ID Act - Do we need permission from Government to Retrench?

BY

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Most of the Industrial Establishments are not required to take permission from Government to retrench or to close down an establishment as per the provisions of the Industrial Disputes Act. Yet many of us express our inability in this regard with reference to the Industrial Disputes Act. Similarly the other block in our minds is about a workman working two hundred forty days. *Does having worked for the required two hundred forty days automatically give permanent employment status to a workman in an industrial establishment?* **Certainly not**. But the Act has imposed certain restrictions on termination or discharge or dismissal of workmen who have committed acts of misconduct under certain circumstances. In this paper, an attempt has been made to place the subject in context alongside supporting judicial pronouncements and to bring out some of the salient features of the Industrial Disputes Act, 1947.

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Industrial Disputes Act (ID Act) is one of the most important pieces of legislation, as its scope and applications are very wide. The objective of the ID Act is to reduce or resolve differences between the employers and the workmen, thereby improving productivity in the organization and establishing a congenial work environment. ID Act also provides the mechanism to improve service conditions of the workmen through collective bargaining. To achieve these end objectives, the ID Act provides certain checks and balances on the actions of the management with regard to closure, lay-off, retrenchment and dismissal. Because of which it is widely believed that in India, the workmen are protected and the employer has no freedom to deal with his employees to run its business.

While it is so, it is interesting to note that the Hon'ble Supreme Court while dealing with the matter between the *State of Utter Pradesh and Jaibir Singh* in the year 2005 [LLJ (II)831] categorically stated that the objective of the ID Act is to regulate and harmonize the relationship between employers and employees for maintaining industrial peace and social harmony. **A worker oriented approach unmindful of employer, would be a one sided approach and not in accordance with the provisions of the Act.** The Apex Court made these remarks on the decisions of the lower courts of the country. Out of over hundred labour laws in the country, this law has given birth to enormous case laws from all the courts including the Apex Court during the last four and half decades. This makes us look at the provisions of law through a microscope to understand its observance better. As the legislation of ID Act covers many aspects of the employer employee relationship, it has been decided to review only few sections of the law, which deal with the cessation of employment.

Chapter V-A and V-B of ID Act deals with the procedure to be followed with regard to the workmen who are in continuous service for one year in the industrial establishment for lay-off, retrenchment and closure. If a workman worked for two hundred forty days in the preceding twelve months, it is deemed that he or she is in continuous service for one year. Thus the concept of working for two hundred forty days is to determine continuous service of a workman and provide necessary safe guards to the workmen working in certain industrial establishments. Section 33 imposes restrictions on the employer during certain circumstances.

Let us look at the issue of termination of employment of an industrial workman covered under ID Act and applicability of 'Chapter V-A & V-B' of the ID Act. While Chapter V-A is

applicable to industrial establishments employing between fifty and hundred workmen, Chapter V-B is applicable to industrial establishments employing hundred or more workmen. The industrial establishments which are not covered under Chapter V-B will get covered under Chapter V-A. These industrial establishments can retrench its workmen by giving one month notice, paying compensation at the rate of fifteen days for every completed years of service and serving a notice on the appropriate government. They are not required to take permission from the Government to retrench its workmen while the industrial establishments covered under Chapter V-B are required to take permission from the Government to retrench its workmen.

Chapter V-A and V-B of ID Act also deals with the procedure and compensation payable for lay- off, retrenchment and closure. Interestingly chapter V-B is applicable only to a certain category of industrial establishments and other categories of industrial establishments to which the ID Act is applicable are not covered under these chapters. It is applicable only to Factories, Mines and Plantations. That is to say irrespective of the number of employees employed in other industrial establishments, such as hospitals, hotels, retail sector, Information Technology (IT) and Information Technology Enabled Services (ITES), shops and establishments etc., they are not covered under the provisions of chapter V-B even though they are covered under ID Act. They will get covered under chapter V-A where no permission is required from the Government to retrench the workmen.

Even within factories, the industrial establishments which are of a seasonal character or in which work is performed intermittently are not covered under chapter V-B. In India, most of the agro based industries such as cotton, tobacco, jute, silk and woolen textiles, sugarcane and vegetable oil industries are seasonal industries, as they are based on agricultural raw material. This industry is very significant in our country as it contributes 14% to the total industrial production and provides employment to 35 million people. The Supreme Court in the matter between *Haryana Seeds Development Corporation Vs Presiding Officer* (1997 LLR 806) held that termination of the workers in a seasonal establishment will not amount to retrenchment.

