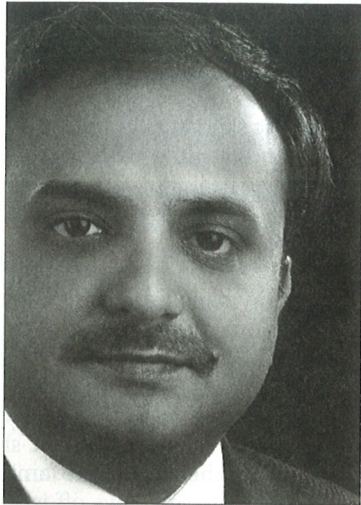


Q & A



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.

I run a factory in Tamil Nadu, which is covered within the ambit of the Employees' State Insurance Act, 1948. All my employees in the factory are insured under this Act. I timely pay the required contribution to the Employees State Insurance Corporation. Due to some reasons, I could not pay the contribution within the due date. Please tell me do I need to pay any penalty for the delay in payment.

Please note that as per Section 39(5) (a) of the Employees' State Insurance Act, 1948 ("ESI Act"), any delay in payment of the contribution by the employer attracts interest at the rate of 12% per annum. The said provision has also been reproduced hereunder for your ease of reference:

"39.(5)(a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the regulations till the date of its actual payment..."

However, in certain circumstances the law carves an exception on levy of such interest if the delay in payment of contribution was due to reasons beyond the control of the employer. The said view was backed by the Madras High Court in the case of Fenner (India) Ltd. v. Joint Regional Director, Employees' State Insurance Corporation (2003) 2 LLJ 447 (Mad.), wherein the Hon'ble Court specifically held that in cases where the employer fails to pay the required contribution and such

failure is due to the circumstances beyond his control or if the situation makes it impossible for the employer to pay the contribution even if he wants to make the payment, then the failure will not attract the penalty as specified in Section 39(5)(a) of the ESI Act.

The exemption provided under the aforesaid judgment, would become applicable to you only if the delay was despite your willingness to timely make the contributions and for reasons which were clearly beyond your control. However, if such is not the case, you would be duly liable to the penal interest of 12% per annum for the duration of the delay in making your contribution towards the Employees State Insurance Corporation under the ESI Act.

I was working in a Bank in Faridabad. Since, I had to pursue my studies I resigned from my service. As per the rules of the company, I had to serve one month notice period, which I had done. During this one month period, I was made to work much beyond the working hours to complete an ongoing project. Due to the work pressure I also had to work on a national holiday. As per the policy of the company, I am entitled for overtime but the policy is silent on the amount of overtime to be awarded. On last day of the notice period, I was paid overtime as per my normal wages. Considering the facts and circumstances, please tell me about the law governing overtime wages of my company. The law regarding leaves and payment of overtime wages is

contained in the Punjab Shops and Commercial Establishments Act, 1958 (the "Act") and the Rules framed thereunder.

The Act provides for the regulation of conditions of work and employment in shops and commercial establishments, which also includes Banks. The Act also provides for provisions regarding entitlement of overtime wages to people employed in such shops and establishments.

Section 7 of the Act prescribes that no person shall be employed about the business of the establishment for more than forty-eight hours in any one week and nine hours in any one day. It further prescribes that on occasions of seasonal or exceptional pressure of work a person employed in an establishment may be employed about the business of the

establishment in excess of the aforesaid working hours, provided:

a) the total number of overtime hours worked by an employee does not exceed fifty within a period of any one quarter; and

b) the person employed overtime shall be paid remuneration at twice the rate of his normal wages calculated by the hour.

In the event your working hours extended beyond the maximum working hours prescribed above, you are entitled to claim wages at twice the rate of your normal wages for every hour beyond nine hours in a day or forty eight hours in the week.

I further note from your query that you were also made to work on a national holiday. Please note that as per Section 12 of the Act, every employee in a shop or commercial establishment is entitled to:

a) a holiday with wages on the

Independence Day, Republic Day and Mahatma Gandhi's Birthday; and

b) five other holidays with wages in a year in connection with such festivals as Government may declare from time to time by notification.

As per the provisions of Section 12 of the Act, if the 'national holiday' mentioned in your query falls within the ambit of the aforesaid days, you will be entitled to receive wages that are twice of the rate of your normal wages calculated by the hour for that particular day.

Accordingly, please note that subject to the criterion laid down in the Act, you will be entitled to wages at twice the rate of your normal wages for every hour of work beyond the prescribed working hours and also for every hour of work on the said national holiday.

HC

Compassionate Employment in India

In a developing and populated country like India, one keeps coming across situations where a government servant, who is the sole bread earner of the family, dies in harness or gets retired on medical grounds, thereby leaving his family in penury and without any means of livelihood. In order to address such situations, the Government of India, provides a scheme for recruitment by way of compassionate employment. It is a central government supported scheme which aims at providing protection against socially recognized indigent conditions such as financial hardships or disabilities. The applicability of the scheme is extended to the government servants including the

members of the armed forces, who die during the service or are killed in action or become medically unfit for employment.

