Q&A

Krishna Vijay Singh

I am the sole proprietor of an advertisement agency based out of Mumbai. My nephew (brother's son) has an inclination towards visual arts and painting. Further to this, he is keen to work with the creative team of my advertisement agency during his vacations for a period of one month after which he might opt to work regularly post his school hours. Since my nephew is only 13 years old, are there any child labour implications?

Please note that as per Section 2 (ii) of Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, your nephew is covered under the definition of a child as he is below the age of 14 years. Section 3(1) of the said Act prohibits the employment of a child in any occupation or process. However, Section 3(2)(a) & (b) of the said Act provides for certain exceptions to Section 3(1) of the Act which are as follows:

a) Where a child helps an enterprise run by his family during vacations or after school hours which is other than hazardous occupations or processes; or

b) When a child works as an artist in an audio-visual entertainment industry, including advertisement, films, television serials or similar entertainment excepting circus.

Please note that your nephew would fall within the definition of 'family' under Section 3 of the Act. Further since you are the proprietor of the advertisement agency and your nephew intends to work with the creative team of your agency in the capacity of an artist, the aforementioned exceptions laid down in Section 3 of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 would apply and no child labour implications would arise in the present case.

I am one of the partners in a start up based out of Delhi. The number of employees are increasing in the organisation. Are there any exemptions relating to labour law compliances for start-ups?

Please note that the Government of India vide its advisory dated January 12, 2016 has granted start ups with the facility of self-declaration for compliance with respect to nine (9) labour laws for the first year from the date of setting up of start ups. As per the advisory a start up may be allowed the facility to file self-declaration with respect to these nine (9) labour laws for a further period of two (2) years if the self declaration option of the first year has been availed by the start up. Many State Governments have adopted the aforesaid recommendation/advisory. There is a further advisory by the Central Government to extend the period to five years and is likely that states will extend it to five years.

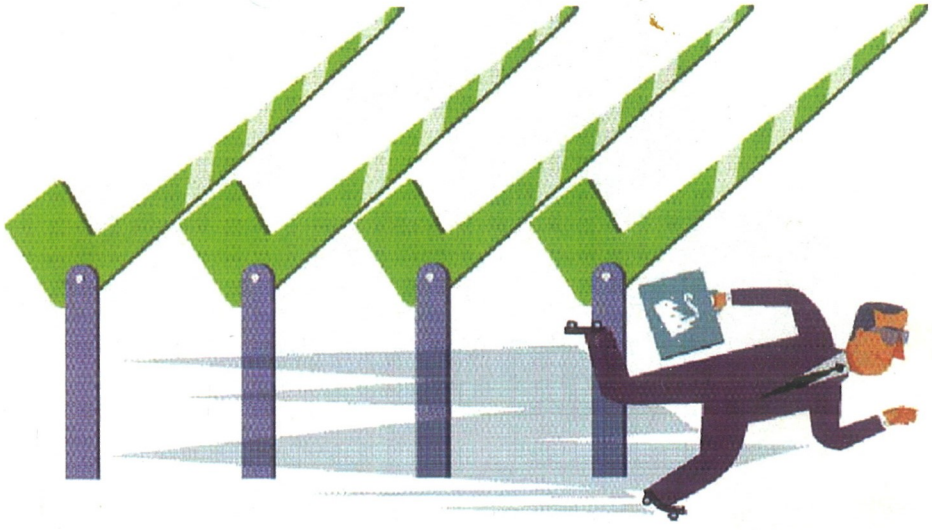
The aforesaid labour laws include Industrial Disputes Act, 1947, Trade Unions Act, 1926, Building and Other Constructions Workers' (Regulation of Employment and Conditions of Service) Act, 1996 and Industrial Employments (Standing Orders) Act, 1946. Other such laws include Inter-State Migrant Workmen (Regulation and Employment and Conditions of Service) Act, 1979, Payment of Gratuity Act, 1972, Contract Labour (Regulation and Abolition) Act, 1970, Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and Employees' State Insurance Act, 1948. Therefore, as per the advisory a self-declaration for the aforesaid legislations would suffice for a start up. Further, the labour department would inspect these start ups (in the first three years) only if there is credible information with respect to any unscrupulous activity or malaise practice.

I am a HR manager in a company based out of Gurgaon. An employee in our Company is pregnant and has applied for maternity leave. We have approved the said leave. Are there any legal requirements that the company needs to comply with pertaining to the said maternity leave?

Please note that the Maternity Benefit Act, 1961 entitles a woman employee to full compensation during absence from work at the time of maternity leaves. The period of maternity leave has been increased to 26 weeks as per Section 5(3) of the said Act (subsequent to the Amendment of 2017) as compared to the earlier period of 12 weeks. Apart from providing leave under the said Act, an employer may permit a woman employee to work from home if the nature of work is such that it can be done from home.

Applicability Of Section 25 Of Industrial Disputes Act In Cases Of Voluntary Abandonment

BY K.V. SINGH



The Industrial Disputes Act, 1947 ("Act") is a legislation which provides for certain safeguards for workmen, including cases of retrenchment. However, very recently, the Hon'ble Supreme Court has laid down the effect of Section 25F of the Act in cases of abandonment of services by the workman.

As per section 2(oo) of the Act, "retrenchment means termination of the services of a workman by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include: -

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned; on its expiry or of such contract being terminated under a stipulation in that behalf contained therein..."

The Act lays down certain provisions and procedures to be followed by employers in case of retrenchment of workmen. The provisions were incorporated in the Act with the objective of giving reasonable opportunity and time to workmen to seek alternate opportunities in the event of retrenchment. They aim to safeguard the workmen's financial interest such that the employers are required to provide reasonable compensation to workmen for sustenance during such times.

