

Q&A

Were a business consultancy company registered as a commercial establishment in Haryana. We operate our establishment five (5) days a week from 10 AM to 6 PM. As a company policy, we do not make any employee work overtime, unless there is a business exigency. However, some of our employees keep sitting in the office even after the office timings even when they are not required by their managers to work overtime. Do we still have to pay them overtime wages?

Please note that just being present at the workplace beyond the normal working hours does not entitle any employee to overtime wages. The Punjab Shops & Commercial Establishments Act, 1953 ("PSCA") stipulates the normal daily and weekly hours of work, and requires an employer to pay overtime wages, when an employee is made to work beyond such maximum working hours. Working overtime typically connotes a situation wherein the employer requires an employee to work beyond the normal working hours. In cases where there are no such instructions whatsoever from the employer to work overtime, the employee cannot claim overtime wages.

Nonetheless, to ensure that there is no dispute or misunderstanding between your company and the employees on this issue, you may consider incorporating clear provisions on overtime work and wages in the employee handbook or employment policies, if you do not have them already. You may also put down a clear and transparent process by which the managers can instruct an employee to work overtime and all such instructions should be recorded. This would deter an employee from making false claims for overtime wages. You may also consider discouraging employees from sitting idle at the workplace beyond office hours.

We are a private company registered

under the Companies Act, 1956. Is there anything which our company needs to take note off while terminating a manager who has been with the company for over ten years due to misconduct?

There is no special consideration required in terminating a manager who has worked for your company for more than ten years. However, please note that termination of the manager for misconduct may lead to challenge of the termination on the ground that the manager has not been afforded an opportunity to defend himself against the charge. You should therefore conduct an enquiry, and take action commensurate with the misconduct, if established. Separately, if the employment contract provides for severance of employer-employee relationship at will by serving advance notice, you may consider exercising the said option.

We are a US company, listed on the New York Stock Exchange. Our company, under the Omnibus Plan, is considering to grant Restricted Stock Units ("RSUs") to its employees in a number of jurisdictions including seven employees based in India. The Omnibus Plan intends to provide a means of rewarding and retaining the key personnel/employees of our Company. The RSUs shall be granted to the employees by way of an agreement inter alia containing name of the employee, date of grant and other terms and conditions governing the RSU as provided in the Omnibus Plan. The RSU so awarded will be released to the employee, free of cost, in accordance with the vesting schedule provided on the cover sheet of every such agreement subject to fulfillment of the conditions specified by the Committee. Advise briefly on exchange control legislation which may affect the grant of awards, the delivery of shares under awards, or the disposal of shares?

We understand that RSU Plan is a type of employee stock option plan (ESOP).



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Broadly, you may note that the regulations issued by the Reserve Bank of India ("RBI") under the Foreign Exchange Management Act, 1999 ("FEMA") govern the acquisition and disposal of shares of a foreign parent company under ESOPs to Indian residents. Please note that the RBI has granted general permission to individuals resident in India to acquire shares of a foreign company under Cashless Employee Stock Option Plan, which refers to an acquisition of shares of a foreign company by an employee without any remittance from India. Since your Company is considering granting its employee(s) RSU's free of cost, the employee(s) will not be required to remit any consideration for RSU's, and therefore, the same would fall within the ambit of Cashless Employee Stock Option Plan mentioned above. In other words, FEMA regulations permit the acquisition of shares of foreign companies under ESOP schemes by the Indian residents. However, at the time of sale or transfer of the shares so acquired by Indian employee(s), the proceeds from sale or transfer are required to be repatriated to India. 

