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the employment quarterly

April to June, 2022

Index

Legislative Updates

Judicial Updates

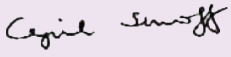
Welcome to the Employment Quarterly – our quarterly newsletter on key employment and labour updates for the period from April to June 2022.

This issue covers the key legislative updates at the Central and State levels, such as the circular issued by the Employees' Provident Fund Organisation (**EPFO**) directing its field offices to adopt a more proactive approach to ensure coverage of contract labourers deployed by contractors to principal employers, under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, letter by the EPFO in relation to members of the pension fund under the Employees' Pension Scheme, 1995 (**EPF Scheme**) who have attained 58 (fifty-eight) years of age, clarification issued by EPFO regarding final withdrawal of provident fund for international workers under the EPF Scheme, notification with draft rules to amend the Rights of Persons with Disabilities Rules, 2017, notification of the model Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome policy for establishments under the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017, exemption under the Tamil Nadu Shops and Establishments Act, 1947 for shops and establishments to remain open on all days of the year, etc.

Additionally, this issue provides an update on the recent draft rules under the Labour Codes published by various State Governments and also includes an overview of key orders, letters and advisories released by certain State Governments in response to the changing number of COVID-19 cases.

Besides legislative updates, this issue also discusses key developments in labour laws brought forth by various judicial pronouncements. We have analysed key decisions of the Supreme Court of India and of various High Courts, inter alia, dealing with mandatory vaccination, exclusion of conveyance allowance from the definition of 'wages' under the Employees' State Insurance Act, 1948, burden on employers to prove that the employee has been gainfully employed, restriction on the use of artificial breaks as a tool to deny maternity benefits, conducting disciplinary enquiries for dismissal of temporary employees, etc. We hope you will find the above to be useful. Please feel free to send any feedback, suggestions or comments to cam.publications@cyrilshroff.com.

Regards,
Cyril Shroff



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LEGISLATIVE UPDATES

I. Key Central Legislative Changes

A. The Employees' Provident Fund Organisation (EPFO) circular on a more proactive approach to cover contractors

The EPFO *vide* its circular dated April 27, 2022, directed its field offices to adopt a more proactive approach to ensure coverage of contract labourers deployed by contractors to principal employers, under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (**EPF Act**).

The circular provides for an action plan and, *inter alia*, states that the EPFO zonal offices should obtain copies of principal employer registration certificates and contractor licences from the competent authorities in their jurisdiction under the Contract Labour (Regulation and Abolition) Act, 1970, within 15 (fifteen) days of this circular being issued. Based on this, instructions will be issued to principal employers in the respective jurisdictions to register the contractors (manpower service providers) engaged by them on the EPFO employer's portal within a prescribed time limit, and monitor compliances, including the payment of employees' provident fund contributions by the contractors in relation to the contract labour deployed with the principal employers.

B. EPFO letter to employers in relation to members of pension fund who have attained 58 (fifty-eight) years of age

The EPFO *issued* a letter dated April 22, 2022, to employers, clarifying that under the Employees' Pension Scheme, 1995 (**EPF Scheme**), an employee shall cease to be a member of the pension fund upon attaining 58 (fifty-eight) years of age or from the date of vesting of admissible benefits under the EPF Scheme, whichever is earlier.

Since many employers continue to remit pension contribution for employees aged 58 (fifty-eight) years and above, the EPFO has further clarified that a link titled "*Employees attaining 58 years of age in the current month*" is provided on the home page of the unified employer portal, which should be utilised to check if any member has attained this age in a particular month before uploading the electronic challan cum return for the provident fund contributions. This will aid members in applying for final settlement without the fear of it getting rejected.

C. Clarification regarding final withdrawal of provident fund for International Workers (IWs) under the EPF Scheme

The EPFO vide a letter dated April 27, 2022, has clarified that IWs from countries that do not have a social security agreement with India are eligible for full withdrawal of their provident fund accumulations after they attain the age of 58 years, as per provisions of the substituted Para 69(1)(a) under Para 83 of the EPF Scheme (*Circumstances in which accumulations in the Fund are payable to an International Worker*), subject to the condition that such IWs have ceased to be in employment of an establishment covered under the EPF Act.

