THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Fifth Edition

Editor
Carson Burnham

THE LAWREVIEWS

THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Fifth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Carson Burnham

THE LAWREVIEWS

CONTENTS

1 Disha Mohanty and Anup Kumar are principals and Shivalik Chandan is an associate at G&W Legal.

Chapter 7

INDIA

Disha Mohanty, Anup Kumar and Shivalik Chandan[1]

I INTRODUCTION

The Constitution of India confers powers to state governments as well as the central (federal) government to enact laws concerning employment and labour, except for certain matters which are reserved for the central government.

A large number of labour legislations exist on different aspects of labour, namely, fixation and payment of wages, social security, occupational health and safety, women and child labour, industrial relations, resolution and adjudication of industrial disputes, and equal opportunities, including opportunities for disabled and transgender individuals.

Currently, over 50 separate legislations concerning employment and labour law are in effect in the country. The existing labour and employment legislations can be categorised into the following categories:

a legislations enacted and enforced solely by the central government;
b legislations enacted by the central government and enforced both by the central and state governments;
c legislations enacted by the central government and enforced by the state governments; and
d legislations enacted and enforced by the various state governments which apply to respective states.

Given the plethora of legislations that exist on the subject of labour and employment, we have discussed the following key employment disputes and procedures that apply thereto:

a termination of employees;
b disputes concerning sexual harassment; and
c other employment matters.

i Classification of employees

Employees in India are broadly categorised into workmen and non-workmen. The Industrial Disputes Act 1948 (the ID Act) deals with settlement of industrial disputes, and provides statutory protection to workmen in certain matters, such as termination, transfers and closure of establishments. The ID Act, among other things, also deals with the transfer of business undertakings in relation to workmen.

1 Disha Mohanty and Anup Kumar are principals and Shivalik Chandan is an associate at G&W Legal.

Workmen

The ID Act defines a 'workman' as any person who is employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, regardless of whether the terms of employment are express or implied. The following categories of employees are excluded from the definition of workmen:

a persons employed in an administrative or managerial capacity; and

b persons employed in supervisory work and earning more than 10,000 Indian rupees per month.

The definition of a workman is broad enough to cover all employees, except those performing managerial or supervisory functions, but has been a matter of constant debate over the years.

It is common for an employee to be performing multiple roles, such as managerial or supervisory work as well as work that may be technical, skilled, unskilled or operational in nature. Several courts have ruled that where an employee performs multiple roles, the dominant nature of work performed by such persons in the usual course should be considered while deciding whether the employee is a workman or a non-workman.

Generally, software employees and other white-collar workers performing technical work will fall under the category of workmen. That being said, classification of white-collar employees as workmen is a hotly debated (and frequently litigated) topic and courts in India are yet to conclusively prescribe clear parameters for such determination.

Non-workmen

All employees other than workmen, namely employees performing managerial and supervisory functions, will fall under the category of non-workmen.

Non-workmen are not covered under the ID Act and their employment is regulated under the employment contract and the state-specific Shops and Establishment Acts.

Industrial disputes

Pursuant to the ID Act, industrial dispute means any dispute or difference (1) between employers and employers; (2) between employers and workmen; or (3) between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

Generally, disputes between an employer and an individual workman will not be deemed as an industrial dispute under the ID Act, unless such dispute is espoused by the trade union in writing at the commencement of the dispute. However, as an exception, disputes between an individual workman and employer relating termination, discharge or dismissal of employment will be considered as industrial disputes.

Labour court and tribunal

Labour courts

Under the ID Act, the appropriate government has the power to constitute labour courts for resolving certain industrial disputes concerning dismissal or termination of employment, withdrawal of any privilege to workmen, legality of the order passed by employer against a workman under the applicable service rules and disputes concerning the service rules.

