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EMPLOYMENT AND LABOUR NEWSLETTER

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I. NOTIFICATIONS

Women Workers can now be employed In Night Shifts in Factories in Himachal Pradesh: Government of Himachal Pradesh

The Madras High Court in the case of *Smt. R. Vasantha v. Union of India (2001) 2 LLJ 843 (Mad).,* had set aside Section 66(1)(b) of the Factories Act 1948 ("**Factories Act**"), which prohibited women workers to be employed in factories in the night shift i.e. from 10 PM to 5 AM and thus, held the same to be unconstitutional. Section 66 of the Factories Act allowed women to work in factories only between 6 AM and 7 PM and such hours could only be extended by a notification of the state government, provided it did not authorize the employment of woman between the hours of 10 PM and 5 AM.

In pursuance of the order of the Madras High Court, the Government of Himachal Pradesh on 12 August 2022 issued a notification ("**Notification**") enabling women workers in factories to work during night hours i.e. from 7 PM until 6 AM. This Notification made Himachal Pradesh join Maharashtra, Karnataka, Uttar Pradesh, Haryana and Assam who have issued a similar notification and have listed out certain conditions for employers to comply with, with respect to health, safety and security of women workers.

The Notification inter alia lists down the following health, safety, and security measures:

- No woman shall be bound to work without her consent before 6 AM and after 7 PM.
- No woman shall be allowed to work for more than 8 hours in any day and for more than 48 hours in any week.
- No women shall be employed against the provisions laid down under the Maternity Benefit Act 1961.
- Transportation facility from and to residence accompanied by security guards in vehicles.
- The occupier is to intimate the proposed arrangement to the concerned Inspector of region for verification, giving him a minimum period of 7 days for such verification.
- Sufficient supervision is required during such working hours and journey.
- Provision of proper lighting in all places where the female employees may move during such shift.
- Provision of appropriate medical facilities, telephone connections and a separate vehicle where more than 100 female employees are employed in a shift, for purposes of immediate hospitalization.
- Women shall have exclusive boarding/lodging arrangements in control of female supervisors.
- The female workers shall have a monthly meeting through their representatives with principal employer Once in 8 weeks as grievance day.
- Employer shall send a fortnightly report to Inspector of details of employees engaged during night shift, and an express report to the Inspector and local Police station in case of any untoward incidents.
- Toilets, washrooms, drinking water facilities, passage towards conveniences shall be close to the workstation of women workers. The entry and exit for women workers are to be well-lit.
- The provisions of the Sexual Harassment of Women at workplace (Prevention, Prohibition and Redressal) Act, 2013 as applicable to the establishment, shall be complied with.

II. CASE LAWS

1. Continuity of service with back wages can be directed in cases where the retrenchment was not bona fide: Supreme Court of India

Case: Armed Forces Ex Officers Multi Services Cooperative Society Ltd vs Rashtriya Mazdoor Sangh (INTUC), Civil Appeal No. 2393 of 2022

The Supreme Court of India has upheld the order of the Bombay High Court and the Industrial Tribunal. by reiterating the principle that the continuity of service with order of back wages (as per the Tribunal/Court of law) can be directed in cases where the retrenchment is not bona fide and has been set aside. However, where the retrenchment is bona fide, re-employment of retrenched workmen will not entitle them to continuity of service, and they may then be offered re-employment on new terms and conditions.

Armed Forces Ex Officers Multi Services Cooperative Society Ltd retrenched the services of 55 workmen, on the grounds that it had closed its business. Retrenchment compensation as per Section 25F of the Industrial Disputes Act, 1947 ("**ID Act**"), was also offered. On a dispute regarding a demand of workmen for reinstatement of 55 workmen with continuity of service and full back wages, the termination orders were set aside by the Tribunal and the workmen were directed to be reinstated with continuity of service and 75% back wages.

The Supreme Court upheld the finding of the lower court which held that the retrenchment seems to have been imposed as a retribution against the workmen for going on a strike and was hence not bona fide. Therefore, the direction of reinstatement with continuity of service and back wages was held to be justified.

2. Private School Teachers are now entitled to Gratuity: Supreme Court of India

Case: Independent Schools' Federation of India (Regd.) vs. Union of India (UOI) and Ors., Appeal (Civil), 8162 of 2012

The Supreme Court has held that private school teachers are employees and are therefore entitled to gratuity payment if in continuous service for at least five years. The Apex Court observed that payment of gratuity could not be categorized as a windfall or a bounty payable by the private schools as it was one of the minimal conditions of service.

Via a notification dated 3 April 1997 released by the Ministry of Labour and Employment, the Payment of Gratuity Act, 1972 ("**PG Act**") was extended to educational institutions with 10 or more employees. Since the PG Act was amended in 2009, the law is effective even if the institution reduces employees to less than 10, giving all private employees the right to gratuity retrospectively since 1997.

The Petitioners claimed that teachers employed were not "employees" as per the PG Act and challenged the 2009 amendment on the grounds that it was against the doctrine of separation of powers.

The Apex Court observed that *"the amendment with retrospective effect remedies the injustice and discrimination suffered by the teachers on account of a legislative mistake, which was understood after the pronouncement of the judgment in Ahmedabad Private Primary Teachers' Association. The amendment was necessary to ensure that something which was due and payable to the teachers is not denied to them due to a defect in the statute".*

By rejecting the argument of the Petitioners that they don't have the capacity and ability to pay gratuity to the teachers as unapt and parsimonious, the Court directed private schools to pay employees/teachers gratuity with interest in terms of the PG Act in six weeks.

