# Q&A

**We have an industry in Gurgaon. Some of our employees are absconding from work without approval or even intimation. Such uninformed and untimely absenteeism is adversely affecting our productivity and resource use. Please let us know the measures to handle such situations and advise whether we can terminate those employees.**

Under the Model Standing Orders framed under the Industrial Employment (Standing Orders) Central Rules, 1946, 'habitual absence without leave for more than 10 days' is considered to be an act amounting to 'misconduct'. The erring worker may be fined, suspended or even dismissed from the employment if he is found guilty of misconduct.

Habitual or unauthorised absence may be a ground for dismissal of the employee; however, it does not lead to an automatic termination of employment. You must make an attempt to reach out to such absconding employees and give them an opportunity to present their case before their employment is terminated. In catena of decisions, the Courts have emphasised on the requirement of compliance with the principles of natural justice in cases of habitual absence from work. The Hon'ble Supreme Court of India in D.K. Yadav vs. J.M.K. Industries Ltd. (1993-3SCC-259) observed that even when management has the statutory standing powers to terminate the services of an employee who overstayed the leave period, it will be a violation to Article 21 of Constitution of India to do so without giving a hearing to the employee concerned since it will deprive the person of his livelihood. Such an action cannot be held just, fair and reasonable. In this case, the company had terminated the services of the employee concerned as he had willingly absented from duty continuously for more than five (5) days without leave, prior information, or previous permission of the management. However, the court held that in all cases where detrimental action is taken against an employee, the employer is required to justify that such an action was taken for 'just and sufficient' reasons.

Therefore, it is necessary for you to conduct an enquiry and issue a show cause notice to the absconding employees.

**We are an establishment in the service industry and would like to seek your guidance on whether an employee who has been terminated, has collected his final pay cheque and tendered the "No Due Certificate", can ask for any further settlement money?**

On the face of it, a no dues certificate from the employee would suggest that his account with the employer has been settled to his satisfaction. However, it is possible for an employee to raise a demand in case it can be established by the employee that (i) the final settlement cheque was handed over by the employer on the condition that the employee signs a no dues certificate, and the employee was coerced into signing the same; and (ii) the final settlement amount does not reflect the full amount owed by the employer to the employee. Therefore, it is prudent to include a statement of account (counter signed by the employee) along with the no dues certificate or release letter so that the basis of arriving at the full and final settlement is clear and cannot be questioned without good reason.

**We are a factory based in Allahabad and have 300 permanent workers. However, during the crushing season the strength is enhanced up to 900. Please let us know if we are required to appoint welfare officers for the factory? Will the workers employed during the crushing season be considered for calculation of the employment strength with regard to recruitment of welfare officers under the Factories Act?**

Please note that as per section 49 of the Factories Act, 1948, every factory wherein 500 or more workers are employed is required to appoint a welfare officer. Please note that the employees employed during the crushing season would fall within the definition of the term 'worker' as the work performed by them is incidental to or connected with the manufacturing process.

Therefore, in order to ascertain the applicability of section 49 of the Factories Act, the employees employed during the crushing season should be included in the count. In view of the aforesaid, you would be required to appoint a welfare officer. HC

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# Wage Discrimination Between Temporary And Permanent Workmen

- BY **K.V.SINGH AND ANKITA RAI**

India in the 21st century has gone aggressive towards globalisation by not just adopting 'state of the art' industrial infrastructure, but also by implementing internationally ratified labour practices. India is a welfare state where the economic condition of its working class predominantly determines the existence of its social justice. The Supreme Court of India through its exhaustive judgement dated 26th October 2016 in State of Punjab & Ors v Jagjit Singh & Ors1 (hereafter referred as 'Jagjit Singh's case'), has recently clarified the significance and ambit of the doctrine of 'equal pay for equal work' for achieving the said social justice. As per the Supreme Court, the artificial parameters adhered within the present day industries are sufficiently fallacious to unjustifiably deny the fruits of labour. This is substantiated from the state of an employee who is paid less for the same duties and responsibilities, which if undertaken by another, is paid more. Such an action in welfare state is not simply demeaning, but fatal to the human dignity. No workman would voluntarily accede to a lesser pay, unless he is compelled to sacrifice his self-worth, dignity and integrity in exchange for food and shelter for his family. A disparity of this kind, wherein a workman is paid less than he deserves constitutes nothing but an act of exploitative enslavement, emerging out of a domineering position. The Apex Court has been categorical to call such a practice as oppressive, suppressive and coercive.

## Equal work for equal pay

The doctrine of 'equal pay for equal work' is envisaged under Article 14 read with Article 39(d) of the Constitution of India. This doctrine is well entrenched in service-jurisprudence which does not permit its blind and blanket enforcement on the basis of sheer similarity in the nature of the work undertaken. The doctrine cannot be applied in vacuum. The Supreme Court of India in Jagjit Singh's case analyzes and discusses its catena of decisions before finally resetting the parameters for applying the principle of 'equal pay for equal work'. The following are the parameters for applying the doctrine of 'equal pay for equal work':

- The burden to prove that the post occupied by the claimant requires him to discharge equal work of equal value and sensitivity to the post with higher pay, shall lie on the claimant alone.
- The mere fact that the post of the claimant is in a different department to the post with higher pay by itself cannot disallow his claim.
- The doctrine cannot be automatically invoked merely because the pay scale of the posts compared share the same title. Dissimilarity in qualifications, powers, duties and responsibilities are indispensable factors for ruling out the application of this doctrine thereby allowing disparity in the pay scales.
- Differentiation of pay scales for posts with difference in degree of responsibility, reliability and confidentiality fall within the realm of valid classification justifying pay differentiation.
- Persons performing similar functions, duties and responsibilities can be placed in different pay scales such as "selection grade" in the same post, but such a difference must have a legitimate foundation such as merit, seniority, etc.
- The post equated with must be in the hierarchy similar to the post held.
- The doctrine is inapplicable in such a case where the post equated with is in different establishment having a different management.
- The doctrine also stands inapplicable where the post equated with is in an establishment though owned by the same management but located at a different geographical location.
- The doctrine is inapplicable to posts discriminated on the basis of priority under prevalent Government policy thus validating their different pay scales.
- The doctrine stands inapplicable where differential higher pay scale is extended to persons discharging same duties and holding same designation with the objective of ameliorating stagnation or decrease of lack of promotional avenues.
- The doctrine is enforceable only if the claimant is posted through a regular selection process equivalent to the one required for being appointed at the post equated with.

Though the verdict in Jagjit Singh's case was delivered in the context of government workers, it even then strikes at the heart of the prevailing inequity to the workforce in both the public and the private sector, which is basically divided into a two-tier caste system, comprising of regular and contract workers. Also, it is an undisputable fact that only a limited section of the entire workforce is privileged to be employed as permanent workmen. It is also a fact that unlike temporary workmen, the legal benefits attached to permanency include job security, higher wages, better working conditions, provident fund, insurances and many more ancillary benefits.