Thus, the application of Chapter V-B is restricted to non seasonal factories, mines and plantations employing more than 100 workmen on an average in the preceding twelve months. Labour Law being a concurrent subject, State Governments have the power to make amendments and obtain the President's assent. Some State Governments such as Utter

Pradesh, Rajasthan, and Andhra Pradesh amended the ID Act such that Chapter V-B is applicable only to industrial establishments that employ 300 or more workmen. This will enable employers who employ below 300 workmen to retrench its workmen without obtaining prior permission from the Government but by serving a notice on the Government which is more in the nature of information.

To remove apprehensions and attract investment, the Gujarat Government way back in the year 2004 made amendments to the ID Act such that the Chapter V-A and V-B are not applicable to industrial establishments set up in **Special Economic Zones** declared as such by the Government of India. In its place, the State has introduced Chapter V-D and V-E giving total freedom to the employers to deal with their workmen in the matters of lay-off, retrenchment and closure without obtaining prior permission from the Government. However, the amendment made the employer to pay much higher compensation than provided in Chapter V-A and V-B. Under the amended legislation the compensation payable is 45 days wages for every completed year of service against the 15 days in the ID Act.

As the applicability of the Chapter V-A and V-B are based on the number of workmen employed by the industrial establishment during the preceding twelve months, there has been a debate on the computation of number of workmen in an industrial establishment. It has been held by the Hon'ble Bombay High Court in the matter of *Dyes and Chemicals Workers Union Vs Bombay Oil Industries Limited*, 2001 LLR 602 that only persons fulfilling the criteria as per the definition of 'workman' will be included for computing the number of employees under section 25K of the ID Act. That is to say, the persons discharging supervisory and management functions are excluded for the purpose of computation of number of workmen employed. The other question that arose was as to whether workmen engaged through contractors or workmen engaged as badili or casual should be included for the purpose of computation of number of workmen of the industrial establishment or not. The Bombay High Court in the matter of *Maharashtra General Kamgar Union Vs Indian Gum Industries*, 2000 (86) FLR 533 held that neither contract labour nor the mathodhi workers will be taken into account to determine the strength of the workmen for seeking closure of an establishment. Thus for determination of strength of workmen of an industrial establishment, only the workmen who are on the rolls of the establishment should be taken into account.

From the above discussion, it is obvious that the application of the provisions of Chapter V-A & V-B and 'retrenchment' are applicable only to a small section of major industrial

establishments and are not applicable to most of the medium and small factories and other industrial establishments. Therefore, it is for us to plan and organize our work and manpower deployment rather than lamenting for changes in the ID Act and looking to the Government. It could also be seen that the State Governments have enough power to make amendments to the legislation to suit their specific requirements for the growth of industrial establishments and further liberalize the provisions of the legislation without depending on the Central Government.

The Industrial Disputes Act has excluded the below mentioned categories of 'terminations' from the definition of retrenchment.

1. Termination of the service of the workman as a result of the non-renewal of contract of employment.

2. Termination of the service of a workman on the ground of continued ill health.

While endorsing that the terminations in the above category do not fall under 'retrenchment' under the ID Act, the courts have further extended it to include other categories as well, some of which are as under.

The Supreme Court in the matter between *Punjab State Electricity Board Vs Darbara Singh,* (2006 LLR 68 SC) confirmed that non-renewal of contract of service will not fall under the provisions of retrenchment. Where engagement of a workman was for a specific period, as such his termination will be excluded from the provisions of section 2(oo)(bb) of ID Act and no retrenchment compensation will be payable on his termination even when he has worked for 240 days.

It has also been held that the termination of a trainee does not fall under the definition of retrenchment. The Delhi High Court in the matter of *R. Kartik Ramachandran Vs Presiding Officer, Labour Court,* (2006 LLR 358) held that compliance of section 25 F of the ID Act will not be necessary on termination of a trainee.

When it comes to casual workmen, the Supreme Court in the matter between *Batala Coop Sugar Mills Ltd Vs Sowaran Singh,* (2005 LLR 1211 SC) held that a casual workman on daily wages for a specific period and for specific work, will not fall under the ambit of retrenchment.