3. Shareholders cannot be impleaded as a party in adjudication of disputes between employers and the workmen: Kerala HC

Case: Rubber Wood India Pvt Ltd & Ors v. Manojkumar P.S. & Ors, WP(C) NO. 5187 OF 2020

The Kerala High Court has held that the shareholder of a company cannot be made an independent party in the adjudication of a dispute between the company and its workmen.

In this case, the dispute had arisen between Rubber Wood India Private Ltd and its workmen, wherein the Rubber Board, being a shareholder of the company, was being pleaded as a respondent by the workmen.

The Court held that the company, established under the Rubber Act, 1947, which falls under the aegis of Ministry of Commerce and Industry, Government of India, is an instrumentality of the Central Government, and accordingly the dispute falls under Section 10(2A)(1)(d) of the ID Act. It added that since the Rubber Board was only a shareholder in the said company, it could not be impleaded as a party in adjudication of a dispute between the workmen and their employers in relation to management of the Company.

4. A client list may not always be construed as confidential information to claim any right: Delhi HC

Case: Manipal Business Solutions Private Limited Vs. Aurigain Consulants Private Limited and Ors, CS(OS) 190/2022

The Delhi High Court has reiterated that not every customer/client list would qualify as confidential information or trade secret unless the confidentiality about it is of economic/business/commercial value. A client list cannot be construed as confidential information to claim any right, if there is no determination as to what the confidential information is, how it is confidential and, if at all, how the defendant company has used such information to the detriment of the Plaintiff.

In this case, the Defendants had been employed by the Plaintiff to carry on its business, and certain trade secrets, business connections and confidential information had been disclosed to them for which they were made to sign a non-disclosure agreement ("**NDA**"), that for a period of two years from the date of their resignation, they could not disclose the information to anybody. Subsequently, the Defendants resigned from the Plaintiff organization and started their own firm by carrying out similar business as a competitor. The Plaintiff's contended that the Defendants were doing business with a regular customer of the Plaintiff and were therefore violating the terms of the NDA. Therefore, they sought to restrain the Defendants from carrying on any business in contravention of the terms of the NDA and from making any further use of the confidential information. The confidential information of the Plaintiff that is being claimed included customer data, agent data, contract data, employee data, market data and business plans.

The Court, by referring to it's decision in *American Express Bank Ltd. v. Priya Puri (2006) 3 LLN 217*, observed that *"a competitor even after knowing which particular entity/an individual/person is currently in business with, can approach such individual/person to canvas about itself, and it is for the customer to decide which business/entity to choose. Creating a database of clients/customers and then claiming confidentiality on it does not create a monopoly over such customers".*

The Court held that there was no unlawful interference with business or breach of contract with the plaintiff, by observing that Section 27 of the Indian Contract Act 1872 which states that agreements in restraint of trade are void, is a facet of Article 21 of the Constitution, and such right of the defendants cannot be defeated by stating that they are enticing the clients or interfering with the business.

5. Termination of a workman would be valid only after compliance with section 25F of ID Act – once the worker has acquired status of workman and has completed 240 days of continuous service in a calendar year: Delhi HC

Case: Union Bank of India v. Mohd. Tasleem, W.P. (C) 10807/2022 and CM Appl. 31398/2022

The Delhi High Court has upheld the order of the Central Government Industrial Tribunal ("**Tribunal**") by reiterating that the termination of a workman would be valid only after compliance with section 25F of the ID Act, and also stated that it cannot displace the order of the Tribunal only because it can take a different opinion on the basis of the record. The Tribunal has pressed on the importance of maintenance of documents by a management relating to employment of persons and payments made to them.

The respondent/workman was working as a peon/messenger since 02.01.1998 with the petitioner-management on daily wage basis. However, the petitioner suddenly terminated his service on 15.12.2004 without any notice, notice pay or payment of termination compensation.

The Tribunal, by relying upon all relevant documents held that *"the law is well settled that once the claimant acquires the status of workman within the meaning of section 2(S) of the Industrial Disputes Act, 1947 and completes 240 days of continuous service in a calendar year preceding his termination, the same would be valid only after compliance of the due procedure laid down in section 25F of the ID Act. The law is again well settled that the burden lies on the claimant to prove that he had worked for 240 days or more in the calendar year".*

The Tribunal also observed that the *"Petitioner management is a nationalized bank and supposed to maintain-all relevant documents relating to employment of persons and payment made to them"* as it had only furnished a list of days in which the respondent was engaged by the petitioner, but not a single piece of paper or document was placed on record. Therefore, the Tribunal relied on the proof of the respondent that he was working from 1998 to 2004 and that his service was illegally terminated by the petitioner without complying with section 25F of the ID Act and failing to follow the due procedure of law.

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Contact Information

Mumbai
ALMT Legal, Advocates & Solicitors
1104A Raheja Chambers
Free Press Journal Marg Nariman Point
Mumbai 400021
Tel: + 91 9152510000 / + 91 40510000
Email: labourteam@almtlegal.com

ALMT Legal
ADVOCATES & SOLICITORS