

Q & A

One of our male employees has been accused of sexual harassment by a woman employee of one of our clients. The incident allegedly took place at a business meeting at a hotel. We would like to know whether their Internal



K. V. Singh
Senior Partner, Kochhar & Co.

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.

Complaint Committee ("ICC") should inquire into the matter or ours.

We are of the view that the ICC of an organization can conduct an inquiry only against an employee of such organization and not against an outsider. This is apparent from Section 11 (1) of the The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("Act"), the relevant portion of which reads as under:

"Subject to the provisions of section 10, the Internal Committee or the Local Committee, as the case may be, shall, where the respondent is an employee, proceed to make an inquiry into the complaint in accordance with the provisions of the service rules applicable to the respondent and where no such rules exist, in such manner as may be prescribed, or in case of a domestic worker, the Local Committee shall, if prima facie case exist, forward the complaint to the police....."

Thus, Section 11 (1) provides that the Internal Committee will proceed to make an inquiry where the respondent is an employee. In the present case, the respondent is an employee of your company. Therefore, it is the ICC of your company which can take up the inquiry and not the ICC of your client's company since the respondent is not an employee of your client's company.

In this regard, it is also pertinent to refer to the guidelines laid down by the Hon'ble Supreme Court of India in Vishaka vs. State of Rajasthan, AIR 1997 SC 3011 which occupied the field until the passing of the Act. The said guidelines also provided for the constitution of complaints committee by the employers and in the case of an allegation of sexual harassment by an outsider, even the said guidelines only provided for support and preventive action by the employer, and not for inquiry against such outsider. The relevant portion of the said guidelines is also reproduced below:

"10. Third Party Harassment:

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and the person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action."

Therefore, we are of the opinion that it is the ICC of your company that can initiate an inquiry into the incidents not the ICC of your client's company.

I am an employee in a private organization. I had signed an employment contract at the time of my appointment according to which the organization can change my department and

transfer me anywhere in India. However, the certified standing orders of the organization do not allow it to transfer me to any other department. Please advise if my organization can transfer me to another department or not.

Please note that the certified standing orders have statutory force under the Industrial Employment (Standing Orders) Act, 1946 ("Standing Orders Act"). The standing order implies a contract between the employer

and the workman. Therefore, the employer and the workman cannot enter into a contract overriding the statutory contract as embodied in the certified standing orders unless the same is done by way of modification in the standing order as stipulated in the Standing Orders Act. Further, please note that while the standing orders are in force, if there is any conflict between your employment contract and certified standing orders, the certified standing orders will prevail.

In the case of *Western India Match Co. vs. Workmen* (AIR 1973 SC 2650) the Supreme Court held that the terms of employment specified in the Standing Order would prevail over the corresponding terms in the contract of service in existence on the enforcement of the Standing Order. In view of the aforesaid, we are of the opinion that your company cannot transfer you to any other department in the present circumstances. **HC**

Employee Stock Options: The Indian Scenario

A stock option is the opportunity, given by an employer, to own a certain number of shares of the company's common stock at a pre-established price, known as the grant price, over a specific period of time, known as the vesting period.

Section 2 (37) of the Companies Act, 2013 defines the term "employees' stock option" to mean: The rise in the number of start-ups joining the bandwagon for a piece of the lucrative Indian market has led to an increased emphasis on Employee Stock Option Plans (ESOPs) as a means of talent acquisition and retention.

Some of the salient features of general ESOPs are as follows:

- An option is given to employees to acquire equity shares (or other convertible securities) of the company at a future date but the price is fixed in advance;
- The employee has the option to decide whether to acquire the shares/convertible securities or not;
- In case the employee opts for

the shares, he has to exercise an option and pay the agreed price (the employer could also devise cashless schemes, subject to SEBI Guidelines and provisions of the Companies Act, 2013);

- After the lock-in period (if any) the employee can sell the shares and realize the gain;
- The employees holding stock options do not have the right to receive dividends or vote or enjoy any other privileges of a

shareholder till the shares are actually issued on exercise of option, after the completion of the vesting period;

- The options granted to the employees are not transferable to any other person. The option granted to the employee cannot be pledged, hypothecated, mortgaged or otherwise alienated in any other manner.

