

PROTECTION TO EMPLOYEES OF INDIAN TECH COMPANIES

Can the employees of electronic data processing and computer software development units in India claim protection under the Industrial Disputes Act, 1947 (“ID Act”), in the event of a dispute with the management?

Introduction

India has myriad employment and labor laws emanating out of its socialist policies. Chief among them is the ID Act, which, inter alia, makes provisions for the investigation and settlement of industrial disputes. When any employer discharges, dismisses, retrenches or otherwise terminates the services of a workman without complying with the conditions of retrenchment provided in the ID Act, the dispute or difference that can arise as a result between the workman and the employer is deemed to be an industrial dispute. (Section 2A of the ID Act)

Analysis of the ID Act

Do employees of electronic data and computer software development units fall within the definition of “workmen” under the ID Act?

Workmen have been defined to mean any persons (including apprentices) employed in any industry to do any manual, unskilled, skilled, technical, operational or supervisory work for hire or reward, whether the terms of employment are express or implied, and for the purposes of any proceeding under the ID Act in relation to an industrial dispute, includes persons who have been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any person –

- (i) who is subject to the Air Force Act, 1950;
- (ii) who is employed in the police service or as an officer or other employee of a prison;
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who being employed in a supervisory capacity, draws wages exceeding Rs. 1600 per month, or who exercises functions of a managerial nature.
(Section 2(s) of the ID Act)

As regards types of employees that fall within the definition of workmen, there is a plethora of caselaw. The Indian Supreme Court in H. R. Adyanthaya v. Sandoz (India) Ltd., 1994 II CLR 552, as cited in Dr. H. G. Abhyankar, Commentaries on Industrial Disputes Act, 1947 (2nd ed.) 282, has coined the dominant nature test. Under this test, in order to decide the status of an employee under Section 2(s), the actual work performed must be examined. The nature of duties actually performed that predominates, is decisive of the matter.

Managerial employees have been specifically excluded from the scope of the ID Act. As such, it is the lower cadre employees that take recourse to the ID Act for compensation and reinstatement. However, in recent times, the coverage of the ID Act has been extended to teachers and other professionals. Since skilled, technical and operational employees, who do not perform administrative or managerial tasks, have been specifically included in the definition of “workman” it can safely be assumed that employees of electronic data and computer software development units will fall within the definition of “workman”.

What constitutes retrenchment under the ID Act?

Retrenchment means the termination of service of a workman by the employer, for any reason other than a punishment inflicted by way of disciplinary action.

Retrenchment, however, does not include the following:

- i. voluntary retirement of the workman;
- ii. retirement of the workman on reaching the age of superannuation;
- iii. termination of service of the workman as a result of non-renewal of the employment contract on its expiry or the termination of such contract under a stipulation to that effect contained in the contract;
- iv. termination due to continued ill health. (Section 2(oo) of the ID Act)

When a workman is retrenched, and the employer proposes to take on another employee, an opportunity must be given to the retrenched workman to offer himself/herself for re-employment. Such retrenched workman will have preference over other persons. (Section 25H of the ID Act)

What are the conditions to be fulfilled before retrenching a workman?

The following conditions have to be fulfilled by an industrial establishment having less than one hundred workmen, for the retrenchment of a workman who has been in continuous service for not less than one year.

- (i) The workman must be given a one month's notice in writing, indicating the reasons for retrenchment. The retrenchment can take effect only after the notice period has expired, or if the workman has been paid wages in lieu of such notice.
- (ii) The workman must be paid, at the time of retrenchment, compensation, which is equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.
- (iii) A notice must be served in the prescribed manner, on the appropriate Government. (Section 25F of the ID Act)

The following are conditions precedent to the retrenchment of a workman, who has been in continuous service for not less than one year by an industrial establishment with one hundred or more workmen.

- (i) The workman must be given a three months' notice in writing, indicating the reasons for retrenchment. The retrenchment can take effect only after expiry of the notice period, or if the workman has been paid wages in lieu of such notice.
- (ii) The prior permission of the appropriate Government must be obtained by making an application in the prescribed manner.
- (iii) Where permission has been granted, the workman must be paid, at the time of retrenchment, compensation which is equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. (Section 25N of the ID Act)

What constitutes lay-off under the ID Act?