Industrial tribunal

The appropriate government can set up one or more industrial tribunals with wider jurisdiction in comparison to the labour court. The nature of disputes handled by the industrial tribunal concerns:

a wages of employees;
b bonus and provident funds that are provided;
c working hours;
d rationalisation;
e leaves and the holidays;
f service rules concerning maintenance of discipline in the industry among the employees; and
g any other matter that may be considered to be heard and discussed necessarily.

National tribunal

A national tribunal is formed by the central government by an official gazette for adjudication of industrial disputes that are considered to be of national importance. If a dispute between two parties of an industry reaches the national tribunal, then both the labour court and the industrial tribunal lose their jurisdiction over the matter.

II PROCEDURE

i 'At will' employment

Indian laws do not recognise the concept of 'at will' employment. Services of an employee can be terminated for a valid cause after an inquiry during which due opportunity is provided to the alleged employee to present their case having regard to the principles of natural justice.

The law permits employers to terminate employment in cases of redundancies after compliance with the applicable law. An employer is required to provide a prior advance notice and payment of severance compensation as per the applicable law.

ii Termination for workmen employees

Pursuant to the ID Act, termination of employment of workmen can be done for any reason, provided that all workmen who have completed one year of continuous service[2] under an employer are given:

a notice of one month or payment of wages in lieu of notice; and
b compensation equivalent to 15 days' average pay for every completed year of continuous service, or any part thereof over six months.

Furthermore, the employer will also be required to serve notice to the relevant labour authority about the retrenchment. The above conditions are not applicable in case of termination of employment as a punishment inflicted by way of disciplinary action.

2 A workman shall be deemed to be in continuous service under an employer for a period of one year, if the workman, during a period of 12 calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than 190 days in the case of a workman employed below ground in a mine, and 240 days in any other case.

Factories and mines employing more than 100[3] workmen will have to obtain prior approval of the relevant government authority, and also provide three months' prior written notice or payment in lieu of notice instead of one month's notice.

Prior permission of the relevant government authority will also be required for closure of establishments where 50[4] or more workmen are employed.

iii Procedures for settlement of termination under the ID Act

The ID Act provides for the appointment of conciliation officers, boards of conciliation, courts and tribunals for settlement of industrial disputes.

At the first instance, the dispute is referred to conciliation officers who work in the Department of Labour. Their role is to work with the parties to help them settle the dispute. The outcome of the conciliation proceedings is not binding on the parties.

The state government may also set up a board of conciliation to help settle a specific case or dispute. The board of conciliation is not a permanent body and is set up on an *ad hoc* basis for specific matters.

If the parties are unable to resolve their disputes through conciliation, the conciliation officer or the board of conciliation will submit with the appropriate government a full report setting forth the proceedings and steps taken for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and its findings thereon, the reasons on account of which a settlement could not be arrived at, and its recommendations for the determination of the dispute. The conciliation officer or the board, as the case may be, is required to submit its report to the government within the prescribed time, which can be extended by the government.

The appropriate government may thereafter decide to refer the matter to the labour courts for judicial trial. Although the ID Act requires the labour courts to pronounce its judgments within a period of six months, practically, there is a significant delay in disposal of the cases.

Pursuant to the ID Act, a workman can make an application directly to the Labour Court for adjudication termination related disputes after the expiry of 45 days from the date they have made the application to the conciliation officer of the appropriate government for conciliation of the dispute.

A party aggrieved from the decision of labour court may prefer appeal before the jurisdictional High Court followed by the Supreme Court of India.

iv Termination of non-workmen employees

Termination of non-workmen employees will be governed by the applicable Shops and Establishment (S&E) Act.

S&E legislations in many states, such as Karnataka, Andhra Pradesh, Delhi and Haryana require that employees who have been in continuous employment for a certain specified period should not be terminated except for reasonable cause and after providing prior notice of specified period (generally of one month) or payment in lieu of notice.

3 The threshold for the number of workmen could vary from state to state.

4 The threshold for the number of workmen could vary from state to state.

Several courts have rules that closure of the business due to contraction in the business, reduction of work, loss in business, financial constraints, action in the interest of efficiency and economy, and winding up of the company will be considered as reasonable causes for termination of employees. However, employers are required to provide proper reasons for termination of employment, and merely stating that an employee's services are no longer required will not suffice.

