

# Q & A

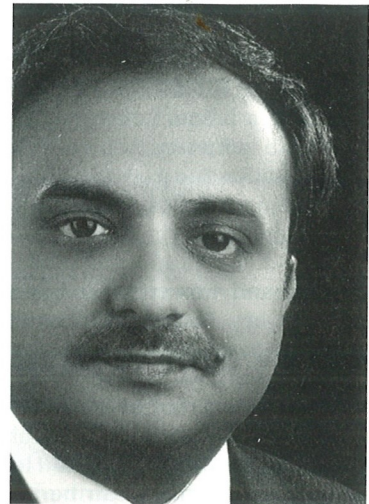
**I was an employee with a public sector company but was retrenched two years ago after having worked with the company for over an year by giving one month salary. Can you please enlighten me of the situations in which retrenchment can be termed illegal and whether I can file an application for reinstatement if my retrenchment was illegal?**

**Answer:** From the facts stated in your query, I understand that the relevant provision of law governing retrenchment in your case was Section 25F of the Industrial Disputes Act, 1947. For the application of the conditions under Section 25F, an employee should have been in the employment of the company for at least one year before the date of retrenchment. Further, as per the said provision, a legal retrenchment is subject to three conditions. Firstly, either one month's notice stating the reasons for the retrenchment is given to the employee, or in alternative of the notice, one month's salary is given to the employee retrenched. The second condition is that the employee must be paid compensation in terms of clause (b) of Section 25E, at the time of

retrenchment. And finally, the appropriate Government or authority needs to be notified of the retrenchment. Besides, you may also note that the employer is required to follow the last in first out principle during retrenchment, unless there are good reasons recorded in writing for not following the said principle.

I note that the first condition has been satisfied in your case and you have been given one month's salary in lieu of the notice. However, it appears that retrenchment compensation has not been given and that a notice to the appropriate government in terms of clause (c) of Section 25F of the Act may not have been given. It is also not clear if the last in first out principle was followed or not. In the event any of the aforementioned conditions were not met in your case, the retrenchment could be termed illegal and you may refer the industrial dispute with the competent labor court for reinstatement and back wages.

Although Limitation Act, 1963 is not applicable to the reference made under the Industrial Disputes Act, however, delay in raising the industrial dispute is



**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.

definitely an important circumstance which the labour court may consider while granting relief. I understand that it has been about two (2) years since your services were terminated on the ground of retrenchment.

You may note that where the retrenchment is illegal, the labor courts may take into account factors like manner, nature and length of employment, the reasons for retrenchment and also the delay in raising the industrial dispute while passing in award in favour of the workman. In certain circumstances, including in cases where there has been a long delay in raising the industrial dispute, and reasons for retrenchment show that reduction of work force was essential for survival of the company, a labour court may substitute monetary compensation for a reinstatement in case of illegal retrenchment.

**My husband was employed at a local factory. Unfortunately, my husband passed away a few months ago in an accident. My lawyer wants proof of my husband's salary. Since I do not have the original, he is suggesting the claim can be made based on minimum wages act. I have a photocopy of the salary certificate. Please tell me the better way?**

**Answer:** The photocopy of the salary certificate alone may not be sufficient to prove the salary of your husband. I suggest that you approach the employer of your husband to provide you an original salary certificate. In addition, or in any case, you should lead evidence through a witness employed at the local factory where your husband was employed, and who has issued the salary certificate, to corroborate the genuineness of the salary certificate and the

factum of last salary of your husband. Besides, I suggest that you also submit the bank statement of your husband where salary was credited and this aspect may also be further corroborated by a witness from the bank. The above should not be difficult.

Proceeding with your claim on the basis of wages specified by the government under the Minimum Wages Act, 1948 may not be prudent. The government sets the minimum wages under the Minimum Wages Act, 1948 for specified category of employment and every employer in the specified category is required to pay a salary/wage to the employee which is not lower than the minimum wages specified by the government under the Minimum Wages Act. In other words, the last salary of your husband would be at least equal, if not more, than the minimum wages. Making a claim on the basis of minimum wages should only be considered if for some reason the last drawn salary of your husband was lower than the minimum wages applicable to his category of employment under the minimum wages.