We have discussed herein below some of the stock option plans/schemes:

1. Employee Stock Option Scheme (ESOS): Under ESOS, a company may grant an option to its employees to acquire shares at a future date at a pre-determined price. The exercise price in such schemes is generally lower than the prevailing market price. The employer may also devise a cashless scheme subject to the SEBI Guidelines and the provisions of the Companies Act, 2013 where the employee is not required to pay any cash for the shares. Eligible employees have the option to acquire shares upon vesting within the exercise period. Employees are free to dispose of

“The option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price.”



the shares subject to lock-in-period if any;

2. Employee Stock Purchase Scheme (ESPS): Such schemes are generally used in listed companies, wherein the employees are given the right to acquire shares of the company immediately (and not at a future date as in the case of ESOS) at a price lower than the prevailing market price. In terms of the SEBI Regulations, shares issued by listed companies under ESPS are required to be locked-in for a minimum period of one year from the date of allotment. However, if ESPS is part of a public issue and the shares are issued to employees at the same price as in the public issue, the shares cannot be subject to any lock-in.

3. Share Appreciation Rights (SAR)/ Phantom Shares: Under this scheme, no shares are offered or allotted to the employee. The employee is given the appreciation in the value of shares between two specified dates as an incentive or performance bonus, that is linked to the performance of the company as a whole, as reflected in its share value.

4. Stock Options of Foreign Holding Company: The Reserve Bank of India has granted general permission to persons resident in India, being individuals, who are employees or directors of an Indian office or a branch of a foreign entity or of a subsidiary in India of a foreign entity or by an

Indian company in which foreign entity has direct or indirect equity holding, to acquire equity shares offered by such foreign entity without obtaining prior approval from the RBI. The aforesaid general permission is subject to the condition that the shares under the employee stock option scheme are offered by the issuing entity globally on a uniform basis and the Indian company files an annual return with the RBI (through the Authorized Dealer) giving details of the remittances/beneficiaries, etc. The participants resident in India, who acquire shares under such a scheme/plan, are entitled to transfer/sell the shares so acquired, provided that the proceeds thereof are repatriated to India immediately thereafter or in any case, not later than ninety (90) days from the date of sale of such shares.

ESOPs may be treated as an instrument for businesses for retaining their employees as there is a lock-in period for exercising the right to purchase the shares. Since a part of the ownership is vested with the workers, it serves as an able mechanism to generate a sense of loyalty towards the organization, along with aiding the stabilization of the company's economic base.

ESOPs have developed as an extension of employee welfare schemes, owing primarily to its operation as a cash-out

mechanism for employees on their retirement. Fettered to this is the dominant notion that companies which offer ESOPs tend to be less likely to lay off the workers. As an equitable company practice, notable here is the sale of 'Taxi For Sure' (TFS) to 'Ola Cabs' (Ola). It has been widely reported that TFS acceded to Ola's buy-out plan over that of other probable buyers, since Ola agreed to retain TFS's 1800-strong workforce along with the existing TFS operators and upon the sell-out, TFS accelerated the equity stock option for its stockholders. It meant that the unvested portion of the options was automatically vested, thereby allowing the employees to immediately exercise their options. Thus, the employees gained benefits out of the sell-out - benefits which were previously earmarked for the promoters and investors.

Owing to the dependence of the share value on company's performance, ESOPs have developed as a vital cog between the employer and the employee. Furthermore, it has helped align the employee's vision with that of the company. In the present corporate setup, it has become a key component for imparting a sense of ownership in the workforce, thereby ensuring that everyone has a stake in the performance and subsequent results of the company. (HC)