Q & A

- BY K V SINGH

One of our marketing executives has refused to accept the increment offered by the Company. She is demanding a higher increment and the company is unable to give the increment demanded by her. Please let us know whether this amounts to insubordination, and whether the company can take disciplinary action against her. If not, what are the options before the Company?

The compensation payable to an employee is generally a matter of agreement between the employer and the employee. An employee is entitled to negotiate or demand an increase in his or her compensation. However, it is the prerogative of the employer to reject such a demand, or refuse to grant the increment demanded by the employee. Nevertheless, refusal by an employee to accept the increment offered by the employer will not constitute as an act of insubordination. Disciplinary action merely on the ground that the employee has refused to accept the increment offered by the company is not sustainable.

However, in the present circumstances, as the employee and your company are at disagreement so far as the compensation offered to the employee is concerned, the company may consider communicating to the employee, that in case the increased compensation is not accepted by the employee, it would be deemed that the employee is not desirous of continuing in the employment of the company. You may request the employee to communicate in writing that the compensation offered by the company is acceptable with a specified time frame, failing which, it would be deemed that the employee is unwilling to continue in the employment, and the company may terminate the services of the employee.

The notice period clause in our appointment letter mentions that the time period of three months from both sides would be required for termination of services. One of our marketing executives submitted his resignation 3 weeks back. The employee wants to serve the full notice period of three months. His manager wants to relieve him on completion of one month notice. The employee has indicated that if we ask him to leave earlier, he should be given notice pay in lieu of the remaining two month notice period. What is the legal situation in this respect, if we want to relieve him earlier?

We understand that the appointment letter issued to your employees states that the employment can be terminated by either side by giving a three months' notice. Since the marketing executive, in question has submitted his resignation and given complete three (3) months' notice thereof, if the manager wants to relieve him on completion of one months' notice period only, the employee would still be entitled to salary in lieu of notice for the remaining two months' notice period. However, if the employee himself requests for waiving off the notice period requirement and the management accepts such request, the salary for the remaining two months would not be payable to the employee.

We have a unit where we manufacture automotive components. I am the supervisor and we intend to lay-off certain workmen. I wanted to confirm that whether even laying off just one workman (in an establishment, which employs more than 100 workmen) requires authority approval?

Please note that prior government permission is required for laying off workmen (other than causal or badli workmen) whose names are borne on the muster rolls of an industrial establishment in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months. The requirement of obtaining prior permission is applicable irrespective of the number of workmen laid off including in cases where only one workman is laid off. However, such permission is not required where the lay-off is on account of shortage of power or natural calamity. Further, the requirement of prior permission is not applicable to establishments of a seasonal character or in which work is performed only intermittently. HC

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Amendment of Section 25(O) of ID Act - Closure of Industrial Undertaking

There were no provisions relating to the closure of a business in the Industrial Disputes Act , 1947 (hereinafter referred as "ID Act"). Section 25FFA was inserted vide the amending Act 32 of 1972, giving an unqualified right to an employer to close down his industrial establishment subject to a provision of sixty days' notice. The legislature felt a need to balance the scales for the employees and the employers by accustoming the whole process of closure, with a prior scrutiny for large scale lay-offs, retrenchments and closures pertaining to big establishments. Chapter VB containing Sections 25K to 25S was introduced in the ID Act by the ID (Amendment) Act with a restricted application to factories, mines and plantations (industrial establishments) employing more than 100 workers in order to regulate lay-offs, retrenchments and closure of such Industrial Establishments. For the purpose of this chapter, the nature of the work involved in an industrial establishment should not be of a seasonal character, or only intermittent in nature.

However, Section 25-O enacted as a part of said Chapter VB was struck down by the Supreme Court of India in Excel Wear on the ground that the restrictions imposed by Section 25-O were unreasonable for the following reasons:

(i) Section 25-O did not require giving of reasons in the order;

(ii) No time limit was fixed while refusing permissions to close down;

(iii) There was no deemed provision for according approval in the Section. It was held that the result would be that, if the Government order was not communicated to the employer within 90 days, strictly speaking, the criminal liability under Section 25-F may not be attracted, if, on the expiry of that period the undertaking is closed, but the civil liability under Section 25-O (5) would come into play on the expiry of period of 90 days.

(iv) The order passed by the authority was not subject to any scrutiny by any higher authority or tribunal either in appeal or revision and the order could not be reviewed even after some time;

(v) The employer was compelled to resort to the provision of Section 25-N even after approval of closure;

(vi) The restriction imposed was more excessive than was necessary for the achievement of the object and thus highly unreasonable. It was suggested that there could be several other methods to regulate and restrict the right of closure e.g. by providing for extra compensation over and above the retrenchment compensation.

Thereafter, Section 25-O was amended in 1982 with a view to remove the perversion from which the earlier Section 25-O suffered. Though many high courts had differed in opinion and struck down the amended Section 25-O, the constitutionality of the amended Section 25-O was upheld by a constitutional bench in Orissa Textile following the ratio decidendi of Meenakshi Mills.

For instance, The Karnataka High Court in Stump, Scheuk & Somappa Ltd. V Karnataka while striking down the Section 25-O (as amended) of the ID Act held that it offends Article 19(1)(g) of the Constitution and is not saved by Article 19(6). The Calcutta High Court in Mollins of India v West Bengal found Section 25-O to be ultra vires of the Constitution.

Section 25-O (1) contemplates that an employer who intends to close down an undertaking is required to apply to the 'appropriate government' at least 90 days prior to the date of intended closure date. Subsequently the 'appropriate government' has to pass an order granting/refusing such permission within a period of sixty days from the date on which such application is made otherwise it is considered as deemed permission on the expiration of the 60th day.

In the matter of Orissa Textile , the Supreme Court held that under the unamended Section 25-O, the order was to be passed on a subjective satisfaction of the appropriate Government. Now, in the amended Section 25-O, the words used are "the appropriate Government may, after making such enquiry as it thinks fit, and after giving a reasonable opportunity of being heard to the employer, the workmen and persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, interest of the general public and all other relevant factors by order and for reasons to be recorded in writing, grant or refuse to grant such permission." Thus, now the appropriate Government before passing an order is bound to make an enquiry. Now the order passed by the appropriate Government has to be in writing and contain reasons. As in the case of retrenchment, so also in closure, the employer has to give notice by filling up a form in which he has to give precise details and information. In view of the above, the amended Section 25-O was upheld as constitutionally valid by the Supreme Court.

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1 Act 14 of 1947
2 Act 32 of 1976
3 Excel Wear v Union of India (1978) 2LLJ 527 (SC) : AIR 1979 SC 25 : (1978) 4 SCC 224
4 Orissa Textile & Steel Ltd v Orissa (2002) 2 LLN 853 (SC)
5 Workmen of Meenakshi Mills v Meenakshi Mills Ltd (1992) 1 LLN 1055 (SC)
6 (1985) 2 LLJ 543, 559-60 (Kant)
7 (1989) 2 LLJ 400, 413 (Cal)
8 Orissa Textile & Steel Ltd v Orissa (2002) 2 LLN 853 (SC)