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THE COMPLIANCE WATCH

QUALITY | WILL TO WIN | BUILDING & LEVERAGING RELATIONSHIPS

IN THIS ISSUE

UCS POV | JOINT DECLARATION COMPLIANCE UNDER THE EPF ACT

BALA HARISH
VICE PRESIDENT

Para 26(6) of the EPF Scheme (appended below) requires an employer to submit a joint declaration with the employee who is exceeding the PF ceiling limit of wages for covering him/her under the PF Scheme. Although this provision has been in effect since 1952, EPFO did not enforce it strictly. However, lately it is observed that this provision is being enforced by a few EPFO offices in a phased manner.

The PF department has begun requesting the joint declaration from the employer and employee in order to begin the process of ensuring formal compliance under Para 26(6) of the EPF Scheme with immediate effect. Each and every employee is required to have given their consent in writing in accordance with this provision. We have noticed that in some cases the PF claims/PF withdrawals/PF transfers, etc. are being rejected due to non-submission of joint declaration. Therefore, we propose that required action be taken by the establishment to ascertain that this compliance is followed for all employees in order to ensure that no hardship is faced by the employees as well as the establishment. The Joint Declaration framed by the RPFC Central, Karnataka has to be filed employee-wise, on the establishment letterhead for all those employees who's Basic is more than the PF ceiling limit of ₹ 15000.

In view of the above, we recommend the below steps in order to ensure proactive compliance:

- Obtaining/submitting a joint declaration as a part of establishment's onboarding formalities.
- Ensuring that the joint declarations are made as a part of all those employees currently exiting and those who have not signed such joint declaration forms at the time of their joining the company.
- Initiate the process of getting these declarations from all the existing employees to submit them to the PF Dept

> ***An employer to submit a joint declaration with the employee who is exceeding the PF ceiling limit of wages for covering him/her under the PF Scheme***

Further, on the implementation of the Wage Code, which has the new wage treatment divides the scope of wages into 2 categories, viz. inclusive wages & excluded wages, out of which the exclusion allowance cannot exceed 50% of the total remuneration. If the excluded allowance exceeds 50% of the total remuneration, then it shall be deemed as wages and consequently be added with the inclusive wages. To prevent problems with changes in the "deemed wages" component, which could change in a given month while being calculated at 50% of the gross wages, it is proposed to keep the present basic wage of the company under a new column named "PF Wages." Additionally, as the Joint Declaration under Para 26(6) is filed stating that the PF is paid on "PF Wages", which will help the organization to meet the compliance under the Act, as well as under the Wage Code and the employee and employer additional PF burden can also be reduced.

EPF Scheme [Para 26(6) *Notwithstanding anything contained in this paragraph [an officer not below the rank of an Assistant Provident Fund Commissioner] may, on the joint request in writing, of any employee of a factory or other establishment to which this Scheme applies and his employer, enroll such employee as a member or allow him to contribute more than rupees [fifteen thousand rupees] of his pay per month if he is already a member of the Fund and thereupon such employee shall be entitled to the benefits and shall be subject to the conditions of the Fund, provided that the employer gives an undertaking in writing that he shall pay the administrative charges payable and shall comply with all statutory provisions in respect of such employee].*

10 MN APPRENTICESHIPS IN 10 YRS: WHAT INDIA NEEDS TO SOLVE ITS UNEMPLOYMENT

Doubling the number of apprenticeships from around 500,000 at present to 1 million per year will help address unemployment in the country, according to a report released by TeamLease Services in association with JustJobs Network. The report, titled "*Reimagining Employability for the 21st-century - 10 Million Apprentices in 10 Years*", provides a road map for increasing the number of apprenticeships.