As stated earlier, it may not be advisable to proceed with the claim merely on the basis of a photocopy of the salary certificate issued by the local factory/employer. In the event the said salary certificate is not proved by a witness from the employer and the factum of the last salary of your husband is not established, the court may calculate the compensation taking the salary of your husband in terms of the Minimum Wages Act, 1948.

**My company has recently recruited new employees. I have been told by some of them that in their previous organization they were being paid bonus as a part of their monthly salary. But, as per the Bonus Act, there is not specific requirement of a monthly payment of bonus. Can you please confirm.**

I confirm your understanding that

under the Payment of Bonus Act, 1965 ("Bonus Act") there is no specific indication of monthly bonus payments. The amount of bonus payable under the Act is determined annually, depending on the profits of the establishment (or 'available surplus') in an accounting year. Similarly, the eligibility of an employee (covered under the Bonus Act) to receive bonus is also based on the number of days on which the employee has worked in an year. Therefore, if payment is made on a monthly basis, an employee may still claim any balance that he would be entitled upon completion of the accounting year, if the bonus so calculated is higher than the amounts paid to him on a monthly basis.

Further, you may note that as per section 19 of the Bonus Act, all amounts payable to an employee by way of bonus under this Act are required to be paid within a period of eight (8) months from the close of the accounting year. In case of any dispute regarding bonus payment pending before any authority in terms of the Bonus Act, the bonus is required to be paid within a month from the date on which the award becomes enforceable or the settlement comes into operation, in respect of such dispute.

Although it is clear that the amount of bonus payable under the Act is determined on an annual basis, however, the same is required to be paid within eight (8) months from the close of the accounting year. Thus, it is possible to pay the bonus with respect to a particular accounting year on a monthly basis; however, the entire bonus, even in the case of monthly installments should be paid within a period of eight (8) months from the close of the accounting year. (HC)



# Bullying at workplace

**A** call from the editorial department of Human Capital in early January and I thought it was to convey greetings for the New Year. I could not have been more wrong, and I soon realized that I was being bulldozed to write about 'bullying at workplace'. My meek protests were casually brushed aside and I was given a tight deadline. Left with no choice, I got down putting some mind to the subject. Soon, several memories flashed through, the first of a great bull that had decided one day not to allow anyone past him on the road outside our house. As we dared to squeeze past in our old but strong ambassador car, it looked menacingly at the poor car, and without any further cause, repeatedly smashed it with its powerful blows. Eventually, we had to leave the car and get back home after the bull had lent its fury, and had parked itself in front of the badly dented vehicle. Thankfully, it was soon persuaded by the municipality to Lord amongst the cows at the local Gaushala enclosure, much to our relief.

On a more serious note, bullying is not the sole prerogative of the bulls. In the initial years of my practice, tales abounded of several advocates who would throw files at their juniors, wrapped in the most colorful and offensive expletives, at the flimsiest reason. Work spaces appear to have improved since then, and we rarely come across such overtly insulting and abusive behavior. Nevertheless, it would be wrong to assume that the malice has disappeared completely. It appears that the proverbial bull now displays its traits in a more private and personal manner at the workplace, often targeting the intended victim when she or he is alone.

Bullying as such is not defined by law. In order to define and understand workplace bullying, let us consider its attributes. Firstly,

there has to be a power imbalance where the target feels she or he is not in a position to oppose or defend against the actions of the bully. This could be for a variety of reasons, such as, the superior position of the bully at the workplace or the social support that the bully enjoys within the workplace due to peer support or support from those in powerful position. Secondly, there has to be an element of malice and aggression. In other words, there has to be an intention to victimize and humiliate the target. Thirdly, such humiliation should have continued for some time, that is, it should not be a one off incident. It would be very difficult to call a single incident or a series of incidents that have ceased without any reason as bullying. If there is malice, the abuse would continue and not cease without intervention or a cause. Fourthly, there should also be an element of increase in the aggression or victimization over a period of time.