Similarly, termination at the end of the project also does not fall under the category of retrenchment. The Punjab & Haryana High Court (2010 LLR 482) held that even when the workman working on a project was not given contractual appointment, his termination would not be retrenchment when the contract comes to an end.

It is very clear from the above discussion, that trainees, casual, project based construction workmen and workmen engaged for a fixed term are not covered under the provisions of retrenchment.

From the above reading it is amply clear that it is the requirement of the management to perform the function of anticipating / forecasting, assessing manpower requirements and inducting manpower in different categories to meet specific requirements of the industrial establishment from time to time. The ID Act has given ample scope to the industrial organizations to do this. Hence, HR professionals have a major role to play in categorizing the manpower requirements and planning to take them as per those requirements.

The other exclusion mentioned above is that of termination of service of a workman on the ground of continued ill health. The Delhi High Court (2007 LLR 303) in the matter of *J B Kumar Vs Brijesh Sethi* held that termination for continued ill-health of an employee is excluded from retrenchment. However, it is held that discharge for continuous ill health must be supported with sufficient evidence. (*Somasundaram Vs Labour Court, Coimbatore*, 2010 LLR 919 Mad HC.

It is generally stated by most of the managements as well as Human Resource professionals that termination of an employee is not possible once he has completed two hundred forty days of work in an organization in view of the provisions of the Industrial Disputes Act. On the other hand, trade union representatives time and again demand and insist that the workman should be taken on the permanent rolls of the company as they have worked for more than two hundred forty days. There are number of occasions where managements have voluntarily decided to take these employees on their rolls thinking that it is a requirement under law.

It is not true to state that when a workman works for two hundred forty days he automatically gains the status of a permanent workman. The Industrial Disputes Act laid down certain procedures that are to be followed for termination of a workman who has worked in an

industrial establishment for two hundred forty days or more. However, these procedures have no universal application to all the industrial establishments covered under the Act, as discussed above.

The act never conferred the status of permanency simply because a workman worked for 240 days or more in the preceding twelve months. The Supreme Court in the case between *Hindustan Aeronautics Ltd Vs Dan Bahadur Singh,* AIR 2006 SC 2733 held that the completion of 240 days' work does not confer right for regularization and again the same was reiterated in the matter of *Gangadhar Pillai Vs Siemens Ltd,* 2007 1 SCC 533.

Thus, it is very clear that all terminations do not fall under the category of retrenchment and all industrial establishments are not covered under Chapters V-A or V-B of the ID Act. Similarly, working in an establishment for two hundred forty days does not confer permanent status to a workman. Hence it is our duty to understand the applicability of various provisions of the Act and take decisions accordingly.

The real pain to the industrial organizations is the restrictions under section 33 of Act for awarding punishment of dismissal or discharge of a workmen who has committed a misconduct which has been established by following due process of law.

Section 33 of the Industrial Disputes Act imposed restrictions and a temporary ban on the employer's right to alter the conditions of service of a workman or to punish a workman by way of discharge or dismissal when an industrial dispute is pending before a conciliation authority or Labour Court or Industrial Tribunal or Arbitration. The employer has to seek prior approval of the authority before whom the dispute is pending for effecting any change in conditions of service or for discharging or dismissing the workman in respect of any matter of misconduct that is connected with the dispute u/s. 33(1) and in case of misconduct not connected with the dispute, the employer can pass an order of discharge or dismissal, but he should seek approval simultaneously u/s. 33(2)(b) and also make payment of one month wages. That is to say, if a workman committed a misconduct that is not connected with the pending industrial dispute, the workmen should be rewarded with an additional one month wage for no reason.

Thus for imposing a penalty of dismissal or discharge on a workman for his acts of misconduct which are not connected with the dispute pending before the authority, the

employer is required to make an application for approval of the orders under Sec 33(2)(b) of the ID Act, after conducting an enquiry and establishing the misconduct in accordance with the Standing Orders of the industrial establishment; which is a major constraint to the employer in addition to the payment of one month wages to a workman who has committed misconduct.

The employer is required to do all the three acts simultaneously, that is the discharge or dismissal of the workman, making payment of one month wages and making application for approval for discharge or dismissal of the workman. The Supreme Court in the matter of *Straw Board Manufacturing Co Ltd Vs Gobind*, [1962 I LLJ 420] held that the employer shall ensure that all the three actions shall be simultaneous and shall form part of the same transaction failing which the application runs the risk of being rejected.