Need for apprenticeship

Speaking to Business Standard, *Rituparna Chakraborty*, co-founder and executive director, TeamLease Services, said: "*Despite being the fifth largest economy in the world, India still lags at 142nd position in terms of per-capita income. This is because a large part of India's working population doesn't have the suitable skills because they cannot invest in their reskilling. This is where apprenticeships will play an important role in skilling them, so that the gap between employers and the employees is bridged.*"

The report notes that an apprentice's entry into work is smoother than that of a non-apprentice. It calls for degree-linked apprenticeships, so that employees have required certification for their skills. It will allow them to learn online, on campus, on site and on the job. "*There is a growing chasm between education, training and employment in India. The incidence of formal training remains low, despite a plethora of govt. schemes and institutions providing training. Apprenticeships can help bridge these gaps, resulting in better outcomes for youth, but also good return on investment for employers by significantly reducing the cost of hiring*", added Sabina Dewan, president & executive director, JustJobs Network. The report says that an employer-led training manual, streamlined governance architecture, apprentices' welfare programmes, and change in pedagogy in universities will enable India to generate 10 million apprenticeships in the next 10 years, thus, solving the problem of unemployment in the country. For instance, Germany creates about 500,000 new apprenticeships every year in about 500 different occupations at a cost of €6.84 billion.

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Challenges

The report notes that out of 339 central public sector undertakings (CPSUs), only 150 engage apprentices. These CPSUs have around five million employees. According to the provisions of the Apprenticeship Act, 1961, 2.5 per cent of employees at firms with staff strength more than 30 must be apprentices. Hence, these CPSUs should engage a minimum of 125,000 apprentices, but have only 41,250 on board. The report notes that this low intake is due to a lack of information coupled with cumbersome compliance requirements for private and public sector firms, complicated governance architecture of programmes, and a bias towards academic education over vocational training.

Untapped potential

The Sixth Economic Census estimates that there are approximately 2.6 million MSMEs in the country with five or more workers. The report notes that if each establishment engages even one apprentice, the MSME sector can generate over 2.5 million apprenticeships.

Concerns remain

The report also highlights concerns related to adequate protection for apprentices, and says there is evidence that some employers exploit apprentices as cheap labour, and don't provide them the mandated training. Moreover, the "apprentices from socio-economically disadvantaged backgrounds have less education, pursue occupations that demand manual skill, and are employed in informal employment, as the barriers to entry are lower than in formal work, even though productivity, wages, and opportunities for upward mobility in informal work are limited. So, the need is that they don't get trapped in low paying apprenticeship work and get to upskill themselves," added Chakraborty.

Source : Business Standard

MOST STATES READY, STAGGERED ROLLOUT OF LABOUR CODES LIKELY

With the government setting the stage for the four new labour codes, there are indications of a staggered implementation with an initial rollout of two codes, The Code on Wages and The Code on Social Security. These will likely be followed by the other two – The Industrial Relations Code and The Occupational Safety, Health and Working Conditions Code, at a later stage.

Senior government officials indicated there is an emerging consensus in favour of a staggered implementation, with most states having pre-published the draft rules for The Code on Wages. "*Many discussions have happened with all stakeholders. Concerns were raised about the wage provision, whether allowances can be more than 50 per cent. Those have been sorted out and we are trying to build consensus on other issues. Most states have pre-published draft rules for Wage Code, and for rest also they are doing it. A phased implementation is being considered and discussed,*" a senior government official told The Indian Express.

A consensus has emerged on various issues, such as the provision for allowances being capped at 50 per cent of the total salary, for which the industry had earlier sought a review. Industry representatives, including CII, in their recent meeting with Labour & Employment Ministry officials gave their consent for the wage provision and made representations for grandfathering gratuity calculations. CII in its representation recommended clarity on calculation of wages, especially defining the basic component. It has also sought that gratuity calculation should be prospective with the new law. "*Grandfather the retrospective period as it impacts all companies books of account,*" it said.

Earlier, the industry had sought a review for the provision for basic pay and allowances. The labour codes propose to define wages with basic pay to be at least 50 per cent of total salary, which effectively reduces take-home salaries but raises contributions towards social security components such as Employees' Provident Fund. "*The sense was that if the industry asks for a change in the law for tweaking this wage provision, then there could be similar demands for such amendments from other stakeholders. So, we have instead asked for grandfathering of the gratuity, it should be as per old calculations for earlier deductions and that changes should be prospectively applied,*" an industry representative said.

