Q & A

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.

We are a pharmaceutical company modifying our standard employment agreements for employees. Can we include a clause for 'cashing-out' unavailed annual leaves by the employees at the end of the year?

Provisions for leave entitlement and encashment of earned leave vary from State to State, and, is governed by a state's Shops and Establishment Act, where the establishment is located. The Shops and Establishment Acts specify the number of days an employee is entitled to earned leave, casual leave and sick leave, and the number of days of unavailed earned leave that can be carried forward or encashed. Generally speaking, the employer is required to pay the employee the amounts due towards unavailed leave at the time of severance of employment. Since the law may vary from State to State- there are limitations on the number of unavailed earned leaves that an employee may accumulate.

Thus, the rights of the employee in respect of leave and encashment thereof, are protected by law. The employer is required to provide leave benefits, which are at least equal to the leave benefits required to be provided by the Shops and Establishment Act. An employee cannot claim benefits greater than those provided under the Shops & Establishment Act, unless there is an employer-employee agreement to the contrary. However, an employer is free to provide greater benefits than those provided under the Act.

Could you confirm if the statutory bonus payments under the Payment of Bonus Act be prorated on the basis of joining date of an employee?

We confirm that the statutory bonus payable under the Payment of Bonus Act, 1965 ("Bonus Act") can be prorated on the basis of an employee's joining date. The Bonus Act provides for proportionate reduction in the bonus payments in cases where the employee has not worked for all the working days in an accounting year. Please note that an employee would be deemed to have worked in any accounting year on the days on which:

(a) he/she has been laid off under an agreement or as permitted by standing orders under the applicable law;
(b) he/she has been on leave with salary or wage;
(c) he/she has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and
(d) he/she has been on maternity leave with salary or wage, during the accounting year.

I was working at a private management college as an associate professor. The college recently issued a discharge notice to me one month before expiry of my 1 year probation. Though I have approached the court and got an injunction, please advise if I have a good case?

Please note that in the event the employer is not satisfied with the performance of an employee on probation, the employer is free to terminate the services of the employee before the completion of probation period subject to the notice period, if any, prescribed in the employment letter or company's policy. The basic idea behind keeping an employee on probation is to give the employer an opportunity to evaluate the employee's performance and / or suitability before confirming the appointment. If the employer is dissatisfied with the performance of the probationer, the employer may either extend the probation period, or, terminate the employment of the probationer. In respect of a probationer, the employer is not required to establish or prove the unsatisfactory performance of the probationer through an enquiry prior to terminating his or her services. Nevertheless, it is important to be aware of the legal issues surrounding termination of an employee on probation. In the absence of enquiry, the termination is valid so long as it is done by a non-stigmatic order. Reviewing the case law will also assist us in understanding how the courts have interpreted 'stigmatic' and 'non-stigmatic' orders.

The Supreme Court of India in the matter of Chaitanya Prakash and Anr. Vs. H. Omkaraappa [(2010)2SCC623] observed that the termination order referring to the unsatisfactory services of the probationer cannot be said to be stigmatic, and, there is no need to follow the principles of natural justice while terminating the services of a probationer. Once the facts stated in the termination are only the reasons and the conclusions for holding that the employee is unsuitable for the services, then the order cannot be said to be stigmatic. However, if the order imputes something more than unsuitability for the post in question then the order may be considered to be stigmatic. However, in the event the employee is discharged by the employer on the basis of misconduct or if there is a nexus between the allegations of misconduct and discharge, the same would come within the purview of a stigmatic termination. In such an event, the order of termination, even if couched in language which is not stigmatic, may amount to a punishment for which a departmental enquiry may be imperative. In my view, if the discharge from service has been on the ground of non-suitability, or any other non-stigmatic reason, you may not have a good case against the college.

Equal Pay, Equal Work

- BY **K.V.SINGH**

The Supreme Court in State of Punjab v. Jagjit Singh, in 2016, posed an old question to India's labour movement, which was whether there is a mechanism by which there could ever be justice done to the norm of 'Equal pay for Equal work' for all the employees of the Country.