S&E legislations afford the impacted employee with a right to appeal to the concerned authority in cases where no reasonable cause has been cited by the employer.

v Alternate remedies

Some employees (workmen and non-workmen) may also have the right to make a claim in the jurisdictional civil courts for termination-related disputes under the pretext of breach of the employment contract. However, an employee can either seek relief under the special legislation, namely the ID Act (for workmen) or S&E legislation (in the case of non-workmen), or from the civil court for breach of contract. An employee cannot make a claim in both the civil court as well as before the authority under the ID Act or S&E legislation, as the case may be.

vi Disputes relating to sexual harassment at the workplace

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (the POSH Act) aims to protect women employees as well as visiting women and contract workers.

The POSH Act requires employers to:

a frame a policy on the prevention of sexual harassment of female employees;

b set up an internal complaints committee (ICC) to deal with complaints relating to sexual harassment of female employees, in cases where an employer is employing 10 or more employees;

c organise periodic workshops to sensitise employees to prevent sexual harassment; and

d submit an annual report with the jurisdictional labour officer on the number of complaints received and the action taken by the relevant employer.

The ICC is responsible for the following:

a receiving complaints of sexual harassment at the workplace;

b initiating and conducting inquiries pursuant to this policy;

c submitting findings and recommendations of inquiries;

d coordinating with the employer in implementing the appropriate action;

e maintaining strict confidentiality throughout the process pursuant to the POSH Act; and

f submitting annual reports to the employer and district officer as outlined by the policy.

The complainant may file a written complaint of sexual harassment at the workplace to the ICC within three months from the incident or last incident. The complaint must be in writing and signed by the complainant. The ICC may extend the timeline by another three months if satisfied that genuine reasons prevented the lodging of the complaint within the prescribed period.

In cases where the aggrieved employee is unable to file a complaint on account of death, physical incapacity or mental conditions, the complaint may be filed by the aggrieved

employee's relative, friend, co-worker, an officer of the National Commission for Women or State Women's Commission, or any person who has knowledge of the incident with the written consent of the aggrieved individual, as may be prescribed.

Within seven days of receiving the compliant, the ICC must forward the same to the accused for their response. The accused must submit their response along with supporting documents within 10 working days from the date of receipt of compliant. The ICC should conclude the hearing within 90 days from the date of receipt of complaint. The ICC is required to follow the principle of natural justice and hear both the complainant and the respondent. Legal representatives of the parties are not allowed to participate in the proceedings before the ICC.

If requested in writing by the complainant, the ICC may recommend that the employer provide certain interim relief, namely:

a transfer the aggrieved employee or the complainant to any other workplace;
b grant leave of up to three months to the complainant; or
c grant such other relief to the complainant as allowed by the POSH Act or the Rules, including, but not limited to, restraining the complainant from reporting on the work performance of the complainant.

The ICC will after completion of the inquiry submit its finding with the employer of the accused along with appropriate action to be taken, if any, against the accused as per the employer's policy, which could include the ICC recommending termination of the accused.

III TYPES OF EMPLOYMENT DISPUTES

From a general employment perspective, the most common types of disputes that arise between employers and employees relate to:

a unfair dismissal;
b breach of contract pertaining to non-payment of non-statutory incentives;
c harassment and bullying; and
d non-payment of severance compensation.

Additionally, India also has several specific legislations on several other aspects of employment, such as payment of wages, bonus, gratuity benefits, maternity benefits, social security, leaves and holidays, equal opportunities, etc., and each of the specific legislations provides for a specific authority that has jurisdiction to entertain disputes covered under the legislation.

For example, the Payment of Wages Act 1936 regulates the payment of wages of certain classes of employed persons. The authority appointed under the Act has jurisdiction to entertain applications relating to (1) deductions and fines not authorised to be deducted from the wages; and (2) delay in payment of wages beyond the wage periods.