The National Labour Conference, which had a virtual address by the Prime Minister, discussed a range of issues on the rollout of the labour codes along with discussions on migrant workers' data and Vision-2047 for workforce.

Experts said a phased implementation of the codes will give the Centre an edge ahead of the general elections. "*It will not be one-go because none of the state governments have notified the rules, all of them have it in draft form. All are waiting and watching*

> ***The proposed phased implementation of the codes, along with social security measures for informal workers, was part of the discussions at the National Labour Conference of labour ministers and secretaries of all states/UTs and the Centre held recently at Tirupati.***

before the elections, the government may like the Wage Code and Social Security Code to be implemented because gig employees are taken care of, universal social security would be there, minimum wage would be there. Electorates are not worried about hire-and-fire, trade unions are worried about that. So for election purposes, it is imperative to pass Wage Code and Social Security Code instantly," labour economist and professor at XLRI – Xavier School of Management Jamshedpur, K R Shyam Sundar said.

Strategically, he said, it is better to bring Wage Code and Social Security Code first, and those on OSH and IR later. "It is a strategic move for the government to hard pedal the industry to introduce Wage Code, thereby earn legitimacy and also satisfy the credibility gap and also introduce social security to be inclusive about gig workers, and then through the backdoor introduce the IR code and the OSH code." With labour being a concurrent subject, the Centre and states have to frame laws and rules. While Parliament cleared the labour codes in 2020, and the Centre pre-published the draft rules, some state governments are yet to complete the process. Thirty-one states and Union Territories (UTs) have pre-published the draft rules for the Code on Wages, while 26 have done for the Industrial Relations Code. 25 states have pre-published draft rules for the Code on Social Security and 24 have done for the Occupational Safety, Health and Working Conditions Code.

Some of the key features of the proposed labour codes include bringing in a national minimum wage, widening of coverage of social security to cover informal and gig/ platform workers, providing greater flexibility to employers in hiring decisions without government permission by raising the threshold for requirement of a standing order rules of conduct for workmen employed in industrial establishments from 100 workers to 300 workers.

Source : The Indian Express

SC RESERVES JUDGMENT IN EPFO CASE

The Supreme Court recently, reserved judgment in appeals filed by the Employees Provident Fund Organisation (EPFO) against a decision of the Kerala High Court setting aside amendments on "determination of pensionable salary" under the Employees Pension Scheme (EPS) of 1995 as "*ultra vires*". Appearing before the Bench led by Justice U.U. Lalit, senior advocate Aryama Sundaram and advocate Rohini Musa, for the EPFO, said the EPS would face a "*complete collapse*" if the Kerala High Court judgment was allowed to hold fort.

Mr. Sundaram said the High Court judgment would effectively mean that every private sector employee should be paid a pension irrespective of his salary limit. Every private sector employee would opt for pension and claim it based on the last drawn salary that yields 50% of the pensionable salary, despite the fact that he did not contribute to the fund. "*Even government employees' government pension schemes do not yield 50% of their last drawn salary after 2004, since the scheme was repealed as unviable. They now get pension based only on their contribution. The anomaly therefore is that EPS, which is a contributory fund, is being burdened with rates of pension which even the budgeted pension schemes do not provide,*" Mr. Sundaram argued.

Additional Solicitor General Vikramjit Bannerjee, for the government, submitted that the EPS was the largest surviving defined benefits scheme in the world. Many of such schemes have collapsed all over the world and others replaced by corpus-based pension schemes, he said. Both Mr. Sundaram and Mr. Bannerjee submitted that the EPS should be allowed to survive as a "*guaranteed benefit scheme only for poor workers*".

"*The poor workers in EPS, who earn below the wage ceiling, are bidi rollers, construction workers, sanitation workers, manual labourers, plantation workers, brick kiln workers, miners, security guards, etc,*" Mr. Sundaram contended.