There is no legislation in India specifically dealing with the issue of bullying at workplace. This is still a matter primarily within the purview of the organization and it is for the organization to frame effective policies that discourage bullying. Needless to say, bullying affects employee morale and can result in lower productivity.

Further, sometimes the employers may also resort to bullying for a variety of reasons, including in order to decline increments or promotions to deserving employees, or to avoid legal obligations such as payment of retrenchment/severance compensation, or to discourage employees from objecting to favoritism and discrimination or from exercising their right to organize collectively. In so far as acts of bullying by the employers are concerned, the Industrial Disputes Act, 1947 includes some of them within the definition of 'Unfair Labor

Practices'. Such unfair labour practices are punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both. Some of the acts that are construed as Unfair Labor Practices include , (i) to interfere with, restrain from, or coerce, workmen in the exercise of their right to organize, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; (ii) discharging or dismissing a workmen by way of victimization or in the colorable exercise of the employer's rights, or for patently false reasons or in utter disregard of the principles of natural justice; (iii) showing favoritism or partiality to one set of workers regardless of merit; (iv) discharging or discriminating against any workman for filing charges or testifying against an employer in any enquiry or proceeding relating to any industrial dispute; and (v) indulging in acts of force or violence.

However, the said Act applies only to workmen, and excludes employees at a managerial level or supervisory level. The Factories Act, 1948 also provides for special provisions with respect to the health, safety, welfare, working hours, leaves etc. of the workers in a factory but as the name of the legislation suggests, the applicability is restricted to premises where manufacturing process is carried out. These welfare measures help in containing the possible abuse of workmen at factories which could put their health and safety at risk. Similar provisions in respect of other organizations are provided under the shops and establishment legislations, enacted at state level. However, both these legislations do not provide for provisions relating to behavioral bullying at workplace.

The Industrial Employment (Standing Orders) Act, 1946 is another piece of legislation which aims to protect employees from unnecessary harassment by requiring employers to formally define the conditions of employment vide the concept of standing orders, a contractual document governing the terms and conditions of employment including suspension or dismissal for misconduct, and acts or omissions which constitute misconduct. The said legislation

also creates an obligation on the employer to provide for means of redressal of complaints of the employees. However, the applicability is restricted only to certain industrial establishments.

Coming back to bullying at workplace that does not involve the employer, the attributes described earlier may not apply where such exploitation or victimization is that of a woman employee. It is difficult to distinguish whether a particular victimization of women is pure non-sexual bullying or sexual harassment. In both cases, there is malice. The only difference is that sexual harassment necessarily includes victimization with a view to seek or obtain sexual favors. For a person accused of sexual harassment of a woman employee, it would be difficult to establish that the bullying was not with a view to seek sexual favors. As you may have noted, in case of sexual harassment, which is another form of bullying, repetitive or continued harassment may not be necessary and a single incident is sufficient to establish the same.

It may also be pertinent to note that sexual harassment at workplace is no longer a workplace matter alone. The recent amendments to the Indian Penal Code have also made sexual harassment a cognizable offence punishable with imprisonment which may extend to three years, with or without fine. The enhanced punishment for assault or criminal force with the intent to outrage the modesty of a woman and the new definition of rape in the Indian Penal Code also provide further protection to women at workplace.

It is difficult to define bullying at workplace and even more difficult to frame a comprehensive legislation covering all aspects of bullying. Organizational factors contribute to fostering and enabling bullying. Bullying on the part of the employers, leave employees bitter and dejected. Employees who are allowed to mistreat others create a culture of distrust and dissatisfaction. Ultimately, it is for the employers to learn how to create a positive work environment which does not encourage bullying and the bull is confined to bullying at the 'Gaushala'. (HC)

<sup>1</sup> Section 25U of the Industrial Disputes Act, 1947

<sup>2</sup> Section 2(ra) read with the Fifth Schedule to the Industrial Disputes Act, 1947