D. Draft notification to amend the Rights of Persons with Disabilities Rules, 2017 (Disabilities Rules)

The Ministry of Social Justice and Empowerment has issued a notification with draft rules dated June 21, 2022, to amend the Disabilities Rules under the Rights of Persons with Disabilities Act, 2016 (**Disabilities Act**), to prescribe new standards on physical environment to be maintained by '*public buildings*'. These draft rules shall be taken into consideration after the expiry of a period of 30 (thirty) days from the date on the notification, which is published in the official gazette for public comments.

Under the extant Disabilities Act, read with Rule 15 (1) (a) of the Disabilities Rules (*Rules for Accessibility*), every establishment is required to comply with the prescribed standards relating to, inter alia, physical

environment in public buildings, i.e. Harmonised Guidelines and Space Standards for Barrier Free Built Environment for Persons with Disabilities and Elderly Persons as issued by the Government of India, Ministry of Urban Development in March, 2016. The definition of a 'public building' under the Disabilities Act includes a private building, used or accessed by the public at large, including for commercial activities.

Through the aforesaid draft amendment, Rule 15(1)(a) of the Disabilities Rules is to be substituted with new guidelines on standards for public buildings specified as "*Harmonised Guidelines and Standards for Universal Accessibility in India – 2021, issued by the Government of India, Ministry of Housing and Urban Affairs vide letter no. 28012/09/2019-W3, dated December 27, 2021, as amended from time to time and made available on https://drive.google.com/file/d/1d4dedBt2cw-JEvy_qqSodQ9ENfOyNfef/view;*"

E. Notification of model Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) policy (HIV Policy) for establishments

The Central Government has notified the HIV Policy under the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 (**HIV and AIDS Act**), *vide* a notification dated May 13, 2022. The HIV Policy applies to all establishments, which are a body corporate or co-operative society or any organisation or institution or 2 (two) or more persons jointly carrying out a systematic activity for a period of 12 (twelve) months or more at 1 (one) or more places for consideration or otherwise, for the production, supply or distribution of goods or services.

The HIV Policy is based on the following 3 (three) principles:

i. Non-discrimination against people infected with and affected by HIV and AIDS;

ii. Confidentiality related to one's HIV status and HIV-related data; and

iii. Grievance redressal mechanism in the form of a complaints officer at establishments and ombudsman at state level.

Based on the abovementioned principles, some of the obligations that are imposed on employers under the HIV Policy include, *inter alia*, ensuring non-discrimination against employees infected with and affected by HIV and AIDS, including denial of, termination from and unfair treatment at the employment, prohibition of HIV testing as a pre-requisite for obtaining employment, ensuring all staff members understand the concept of consent, disclosure and confidentiality related to HIV and AIDS, appointment of a complaints officer at every establishment with 100 (one hundred) or more employees to dispose complaints pertaining to violation of the HIV and AIDS Act, and adopting data protection measures in relation to the records of HIV-related information of protected persons.

II. KEY STATE LEGISLATIVE CHANGES

A. Exemption under Tamil Nadu Shops and Establishments Act, 1947 (TNSEA)

The Labour Department, Tamil Nadu, *vide* a notification dated June 2, 2022, has exempted all shops and establishments, employing 10 (ten) or more persons, from the provisions of Section 7(1) and Section 13 (1) of the TNSEA, dealing with opening and closing hours of shops and commercial establishments, respectively. Accordingly, such shops and establishments are permitted to remain open on all days of the year, for a period of 3 (three) years with effect from June 5, 2022. The said exemption is subject to certain conditions.

Some of the key conditions are:

i. every employee shall be given 1 (one) day holiday in a week on a rotational basis and the details of every employee shall be provided in 'Form S' added to the Tamil Nadu Shops and Establishments Rules, 1948, and shall be exhibited by the employer in a conspicuous place in the establishment.

ii. an employer shall not require or allow any employee to work at the establishment for more than 8 (eight) hours on any day, and 48 (forty-eight) hours during any week and the period of work, including overtime, shall not exceed 10 and a 1/2 (ten and a half) hours on any day and 57 (fifty-seven) hours in a week.

iii. women employees shall not be required to work beyond 8.00 PM on any day under normal circumstances, unless written consent of the woman employee is obtained by the employer, which shall allow them to work between 8:00 PM and 6:00 AM, subject to providing adequate protection for their dignity, honour and safety.

iv. transport arrangements shall be provided to the women employee who works in night shifts.

v. the employees shall be provided with restroom, washroom, safety lockers and other basic amenities.

vi. every employer employing women employees shall constitute an operational Internal Committee against sexual harassment of women under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (**POSH Act**).