Senior advocate Gopal Sankaranarayanan, for the pensioners and employees' side, said the EPS was far from collapse. The scheme has been paying pension from the interest received from its corpus. Its "*majestic*" corpus lay intact and untouched. "*Let us be realistic, of all the people in the country, the EPFO comes and says that we do not have funds. They have not touched the corpus even once,*" the senior lawyer submitted.

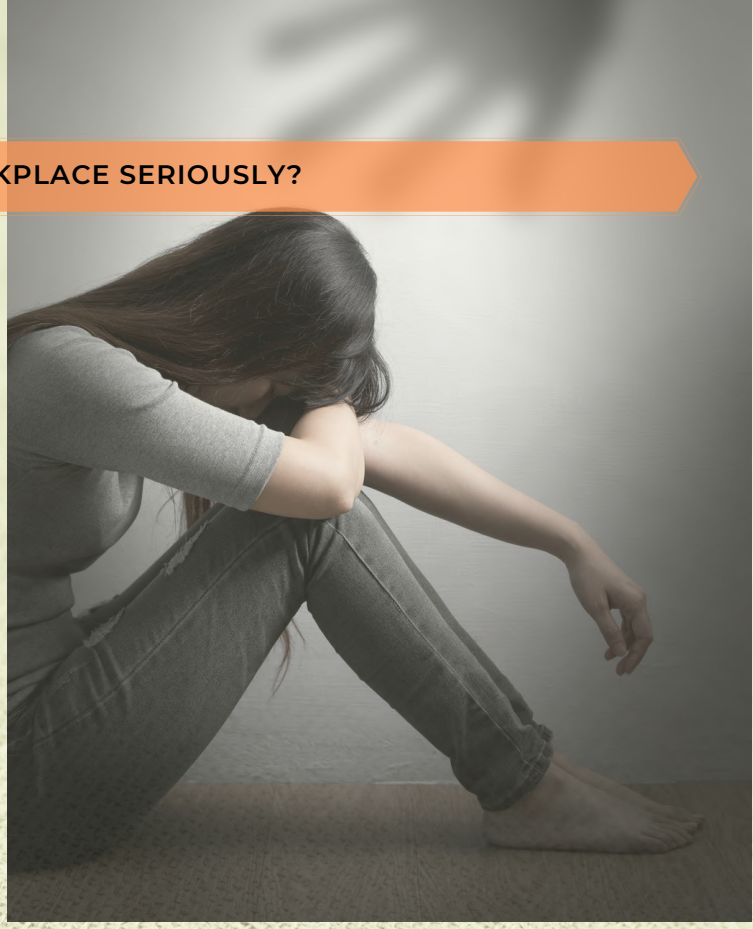
The dispute revolves around the controversial amendments made to Clause 11(3) of the EPS-1995. Challenges to the EPS amendments said they were skewed. The people who challenged the amendments came from all walks of life and work. They sought a more secure life with a decent pension.

In the earlier version of EPS-1995, the maximum pensionable salary cap was ₹6,500. However, members whose salaries exceeded this cap could opt, along with their employers, to contribute up to 8.33% of their actual salaries. The amendments raised the cap from ₹6,500 to ₹15,000. But the amendments said only employees, who were existing EPS members as on September 1, 2014, could continue to contribute to the pension fund in accordance with their actual salaries. They were given a window of six months to opt for the new pension regime.

In a judgment in the R.C. Gupta case, the Supreme Court had said that a "*beneficial scheme*" like EPS-1995 "ought not to be allowed to be defeated by reference to a cut-off date like September 1, 2014. Besides, the amendments created additional obligations for members whose salaries exceeded the ₹15,000 ceiling. They had to contribute at the rate of 1.16% of the salary in addition to their EPF contribution. Besides, these employees had to make a fresh option within six months. The amendments had also extended the period of calculation of average salary from 12 months to 60 months.