The Maternity Benefit Act 1961 is applicable in respect of an establishment where 10 or more persons are employed, or were employed, on any day of the preceding 12 months. The Act requires employers to provide paid maternity leave of a specified duration to female employees expecting a child. A female employee is entitled to maternity leave only if she has worked for the employer for at least 80 days in the 12 months immediately preceding the date of her expected delivery.

Under the Act, a claim can be made before the jurisdictional labour inspector or authority appointed by the Act for (1) non-payment of maternity benefits; and (2) termination of a female employee during or on account of her absence from work on account of absence due to maternity leave.

The Payment of Gratuity Act 1972 is a social security legislation that requires employers to pay gratuity to employees on (1) superannuation; (2) death or disablement due to accident or disease; or (3) retirement or resignation, provided the person has completed five years of continuous service with the employer. For every completed year of service or part thereof in excess of six months, the employer has to pay gratuity to an employee at the rate of 15 days' wages that was last drawn by the employee concerned. However, the maximum gratuity payable under the Payment of Gratuity Act 1972 is 2 million Indian rupees or such higher ceiling as agreed in the employment agreement.

If the amount of gratuity payable under this Act is not paid by the employer, within the prescribed time, to the person entitled, they can submit an application to the controlling authority appointed under the Act, who shall hear the parties and issue a certificate for that amount to the collector, who shall then recover the same, together with compound interest thereon.

It is important to understand that more than one authority may have seem to have overlapping jurisdiction over a particular matter, and it is important to ascertain the most appropriate authority before which a given claim can be made. For example, in respect of a workman who is covered under the Payment of Wages Act 1936, the claims relating to non-payment of wages during the wage period or unauthorised deductions can be made before the authority under the Payment of Wages Act. However, the issues relating to determination of actual wages can be the subject matter of industrial disputes under the ID Act over which appropriate industrial tribunals may have the jurisdiction.

IV YEAR IN REVIEW

The past year saw the adjudication of quite a few labour disputes in the courts, leading to significant legal developments. A summary of some of the major judgments passed by Indian courts in this field can be seen below.

i M/s Forest Industries (Travancore) Ltd v. The Assistant Provident Fund Commissioner (Kerala High Court)[5]

The Provident Fund Act requires employers to deduct an amount from the wages of their employees, and deposit the same into a provident fund account along with an equal contribution made by the employer. It also levies a monetary penalty along with additional interest on due amounts in events of default of payment by an employer into the employee's provident fund account.

The company in this case was undergoing a serious financial crisis and was unable to make the entire due payment at once. It was held by the High Court of Kerala that under certain special circumstances, the payment of dues for the provident fund by the employer can be made in equal monthly instalments, if there is sufficient cause to do so. However,

5 *M/s Forest Industries (Travancore) Ltd. v. The Assistant Provident Fund Commissioner*, WP(C) No. 6574 of 2022.

the Court also stated that if the employer failed to pay any of the instalments in time, the employee would be entitled to recover the entire due amount at once. This judgment may serve as a relief to employers who have legitimate reasons for their inability to pay dues relating to the provident fund.

ii Horticulture Experiment Station Gonikoppal, Coorg v. The Regional Provident Fund Organisation (Supreme Court)[6]

In this case, the Supreme Court held that there is no requirement of *mens rea* or *actus reus* (criminal intent and commission of a criminal act) for a civil penalty to be imposed. This statement was made while upholding a decision made by the Karnataka High Court regarding a default in payment of dues under the Provident Fund Act.