B. Employees' State Insurance Act, 1948 (ESI Act) extended to cover certain establishments in Andaman and Nicobar Islands

The Ministry of Labour and Employment *vide* notification dated May 30, 2022, has extended the provisions of the ESI Act to certain classes of establishments in the Union Territory of Andaman and Nicobar Islands. This notification has come into effect from June 1, 2022, and will extend to establishments, including but not limited to shops, hotels and restaurants wherein 10 (ten) or more persons are employed, or were employed, on any day of the preceding 12 (twelve) months.

C. Government of Uttar Pradesh allows women workers in factories to work during night shifts

The Government of Uttar Pradesh *vide* a notification dated May 27, 2022, has exempted all factories in the state from restrictions imposed under Section 66 of the Factories Act, 1948, in relation to women working between 07:00 PM and 06:00 AM. However, this exemption is subject to certain conditions including the following:

i. no women worker shall be bound to work without her written consent before 06:00 AM and after 07:00 PM.

ii. such women workers shall be provided with (i) free transportation from their residences to the workplace by the employer of the factory and back; (ii) food; (iii) access to washroom and drinking facilities.

iii. no woman worker shall be terminated from her employment if she refuses to work during the aforementioned timings.

iv. atleast 4 (four) women workers must be present on the premises or a particular department, for women to be allowed to work during the aforementioned timings.

v. employers shall take appropriate steps to prevent sexual harassment and also maintain a complaint mechanism in the factory itself as prescribed under the POSH Act.

vi. employer shall send a monthly report electronically or otherwise, stating the details of women workers engaged during night shifts, and also send a separate report whenever there is some untoward incident to the inspector of factories of the relevant region, and also the local police station in the latter situation.

vii. women workers shall be made aware of their rights by prominently displaying guidelines.

D. Government of West Bengal appeals to employers and employees to adhere to the guidelines to settle legitimate dues of workers under Payment of Bonus Act, 1965 (Bonus Act)

The Labour Department of West Bengal government *vide* a circular dated April 22, 2022, has made an appeal to all employers and employees covered under the Bonus Act to adhere to the following guidelines while settling the legitimate dues of workers with respect to the payment of bonuses for the year 2022 under the Bonus Act. The key guidelines are set out below:

i. All establishments where bonus was paid in the previous year are requested to see that the rate of bonus payable this year is not lower than that of last year. However, where there is a dispute, the same may be settled amicably through negotiations. Employers are also requested to consider payment of an amount of ex-gratia in lieu of statutory bonus to all workmen and employees who are no longer eligible under the Bonus Act by virtue of earning higher than the notified salary threshold (which is INR 21,000 (Indian Rupees Twenty-One Thousand only) per month).

ii. All employees, whether in casual employment or re-employed after retirement or employed through contractors and have worked for not less than 30 (thirty) days during the year, should be paid bonus.

iii. All payments of bonus should be completed by September 23, 2022, and in respect of Muslim employees/ workers before Id-ul-Fitr of 2022.

E. Goa Shops and Establishments (Amendment) Act, 2021 (Goa S&E Amendment Act) brought into effect from May 2, 2022

The Labour Department of Goa vide notification dated May 5, 2022, has notified May 2, 2022 as the effective date for the enforcement of the Goa S&E Amendment Act.