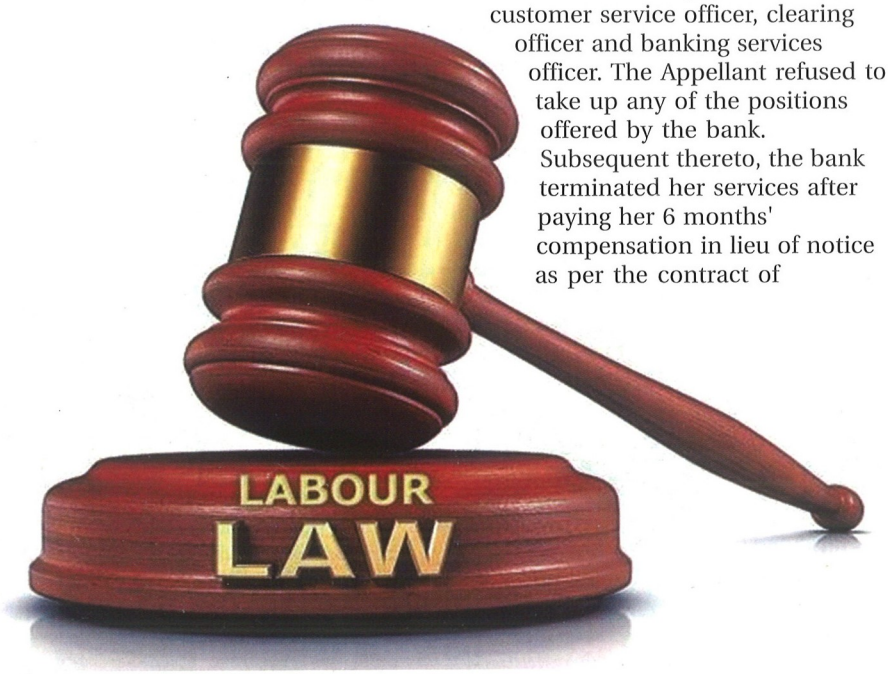
Section 25F of the Act provides for conditions that the employer is required to fulfil before retrenchment of workmen. The said provision provides that no workman who has been in continuous service for not less than one year under an employer shall be retrenched by the employer unless:-

(a) the workman has been given one month notice in writing indicating the reasons for retrenchment and the period of notice has expired; or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part

thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government Section 25B of the Act defines continuous service as "uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or as strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman..."



The Hon'ble Supreme Court of India in the case of Manju Saxena vs. Union of India [Civil Appeal Nos. 11766 - 11767 of 2018] has held that "Once it is established that the Appellant had voluntarily abandoned her service, she could not have been in "continuous service" as defined under S.2(oo) the I.D. Act, 1947. S. 25F of the I.D. Act, 1947 lays down the conditions that are required to be fulfilled by an employer, while terminating the services of an employee, who has been in "continuous service" of the employer. Hence, S. 25F of the I.D. Act, would cease to apply on her". Since the Appellant had voluntarily decided to abandon the service, the Court held that the workman would not be considered to be in continuous service for the purpose of Section 25F of the Act.

The facts of the aforesaid case were that the workman i.e. Manju Saxena (Appellant) was working with HSBC Bank in the capacity of a lady confidential secretary and was later promoted to the position of senior confidential secretary. The post of senior confidential secretary became redundant and the Appellant was offered multiple positions of the same level with the same pay scale i.e. business development officer, customer service officer, clearing officer and banking services officer. The Appellant refused to take up any of the positions offered by the bank. Subsequent thereto, the bank terminated her services after paying her 6 months' compensation in lieu of notice as per the contract of employment and compensation equivalent to 15 days' salary for every completed year of service. The Appellant initiated proceedings against the bank seeking a higher severance package.

The Hon'ble Supreme Court in the aforesaid case has discussed the concept of abandonment from service. The Court observed that the concept of 'abandonment' had been discussed at length in a Judgment delivered by a three Judge Bench of the Hon'ble Supreme Court in the case of Buckingham & Carnatic Co. Ltd. vs. Venkatiah & Ors. (1964) 4 SCR 265 wherein it was held that "abandonment of service can be inferred from the existing facts and circumstances which prove that the employee intended to abandon service".

The Court observed that "In the case before us, the intentions of the Appellant can be inferred from her refusal to accept any of the 4 alternative positions offered by the R2 Bank. It is an admitted position that the alternative positions were on the same pay scale, and did not involve any special training or technical knowhow."

In the aforesaid case, the bank had paid the Appellant a sum of Rs. 8,17,071/- which included 6 months' pay in lieu of notice under section 25F(a) of the Act and an additional amount calculated on the basis of 15 days' salary multiplied by the number of years of service, in compliance with section 25F(b) of the Act. However, no notice was sent to the appropriate government or authority notified, in compliance with section 25F(c) of the Act.

The Court held that since the Appellant had voluntarily abandoned her services, she would not be covered by section 25F of the Act. Therefore, the Appellant was not entitled to any further compensation as claimed by her. In view of the above, it can be safely concluded that in case where the workman has abandoned the service despite being given reasonable opportunity to continue along with the benefits of the previous service, Section 25F of the Industrial Disputes Act, 1947 will not apply. HC

About the Author

KRISHNA VIJAY SINGH is a senior partner at Kochhar & Co., one of the leading and largest law firms in India with offices at New Delhi, Gurgaon, Bengaluru, Chennai, Hyderabad, Mumbai, Dubai, Riyadh, Jeddah, Singapore, Tokyo and Atlanta (USA). The firm represents some of the largest multinational corporations from North America, Europe, Japan and India (many of which are Fortune 500 companies) in diverse areas of corporate and commercial laws.