The Supreme Court in the matter of *Tata Steel Vs Modak* [1966 AIR 380] and *Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd Vs. Ram Gopal Sharma* [2002 (92) FLR 667] held that in case of misconduct not connected with a pending dispute u/s 33(2), the employer may discharge or dismiss the workman after domestic enquiry, make payment of one month wages and seek approval from the authority before whom the industrial dispute is pending. If the approval is granted, the discharge or dismissal shall take effect from the date of the order. In case of refusal of approval application, then the workman is deemed to be in continuous service. In view of this, the management runs the risk of taking back the workman in the event of refusal of the application for approval even after following the procedures laid down under law.

However the jurisdiction of the Tribunal on the application made for approval after dismissal or discharge of a workman for a misconduct not connected with the dispute before the Tribunal is limited to the following factors:

(a) Whether a proper domestic enquiry was conducted in accordance with the Standing Orders by observing the principles of natural justice.

(b) Whether a prima facie case for dismissal based on the evidence on record is made.

(c) Whether the employer had arrived at a bona fide conclusion that the workman was guilty of the misconduct.

(d) Whether the dismissal or discharge was not intended to victimize the workman.

and the Tribunal does not sit as a Court of Appeal re-appreciating the evidence and it is only to examine the proceedings and findings of the enquiry and to ascertain whether a prima facie case had been made out or not.

In fact the risk to the Management is lower in the case of discharge or dismissal connected with the dispute, as the workman will be dismissed or discharged only after obtaining the approval from the concerned authority. After filing the application and before the communication of the approval the employer can at his will may allow the workman to perform his duties or place him under suspension and make payment of subsistence allowance in accordance with the Standing Orders. The Supreme Court in the matter of Lord *Krishna Textile Mills Vs Its Workmen* [1961 AIR 860] held that in case of misconduct connected with pending dispute, u/s 33(1), the discharge or dismissal shall take effect only on the approval granted by the concerned Industrial Court. The Supreme Court in the matter of *Ram Lakhan Vs Presiding Officer* [2001(I) LLJ 449] also held that during the pendency of management's application for permission to dismiss the workman, the company shall pay the subsistence allowance if the workman is placed under suspension.

The ID Act also imposed restrictions on discharge or dismissal of a protected workman during pendency of an industrial dispute. The ID Act defined the protected workmen and also defined the minimum and maximum number of protected workmen in an industrial establishment and the procedure for declaring a workman as a protected workman. The concept of protected workmen is primarily to protect the office bearers of registered trade union.

All the registered trade union office bearers will not become protected workmen automatically. Only such of those office bearers whose names have been notified by the registered trade union on or before 30th of April every year and approved by the Management will fall under the category of protected workmen. The total number of protected workmen is restricted to one percent of the total number of workmen subject to a minimum of five and a maximum of one hundred. If the total number of registered trade unions are more than one, protected workmen shall be based on the membership of the each registered trade union. The period of recognition of the workman as a protected workman will be for twelve months only.

The Karnataka High Court in the matter of *Bagalkot Cement Co Vs The Management of Kanoria Industrial Ltd* [2006 LLR 674] held that dismissal of a protected workman, without seeking permission will be a violation of section 33(3) of the ID Act.

In today's age, the third generation industrial workers are quite knowledgeable. Most of the industrial workers are educated and have access to the latest information through technology driven devices and media. The knowledge flow from among the workmen and the trade union leaders is also very fast and quick. Unfortunately, these provisions are misused by some strong trade union leaders in creating un related industrial disputes and allowing such disputes to be in limbo before the conciliation authority or the tribunal for long periods of time, so that the workmen who have committed grave misconduct are also protected under section 33 of the ID Act. Hence it is essential for the employers to understand the restrictions imposed on discharge or dismissal under certain special circumstances and ensure that industrial disputes are not kept pending for too long a time. It would be better to resolve at the earliest in the interest of the management and the workmen.

From the above readings, it would be appropriate to conclude that the need of the hour is to have a re-look at **Section 33 rather than Chapter V-A and V-B of the Industrial Disputes Act** as discipline alone will bring productivity in an industrial organization.

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