The Goa S&E Amendment Act was issued by the Department of Law, Goa, on September 24, 2021, to further amend the Goa, Daman and Diu Shops and Establishments Act, 1973 (**Goa S&E Act**). Some key amendments under the Goa S&E Amendment Act are:

i. In relation to registration of establishments, the requirement for the inspector to be "*satisfied with the correctness of the statement submitted*" by an establishment has been replaced with the obligation on the inspector to register the establishment within a period of 7 (seven) working days from the date of receipt of the statement and the fees for registration of the establishment. If the inspector fails to register the establishment within the prescribed timeline, the establishment shall be deemed to have been registered and the electronic certificate of registration shall be auto-generated.

ii. Similarly, the registration of the establishment shall be renewed automatically after the expiry of the period of 7 (seven) working days from the establishment making the renewal application and an electronic certificate of renewal shall be auto-generated. Further, the applicant establishment can now obtain a renewal for any period requested as opposed to the earlier condition that the registration certificate could not be granted for a period exceeding 5 (five) years from the date of expiry of the registration certificate.

iii. A new provision has been introduced that specifies that no woman shall be allowed or required to work in any shop or establishment except between 6:00 AM and 7:00 PM, except if the authority is satisfied that the provisions related to protection of women's dignity, honour, safety are adequate, and the facility of transportation from the shop or

establishment to the doorstep of their residence exists and woman employees working during such timings, have provided their consent for the same.

F. Punjab Shops and Commercial Establishments (Haryana Amendment) Rules, 2022

The Labour Department, Haryana *vide* notification dated May 17, 2022 has enforced the amendment to the Punjab Shops & Commercial Establishments Rules, 1958 (as applicable to Haryana) (**Haryana S&E Rules**) through the introduction of the Punjab Shops & Commercial Establishments (Haryana Amendment) Rules, 2022 (**Haryana S&E Rules Amendment**).

Under the Punjab Shops and Commercial Establishments Act, 1958 (as applicable to Haryana) (**Haryana S&E Act**), the government has the power to exempt any establishment or class thereof or any employer or employees or class thereof from the provisions of the Haryana S&E Act. This is subject to the conditions laid down under Rule 15 of the Haryana S&E Rules for grant of such exemption, which, *inter alia*, specifies under Rule 15(2)(iv) that no woman shall be required or allowed to work whether as an employee or otherwise in any establishment during the hours from 8:00 PM to 6:00 AM with a proviso which lists out the establishments which are exempted from this prohibition on women working in night shifts such as, *inter alia*, information technology and information technology enabled services establishments.

Through the aforesaid Haryana S&E Rules Amendment, the proviso to Rule 15 (2) (iv) of the Haryana S&E Rules in relation to Section 30 of the Haryana S&E Act (*Condition of employment of women*) has been modified to also include logistics and warehousing establishments into the list of exempted establishments vis-à-vis women working during night shifts.

G. Labour Department, Haryana lays down conditions for employing women in night shifts

The Labour Department, Haryana, *vide* notification dated June 7, 2022, has laid down certain conditions for the employment of women in night shifts i.e., from 7:00 PM to 06:00 AM in establishments such as IT/ITES establishments, banking establishments, 100% (hundred percent) export-oriented establishments and logistics/ warehousing establishments. This notification has been issued under Section 28 and Section 30 (3) of the Haryana S&E Act to safeguard the interests of women workers. The employer must apply for exemption to the prescribed authority atleast 1 (one) month prior to the commencement of the period in respect of which the exemption is required for women workers to be allowed to work during night shifts. This exemption, if granted, shall be valid for a period of 1 (one) year and be subject to certain conditions, some of which are set out below:

i. a declaration/ consent from each women worker, including security guard, supervisors, shift-in-charge or any other women staff to work during night shift i.e. between 07:00 PM to 06:00 AM shall be obtained and a copy of the same shall be forwarded to the Labour Commissioner, Haryana.

ii. women workers shall be made aware of their rights by prominently displaying the guidelines on the subject (i.e. the anti-sexual harassment policy required to be formulated under the POSH Act).

iii. women workers shall be allowed to raise issues of sexual harassment to workers in the workers' meeting and other appropriate forums in written or in electronic form or through a complaint box.

iv. employer shall ensure that women workers are employed in a batch not less than 10 (ten) and the total of the women workers employed in a night shift shall not be less than 2/3rd (two-third) of the total strength.

v. sufficient security shall be provided to women during the night shift at the entry as well as exit point.

vi. separate canteen facility shall be provided for women workers if the number of women workers is more than 50 (fifty).

vii. employer shall provide security guards (including female security guard) and transportation facility to women workers from their residence and back (for the night shift) and each transportation vehicle shall also be equipped with CCTV cameras.

viii. not less than 1/3rd (one-third) of the strength of the supervisors or shift-in-charge or other supervisory staff shall be women.

