a rule and denial of such benefit is an exception on the proof of that such a person had remained gainfully employed during such period."

11. It follows that where the order of dismissal, removal or reduction in rank is set aside unconditionally, back benefits are to be paid necessarily.¹⁹ The grant of back benefits to an employee who has been illegally kept away from his employment is a rule and denial of service benefits to such reinstated employee is an exception.²⁰ When a civil servant is reinstated in service and his dismissal from service is held to be illegal and for no fault of his, then his reinstatement in service would mean that he has always been in service and as a consequence be paid salary from the day he was illegally removed or dismissed from service. One of the exceptions of not granting full back benefits is that if the reinstated employee had accepted another employment or engaged in any profitable business during the intervening period; in such a case, the said amount would be set off against the salary.²¹ This is now available as an instruction under Sl. No. 155, Vol-II, Esta Code, 2007 edition.

12. This principle of restitution and payment of back benefits also finds its presence under the second proviso to section 16 of the Punjab Civil Servants Act, 1974 ("Act") which deals with back benefits in the shape of arrears of pay in the event that the order of dismissal or removal or reduction in rank is set-aside in the following manner:-

Provided further that where a civil servant has been dismissed or removed from service or reduced in rank, he shall, in the event of the order of dismissal, removal from service or reduction in rank being set aside, be entitled to such arrears of pay as the authority²² setting aside the order may determine.

13. In the past, the concept of arrears of pay was dealt with by Fundamental Rule 54 ("FR") and Civil Service Rule (Punjab) 7.3 ("CSR") issued by the Federal Government and the Punjab Government, respectively. The said Rules provide as follows;

F.R. 54.-Where a Government Servant has been dismissed or removed is reinstated, the revising or appellate authority may grant to him for the period of his absence from duty:-

- (a) if he is honourably acquitted, the full pay to which he would have been entitled if he had not been dismissed or removed and, by an order to be separately recorded, any allowance of which he was in receipt prior to his dismissal or removal; or
- (b) if otherwise, such portion of such pay and allowances as the revising or appellate authority may prescribe.

In a case falling under clause (a), the period of absence from duty will be treated as a period spent on duty.

In a case falling under clause (b), it will not be treated as a period spent on duty unless the revising or appellate authority so directs.

Explanation:-In this rule, "revising authority" means the "authority" or "authorised Officer" as defined in the Government Servants (Efficiency and Discipline) Rules, 1973, who passes the final order on the case and not the authority who passes an order on appeal.

CSR 7.3. When a Government Servant who was dismissed or removed from service, is reinstated, the revising or appellate authority may grant to him for the period of his absence from duty:

- a) If he is honourably acquitted, the full pay to which he would have been entitled if he had not be dismissed or removed and by an order to be separately recorded any allowances of which he was in receipt prior to his dismissal or removal; or
- b) If otherwise, such proportion of such pay and allowances as the revising or appellate authority may prescribed"

In a case falling under clause (a) the period of absence from duty will be treated as a period spent on duty. In a case falling under clause (b) it will not be treated as period spent on duty unless the revising or appellate authority so directs.

Note 1.--This rule is absolute and unconditional and so the question of lien does not arise in the case of Government Servant who is dismissed from service and reinstated on appeal when the period of unemployment between the date of dismissal and reinstatement is declared by the appellate authority as duty.

Administrative Instruction.--Post vacated by a dismissed Government Servant may be filled substantively subject to the condition that the arrangements thus made will be reverse if the dismissed Government Servant is reinstated on appeal.

Note 2.-The term 'revising authority' as used in this rule includes an authority revising its own orders.

14. FR and CSR predate the Constitution and the Act. After the promulgation of the Constitution in 1973, FR and CSR were given protection under Article 241 of the Constitution, albeit subject to their consistency with the Constitution and till such time that a law was made under Article 240 by the appropriate legislature. Further, section 23(2) of the Act²³ provided that any rules, orders or

instructions already in force before the commencement of the Act shall in so far as they were not inconsistent with the provisions of the Act, be deemed to be the Rules made under the Act. Thus, the position emerging post 1973 is that Fundamental Rules, Civil Service Rules (Punjab) and other orders or instructions in respect of terms and conditions of service shall remain subject to the Act and in case of any inconsistency, the provisions of the Act shall prevail. Therefore, for the purposes of back benefits, we give primacy to the proviso to section 16 of the Act and examine and interpret it keeping the spirit and wisdom of FR 54 and CSR 7.3 in view.

