Q&A

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We have recently set up a company in Gurgaon. In accordance with the provisions of the Prevention of Sexual Harassment Act, we had constituted an Internal Complaints Committee in May 2015. I would like to know where is the annual report under the said Act required to be submitted, what is the last date for submission of the said report and whether the report is to be submitted by the Company or the Committee?

In terms of Section 21 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, the annual report is required to be submitted by the Internal Committee to the employer and the District Officer.

The Additional Deputy Commissioner has been appointed as the District Officer in Gurgaon. Therefore, the Internal Committee may submit the report to the Additional Deputy Commissioner cum District Officer with a copy to the Company. The office of the Additional Deputy Commissioner is in Vikas Sadan (opposite Mini Secretariat).

The Act or the Rules do not specify any due date for submission of the report. However, the same should be submitted at the earliest after the end of the calendar year.

An apprentice was engaged in our establishment on a monthly stipend for a period of 1 year. The terms of his engagement were mentioned in an apprenticeship contract. However, the said contract was not registered with the Apprenticeship Adviser. After the expiry of the training period, we did not give employment to the Apprentice. Now he has raised an industrial dispute alleging that his removal is mala fide. Could you please tell us whether he can raise such a dispute?

The Apprentices Act, 1961 ("the Act") regulates & control the training of apprentices in trades and matters connected therewith. Section 7(1) of the Act states that "the contract of apprenticeship shall terminate on the expiry of the period of apprenticeship training". Therefore, you are within your rights to end the engagement of the apprentice once the training period is over.

Further, if an apprentice has any grievance, the legal remedy available to him under the Act is to approach Apprenticeship Adviser and he cannot raise an industrial dispute under the provisions of the Industrial Disputes Act, 1947.

The above is notwithstanding the fact that the Apprenticeship Contract is not registered with the Apprenticeship Adviser. This position of law has been laid down by the Hon'ble Supreme Court in various judgments, including U. P. State Electricity Board vs. Shri Shiv Mohan Singh & Anr, AIR 2004 SC 5009 wherein the Hon'ble Court held that as long as apprentices act as trainees they will be governed by the Apprentice Act, 1961 and not the Industrial Dispute Act, 1947. The Hon'ble Court also pointed out that simply because a contract is not registered with the Apprenticeship Adviser it will not change the nature and character of the engagement of apprentices. HC

Considering special allowances as a part of Provident Fund

Section 2(b) of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 ("Act") defines the term "basic wages" to mean:

"all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include: (i) the cash value of any food concession; (ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment; (iii) any presents made by the employer."

The employers had been interpreting the expression "or any other similar allowance" to mean an omnibus exclusion of all allowances from basic wages and had been calculating provident fund contribution only on Basic Wages and Dearness Allowance. However, the Provident Fund authorities had been contending that the expression "commission or any other similar allowance" is one continuous term meaning thereby that only commission and any allowance similar to a commission is excluded from basic wages, not any other allowance. EPFO had also issued a circular dated November 30, 2012, reiterating this position. The issue has been hotly contested in various High Courts.

It was held by Madhya Pradesh High Court in Surya Roshni Ltd. Vs. Employees Provident Fund and Anr. & Motage Enterprises Pvt. Ltd Vs. Employees' Provident Fund and Anr. That special allowance was liable to be included in basic wages for the purpose of calculation of provident fund contribution. In holding so, reliance was placed upon the judgment of the Apex Court in Bridge & Roof Co. (India) Ltd. v. Union of India , which laid down the following basic principles:

(a) Where a payment is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.
(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example, it was held that overtime allowance, though it is generally in force in all concerns, is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.
(c) Conversely, any payment by way of a special incentive is not basic wages.

Relying upon the said principles, the Hon'ble Madras High Court held in Gordon Woodroffe Ltd. Vs. The Regional Commissioner Employees' Provident Fund that 'special allowance' being paid to workers in the said case would not form part of 'basic wages' since the same was paid only to those workers who agreed to resume working on Saturdays under a settlement agreement and therefore, it did not satisfy the test of universality. Further, a Division Bench of the Madras High Court held in Regional Commissioner, EPF Vs. Management of Southern Alloy that special allowance paid by the employer to the employee as a result of an agreement entered into between the parties could neither be included in the basic wages nor could it be treated as dearness allowance.

One aspect which needs to be considered in this regard is that the central issue in the Bridge and Roofs case was not regarding any allowance but whether a production bonus being paid to the employees was included within the basic wages. The answer to the said question could be easily found in the definition of 'basic wages' itself which specifically excludes bonus. Therefore, the issue whether other allowances should be included in basic wages or not was not before the Hon'ble Supreme Court in the said case.

A special leave petition (SLP) was filed by Surya Roshni Limited in 2012 against the decision of the Hon'ble Madhya Pradesh High Court referred above. The Hon'ble Supreme Court passed an order dated 13.07.2012 thereby staying the judgment of the High Court while directing the Petitioner - Surya Roshni Limited to deposit 60% of the amount demanded.

The decision of the Madhya Pradesh High Court appears to be sound in law and is likely to be upheld. Nevertheless, the possibility of the Supreme Court holding that the observations in the Bridge and Roofs case regarding allowances were obiter and taking a contrary view by allowing the SLP cannot be ruled out. However, until it happens, the decision in the Bridge and Roofs case holds the field.

In view of the aforesaid, the employers should include special allowance and any other allowances which satisfy the test of universality in the basic wages for the purpose of calculation of provident fund contribution. HC

1 2011 LLR 568
2 2011 (130) FLR 1047
3 AIR 1963 SC 1474
4 2011 LLR 29
5 (1981) 2 MLJ 185