An Act Of Misconduct

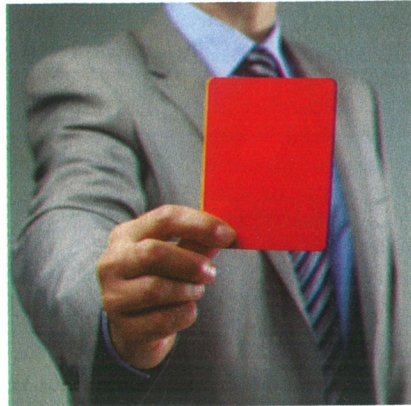
BY KRISHNA VIJAY SINGH

Misconduct is understood as an unacceptable conduct by an employee while discharging his duty, and can include acts like non-observance of duty, non-performance of work, negligence, absence without leave, strikes, go-slow, gherao, acts subversive to discipline, insubordination, disobedience, riotous and disorderly behaviour, or damage to property. Misconduct also encompasses acts like theft, dishonesty and fraud, disloyalty, moral turpitude, corruption etc.

The Supreme Court in the case of *Govinda Menon v. Union of India* affirmed the decision of the Queen's Bench in *Pearce v. Foster*, in which it was upheld that if a servant conducts himself in a way inconsistent with faithful discharge of his duty in service, it is misconduct. Misconduct need not be misconduct in carrying of the service or the business. It is sufficient if it is conduct which is prejudicial, or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovered at the time, but also if he discovers it afterwards, in taking action against the servant.

In *Mahendra Singh Dhantwal vs Hindustan Motors Ltd. & Ors*, the Supreme Court gave a wide meaning to the term 'misconduct' by stating that an act can be considered to be an instance of misconduct even if it is not mentioned in the model standing orders or certified standing orders of the company, provided that the act strikes on the purposeful functioning of the establishment and cannot be condoned. However, in the *Glaxo Laboratories* case, the Court took a different stand by declaring that if there was no enumeration of an act of misconduct in the standing orders of the company, a new ground of misconduct cannot be invoked to hold the employee liable *ex post facto*.


In *Life Insurance Corporation (LIC)*, the employee was suspended for his alleged misconduct as he had, in discharge of his duties, issued as many as seven receipts including special premium receipts to policyholders without receiving any premium amount from them. The appellant employee, in substance, admitted the



issuance of receipts by him, and also admitted non-receipt of the amount against any of the said receipts from any of the policyholders. He, however, contended that such mistake occurred on his part due to heavy pressure of workload on him and some family circumstances/worries that were troubling him during those days.

The main issue that came before the Court was whether lack of profit or loss caused due to the misconduct of an employee is a valid defence. The Court held that an employee, in discharge of his duties, is required to exercise higher standard of honesty and integrity. In a case where he deals with the money of the depositors and customers, it is all the more necessary for him to be more cautious in his duties because he deals with the money transactions for and on behalf of his employer. Every such employee/officer is, therefore, required to take all

possible steps to protect the interest of his employer. He must, therefore, discharge his duties with utmost sense of integrity, honesty, devotion and diligence, and must ensure that he does nothing, which is unbecoming of an employee/officer. Indeed, good conduct and discipline are inseparable from the functioning of every employee/officer of any Institution, and more when the institution deals with money of the customers. Any dereliction in discharge of duties whether by way of negligence or with deliberate intention or with casualness constitutes misconduct on the part of employee/officer.¹

Every such employee/officer is, therefore, required to take all possible steps to protect the interests of his employer. He must, therefore, discharge his duties with utmost sense of integrity, honesty, devotion and diligence, and must ensure that he does nothing, which is unbecoming of an employee/officer. It was further held that there is no defence available to a delinquent to say that there was no loss or profit resulting in a case when officer/employee is found to have acted without authority. The very discipline of an organisation, and especially financial institution, where money is deposited of several depositors for their benefit is dependent upon each of its employee, who acts/operates within the allotted sphere as a custodian of such deposit. Acting beyond one's authority by itself is a breach of discipline, and thus constitutes a misconduct, rendering the delinquent to suffer the adverse orders.² 

1. *Damoh Panna Sagar Rural Regional Bank v. Munna Lal Jain*, (2005) 10 SCC 84.
2. *Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik*, (1996) 9 SCC 69.