Source : The Hindu

SHOULD SMES TAKE SEXUAL HARASSMENT AT WORKPLACE SERIOUSLY?



Many SMEs approached for consultation on how to implement POSH (prevention of sexual harassment) provisions at workplaces, especially when new investors scrutinise such provisions. The new-age investors understand the need for making the workplace safe and congenial and the POSH guideline is the first step to inclusion and diversity. Diversity on the other fronts comes later.

Though the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act has been notified, the details on its administration are not clear. We hear about sordid cases of harassment every now and then. These grab the headlines, especially if the people involved are high profile. SMEs can have a major challenge if things blow over and their major ethical customers stop dealing with them due to their poor record on this front. This can also present a risk because while details of how to submit compliance reports are nebulous, the fines prescribed can create an existential issue. SMEs and start-ups often do not take the Act seriously. When it does happen, there is a tendency to brush it under the carpet. Often, the victim is named and shamed while the Act clearly talks about confidentiality and prevention of any backlash on the complainant. There is hardly any training because most of the owners and leadership teams believe that there are no cases and are pretty confident that there will be no cases in the future as well. During discussions with SME employees, it was found that they are not aware of what constitutes sexual harassment and the rights that they have under the Act. They also do not understand that progressive companies go beyond the bare minimum of compliance. Understanding that going above and beyond compliance is a cornerstone of creating a respectful workplace is elusive.

Central and state governments do not publicly compile and release data on how many organisations comply with the guidelines, have committees, number of complaints filed and what the outcome of these complaints is. The Centre has provided information only when questions are asked in Parliament on sexual harassment at workplace, but these data are piecemeal and difficult to find. The Parliament was informed in July 2019 that our government does not maintain any centralised data relating to cases of harassment of women at workplaces. Ideally, the law should be administered in its spirit, but the implementation of the letter of the law is itself a beginning.

Here are some of the misconceptions about the implementation of POSH and how they can be addressed:

The Act is woman-centric and can be misused

If you look at the evolution of the law from the Vishaka judgement, it is understandable. However, progressive companies go above the bare minimum and provide protection on a gender-neutral basis. There are safeguards provided to the accused.

The Internal Complaints Committee (ICC) has strict timelines and guidelines on how to process a complaint. In case the ICC finds that the complaint is false and malicious, it can recommend action against the complainant. Misuse is akin to misusing any grievance procedure. However, not having it at all is not the solution.

The aggrieved woman has to be an employee in the organisation

The aggrieved woman need not be an employee. The woman can be a visitor, a vendor, a customer, a bystander, an intern or even a job seeker.

The external member has to be from an NGO and all members have to be women

Any person who is familiar with the issue of sexual harassment or a member who is committed to the cause for women can be an external member of ICC.

Having a policy and constituting an ICC translate to full compliance

The first recommendation is that companies stop calling it a sexual harassment policy and rename it as an Anti-Sexual Harassment Policy.

In addition to a policy and an ICC, the following aspects are important:

1. Sensitise all employees, including contractors who are regularly interacting at the workplace.
2. Highlight the ICC, its meetings, the nature of the complaint received and its outcome in the Annual Report.

Sexual harassment only includes physical contact

The workplace is not just the physical office space. It could be a zoom call or transport provided by the company. The word 'workplace' is defined broadly and includes any place visited by the employee arising out of or during employment.

The Supreme Court had once observed: "The implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit so as to make available a safe and secure environment for women at workplace in every aspect and thereby enabling working women to work with dignity, decency and due respect." It is imperative that SMEs take this regulation seriously and implement it in the organisation in its true spirit.

Source : Money Control

WORKING WOMAN'S STATUTORY RIGHT TO AVAIL MATERNITY LEAVE CANNOT BE JUST TAKEN AWAY: SC

The Supreme Court recently held that a working woman cannot be denied her statutory right to maternity leave for her biological child only because her husband has two children from previous marriage and she had availed the leave to take care of one of them. The top court said that the grant of maternity leave is intended to encourage women to join and continue in the workplace but it is a matter of harsh reality that despite such provisions, women are compelled to leave their place of work on the birth of a child since they are not granted leave and other facilitative measures.

