Q&A

We are running a software company in Delhi. Recently, we have hired two employees for administrative work of the company. Both the employees have to undergo a probation period of 2 months on completion of which they are to be confirmed automatically. However, we are not satisfied with the services of both the employees and want to terminate their services. Additionally, both the employees have been working in the company since 40 days. Please let me know whether I can terminate service of both of them by giving a short notice period of about 10-15 days.

Please note that if an employer is not satisfied with the performance of an employee on probation, the employer is free to terminate the services of the employee before the completion of probation period subject to the notice period, if any, prescribed in the employment letter or company's policy. Since the basic idea behind keeping an employee on probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment, there is not even the need for an employer to wait for the employee to complete his or her probation period, before termination, if the employer is dissatisfied with the performance. Further, in such situation there is no obligation upon the employer to establish or prove the unsatisfactory performance of a probationer.

In view of the foregoing, we are of the view that you are free to terminate both the employees by giving them 15 days notice. However, such right to terminate shall be subject to the notice period, if any, stipulated under their employment contract or your company's policy, if any.

I run a factory in Gujarat and have 24 people employed in my factory. Last month, one of my employees while coming to the factory in the morning met with an accident and broke his leg and had to be taken to nearby hospital. The employee's wife is now claiming compensation as well as medical expenses incurred due to such accident. Please tell me whether I am liable to compensate the employee in view of the fact that the accident did not take place at the place of employment.

Please note that the law governing employees' compensation (for injury caused by accident) is provided in the Employees' Compensation Act, 1923 ("Compensation Act").

Section 3(1) of the Compensation Act provides for compensation to an employee who sustains personal injury by accident arising out of and in the course of employment. Ordinarily, employment commences when the employee has reached the place of employment and continues till the time he has not left the place of employment. However, there may be a notional extension in both entry and exit time and an employee may be regarded as in the course of his employment even though he had not reached or left his employer's premises.

In this regard, it is noteworthy that courts in India have time and again recognized that the sphere of an employee's employment is not necessarily limited to the actual place where he does his work or when the tool down signal is given by the employer.

Therefore, if any employee meets with an accident while travelling to his work place or while returning from his work place the same may be considered as an accident arising out of and during the course of employment if it is found that the very nature of his employment made it necessary for him to be at the place where the accident occurred. However, if the employee is carrying out his own personal

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work or has gone for his own frolic visit either while travelling to or travelling back from his place of employment or during his employment then in such circumstances the employee may not be entitled for compensation in terms of the Act as the employee was not required to be at that place or time where the accident occurred.

From your query we notice that the accident had occurred while the employee was coming to the place of employment. Since it may be possible to establish that the very nature of the employment made it necessary for him to be at the place where the accident occurred, the accident may be construed as an accident arising out of and during the course of employment. You may therefore be liable to pay compensation to the employee.

Additionally, please note that as per Section 4(2A) of the Compensation Act, you may also have to reimburse the actual medical expenses incurred by the employee for treatment of injuries suffered by him.

Requirement of Continuous Service under the Industrial Dispute Act

In any industry there may arise a situation where it becomes necessary for the employers to reduce their expenditure in order to become financially more solvent. Such circumstances may arise due to the deterioration in business outlook or profit margins. The reduction in expenditure is often in the form of termination of workmen which is akin to downsizing. Additionally, on certain occasions it may become difficult for an employer to carry the economic weight of surplus labour for reasons such as shortage of raw materials, coal or power, accumulation of stocks, break-down of machinery, termination or expiry of client service contracts, etc. The termination may either be in the form of retrenchment which is permanent in nature or lay-off which is temporary.

Keeping in mind the vulnerability of the workmen in the aforesaid situations and to soften the rigor of hardship resulting from workmen being thrown out of employment without their fault, provision for compensating the workmen in the event of retrenchment or lay-off has been incorporated in the Industrial Disputes Act, 1947 (the "Act"). According to Section 25C and 25F of the Act, any workmen who is retrenched or laid-off by the employer is entitled to compensation subject to the conditions stipulated in the Act being fulfilled. One of the conditions required to be fulfilled to entitle the workmen to compensation in case of lay-off and retrenchment is requirement of 'continuous service' by the workmen for a period not less than one year under the employer. The words 'continuous service' ensures that the benefit of compensation under Section 25C and 25F is extended only to workmen who have been in uninterrupted service under an employer for a period of at least one year.

While the provisions of the Act on continuity of service for the purpose of entitlement of compensation under Section 25C and 25F are clear, the determination or computation of 'continuous service' have been a matter of concern for the employers as well as employees. Therefore, a study of the provisions as well as case laws concerning the continuity of service will help us understand the meaning as well as computation of 'continuous service' and view taken by the courts regarding the same.

