Indian Labour Laws (Part 2) - Termination of Employee for Misconduct

This is my second article in the series of employment and termination of employees by Indian corporations. My earlier article dealt with the issue as to whether a software development and IT enabled company qualify as an 'industrial establishment' within the meaning of the Industrial Disputes Act, 1957, ("IDA") and can such a company follow the 'hire and fire' policy for termination of services necessitated for reasons other than misconduct of employee without compliance of the IDA. The present article deals with a situation where the termination of services is necessitated due to misconduct of an employee and the procedural compliances required under Indian labour laws.

For the purpose of clarity let us take a hypothetical situation where the services of an employee say one Mr. Shyam Nagpal have been terminated by an IT company with immediate effect for misconduct and the Company now wants to understand the legal consequences of such termination.

Mr. Nagpal was engaged in software development and was officiating as a “Group Leader”. As a Group Leader, Mr. Nagpal was responsible for monitoring and regulating the work of two to three associates in his team in addition to provision of software development services. Mr. Nagpal's performance for the first one year of service was above average but his performance deteriorated thereafter and he often reported late for work. Considering Mr. Nagpal’s lack-luster performance and due to company’s decision to downsize its work force, Mr. Nagpal’s services were terminated with immediate effect with one month salary in lieu thereof. The Company soon realized that it has failed to undertake proper steps to dispense of Mr. Nagpal’s services and is assessing its implication and exposure under law.

Assessment

The validity of Mr. Nagpal’s termination and consequences thereof under Indian laws would be largely determined by the crucial question whether Mr. Nagpal was a ‘workman’ within the definition of IDA.

An employee is termed as a workman if he is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. A person who is employed mainly in a managerial or administrative capacity, or who being employed in a supervisory capacity draws wages exceeding Rs. 1600/- per month or exercises functions mainly of a managerial nature is excluded from the definition of a workmen. Supervisor means an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them or to adjust their grievances or effectively to recommend such action and in exercising such authority he uses of independent judgment. In nutshell, a supervisor is one having authority over others, to superintend and direct.

Indian Labour Tribunals and Civil Courts have considered the actual and predominant duties discharged by an employee and remuneration received by such an employee as the basis to determine classification under “workman” or “non-workman” category and held that mere managerial or administrative designations are not conclusive of the status of any employee as “non-workman”.

The Supreme Court of India has repeatedly held that it is the principal duties being performed by an employee which are to be considered for the purposes of determining the real
status of the employee namely, whether such an employee has been discharging administrative, managerial or supervisory work. An employee may at times be required to perform managerial, supervisory or administrative work, but such occasional performance by itself does not determine the real status of the employee and it is the principal or major duty performed by the employee that determines the employee’s real status and whether or not the concerned employee is a workman under the IDA.

Consequently, whether Mr. Nagpal, who presumably was not exercising managerial or administrative function, was employed in a supervisory capacity as a Group Leader or for technical/software development work, would depend on whether the main and principal duties carried out by him were:

(a) those of a supervisory character i.e., he had powers to give directions to the others as to the actual manner in which they were to perform and carry out their duties and scrutinize the work done by others in order to ensure that it was being done properly, or

(b) of a nature carried out by a software developer.

If Mr. Nagpal was mainly doing supervisory work, but incidentally or for a fraction of the time, also did some software development work, then he was employed in supervisory capacity and would not be a workman under the IDA. Conversely, if the main work done was of software development, the mere fact that some supervisory duties were also carried out incidentally or as a small fraction of the work done by Mr. Nagpal will not convert his employment as a skilled workman into one in supervisory capacity.

Considering the nature of work performed by Mr. Nagpal was primarily of a software development and not supervisory, Mr. Nagpal would be classified as “workman” in terms of IDA.

In terms of IDA, an employee in workman category who has been in continuous service for at least one year cannot be terminated at will of the employer unless the employee is dismissed by way of disciplinary action or as a result of non-renewal of contract of employment, or terminated on ground of continued ill health, etc. Termination for any other reason whatsoever including termination of service on ground of reduction in volume of business amounts to retrenchment and the IDA prescribes detailed procedure for retrenchment of a workman including compliance with last to come first to go rule, notice, payment of prescribed compensation, i.e., 15 days average pay for every completed year of continuous service, filings/prior approvals from the government, if required, etc.

For termination of services on disciplinary grounds, the procedure for dismissal of an employee (who is classified as “workman” under IDA) on account of misconduct and/or indiscipline (which should be normally incorporated into the Employee Handbook of a company) would need to be in terms of broad principles of natural justice, the IDA and guidelines evolved from various court decisions as follows:

(i) issue a charge sheet;
(ii) hold a domestic enquiry;
(iii) peruse the report of the enquiry officer;
(iv) issue show cause notice to the employee; and
(v) issue order of punishment.

In view of the foregoing, termination of Mr. Nagpal’s services for misconduct without following the principles of natural justice viz. sending notice, enquiry, providing opportunity of defense to the employee may be open to challenge. Contravention of the provisions of the IDA
renders the company’s directors, manager, secretary, agent or other officer concerned with management liable for the prosecution and penalties if it is proved that the offence(s) was committed with knowledge or consent and would entitle the terminated employee to raise dispute before the labour court and seek reinstatement of services with back wages.

**Remedies**

To minimize the exposure arising from termination of Mr. Nagpal’s services for misconduct without following the procedure prescribed under IDA, it is advisable for the company to undertake the following:

1. The Company should immediately clear and pay all pending dues of Mr. Nagpal including gratuity as per the Payment of Gratuity Act, 1972, if applicable, at the earliest.
2. The Company should maintain adequate supporting evidence to show Mr. Nagpal’s poor performance at work. The Company's notices/reminders to Mr. Nagpal to improve his work and productivity should also be part of this paperwork.

To minimize employee related disputes and grievance, it is advisable to be guided by the rules and guidelines stated in the Employee Hand Book and exercising due precaution and adherence to the termination related procedure prior to discharge of employees for misconduct.

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