Q & A

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I am a permanent worker in a factory in Delhi. My employer since past month has laid-off several employees in the factory. However, he is not ready to give us compensation by citing reason that we were not in his continuous service. Kindly advice whether I am entitled to compensation for lay-off or not?

Please note that the law governing lay-off is contained in the Industrial Disputes Act, 1947 (The "ID Act"). According to Section 25C of the ID Act, a workman who has been laid-off is entitled to compensation if the workman's name is borne on the muster roll of the establishment and has completed a continuous service of one year. Further, such a workman is entitled to compensation equal to fifty percent of the total basic wages and dearness allowance which would have been payable to him had he not been laid-off.

It is to be noted that a workman to be entitled for compensation for lay-off should be in continuous service of the employer for the specified period. Section 25B of the ID Act defines continuous service. As per section 25B(1), a workman is said to be in continuous service for a period, if he provides for such period uninterrupted services, which includes interrupted service due to sickness, accident, strikes which are not illegal, lock out or cessation of work not due to the fault of the workman. Therefore, the period during which the workman was out of the office on account of illness, lock outs, etc is not excluded while computing the continuous service.

However, if a workman is not in continuous service within the meaning of section 25(B)(1), then the service will be construed as continuous in terms of section 25(B)(2) for a period of one year if the workman has, in the preceding twelve months, actually worked under the employer for two hundred and forty days. Further, while computing continuous service under section 25(B)(2), number of working days of a workman will include days:

a. on which he has been laid-off under an agreement or as permitted by the standing orders.
b. when he has been on leave with full wages, earned in the previous years.
c. he has been absent due to temporary disablement caused by accident arising out of or in the course of his employment.
d. on which the female employee was on maternity leaves, not exceeding 12 months.

Accordingly, if you worked under the employer for a period of minimum 1 year or have worked in the preceding twelve months for at least 240 days, then you are entitled to get compensation for your lay-off.

I am a factory owner in Haryana. I recently got standing order certified for my factory. However, there are certain issues arising with some of the certified standing orders which I want to modify. Kindly tell me some way to get these orders modified.

Please note that Section 10 of the Industrial Employment (Standing Order) Act, 1946 ("IE Act") contains the provision for modification of the standing orders. Under section 10 of the IE Act, standing orders which are certified are not allowed to be modified for six months from the date on which the standing orders

came into force or the last modification thereof came into operation. Accordingly, an application for modification of the standing orders can be made thereafter to the certifying authority. Please note that while dealing with such an application Certifying Officer will follow the same procedure as that prescribed for certification of standing orders.

We are running a factory in Delhi and are in process of retrenching several employees. We have also two managers and an accountant working in factory. Though notice of retrenchment as per existing law has been given to all of them but they are demanding additional compensation on the ground that no such terms were laid down during their appointment. Please let us know whether we can retrench them or not.

Please note that provision regarding retrenchment is given in ID Act. It may however be noted that the provisions relating to retrenchment under the ID Act extend only to the workman. ID Act defines the term 'workman' as any person employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. However, it does not include those employees that are employed in managerial, administrative or supervisory capacity (provided an employee in supervisory position is drawing wages equal to or more than ten thousand rupees per month).

The role of an Accountant may vary from case to case depending upon the facts and circumstances. The courts have held that the work of an accountant is mainly clerical in nature unless he is vested with supervisory or administrative duties. It has been held that merely signing of salary cheques does not exclude a person from the purview of the definition of workman [Punjab Co-operative Bank Limited vs. R.S. Bhatia (1975 (31) FLR 326 (SC)].

I wish to clarify that a person other than a workman cannot be retrenched under the ID Act. Thus, the provisions relating to retrenchment under the ID Act will not apply to the 'managers' working in managerial capacity. Notwithstanding the above, as indicated, whether a person is a workman or not has to be determined keeping in view his overall role, functions, responsibilities and the salary that such person draws. If the 'managers' are not workman, termination of their services would have to be in accordance with the employment contract. HC

Enforceability of employment bonds in India

Over the last decade, change in business environment due to globalization has resulted in greater business competition. To survive this competition, organizations have been competing for skilled employees to ensure better products and services. The increase in demand for skilled workers together with their limited availability has created a war of talent amongst these organizations.

