Q & A

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I am an employee working in a multinational company and have been employed in this company since two year. I want to make shift from my present company as I am getting a good offer in another company. However, the other company, where I have been offered the job, is a competitor of the company where I am presently employed. Further, at the time of appointment in my present company, I was made to sign an employment agreement which restricts me to join a competitor company for a period six months after resigning from my present company. Please tell me the consequences if I immediately join a competitor company.

Please note that the Indian courts have consistently refused to enforce non-compete clause after termination of the employment contracts by viewing them to be in "restraint of trade". The Indian Contract Act, 1972 ("Act") provides that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. Such covenants are also considered to be against public policy because of their potential to deprive an individual of his or her fundamental right to earn a livelihood.

This principle was appropriately summarized by the Supreme Court of India in Percept D' Mark (India) Pvt. Ltd v. Zaheer Khan (2006), wherein the Supreme Court observed that under the Act, a negative/ restrictive covenant extending beyond the term of the contract is void and not enforceable. Subsequently, even the High Court of Delhi has taken a similar view, in Desiccant Rotors International Pvt. Ltd v. Bappaditya Sarkar & Anr (2008), wherein a senior marketing manager of a company, in his employment agreement agreed that for two (2) years following the termination of his employment, he would be bound by the confidentiality clause of his employment agreement and that he would not compete with the company and/or solicit the company's customers, suppliers and employees. On resignation and within three (3) months of his resignation, the employee joined a direct competitor of the company, as a senior-level employee and started contacting the customers and suppliers of his old company. In the legal proceedings initiated by the company against the employee, the High Court reiterated the aforesaid principle. It was held that the individual's fundamental right to earn a living by practicing any trade or profession of his or her choice cannot be curtailed. The arguments taken by the company that such restrictive covenants were primarily designed to protect its confidential and proprietary information was brushed aside by the High Court and the court ruled that in the clash between the attempt of employers to protect themselves from competition and the right of employees to seek employment wherever they choose, the right of livelihood of employees must prevail.

In view of the above, it is clear that such non-compete obligation extending beyond the termination of employment contract are not enforceable. Therefore, in our view you are free to join any company after resigning from your present company.

We are a company engaged in manufacturing of cloth. We are in process of acquiring a leather manufacturing division of another company. The employees of that division company we are acquiring have provident fund account which vests with private trust, whereas our provident fund is maintained with the regional provident fund commissioner. Please let us know how to get the PF account transferred from trust to regional provident fund commissioner?

From your query, we understand that you want to transfer the provident fund accounts from trust ("Trust") to regional provident fund commissioner ("RPFC'). For the purpose of such transfer, the transferred employees will need to submit an application for transfer to you in Form No.13 as provided under Employees' Provident Fund Scheme. Pursuant thereto, you would have to forward the forms to the Trust with a copy to RPFC. Upon receiving the forms, it would then be upon the Trust to effect the transfer.

Additionally, please note that the Employees Provident Fund Organisation has also started allotting Universal Account Numbers ("UANs") to employees which are linked to the employees' provident fund money. Upon a change in employment, the new employer is required to link the employee ID assigned to the employee with the UAN. Therefore, if the employees of division company which is being acquired have been allotted UANs, they would not be required to fill Form 13. They would only need to provide their respective UANs to you, subsequent to which you will then have to link the employee ID allotted by you to the UANs and the provident fund would be automatically transferred/linked. HC

Termination of Employment of Probationary Employees - Legal Issues

Where there is uncertainty regarding suitability of a candidate for a particular job, it is usual to offer employment to such candidate on a probation basis. As the name 'probation' suggests, the employment offered is to ascertain or test the suitability of the employee on probation for the job. Consequently, it is clear that so long as an employee is on probation, continuation of his or her employment is not certain, and is subject to the employer being satisfied that the employee is suitable for the job.

The employment letter or the contract of employment may prescribe the manner in which the suitability (or confirmation) is to be communicated by the employer. It could be express or implied. The terms of the employment letter or contract may prescribe that the employee would be deemed to have completed his or her probation period successfully at the end of the probation period unless his or her employment is terminated prior to the date of probation period or the probation period is extended. Alternatively, the employment letter or contract may provide that probation period would continue till such time a confirmation is not given in writing by the employer.