The judgment held that the penalty for non-payment of dues by the employer under the Provident Fund Act was the only necessary ingredient for imposition of penalty under the Act, and that since it is a civil penalty, there is no requirement of criminal intent for this penalty to be imposed.

iii Jacob Puliyel v. Union of India (Supreme Court)[7]

A public interest litigation was filed in the Supreme Court challenging the constitutionality of vaccine mandates issued across the country during the covid-19 pandemic. It was contended by the petitioner that restricting non-vaccinated persons from public places, and means of earning an income would violate their fundamental right to life and liberty granted by the Indian Constitution. Certain states in India had issued notifications that put the onus on employers to ensure that their employees are vaccinated before they can enter into a workplace.

Certain specific mandates that were challenged included, among others, an order passed by the government of Delhi restricting government employees and school staff from attending their place of work while unvaccinated, as well as a directive issued by the government of Tamil Nadu stating that vaccines were mandatory to enter public places, schools, colleges, factories and shops.

Among other things, it was contended that a vaccine mandate would violate the fundamental right to life and personal liberty granted to every person in India, as compulsory vaccinations would infringe upon individuals' right to personal autonomy.

The Court found merit in the contention regarding the violation of fundamental rights, and stated that the right to bodily integrity is protected under the Indian Constitution and as such, vaccine mandates cannot be mandatorily imposed on anyone if they do not wish to get vaccinated. But the court also recognised the state's right to impose certain limitations on individual rights if it is for communitarian health at large. Further, the Court recommended that all authorities (including state governments), private establishments and educational institutions should review their vaccine mandates, orders and instructions that impose restrictions on unvaccinated individuals in terms of access to public places, services and resources, given the current low rate of infection and spread of the virus.

6 *Horticulture Experiment Station Gonikoppal, Coorg v. The Regional Provident Fund Organisation*, Civil Appeal No(S). 2136 of 2012, 2121 of 2012, 2135 of 2012 and 2141 of 2012.

7 *Jacob Puliyel v. Union of India*, Writ Petition (Civil) No. 607 of 2021

iv Allahabad Bank and Ors v. Avtar Bhushan Bhartiya (Supreme Court)[8]

In a case regarding termination of an employee and a bank, the Supreme Court decided on the question of when the employers' liability to pay back wages arises.

The ex-employee was dismissed from service after an official inquiry into the charges levied on him by the bank. After this dismissal, he filed petitions claiming that the inquiry report was incomplete. In response to this, the bank stated that the copy of the full report was untraceable, and a fresh petition would need to be filed, following which the ex-employee filed a fresh petition, which was allowed by the High Court of Allahabad. The bank was directed to pay 50 per cent of the back wages due to him. Aggrieved by this order, the bank filed a petition with the Supreme Court challenging the payment of back wages, and the same was stayed by the Supreme Court. This stay was then challenged by the ex-employee, and in this challenge, the ex-employee also claimed full back wages as opposed to the 50 per cent.

In the present case, the only question to be determined by the Court was whether the ex-employee is entitled to back wages. After a discussion of the facts, the Court held that the bank was at fault as the full inquiry report was never provided to the ex-employee.

The ex-employee relied on a judgment which had stated that in cases of wrongful termination, payment of the full back wages is normal practice. However, the Court, while discussing this judgment, pointed out that for issues regarding back wages, an employee must assert unemployment, or employment at a lower wage at the first instance possible. Only then does the burden shift to the employer, to either show that the employee was gainfully employed, or if such proof is not provided, pay the back wages. As such, the Court pointed out that there was nothing on record which stated that the ex-employee was not gainfully employed elsewhere after his dismissal from the bank.

Therefore, the Court held that the order passed by the High Court struck a perfect balance in this specific instance, and the ex-employee would be entitled to 50 per cent of the back wages, and not the entire amount.

V OUTLOOK AND CONCLUSIONS

The Indian government, in 2019, introduced four Labour Codes (the Code on Wages, the Industrial Relations Code, the Code on Social Security, and the Occupational Safety, Health and Working Conditions Code) with a view to consolidating and amending the 29 major labour legislations currently enacted in the country. The Codes are meant to facilitate a more streamlined procedure for compliance by employers and employees, as well as resolve conflicting definitions and provisions that exist currently due to the large number of legislations covering overlapping topics. The Codes have been passed by both Houses of the Parliament and have received the assent of the President as well.