15. Coming back to the second proviso to section 16 of the Act, it is important to structure the discretion to be exercised by the authority or court in granting arrears of pay after the order of dismissal, removal or reduction in rank has been set-aside. This discretion is to be structured keeping in mind the constitutional provisions discussed above, the wisdom handed down by the jurisprudence evolved till date and the administrative and financial oversight envisaged under FR, CSR and the Esta Code. The reinstatement or restoration of an employee to the post may be due to the following different reasons: (a) purely on merits; (b) on technical grounds without touching the actual merits of the case and (c) on the ground of leniency where the actual order is either converted into a lesser penalty or totally set-aside.

16. An employee on reinstatement on merits cannot be deprived of back benefits. Any such deprivation would be against the constitutional rights (discussed above) guaranteed to an employee. Besides, CSR 7.3 (a) also points in this direction. In case of reinstatement or restoration to a post on merits, the employee is entitled to full back benefits and there is no discontinuity of service, thus the question of intervening period does not arise in such a case. The discretion under the second proviso to section 16 of the Act is to be exercised in favour of the employee by granting him all the back benefits.

17. However, the above principle of grant of back benefits is qualified by a situation where the order of reinstatement is conditional; either civil servant's dismissal from service is declared illegal for a defect in disciplinary proceedings or the penalty is modified to be on the lower side with the result that the civil servant is reinstated. In the former situation, the merits of the case and the determination of the fault of the employee go untouched, even though he stands reinstated. Here, an inquiry could still be made into the employee's conduct or his conduct may be considered such as to call for a departmental inquiry. The de novo proceedings could be initiated from the stage where the defect had crept in.²⁴ In such a situation, the entitlement with regard to back benefits is put off till the final determination with regard to the civil servant's conduct. If he is found at fault, the competent authority could justifiably deny him part of the back benefits.²⁵ And, in the latter situation, the civil servant is not declared blameless; rather, his penalty is reduced and, therefore, part of back benefits, as necessitated by the implications of reduced penalty, may justifiably be denied to him.

18. We also feel inclined to underscore that a civil servant cannot be burdened with the loss of service benefits without attributing any charge to him. Appellate authorities, without saying a word about the charge, often, as in two of these petitions, reinstate a civil servant taking a lenient view or on compassionate ground or on the ground of proportionality. This view usually becomes the ground to deny back benefits to the reinstated civil servant. It is underlined for the sake of clarity that the matter of 'leniency' or 'compassion' or 'proportionality' does not erode the charge rather it does not consider the award of penalty to be appropriate in the case. It may so happen that the charge stands established yet the authority or the court, applying leniency or compassion or proportionality as standard, feels inclined to extend concession of reinstatement to the civil servant. Notably the civil servant in such a case is not reinstated unconditionally and, therefore, he may be denied a portion of pay - while maintaining a proportion between the gravity of the fault of the civil servant and special/extenuating circumstances of the case - he would otherwise get on reinstatement. It would be in step with the second proviso to section 16 of the Act and would also be consistent with the spirit of

FR 54(b) and CSR 7.3(b). If an employee is reinstated in such an eventuality, the authority or the court needs to clearly state that though the charge ascribed to the employee stood proved, concession is being shown to him to avoid the rigors of major penalty, which would otherwise be unwarranted in view of peculiar circumstances of the case.

Leave without pay or leave of the kind due

19. In case back benefits as of right are not awarded to the civil servant and he is served with any other penalty after reinstatement in service, the intervening period has to be counted for, otherwise the interruption in the service of a civil servant may entail forfeiture of his service²⁶, therefore, the intervening period has to be regularized by treating it as an extra ordinary leave without pay or leave of the kind due or leave without pay, as the case may be. It is pointed out that the regularization of the intervening period is a totally separate matter and has no bearing on the penalty imposed upon the civil servant. The competent authority may condone interruptions in service provided that the gaps are not due to any fault or willful act of the employee.²⁷ The service gaps are usually regularized as extraordinary leave without pay or leave of the kind due. Terming absence period as extraordinary leave without pay is not a punishment, rather, a treatment given to regularize the period spent away from duty.²⁸ Nor could a concession given to a civil servant that his absence from duty be treated as extraordinary leave without pay mean that major penalty imposed in the same order is wiped off.²⁹ Nevertheless the powers given to treat the period of absence as extraordinary leave without pay or leave of the kind due are to be exercised after due application of mind and considering the facts and circumstances of a case.