In the event the 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. It is also settled law that the employer is not under an obligation to establish or prove the unsatisfactory performance of a probationer through an enquiry prior to terminating his or her services. Nevertheless, it is important for employers to be aware of the legal issues surrounding termination of an employee on probation.

The termination is valid so long as it is done by a non-stigmatic order. In this regard, it is noteworthy that the Indian courts have consistently held that the termination of a probationary employee is to be done by a non-stigmatic order and principle of natural justice need not be followed while passing such order. Reviewing the case law will also assist

us in understanding how the courts have interpreted 'stigmatic' and 'non-stigmatic' orders.

The Supreme Court of India in the matter of Chaitanya Prakash and Anr. Vs. H. Omkaraappa [(2010)2SCC623] observed that the termination order referring to the unsatisfactory services of the probationer cannot be said to be stigmatic and there is no need to follow the principles of natural justice while terminating the services of a probationer. Recently, Delhi High Court in The Managing Committee of Shiksha Bharati Senior Secondary Public School Vs. Director of Education and Anr. (2013) has taken a similar view wherein the respondent who was a primary teacher working on probation with the petitioner /school, was terminated by the school with immediate effect before the expiry of extended period of probation. The issue which came up for adjudication before the court was whether termination order stating that the employee lacked professional capability or was negligent and careless or her conduct was deplorable and had indulged in acts of indiscipline and insubordination would amount to order being stigmatic. The Hon'ble Court held that "law with respect to termination of services of a probationer is now well-settled and has to be by a non-stigmatic order. However, it has been held that stating that the performance is not satisfactory or giving of facts in the termination order will not amount to the termination order being a stigmatic one. Also the principles of natural justice have not to be followed before termination of services of a probationer. If an enquiry is held and the enquiry report forms the foundation of termination of services of a probationer, only then, principles of natural justice are required to be followed, however, where the enquiry against a probationer is only for determining employee's suitability for continuing in service and the enquiry report only forms the motive for removal (as differentiated from a foundation for removal) then, a detailed enquiry in terms of the service rules is not necessary."

Similarly, reference must be made to the judgment in the matter of Shri Syed Mohiuddin Ashraf & Anr. Vs. M/s. Central Electronics Limited (2013) wherein the Hon'ble Delhi High Court had taken the same view, with respect to the termination orders of the petitioners who were working with the respondent as probationary engineers. In the present case it was contended by the petitioners that their orders of termination were void as they are violative of principles of natural justice, arbitrary, stigmatic and punitive in nature and without any reason as the petitioners had rendered satisfactory services. In the present case, the Hon'ble Court brushed aside the contentions taken by the petitioners and it was held that the principles of natural justice need not be followed while terminating the services of a probationary officer. In so far as the plea of stigmatic order is concerned, the Hon'ble court observed that since the orders of termination only states that petitioners are unfit for continuing their work thus, the expression used in the order cannot be said as stigmatic in nature.

Additionally, in Progressive Education Society v. Rajendra [(2008)3SCC310], the Hon'ble Apex Court examined the correctness of the order passed by the School Tribunal quashing the termination of the service of respondent No. 1 on the ground of unsatisfactory performance during the period of probation and observed that "The law with regard to termination of the services of a probationer is well established and it has been repeatedly held that such a power lies with the appointing authority which is at liberty to terminate the services of a probationer if it finds the performance of the probationer to be unsatisfactory during the period of probation. Unless a stigma is attached to the termination or the probationer is called upon to show cause for any shortcoming which may subsequently be the cause for termination of the probationer's service, the management or the appointing authority is not required to give any explanation or reason for terminating the services"

Therefore, on a conjoint reading of the above observations by the various courts it is abundantly clear that once the facts stated in the termination are only the reasons and the conclusions for holding that the employee is unsuitable for his services, then the order cannot be said to be stigmatic. However, if the order imputes something more than unsuitability for the post in question then the order may be considered to be stigmatic. Moreover, it is not necessary for an employer to follow principles of natural justice even when the termination of the probationer is ordered on the ground of unsatisfactory service.

However, care should be taken by the employer in the event the employee is discharged by the employer on the basis of misconduct or if there is a nexus between the allegations of misconduct and discharge. In such an event, the order of termination, even if couched in language which is not stigmatic, may amount to a punishment for which a departmental enquiry may be imperative. HC