ix. there shall be not less than 12 (twelve) consecutive hours of rest or gap between the last shift and the night shift whenever a woman worker's shift is changed from day to night and also from night to day.

x. employer shall provide proper lighting not only inside the shop/ establishment, but also the areas surrounding the shop/ establishment, and all places where female workers may move out of necessity during the course of their shift.

xi. where more than 100 (one hundred) women workers are employed in a shift, a separate vehicle must be kept ready to meet emergency situations such as hospitalization, whenever there is a case of injury or incidental acts of harassment, etc.

xii. sufficient number of work sheds shall be provided for female workers to arrive in advance and also leave after the working hours.

xiii. in case of any criminal case, the employer shall initiate appropriate action in accordance with penal law without any delay and also take appropriate disciplinary action against the employee. Further, the employer shall also ensure that victims or witnesses are not victimised or discriminated against while dealing with complaints of sexual harassment and wherever necessary, at the request of the affected worker, shift or transfer the perpetrator.

xiv. employer shall send a half-yearly report to the Labour Commissioner, Haryana, about the details of employees engaged during night shifts and shall also send an immediate report, whenever there is some untoward incident, to the Labour Commissioner and the local police station as well.

H. Labour Department, Haryana releases a State Action Plan for drug menace

The Labour Department, Haryana, *vide* a circular dated June 20, 2022, has released a state action plan for eradication of drug menace from Haryana through a toll-free drug helpline number (9050891508), which is

to be displayed in all offices, educational institutions, and prominent public places.

III. STATUS ON LABOUR CODES

A. Draft Rules released under the Industrial Relations Code, 2020 (IR Code) by various states

During the period starting from April 01, 2022 until June 30, 2022, the draft rules under the IR Code were released by the Governments of Andhra Pradesh, Mizoram, Tamil Nadu and Ladakh, and were open to the public for objections and suggestions.

B. Draft Rules released under the Occupational Safety, Health and Working Conditions Code, 2020 (OSH Code) by various states

During the period starting from April 01, 2022, until June 30, 2022, the draft rules under the OSH Code were released by the Governments of Andhra Pradesh, Karnataka, Tamil Nadu, Assam and Ladakh, and were open to the public for objections and suggestions.

C. Draft Rules released under the Code on Wages, 2020 (Wage Code), by various states

During the period starting from April 01, 2022, until June 30, 2022, the draft rules under the Wage Code were released by the Governments of Andhra Pradesh, Tamil Nadu and Ladakh, and were open to the public for objections and suggestions.

D. Draft Rules released under the Code on Social Security, 2020 (SS Code), by various states

During the period starting from April 01, 2022, until June 30, 2022, the draft rules under the SS Code were released by the Governments of Karnataka and Ladakh and were open to the public for objections and suggestions.

IV. COVID UPDATES

In view of the gradually increasing number of COVID-19 cases across the country, few state governments had issued circulars and orders between April 01, 2022, and June 30, 2022, imposing certain restrictions to curb the spread of COVID-19. The key updates in this regard are:

A. Karnataka

The Department of Health and Family Welfare, Government of Karnataka, vide a circular dated June 10, 2022, has imposed certain preventive and control measures pertaining to COVID-19 in the state. Vide this order, wearing of face covering/ mask in public places (including offices and industrial establishments) and while travelling in personal/ private/ public vehicles has been made compulsory. The owners/ administrators of establishments are required to ensure mask usage and only individuals wearing face covering/ mask shall be allowed entry/ access to such spaces. Individuals displaying symptoms of influenza-like illness (ILI) and severe acute respiratory infections (SARI), under high risk group and those with co-morbidities are required to be tested for COVID-19 on priority and are to remain isolated at home until the test result is declared. Individuals who are eligible for COVID-19 vaccination doses and especially the precautionary dose are advised to get it on priority.

Further, this circular specifically states that the concerned officers/ administrators/ owners shall ensure the implementation of specified preventive and control measures.

B. Maharashtra

The Government of Maharashtra has made wearing of masks a must in closed public spaces (including offices) in Maharashtra, vide an order dated June 04, 2022. That said, the then Minister of Health, Maharashtra, had clarified that masks have not been made mandatory, but people are urged to wear them as a precaution.

