Q&A

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I am in business of manufacturing footwear in Maharashtra. Six months back I had hired designers for designing footwear. I had also imparted them practical training for designing. However, recently two of them have left my services after the completion of training and in violation of their employment agreement by not serving notice period of two months required under the employment contract. Further, according to the employment contract they could not leave my services within one year of their employment. Please let me whether I am entitled to claim any liquidated damages or not?

If the employer has invested or expended money on skill enhancement of an employee, the employer may be entitled to recover the same based on an agreement with the employee provided the training or skill enhancement was such that the employee otherwise would not have received as a result of his employment or the work that he undertakes. In other words, the amount claimed should have been spent to enhance or impart new skills, over and above what an employee would otherwise be expected to know or learn in the course of his employment.

Therefore, if you have actually spent money in imparting new skills to the employees concerned, and the employees in question have left your services in breach of their respective contracts of employment, liquidated damages, to the extent stipulated in their contracts, may become payable by the employees to compensate you on account of such breach. In Toshnial Brothers (Pvt.) Ltd. v. E. Eswarprasad & Ors (MANU/TN/0511/1996), the Madras High Court held that a legal injury to the employer can be presumed where the employer establishes that the employee was the beneficiary of any special favour or training or concession at the expense of the employer and there has been breach of contract by the beneficiary of the same. In such cases, the breach would per se constitute the required legal injury. However, it is to be noted that compensation should not exceed the amount, if any, stipulated in the contract and should not be imposed by way of a penalty.

In the circumstances, you may consider filing suits for recovery of damages against the employees in question.

I run a manufacturing unit in Delhi with around 40 workers employed in the unit. One of my workmen had availed 10 days leave on the premise that his mother is hospitalized. However, it has been over twenty days, the said employee is neither reporting to work nor is taking my calls. In such situation, please let me know whether I need to give any notice for termination to the employee.

Please note that absenteeism without approval or intimation to the

employer would amount to misconduct. You may however note that habitual or unauthorised absence may be a ground for dismissal of the employee but it does not lead to an automatic termination of employment. In other words, the employer must also make an attempt to reach out to the employee and give him an opportunity to present his case before his 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 3 SCC 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 of Article 21 of the 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 the aforesaid 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, and thus it becomes necessary for the employer to establish that adequate inquiry was conducted by such employer prior to the termination of the services of the employee and principles of natural justice were followed in such process.

In view of the above, you may consider initiating disciplinary action against the employee and after giving him due opportunity to defend himself, you may proceed to take appropriate action against him if he is found guilty of misconduct in accordance with company policy or the employment contract, as the case may be.

Statutory Protection for Workmen Pending Adjudication of Disputes

The Legal Position

The relationship of an employer and employee is inherently unequal and the Industrial Disputes Act, 1947 (the "Act") was enacted keeping this aspect in mind. The Act is a comprehensive legislation which seeks to protect the workman, who is usually in a disadvantageous situation, from unjust and illegal actions of the employer. While the provisions of the Act are clear, a study of some of the provisions of the Act and the case law around them throws light on how the management has traditionally reacted in a conflict situation, that is, where any conciliation proceedings or any other proceedings before an arbitrator, labour court or tribunal in respect of an industrial dispute is pending adjudication.

Let us consider Section 33 of the Act. Section 33 of the Industrial Disputes Act, 1947 (the "Act") imposes prohibition on the employer from altering the terms of service of its workmen to their prejudice or to terminate their services during the pendency of any proceedings, including conciliation proceedings, in respect of an industrial dispute. The rationale behind Section 33 is simple. No employer takes kindly to a workman questioning an action taken against him by the management, particularly by raising an industrial dispute. If a workman has challenged a disciplinary action taken against him, without regard to the merits, it is usual for the employer to consider such a workman as a trouble maker who the employer should rid itself from. Thus, Section 33 seeks to protect a workman from victimisation by the employer on account of him having raised an industrial dispute.

Notwithstanding the clear provisions of Section 33, it has taken a long time to settle the position of law on the same.