20. We, therefore, hold that a civil servant on unconditional reinstatement in service is to be given all back benefits and the only exception justifying part withholding of back benefits could be that he accepted gainful employment/engaged in profitable business during the intervening period. In case, the dismissal/removal of a civil servant is declared illegal for a defect in disciplinary proceedings without attending to the merits of the case, the entitlement to back benefits may be put off till the inquiry is conducted in the matter finally determining the fault of the civil servant. In case, where there is some fault of the civil servant, including a situation where concession of reinstatement is extended to the civil servant while applying leniency or compassion or proportionality as standard and where penalty is modified but not wiped off in a way that the civil servant is restored to his position, the back benefits will be paid as determined by the authority/court in the manner discussed above in this judgment. We, however, reiterate that "gainful employment/ profitable business" creates an overarching exception that would cover all cases involving the question of back benefits.

21. Turning to the petitions in hand, it is seen that the petitioner in C.P. 517-L of 2016, who was compulsorily retired from service by the departmental authority, was reinstated by the Tribunal observing that no evidence had been produced against him during the departmental proceedings and that the departmental action was devoid of merit and justification. Even so, the Tribunal chose to strip the civil servant of service benefits for the period he was kept at bay by relying on "the dictum set by the apex Court in 2011 PLC (C.S.) 1003". It has been noticed by us that the judgment reported as 2011 PLC (C.S.) 1003 was not rendered by this Court but refers to a decision of the Balochistan Service Tribunal delivered in the case of Dr. Abdul Naseer v. Government of Balochistan where the civil servant who remained suspended from 31.10.2002 to 14.04.2007 was eventually dismissed. The Balochistan Service Tribunal observed that the civil servant was entitled to benefits for the period of suspension though he was not given benefits for the period he was out of service on the principle of no work, no pay. Strangely, the Balochistan Service Tribunal directed the civil servant "to be reinstated in service with all back benefits from the date of his suspension till date" i.e. the date of decision. The period spent away from duty also fell within that period. In any case, the reliance of the Tribunal on the judgment of the Balochistan Service Tribunal in view of law laid down by this Court is misplaced and not sustainable. When the Tribunal did not ascribe any guilt to the petitioner, he should have been

reinstated with all back benefits subject to the exception of not having remained gainfully employed during the intervening period. Therefore, C.P. 517-L of 2016 is converted into appeal and allowed and the intervening period between compulsory retirement and reinstatement be considered as if the petitioner were on duty. Consequently, C.P. 1062-L of 2016, preferred by the department against the same judgment of the Tribunal, is disposed of accordingly.

22. In C.P. 1019-L of 2016, the respondent was reinstated on compassionate grounds by the appellate departmental authority yet no responsibility was fixed on her and the Tribunal ordered that the period of her absence be treated as leave of the kind due. As the appellate authority accepted her explanation and did not impose any penalty on her, she could not be refused back benefits unless she remained gainfully employed during the period spent away from duty, which is not the case here. Therefore, C.P. 1019-L of 2016 is disposed of in the terms that the intervening period between dismissal and reinstatement be considered as if the respondent were on duty.

23. In C.P. 1232-L of 2016, the respondent was reinstated by the appellate departmental authority though minor penalty of censure was awarded to him which was maintained by the Tribunal. The absence which was treated as leave without pay was converted by the Tribunal into leave of the kind due. It is true that the respondent was not exonerated of his guilt. Only the penalty was reduced. The Tribunal while affirming the penalty of censure failed to discuss the question of arrears of pay that would have become due to the respondent under the second proviso to section 16 of the Act. In the peculiar facts and circumstances of this case, we do not find it appropriate to remand the matter to the Tribunal at this late stage and, therefore, considering the nature of the penalty of censure, we dispose of C.P. 1232-L of 2016 in the terms that the intervening period between dismissal and reinstatement be considered as if the respondent were on duty.

24. In C.P. 1929-L of 2017, the respondent was awarded major penalty of forfeiture of two years of service for absence which was reduced to forfeiture of one year in departmental appeal. The period of absence was to be treated as extraordinary leave without pay. The Tribunal accepted his appeal and decided that the period of absence be treated as earned leave. The absence of the respondent refers to the period for which he had sought leave on medical grounds, though his request remained undecided. On the other hand, disciplinary proceedings were initiated against him. The Tribunal accepted the respondent's appeal on merits with the end result that the absence be considered as earned leave. Here again, we find the decision of the Tribunal just and proper in the circumstances of the case and, therefore, the petition is dismissed and leave refused.

MWA/M-24/SC Order accordingly.