C. Haryana

The office of the District Magistrate, Gurugram, vide an order dated April 19, 2022, has re-imposed mandatory wearing of face mask/ cover in public or workplaces in Gurugram district, and a penalty of INR 500 (Indian Rupees Five Hundred only) for its violation.

JUDICIAL UPDATES

I. Supreme Court (SC)

A. Mandatory vaccination violative of fundamental rights

In ***Jacob Puliyel vs Union Of India 2022 (SCC OnLine SC 533)***, a writ petition was filed by a member of the National Technical Advisory Group on Immunisation (NTAGI), in public interest, against the Government of India, certain State Governments and a few private entities, highlighting various aspects in relation to the mandate pertaining to vaccines in India, such as *inter alia*, adverse consequences of emergency approval of vaccines, need for transparency in publishing clinical trial data of vaccines, lack of transparency in regulatory approvals and vaccine mandates in the absence of informed consent being unconstitutional.

The SC noted that no one can be forced to be vaccinated as the same would amount to violation of an individual's right to bodily autonomy, which is protected under Article 21 (*Right to Life*) of the Constitution of India, 1950. Personal autonomy of an individual involves the right of an individual to determine how they should live their life, which includes the right to refuse to undergo any medical treatment in the sphere of individual health. However, in the interest of protection of communitarian health, the Government is entitled to regulate issues of public health concerns by imposing certain limitations on individual rights, which are open to scrutiny by constitutional courts. Nonetheless, any such limitations placed by the Government on the personal autonomy of an individual to protect legitimate State interest should meet the threefold requirements laid down in the landmark case of *K.S. Puttaswamy vs. Union of India* ((2017) 10 SCC 1) (**Puttaswamy Case**), which are: (a) legality, that is, the existence of law; (b) need, defined in terms of a legitimate State aim; and (c) proportionality, which ensures a rational nexus between the objects and the means adopted to achieve them.

Based on various scientific studies/ data submitted by the parties concerned, the SC noted that the risk of transmission of Covid-19 virus from unvaccinated

individuals is almost at par with that from vaccinated persons and that neither the Central nor the State Governments have produced any material before the Court to justify the discriminatory treatment towards unvaccinated individuals in public places, by imposition of vaccine mandates. Hence, it was held that the restrictions on unvaccinated individuals imposed through vaccine mandates and orders issued by the Government, cannot be considered as proportionate restrictions on an individuals' rights.

In light of the aforesaid, until the infection rate and spread remains low and any new development or research finding comes to light, which provides the Government due justification to impose reasonable and proportionate restrictions on the rights of unvaccinated individuals, the SC has suggested all authorities in this country, including private organisations and educational institutions, to review the relevant orders and instructions imposing restrictions on unvaccinated individuals in terms of access to public places, services and resources. The SC has also clarified that their suggestions with respect to vaccine mandates are limited to the present situation, only when infection rates are low, and this judgement should not be construed to impede the Government from imposing reasonable restrictions on unvaccinated individuals in the future, if the situation so warrants, provided such restrictions meet the threefold requirement for intrusion into the rights of individuals, as enshrined in the Puttaswamy Case.

B. Conveyance allowance does not constitute 'wages' under the ESI Act

In ***Talema Electronic India Private Limited v. Regional Director, ESI Corporation & Anr (Civil Appeal No. 3175 of 2022)***, the appellant had filed an appeal against the judgment and order dated March 30, 2021, passed by the High Court of Judicature at Madras. The main issue before the court was whether conveyance allowance is included within the purview of "wages" under the ESI Act.

Relying upon the case of Employees State Insurance *Corporation v. Texmo Industries 2021 (7) SCALE 438*, on the interpretation of Section 2(22) (d) of the ESI Act, the SC has held that "conveyance allowance" is equivalent to traveling allowance and is excluded from the definition of "wages" under the ESI Act. Accordingly, the SC set aside the judgment and order passed by the said High Court.