The Codes were expected to be enacted sometime in July 2022; however, they have not yet been implemented because the state governments are yet to finalise the Rules for implementation of these Codes. It is anticipated that the Codes will be enacted soon as most states have now already formulated draft Rules.

The Personal Data Protection Bill, which was introduced in the Indian parliament in 2019, contained provisions, among other things, regarding processing employees' personal

8 *Allahabad Bank and Ors v. Avtar Bhushan Bhartiya*, Special Leave Petition (Civil) No. 32554 of 2018 and 9096 of 2019.

data by employer without employees' consent. The Bill was, however, withdrawn in August 2022 due to the need for a major revamp on the basis of recommendations made by the Standing Committee of the Indian parliament. The Information Technology Minister has stated that the Bill will be reworked and introduced in Parliament at a later date after incorporating the appropriate changes. It remains to be seen what impact the new Bill would have vis-à-vis personal data exchange between an employer and employee.

Lastly, with the rise in hybrid work structures and work-from-home arrangements implemented in the aftermath of the pandemic, employers are seeing a significant rise in dual employment cases, wherein employees are on the payroll of multiple employers at the same time. There is no specific law in India that prohibits dual employment or moonlighting, except that such restrictions are prescribed in some regulations governing factories and select Shops and Establishment Acts. Generally, restrictions on dual employment are implemented by way of contractual provisions in employment agreements and policies, wherein employees are prohibited from taking up employment with any other entity, while in active service of the current employer. Moreover, employment agreements also typically contain non-compete provisions – such restrictive covenants during the term of employment have also been upheld by courts in India.

In recent developments, it has been reported that a reputable IT service behemoth in India recently terminated the employment of about 300 employees in India upon finding that these employees were simultaneously employed with the company's competitor. Instances such as this underscore the importance of having clear and robust mechanisms in place to prevent dual employment scenarios, which give rise to business risks such conflict of interest scenarios and risks of breach of confidential or proprietary information.

Appendix 1

ABOUT THE AUTHORS

DISHA MOHANTY

G&W Legal

Disha is a principal at G&W Legal and heads the labour and employment practice. She has extensive experience advising clients on a broad spectrum of employment law matters, which includes advising on statutory compliance, employment audits, large-scale restructuring and retrenchments, data privacy issues, formulation of HR policies and drafting of employment-related documentation as well as supporting HR investigations.

She regularly advises clients on issues such as compensation structure and employee stock options schemes, secondment of foreign employees to India, termination and work force reduction, disciplinary proceedings, retrenchment and restructuring pursuant to mergers, acquisition and transfer of business.

ANUP KUMAR

G&W Legal

Anup is a principal at G&W Legal and regularly provides labour law counselling and advice on termination and work force reduction, disciplinary proceedings, retrenchment and restructuring pursuant to mergers and acquisitions, and also specialises in labour litigation before various forums.

Anup works closely with clients to develop and improve upon corporate compliance programs to minimise risks in the future. He has been involved in carrying out investigations based on whistle-blower complaints into breaches of the FCPA and the (Indian) Prevention of Corruption Act and allegations of fraud and misconduct by employees.

SHIVALIK CHANDAN

G&W Legal

Shivalik is an associate at G&W Legal. He regularly assists client with advice and support on social security contributions, drafting and review of employment documentation such as offer letters, employment agreements, confidentiality and IP assignment agreements, non-compete and non-solicitation agreements, employment handbooks, standing orders, policies on prevention of sexual harassment, data protection and privacy policies, use of company resources, social media policies, work-from-home policies, on-call policies, codes of conduct and covid policies.

G&W LEGAL

C-9 / 9624, Vasant Kunj
New Delhi 110070
India
Tel: +91 11 6134 8306
dishamohanty@gnwlegal.com
akumar@gnwlegal.com
shivalik@gnwlegal.com
www.gnwlegal.com