According to rules, a female employee with less than two surviving children can seek maternity leave. A bench of justices D.Y. Chandrachud and A.S. Bopanna said that childbirth has to be construed in the context of employment as a natural aspect of the life of the working women and the provisions under the law must be construed in that perspective. The court said the rules on maternity benefits are formulated in terms of the provisions of Article 15 of the Constitution under which the State can adopt a provision for the protection of the interest of the women. *Unless a purposive interpretation is adopted, the object and intent of grant of maternity leave would be completely defeated*, it said.

The top court was hearing a plea of the woman, working as a nurse at the Postgraduate Institute of Medical Education and Research (PGIMER), Chandigarh, who was denied maternity leave for her only biological child on the ground that she had two children from her husband's previous marriage and had earlier availed the leave to take care of one of them after the death of his first wife.

"*It is a matter of harsh reality that despite such provisions women are compelled to leave their place of work on the birth of a child, since they are not granted leave and other facilitative measures "Childbirth has to be construed in the context of employment as a natural aspect of the life of the working women. Hence, the provision which has been made should be construed in that perspective,*" the bench said.

The top court bench, said that the provisions of the central civil service rules regarding maternal leaves need to be purposefully interpreted in line with the intent of the Maternity Benefit Act enacted by the Parliament. *"The provisions of rule 43 (1) must be imparted to a purposive construction. For the purpose of interpreting Rule 43, it should be appropriate to look into the Maternity Benefit Act* ", it said, adding that nonetheless, the provisions of the Maternity Benefit Act, 1961, are indicative of the objects and intent of Parliament in enacting cognitive legislation on the subject.

Referring to the provisions of the Act, the bench said that these provisions have been made by Parliament to ensure that absence of a woman from her place of work for the delivery of a child does not hinder her entitlement to receive wages for that period or for that matter the period for which she should be granted leave to look after the child after giving the birth. "*Rule 43 (1) of the CCS Rules contemplate the grant of maternity leave for a period of 180 days, independent of the grant of maternity leave, a woman is also entitled to the grant of child care leave for taking care of two eldest surviving children, whether for rearing or for looking after their need such as education, sickness and alike*," it said.

The top court said that the child care leave can be availed of not only at the point when the child is born but at any subsequent period as is evident from the illustrative part of the rules. The bench said that the facts of the present case indicate that the spouse of the appellant has prior marriage which has ended with the death of his wife after which the appellant was married to him. The bench said that "the fact that he (her spouse) had two-biological children from a prior marriage would not impinge upon the statutory entitlement of the appellant for grant of maternity leave for her sole biological child in the present case".

It said the fact that she was granted child care leave for one of the two children born to her spouse from earlier marriage may be a matter where a compassionate view was taken by authorities at the relevant time. However, this cannot be used to disentitle her from the entitlement of leave under Rule 43 of Central Civil Services leave rules, 1972. "*Unless such a purposive interpretation is adopted, the object and intent of grant of maternity leave would be completely defeated*", the bench said, adding that these rules are formulated in terms of the provisions of Article 15 of the Constitution, under which the State can adopt a provision for the protection of the interest of the women.

The top court set aside the High Court refusing to accept her plea for grant of maternity leave to take care of her biological child and the order of the Central Administrative Tribunal and allowed her plea. "For the above reason, we hold that the appellant was entitled for the grant of maternity leave and the communication of the third respondent (hospital authorities) denying her maternity leave was contrary to the provision of rule 43. "We accordingly set aside the impugned judgement of the high court and the judgement of the CAT. The OA of appellant shall stand allowed. The appellant shall be granted maternity leave as otherwise was admissible under rule 43 of CCS leave rules, 1972",the bench said.

It directed that whatever benefit which was her entitlement should be paid within two months of the order.