C. Once employee discharges initial burden, onus on employer to prove that employee was gainfully employed

In ***Salim Ali Centre for Ornithology & Natural History, Coimbatore & Another v. Dr. Mathew K. Sebastian (Special Leave to Appeal (C) No. 5218/2022***), the respondent was dismissed from service on January 30, 1996. Upon challenge, the single judge directed reinstatement of the respondent with all consequential benefits, except back wages. However, the petitioner preferred an appeal before the division bench and a stay was imposed on reinstatement. While the appeal was dismissed and the respondent was reinstated on December 16, 2010, he remained out of employment from August 23, 2002, to April 30, 2007, and was engaged elsewhere from May 1, 2007 to January 20, 2011.

Thereafter, the respondent filed a writ petition before the High Court praying for tangible benefits, including back wages from the date of reinstatement passed by the court till the reinstatement. Accordingly, the petitioners were directed to pay to the respondent back wages along with 9% (nine percent) interest per annum for the period during which he was out of employment.

In an appeal before the SC, the petitioners submitted that: (a) the respondent had failed to establish that he was not gainfully employed from August 23, 2002, to April 30, 2007; (b) as per the settled position of law, it is the employee who has to prove, by leading evidence that he was not gainfully employed during the period he remained out of employment; and (c) that based on the principle of "no work no pay", the respondent was not entitled to any back wages for the period between August 23, 2002, to April 30, 2007, during which he was out of employment.

The SC noted that once the reinstatement was confirmed, as a natural consequence, the respondent was entitled to back wages for the period during which he remained unemployed, subject to the management proving that he was gainfully employed. The SC further noted that he was entitled to back wages for the period between August 23, 2002, and December 16, 2010, subject to the management proving that he was otherwise gainfully employed. However, the respondent himself claimed back wages only for the period between August 23, 2002, and April 30, 2007, by specifically averring and submitting that he was engaged elsewhere from May 1, 2007, to January 20, 2011, and by submitting so, the employee discharged his initial burden. Thereafter, the onus shifted to the employer to disprove and establish that the employee was gainfully employed throughout the aforesaid period. Further, the principle of "no work no pay", was held to be not applicable to the present case since the employee remained unemployed due to the stay order granted by the court.

II. Calcutta High Court

A. Employer may withhold payment of gratuity pending judicial proceedings

In ***Milan Kumar Ghosh v. Union of India (MANU/WB/0643/2022)***, the appellant was engaged as an agriculture officer in the respondent bank and was suspended from service in March 1996, for alleged acts of misconduct. While the suspension was revoked in January 1997, disciplinary proceedings were initiated against him and continued till June 1999, when the disciplinary authority imposed the punishment of reduction of pay scale. The appellant superannuated in 2013 and upon his retirement, he received all benefits, except for gratuity and additional retirement benefits, which were withheld by the bank on account of a pending criminal case with

the Central Bureau of Investigation (CBI). The appellant filed a writ application before the Calcutta High Court, challenging the withholding of gratuity and additional benefits, however, the said application was dismissed by the learned single judge.

Upon challenge before a division bench of the Calcutta High Court, the respondent justified its actions based on banking regulations, which permitted the bank to withhold gratuity payments until conclusion of any judicial proceedings against the appellant. While the appellant argued that gratuity could only be withheld in accordance with the provisions of the Payment of Gratuity Act, 1972 (**Gratuity Act**), and any banking regulations contrary to the same must not be applicable, the respondent submitted that the banking regulations were made in exercise of the powers under Section 19(2)(f) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, and thus had statutory sanction. The Calcutta High Court noted that, while pendency of a criminal case against the appellant is not a ground for withholding gratuity under the Gratuity Act, in an employment governed by the banking regulations or any similar enactments having statutory sanction, an employer can withhold gratuity and additional retiral benefits of an employee against whom a judicial proceeding is pending, till its conclusion. Accordingly, the court dismissed the appeal.