As the name suggests, the scheme has been created with the purpose of meeting the sudden crisis occurring in a family on account of death or medical invalidation of the sole bread earner of the family, while he/she was in service. The scheme offers employment in Group 'C' posts against the direct recruitment quota to the member of such a family in crisis. The basis of providing employment on compassionate grounds is to allow a family to tide over the immediate financial loss and hardship, which the family may

suffer on account of such a loss and thus limits appointments on compassionate grounds only to dependent family members of the deceased / incapacitated employee. However, such appointment is subject to certain pre-requisites such as eligibility and suitability of the applicant for the post in all respects under the provisions of the relevant recruitment rules.

Since the purpose of the compassionate appointment is to provide immediate financial assistance by way of employment, it is manifest that there are certain exemptions given under the scheme to the applicant. For the applicants under the scheme, the general recruitment requirements

are skipped like procedure through staff selection commission or the employment exchange, clearance from the surplus cell of the Department of Personnel and Training/Directorate General of Employment and Training, ban orders issued by the Ministry of Finance on filling up of posts issued. The applicants under the scheme are also entitled to other relaxations, which include reduction in the upper and lower age limit, though in case of lower age no relaxation can be given below the age of 18 years. Apart from the above relaxations, the government in exceptional circumstances may recruit persons not immediately meeting the minimum educational standards by engaging them as trainees who will be promoted to the grade pay only on acquiring the minimum qualification prescribed under the recruitment rules.

In order to ensure that the scheme does not become an alternative recruitment process, it provides a ceiling limit of 5% for making compassionate appointment against vacancies falling under direct recruitment quota in any Group 'C' post. The said ceiling cannot be exceeded by the use or conversion of vacancies in any other quota. The Government has integrated an added benefit by waving the time limit for making an application under the scheme. Besides the above, the Government has also incorporated a special provision for appointment on belated request for deaths or incapacitations of employees that may have taken place long time in the past. Interestingly, while the concept of compassionate appointment is based on the immediate relief needed to the family, the provision of belated request can be considered as paradoxical to the concept of the scheme itself, since the family was able to manage somehow in all the years passed up to the

date of the application. Therefore, examination of appointments in these cases calls for a greater circumspection by the concerned authorities.

The scheme stems from the noble initiative of the government to address the problems of the families so that they can come out from the sudden trauma due to unexpected death or medical disability of the earning member of the family. However, the scheme must not be misunderstood as an alternative or parallel method to the general recruitment procedure and therefore, the employment provided under this scheme should not be considered as a windfall or a right to get appointed in government service since sole objective of compassionate employment is to enable the family of the deceased to overcome the sudden economic crisis. This view also stems from the judgment of the Apex Court in the case of *MGB Gramin Bank v. Chakrawarti*; AIR 2013 (SC) 3365 wherein the Hon'ble Court opined that compassionate employment should not be considered as a right given to a person. In another case, while taking a dogmatic view of the relaxations provided under the scheme, the Hon'ble Court stated that a person who does not possess the required qualification cannot even apply for recruitment, for the reason that his recruitment would be contrary to the rules and would, therefore, be void in law. The observation of the Supreme Court may have a sweeping implication on the applicants under the scheme for the reason that the Government will not be in a position to consider even a slight relaxation, as the person is now debarred to apply for the post if he / she does not meet the eligibility criteria.

Nonetheless, the fact is that

such a category of recruitment is violative of the principle of equality enshrined in our constitution which provides that there can be no discrimination in public employment. In normal course, while making appointments, the state or instrumentality has to consider all the eligible candidates but in certain circumstances, where the situation is such that the family of the deceased may starve, the exception to the general rule has to be considered.

Though, the Government has taken a significant step to address the social concerns of the aggrieved families covered under the scheme, however, the bigger issue is about the mindset among the people who consider compassionate appointment as a right vested with them. The fact is that compassionate appointment is to be provided to overcome the sudden economic problems of the dependants of the deceased employee and not to provide employment on compassionate basis dehors the constitutional scheme of employment. Compassionate employment cannot be claimed as a matter of right and in no circumstances should be treated as another parallel method of recruitment. Perhaps, it cannot be denied that such a method of appointment is an exception to the right to equality but these appointments also serve as a means of livelihood to certain families. It is imperative that such appointments continue but their constitutionality must also be preserved by ensuring that every such employment is in accordance with the eligibility criterion, rules, regulations or administrative instructions governing the employment, also taking into consideration the financial condition of the family of the deceased / resigned employee. HC

¹ State of Gujarat & Ors. Vs. Arvindkumar T. Tiwari & Anr. AIR 2012 SC 3281

² Union of India & Ors. v. Shashank Goswami & Anr. AIR 2012 SC 2294