

## Spotlight: discontinuing employment in India

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#### **Discontinuing employment**

The termination of employment, whether on a large scale or for a single employee for convenience (and not for cause, such as termination on disciplinary grounds), would be held to be either retrenchment or termination of services, depending on the category of the employee under applicable Indian law.

##### i Retrenchment of workmen

As mentioned in Section I.i, the ID Act applies to an employee who qualifies as a workman. Under the ID Act, retrenchment would mean termination of a workman's contract for any reason other than as a punishment by way of disciplinary action.

In an establishment (other than a factory, mine or plantation with a minimum of 100 workmen), an employer must follow certain conditions for retrenchment of workmen who have been in continuous service<sup>7</sup> for a minimum of one year, namely:

1. to provide the workman with one month's written notice indicating the reasons for the retrenchment or make payment in lieu thereof;
2. to provide the workman with 15 days' pay for every year or part thereof in excess of six months of continuous service; and
3. to serve notice to the appropriate government.

From a practical perspective, many companies do not provide this notice (especially if only a few employees are being retrenched) because they fear that this may lead to enquiries by the labour authorities. However, not providing the notice would be a violation of law.

For establishments employing at least 100 workmen, prior approval would need to be obtained by the employer from the appropriate government before effecting retrenchment. The notice period required to be given to the workmen would increase to three months. The government may enquire into the reason for the proposed retrenchment and give the involved parties an opportunity to be heard. Approval for the retrenchment would be given only after such a hearing.

Under the ID Act, the employer needs to follow the principle of 'last come, first go' in the event of retrenchment. An employer is statutorily required to retrench the workman who is the last to have been hired in the particular employment category in the establishment, unless:

1. the requirement is contracted out by both parties; or
2. the employer can provide valid reasons for deviating from the requirement.

An employer should have reliable and sufficient evidence to justify the deviation from the rule, preferably in the recorded employment history of the employees.

An employer is not required to provide any alternative employment to retrenched workmen. However, a retrenched workman has a right to priority in the event of any rehiring – an employer is required to offer employment first to those workmen who were retrenched by it and are citizens of India.

Notification of employee representatives is not required in cases of retrenchment unless there are recognised employee representatives or a trade union and the agreement with that body or union requires notification, especially for large-scale retrenchments. From a practical perspective, an employer would hold a meeting with the affected employees or workmen and explain the termination requirement to them, and thereafter commence the formal retrenchment process.

Notwithstanding the provisions of the ID Act in relation to retrenchment, if a workman's employment agreement has better termination provisions (such as a longer notice period or severance pay), the employer would be bound by the same.

#### ii Termination of non-workmen

The SEA may specify a notice period to be provided to all employees, including non-workmen. For example, under the SEA in Karnataka, an employer is required to provide one month's written notice or wages in lieu thereof for any employee who has been in continuous employment for six months. Further, the employment contract would need to be examined for termination of non-workmen and related severance conditions.

In practice, an employer may ask for the resignation of the employee rather than terminate his or her contract. Most employees are willing to resign as it is a face-saving way for them to leave the company. If this method is used, it should not be a reason to deny the employee any due compensation under the law or contract.

#### iii Termination for misconduct

The aforementioned rules may not apply to the termination of an employment agreement as a result of misconduct. For example, the SEA in certain states (including in Karnataka) mentions that the notice period requirement need not be followed if the employee is being dismissed for misconduct. Dismissal because of misconduct would occur in the event of a breach of the rules of the employer or objectionable conduct. An employer can provide detailed rules in the employee manual or appointment letter of what an employee can and cannot do in the workplace.

If the dismissal of an employee (in particular, a workman) is by way of disciplinary action, the employer would need to follow the principles of natural justice and the guidelines that have evolved from various court decisions, including proving the misconduct of the employee. Additionally, if there were any standing orders or service rules applicable to the dismissal, the same would need to be followed. Broadly, to prevent the possibility of an employee challenging his or her dismissal before a court of law on the grounds of *mala fide* intentions, victimisation, etc., it is recommended that an employer follow this procedure:

1. issue a charge sheet or a show-cause notice on the employee;
2. hold a domestic inquiry (a single individual may be appointed as an officer to conduct the inquiry). The inquiry officer should not be directly involved in the conduct in question and, preferably, should not be the immediate superior of the employee;
3. peruse the report of the inquiry officer; and
4. issue an order of dismissal.

An order of dismissal may be challenged in a labour court and, if it is found to be flawed, the court has the power to order reinstatement with continuity of service, back wages and consequential benefits.

#### iv Termination under employment contract

An employment contract would normally mention a notice period or payment in lieu thereof for termination of employment other than for misconduct. In the case of senior management this is likely to be three months, and in the case of other employees this would be one month. In practice, at the time of the termination, the employer would check whether the compensation payable under law is more than that prescribed under the contract.