To cope up with this competition, organizations often invest huge amount of time and money on imparting training and skills to their employees. Unfortunately, several of them after acquiring these valuable skills, move out of the organization for better prospects thereby causing huge loss to the employer, which , from the perspective of an employer, cannot be compensated merely by money. The employer in order to safeguard its interest often makes its employee sign an employment bond. These bonds are contracts / undertakings given by the employee wherein employee agrees to serve the employer compulsorily for a certain minimum fixed period of time failing which the employee promises to furnish / pay the amount as specified in the bond. Such promise not to leave the employment for a specified period is usually a negative covenant. Often, along with the bonds, the employers also obtain some kind of security, such as signed undated cheques. The purpose is to deter the employee from leaving the employment before the specified time period.

However, in the current scenario, the most pertinent issue that comes to our mind is whether such method to retain employees is effectual, acceptable and enforceable under the law. Such contracts, in appropriate circumstance, can be challenged on the ground that they restrict the fundamental right of the employee to profess his or her trade or profession. Further, the validity of such bonds would also depend on whether the bond is in fact a valid contract under the Indian Contract Act, 1872 or not. A contract is valid only if it has been made with free consent of the parties, i.e. without force, undue influence, misrepresentation and mistake.

As far as validity of the contracts with respect to the negative covenant is concerned, these contracts have been held to be valid if the

organization has invested resources on personnel training or skill enhancement of the employee. Thus, the employer is entitled to recover damages only if money has actually been spent in providing training to the employee, such training being such that the employee otherwise would not have received as a result of his employment or the work that he undertakes. The amount spent has to enhance or impart new skills, over and above what an employee would otherwise be expected to know or learn in the position that he holds in the company.

Therefore, if the employer has actually spent money in training the employee as aforesaid, and there is a breach of contract by the employee, liquidity damages, as stipulated in the contract or the bond may become payable by the employee to compensate the organization for the time and money spent on the training. 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. Generally courts in India do not grant damages automatically merely because the employment contract executed says so. In order to ensure that liquidated damages or compensation are granted by the court, the organization may have to prove the loss incurred because of the employee's early departure from the services.

While granting liquidated damages under the employment bond, Courts apart from going into the legal injury caused to the employer also take into consideration factors like actual loss suffered by the employer, period of service already completed by the employee under the contract and other conditions, if any, stipulated under the contract. Only after going into these factors, courts determine the loss suffered by the employer to reach a reasonable compensation figure. For instance, in the case of Sicpa India Limited vs Shri Manas Pratim Deb (MANU/DE/6554/2011), the employer incurred expenses, while imparting training to the employee for which an employment bond was executed. According to the bond, the employee was to serve the employer for period of three years or to make payment of rupees two lakhs to the employer. The employee left the employment within two year of signing the bond. To enforce the agreement the employer went to the court, which awarded sum of only Rs 22,532 to the employer as against the compensation amount of Rupess two lakhs stipulated in the contract. While coming to such conclusion, the Court relied upon the law laid down by Supreme Court regarding liquidated damages. The law with respect to liquidated damages have been crystallized by the Supreme Court vide two landmark decisions. First is the decision in case of Sir Chunilal V. Mehta And Sons, Ltd vs The Century Spinning (1962 AIR 1314), wherein it was held that liquidated damages are not in the nature of penalty and can be awarded as mentioned in the contract if loss from the breach of contract cannot be calculated for the remaining period of the contract. Whereas, in the case of Fateh Chand vs. Balkishan Das (AIR 1963 SC 1405), the provision of liquidated damages in the nature of penalty was held to be void, since the actual damages could be calculated and, thus the liquidated damages were held as the upper limit which are to be paid once the actual damages are proved. Since in the present case the damages could be calculated, Court considered the total expenses borne by the employer and the period of service completed by the employee under the contract and thus, divided the total expenses incurred into three parts for three years and awarded the damages for the remaining one year of the employment due to the breach of contract.

Therefore, from the above discussion, it is evident that employment bond stipulating a specified sum as payable by the employee in case of breach of contract is enforceable only if employer has actually spent money on the employee against a promise from the employee that he or she would not leave the employment for the specified duration and has consequently suffered a loss on account of the employee having received the training and leaving the employment before the stipulated period in breach of the employment bond / contract. With the employees in our country free to decide their employment these bonds play an important role to protect the interest of the employer and enable the employer, in appropriate circumstances, to recover the money spent or incurred by the employer in case of an early resignation by the employee. HC