The instant case arose out of conflicting judgments of the Punjab & Haryana High Court where the High Court had analyzed the question as to whether temporary employees (daily-wage employees, ad-hoc appointees, employees appointed on casual basis, contractual employees and the like) are entitled to the same wages as that of permanent employees, if they discharge similar duties and responsibilities as that of permanent employees. The Punjab & Haryana High Court, in the case of State of Punjab v. Rajinder Singh & Ors. took the view that temporary employees would not be entitled to the minimum of the pay-scale as was being paid to similarly placed permanent employees. However, the Punjab & Haryana High Court in State of Punjab & Ors. v. Rajinder Kumar took a contrary view, and, held that temporary employees would be entitled to minimum of the pay scale, along with permissible allowances (as revised from time to time), which were being given to similarly placed permanent employees.

In light of the conflicting views, the matter was referred to a full judge bench of the Punjab & Haryana High Court in Avtar Singh v. State of Punjab & Ors. The full judge bench of the Punjab & Haryana High Court, while adjudicating upon the issue, concluded that temporary employees are not entitled to the minimum of the regular pay-scale merely on account of the fact that the activities carried out by daily wagers and permanent employees are similar. However, this rule was subjected to two exceptions, wherein temporary employees would be entitled to wages at par with permanent employees:

1. If the temporary employee has been appointed in a regular sanctioned post after undergoing a selection process based on fairness and equality of opportunity to all other eligible candidates.
2. If the temporary employee has been appointed in a post which is not a regular sanctioned post, however, their services have been availed continuously, with notional breaks, for a sufficient long period.

The case of State of Punjab v. Jagjit Singh, before the Supreme Court arose out of a challenge raised against all the three aforementioned judgments.

It was held by the apex court that temporary employees shall be entitled to draw wages at the minimum of the pay scale (at the lowest grade, in a regular pay scale), extended to regular employees, holding the same post.

Justice Jagdish Singh Kheher and Justice S.A Bobde held that the principle of 'equal pay for equal work' would be applicable to all the concerned temporary employees, so as to vest in them the right to claim wages, at par with the minimum of the pay-scale of regularly engaged Government employees, holding the same post.

The text of Article 7, of the International Covenant on Economic, Social and Cultural Rights, 1966, to which India is a signatory, was applied by the apex court in stating that "there is no escape from the obligation" imposed upon the states by the Covenant and in view of the "law declared by the Court under Article 141 of the Constitution of India, the principle of 'equal pay for equal work' constitutes a clear and unambiguous right and is vested in every employee-whether engaged on regular or temporary basis."

Referring to the various case laws on the subject, the Court has summarized the principle so enshrined in the Covenant. The 'onus of proof', of parity in the duties and responsibilities of the subject post with the reference post, under the principle of 'equal pay for equal work', lies on the person who claims it. Hence, the burden of proof is on the person approaching the Court to prove that the value of work which the person undertakes is at par with the value of work undertaken by any other person at the reference post. The fact of the subject post being in a department different than that of the reference post does not have any bearing on the principle as persons discharging identical duties cannot be treated differently, in terms of the pay scale, merely because they belong to a different department of the Government.

It was clarified by the Court that the principle of 'equal pay for equal work', applies to cases of unequal scales of pay, based on no classification or irrational classification and that for equal pay, the concerned employees with whom the equation is sought, should be performing work, which besides being functionally equal, should be of the same quality and sensitivity. Also, that persons of the same rank but dissimilar powers, duties and responsibilities can have different pay scales and the principle would not be invoked by automation.

To determine the equity of the function and responsibilities, the duties of the subject and the reference posts must be of an equal sensitivity and quality. It will be considered a valid classification if different pay scales are provided to people with different responsibilities and functions. The nature of work has to be the same and not less onerous than the other in order to claim equality of pay scales. The volume of the work as well as the level of responsibilities to be undertaken by the persons should be the same. If these parameters are not met then no claim could be made by the persons to apply the principle of 'equal pay for equal work'.

It may be noted that the decision of the apex court was in relation to the Government employees only and the two-tier caste system of the regular and contract employees in private sectors remains unaddressed.