Before we proceed further, it is pertinent to note that sub-section (1) of Section 33 provides that without the prior approval of the authority before whom the proceedings are pending, no adverse action, including dismissal or discharge from service, can be taken by the employer against the workman concerned in regard to matter connected with the dispute. However, sub-section (2) of Section 33 provides that during the pendency of any such proceeding in

respect of an industrial dispute the employer may in accordance with the standing orders applicable to the workman concerned in such dispute (or where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman) (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before commencement of such proceeding; or (b) or for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman provided that no such workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

Therefore, from the language employed in section 33(1), it is obvious that before an employer can discharge or dismiss workmen concerned in the pending dispute, for any misconduct connected with that dispute, he must obtain 'the express permission in writing of the authority' before which the proceeding is pending. In other word, unless the employer has obtained the express permission in writing of the authority, there can be no discharge or dismissal of the workmen. On the other hand, in cases falling under Section 33(2), the employer is required to first dismiss the workmen and then seek approval of the action already taken.

As was natural and expected, employers resorted to Section 33(2) to bye-pass the bar imposed under Section 33(1) of the Act. While an industrial dispute was still pending, a workman would be subjected to disciplinary action after internal enquiry for other alleged acts of misconduct and his services would be terminated. The employers would thereafter move an application before the authority for a post facto approval of the action of discharge or dismissal, as the case may be. It is relevant to note that an employee, having lost his means of livelihood, would usually not have the appetite to fight another legal battle. In this way, the protection envisaged under Section 33, stood defeated to some extent.

Further, in many cases employers would not make an application for the post facto approval of the dismissal or discharge of the workman. The employers, in such cases, took the position that the failure to make an application would only render the employer liable to punishment as prescribed under the Act but would not automatically lead to a reinstatement of the workman concerned since the remedy for the workman against breach of Section 33 lies under Section 33A of the Act. Failure on the part of the employee to approach the court or the tribunal under Section 33A or failure to refer the dispute under Section 10(1)(d) of the Act would therefore disentitle the employee from reinstatement where the employer failed and/or neglected to make the application under Section 33(2). Moreover, this contention was upheld by the Supreme Court in the matter of Punjab Beverages Pvt. Ltd., Chandirarh vs. Suresh Chand & Anr. [1978 (3) SCR 370].

Further, conflicting judgments were rendered as regards the date from which a workman is entitled to reinstatement where an application under Section 33(2) was rejected. One view was that the date of reinstatement has to be the date of dismissal of the workman whereas the other view was that it has to be the date when the application under Section 33(2) is rejected by the authority. Although the Supreme Court in Strawboard Manufacturing Co. vs. Gobind [1962 Supp. (3) SCR 618] and Tata Iron & Steel Co. Ltd. vs. S.N. Modak [1965 (3) SCR 411] had endorsed the view that the date of reinstatement has to be the date of dismissal, however, in the matter of Punjab Beverages Pvt. Ltd a contrary view was taken by the Supreme Court.

The aforesaid loopholes were plugged and the conflicting views were clarified by the Supreme Court of India in Jaipur Zila Sahakari Bhoomi vs. Ram Gopal Sharma & Ors. [(2002) 2 SCC 244]. While examining the conflicting decisions, a constitution bench of the Supreme Court held that failure to make an application under Section33(2)(b) of the Act would amount to non-compliance with the mandatory provision of the Act, which would render the order of the dismissal inoperative. The contention that the order of the punishment/dismissal would not become void or inoperative till the same was set aside under Section 33A was rejected by the Supreme Court. The court held that such an approach of employer destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice and/or harassment because of pendency of industrial dispute.

In so far as the question regarding the order of dismissal becoming ineffective from the date it was passed or from the date of non-approval of the order passed under Section 33(2)(b) is concerned, the Supreme Court endorsed the view taken in the case of Strawboard Manufacturing Co and Tata Iron & Steel Co. Ltd. and stated that the view expressed in Punjab Beverages Pvt. Ltd on the question is not the correct. In view of the above, the Court held that if the approval is not given to the employer under Section 33(2)(b), it will have to be deemed that the order of discharge or dismissal had never been passed. In other words, the relationship between employer and the workman shall come to an end de jure only when the authority grants approval. However, if approval is not given, nothing more is required to be done by the employee, as the employee shall be deemed to have continued in service entitling him to all the benefits available. The court further held that this being the position there is even no need for the authority to pass a separate or specific order for reinstatement of the workmen. HC