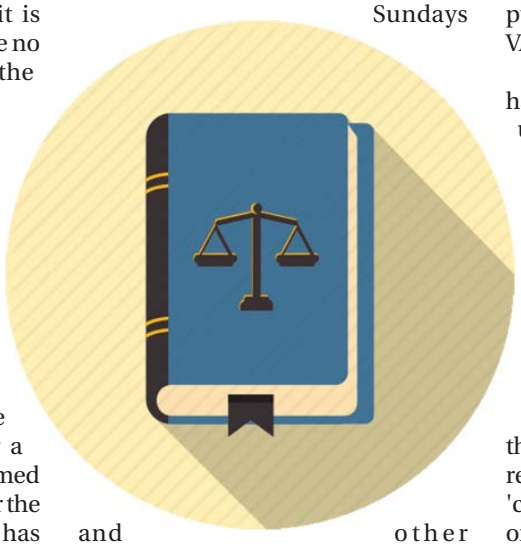
The definition of the expression 'continuous service' is provided under Section 25B of the Act. From the language employed in sub-section (1) of Section 25(B), 'continuous service' means uninterrupted service and also includes service which may be interrupted on account of sickness or authorized leave, accident, strike which is not illegal, lock-out or cessation of work which is not due to any fault on the part of the workman. Thus, the purport sub-section (1) of Section 25(B) is that workmen should be in employment of the employer concerned not only on the days he has worked but also on the days on which he could not work under the circumstances set out above.

Therefore, for an employee to be entitled for compensation under Section 25(B)(1), the requirement is that the employee should have been in 'continuous service' of the employer and the employer must be one and the same. However, it is not necessary that the employee should work in the same capacity during the required period. Further, the term 'continuous service' should not be interpreted to mean that the service of the employee shall be considered interrupted, if he had participated in an illegal strike or had taken any unauthorized leave. In this regard, attention must be drawn towards the observation made by the Bombay

High Court in the matter of Jairam Sonu Shogale vs. New India Rayon Mills Co. Ltd. [(1958) I LLJ 28(B)] wherein the court observed that participation of workmen in an illegal strike does not lead to interruption in continuous service unless the employee is dismissed for such misconduct. The reasoning given by the court for passing such observation was that taking part in an illegal strike amounts to misconduct on the part of the employee and for misconduct an employee invites an order of dismissal. But unless an employee is dismissed from the service for such misconduct, it is difficult to see how there could be no continuity of service so far as the employee is concerned.

Nevertheless, the definition of 'continuous service' is not necessarily limited to completion of one year of service in every year as defined in sub-section (1) of Section 25B. In this regard, reference must be drawn towards sub-section (2) of Section 25B, which provides that if an employee has not been in 'continuous service' within the meaning of sub-clause (1) for a period of one year, he shall be deemed to be in 'continuous service' under the employer for that period, if he has 'actually worked' for 190 days in case he is employed underground in a mine or 240 days in any other case. The rationale behind this sub-section is that if a workmen has not been in 'continuous service' within the meaning of sub-section (1) of section 25B for a period of one year, he shall be deemed to be in 'continuous service' for that period if he has 'actually worked' under the employer for days specified in sub-section (2). While calculating the days on which the workmen has 'actually worked' for the purpose of Section 25(B)(2), employer must ensure that days mentioned in the explanation to sub-section (2) are also taken into account.

The expression 'actually worked under the employer' used in Section 25B(2) is capable of comprehending the days during which the workman was in employment and was paid wages. However, the Supreme Court, in the matter of Workmen of American Express International Banking Corporation vs. Management [AIR 1986 SC 458] was of the view that the expression 'actually worked under the employer' cannot mean those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders etc. Accordingly, the court held that Sundays and other holidays would be comprehended in the words 'actually worked' and discountenanced the contention of the employer that only days mentioned in the explanation should be taken into account for the purpose of calculating the number of days the workman had actually worked. In so far as the daily rated workers are concerned, a different view has been by the courts with respect to the expression 'actually worked'. While dealing with the said issue, the Punjab and Haryana High Court in matter of Ram Gopal v. Presiding officer, Industrial Tribunal-cum Labour Court [2010 II LLJ 395 (P&H)] has held that workmen whose engagement is on daily basis and who is paid salary for the days on which he is actually working cannot be said to be working on holidays for the purpose of reckoning 240 days.



As far as method of calculating 240 days for the purpose of Section 25(B)(2) is concerned, the Supreme Court in the matter of Mohan Lal vs Bharat Electronic Limited [AIR 1981 SC 1253] has held that "…Section 25(B)(2) comprehends a situation where a workman is not in employment of 12 calendar months, but has rendered service for a period of 240 days within the period of 12 calendar months commencing and counting backwards from the relevant date, i.e., the date of retrenchment. If he has, he would be deemed to be in continuous service for a period of one year for the purpose of Section 25(B) and Chapter VA"

As a principle, an employee who has not been in continuous service under Section 25(B) is not entitled to claim compensation for being retrenched or laid-off by the employer. Despite the foregoing, it may not be uncommon that an employee who was not in continuous service may allege continuity of service and claim compensation on being retrenched or laid-off. However, it is pertinent to note that in such circumstances the onus is on the employee to adduce relevant evidence that he has been in 'continuous service' for not less than one year under the employer who has laid-off/retrenched him from the service. Similar view has been taken by the Supreme Court in matter of Range Forest Officer vs. S.T. Hadimani [AIR 2002 SC 1147] where the court held that it is for the claimant to lead evidence to show that he had in fact worked for 240 days.

Therefore, on a conjoint reading of the statute as well as observations passed by various courts, it is clear that sub-section (1) and (2) of Section 25(B) are separate and independent conditions and operate in different field. While continuous service under Section 25(B)(1) requires the workmen to be in uninterrupted service of the employer including the service interrupted for the reasons enumerated therein, Section 25(B)(2) covers those employees under the definition of 'continuous service' who have actually worked for days specified under sub-section (2). HC