Source : The Hindu

GRATUITY SCHEME FOR CONTRACT AND PRIVATE WORKERS IN THE PUBLIC SECTOR, HERE'S WHAT GOVERNMENT HAS TO SAY

Few months ago, the Government had said that there would be no change in the gratuity norms.

Here's what you need to know about the Gratuity scheme. Gratuity is a benefit that is payable under the Payment of Gratuity Act 1972. Gratuity is a sum of money paid by an employer to an employee for services rendered in the company. But, gratuity is paid only to employees who complete five or more years with the company.

When asked by Rameshwar Teli, a minister of state for labour and employment, in the Rajya Sabha in March of this year "*Whether Government is considering to increase the Gratuity payment from 15 days' salary for each completed year to 30 days' salary for all employees of Government sector and Private sector*"? He responded that employees will receive gratuity equal to 15 days of income in a year and that there is no proposal to enhance it to 30 days.

In his other reply on the question on "*whether Government is considering to implement the Gratuity Scheme to the Private and Contract workers of Public Sector even if they have completed one year as they may not complete 5 years services and if so, the details thereof*," Teeli said that it will not be necessary for certain aspects. "Under the Code on Social Security, 2020, completion of continuous service of five years shall not be necessary for payment of gratuity, where the termination of the employment of any employee is due to death or disablement or expiration of fixed term employment or happening of any such event as may be notified by the Central Government. However, the Code has not yet come into force," responded Teeli.

Source : DNA India

GUJARAT HIGH COURT QUASHES REINSTATEMENT ORDER: PERSON WORKING IN SUPERVISORY CAPACITY CANNOT RAISE "INDUSTRIAL DISPUTE"

The Gujarat High Court in the case Gujarat Insecticides Ltd. & 1 other(s) v/s Presiding Officer & 2 others observed and has reiterated that a person working in "supervisory" capacity cannot raise an industrial dispute under the Industrial Disputes Act, 1947. The bench comprising of Justice AY Kogje observed and further made it clear that while deciding whether such person is a workman or not, the Labour Court ought to carefully consider the evidence placed on record and there is no exhaustive list of work to differentiate between the management employee and the Workman. In the present case, the Petitioner Company averred that the Respondent was working in the non-workman category and engaged in the 'supervisory category' and was drawing salary of more than INR 1600. Therefore, the dispute was not an industrial dispute within Section 2(s) of the Act, 1947. It was insisted by the Respondent that he had worked with the company as a Maintenance Engineer and the duties assigned to him were of the nature of a workman's duties as per the ID Act. The respondent was wrongly terminated by way of termination and without any procedure established by law and as such, was entitled back wages. It was observed that the high court took into consideration the Respondent's appointment letter and witness depositions regarding the nature of work performed by him to conclude that the Respondent in Grade-9 was indeed discharging duty of Maintenance Engineer. It was also specified by the depositions that the hierarchical grading in the petitioner-company as per which, the employees above Grade-7 were of the Management Cadre.

The High Court observed that the Labour Court has completely disregarded this evidence, which according to this Court is most relevant for the purpose of deciding the status of workman

and the Labour Court has proceeded that the petitioner-company ought to have produced evidence in the nature of whether the respondent-workman has sanctioned any leave, sanctioned any overtime or prepared any gate passes for employees to go home or has made any ordered or Appointment dismissal. Thus, when the Labour Court, instead of referring to this evidence already on record to establish the nature of work of the respondent and has decided to chase the evidence which is not on record and then on the basis that such evidence not being on record, it was concluded that in the definition of workman, the workman will be covered, this is where, in the opinion of the Court, perversity has crept in. Accordingly, the bench quashed the impugned order. Therefore, seeing the passage of time, it was held by the High Court that the allowances paid u/s 17B of the Act should not be recovered by the Petitioner company.

Source : Daily Gaurdian

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Unit No: 852 - 856
8th Floor JMD Megapolis,
Tikri, Sector 48, Gurugram
122001, Haryana

0124 - 2656800

enquiry@ucsdel.com

www.unitedconsultancy.com