III. Gujarat High Court

A. Forfeiture of gratuity as an afterthought impermissible

In ***Chairman and Managing Director Union Bank of India & Others v. Jaykant R Gohil (R/Special Civil Application No. 699 of 2019***), the respondent was engaged as a branch manager with the petitioner bank. During the course of his employment, a charge-sheet levelling certain allegations in relation to disbursement of term loans was issued to the respondent. After a departmental inquiry, the respondent was dismissed from service in February, 2012. On appeal by the respondent before the appellate authority, the punishment was reduced to compulsory retirement, following which, the respondent filed an application before the competent authority (which is the controlling authority) under

the Gratuity Act, complaining of non-payment of gratuity within the statutory period of 30 (thirty) days. In September, 2015, the petitioner issued a show-cause notice under Section 4(6)(a) of the Gratuity Act, asking the respondent to show cause why an order of forfeiture of gratuity should not be passed. After inviting response from the respondent and considering the monetary loss caused to the petitioner, the amount of gratuity was withheld by the petitioner. The controlling authority under the Gratuity Act, however, noted that it was incumbent on the bank to pay gratuity. Upon appeal, the appellate authority held that the notice was an afterthought and confirmed the order of the controlling authority.

The petitioner challenged the above mentioned orders passed by the controlling authority and the appellate authority before the Gujrat High Court and argued that once the bank had found that the respondent was responsible for causing monetary loss, which was quantified by the competent authority, it was just and proper for the bank to withhold the gratuity amount. However, the respondent contended that there was no imputation of any financial loss caused to the petitioner in the charge-sheet imputing allegations against the respondent, and the order of the disciplinary authority, which had imposed a penalty of dismissal, at best proved failure to take all possible steps to protect the interests of the bank, failure to discharge duties with utmost devotion, etc. Further, it was argued that there had been no quantification of the loss caused to the

bank as required under Section 4(6)(a) of the Gratuity Act. The Gujrat High Court noted that despite a charge-sheet being issued in 2011 and dismissal from service in 2012, it was only after the penalty was modified to compulsory retirement in 2014 and after the respondent had approached the bank, that the bank invoked the provisions of Section 4(6)(a) of the Gratuity Act, as an afterthought. Accordingly, the Gujarat High Court upheld the orders of the controlling authority and the appellate authority.

IV. Karnataka High Court

A. Disciplinary enquiry mandatory before dismissal of temporary employees

In ***K. Murugan v. The Registrar and Others (W.P. No. 25505 of 2009)***, the petitioner, was engaged as a temporary employee and was dismissed from service for indulging in malpractices. The petitioner challenged his dismissal and argued that, despite his status as a temporary employee, the respondent was duty bound to conduct an enquiry prior to his dismissal.

The Karnataka High Court noted that this was not a case of termination *simpliciter* and there was also a stigma attached to the allegations, which would impact the petitioner. Therefore, even though the employee was a temporary employee, the respondents were duty bound to follow the procedure mandated by law, i.e., framing of charges, giving an opportunity to the petitioner, conducting a disciplinary enquiry and thereafter, deciding the issue. Accordingly, the court set aside the order passed by the respondent and noted that the respondent was entitled to proceed from the stage of issuing a charge memo, conducting a fresh enquiry and taking a decision in accordance with the law in the matter, either by permitting the petitioner to re-join duty or by placing him under suspension. Given the nature of allegations, the court did not award back wages to the petitioner at this stage.

V. Kerala High Court

A. Artificial breaks between successive contracts cannot be used as a device to deny maternity benefits

In ***Naziya B. and Others v. State of Kerala (WP(C) No. 26904 Of 2021)***, the petitioners were engaged as programmers at the Kerala University of Health Sciences on a contractual basis, wherein the contract was regularly renewed for a period of 179 (one hundred seventy-nine) days with breaks of 2 (two) days. While the petitioners were allowed maternity leave when applied for, no allowance was provided for the same and the decision of the respondent was brought to challenge before the court.

The court noted that the word 'actually' had been used consciously in the Government's order, which extended the benefit of maternity leave with full pay to female officers appointed on a contractual basis, irrespective of the tenure of the contract, however, no officer was entitled to the above benefits unless she had "actually" worked under the employer for a period of not less than 80 (eighty) days, immediately preceding her expected date of delivery or date of miscarriage. Therefore, persons who had 'actually' worked for a period of not less than 80 (eighty) days immediately preceding the expected date of delivery or date of miscarriage were eligible for benefits. By employing the word "actually", the Government wanted to include persons such as the petitioners who had been working for years together. Further, it was noted that the artificial break of 2 (two) days, inserted between successive contracts cannot be used as a device to deny the benefits, which the petitioners, as female officers, were entitled to. Accordingly, the impugned orders of the respondent were quashed and the respondent was directed to calculate and disburse maternity benefits.

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