Lay-off means the failure, refusal or inability of an employer to give employment to a workman, whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched. A workman is laid-off on account of shortage of coal, power or raw materials, the accumulation of stocks, the breakdown of machinery, natural calamity, or for any other connected reason. (Section 2kkk of the ID Act)

A workman, whose name is borne on the muster rolls of the industrial establishment and who presents himself for work during the normal working hours on any day, is said to be laid-off for that day if he is not given employment within two hours of him presenting himself for work. (Explanation to Section 2kkk of the ID Act)

A workman is entitled to compensation for all the days during which he is laid off, except for weekly holidays that may intervene, if he has completed not less than one year of continuous service under the employer. (Section 25C of the ID Act)

A workman, who has been laid off for more than forty-five days during the period of twelve months, is not entitled to compensation beyond the forty-five days, if there is an agreement to that effect between the workman and the employer. (First Proviso to Section 25C of the ID Act)

The employer may also retrench a workman after the expiry of the first forty-five days of the lay-off, and any compensation already paid during the lay-off may be set off against the compensation for retrenchment. (Second Proviso to Section 25C of the ID Act) This provision is, however, not applicable to industrial establishments with one hundred or more workmen. A workman, employed in an industrial establishment with one hundred or more workmen, may not be laid-off without the prior permission of the appropriate Government. However, prior permission is not required if the lay-off is due to shortage of power or natural calamity. (Section 25M of the ID Act)

Closure of an industrial undertaking to which the ID Act applies

The following conditions have to be fulfilled for closure of an undertaking of fifty or more workmen.

- (i) A sixty days' notice must be served upon the appropriate Government stating the reasons for the intended closure. (Section 25FFA of the ID Act.)
- (ii) The appropriate Government may, if satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer, direct that the sixty days' notice is not required for a specified period.

The following conditions have to be fulfilled for closure of an undertaking of one hundred or more workmen.

- (i) Prior permission from the appropriate Government must be obtained at least ninety days before the date of intended closure.
- (ii) The grant or refusal order of the appropriate Government is final and binding and will remain in force for one year.

- (iii) The appropriate Government may, on application by either party or on its own motion, review the order or refer the matter to a tribunal for adjudication.
- (iv) If an undertaking is closed down without permission, then the closure will be considered illegal, and the workmen will be entitled to all the benefits as if the undertaking had not been closed down.
- (v) On closure, the workmen are entitled to compensation, which is equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. (Section 25O of the ID Act)

Compensation must be paid workmen of undertakings that are closing down, as follows.

- (i) Every workman, who has been in continuous service for not less than one year immediately before the closure, is entitled to compensation, as if he had been retrenched. (Section 25FFF of the ID Act.)
- (ii) If the undertaking has been closed down on account of unavoidable circumstances beyond the control of the employer, the compensation payable to the workman will not exceed his average pay of three months. (Section 25FFF of the ID Act)

The provisions of the ID Act are therefore rigid and pro-labor, which require the company to seek Government permission before they can lay off employees or close down plants. However, the ID Act applies only if the undertaking falls within the definition of an industrial establishment under the ID Act.

Are electronic data processing and computer software development units industrial establishments under the ID Act?

Under the ID Act, an industrial establishment or undertaking “means an establishment or undertaking in which any industry is carried on” (Section 2(ka) of the ID Act) Further, industry “means any business, trade undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen.” (Section 2(j) of the ID Act) Under this definition, any industrial establishment having less than one hundred workmen will have to follow the aforesaid rules of retrenchment (supra. p. 2). Thus, electronic data processing and computer software development units having “at-will” termination clauses in their employment agreements with their technical/skilled, non-managerial employees may have a problem enforcing them, if they have less than one hundred workmen.

In cases where an industrial establishment seeks to:

- (i) retrench a workman and has one hundred or more workmen;
- (ii) effect closure and has one hundred or more workmen; or
- (iii) lay-off a workman and has fifty or more workmen.

a separate definition of “industrial establishment” applies to it. The applicable definition is that of a “factory” under the Factories Act, 1948.

A factory is any premises including its precincts -

- (i) where ten or more workers work, or worked in the preceding twelve months, and where any manufacturing process is carried on with the aid of power; or
- (ii) where twenty or more workers work, or worked in the preceding twelve months, and where any manufacturing process is carried on without the aid of power –

but does not include a mine under the Mines Act, 1952, or a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place. (Section 2(m) of the Factories Act)

For the purposes of this definition, the mere fact that an electronic data processing unit or a computer unit is installed in any premises or part thereof, must not be construed to make it a factory, if no manufacturing process is being carried on in such premises or part thereof. (Explanation II of Section 2(m) of the Factories Act)

Explanation II of Section 2(m) of the Factories Act (“Explanation II”), therefore, exempts electronic data processing units and computer units from the definition of a factory, if no manufacturing process is carried on therein.

The Supreme Court analyzed the above definition of factory in a recent case, Seelan Raj and Others v. Presiding Officer, I Addl. Labour Court, Chennai and Others, (2001) 89 FLR 342, to determine whether electronic data processing and computer software development units would be subject to the provisions of the ID Act.

In this case, the Supreme Court, while referring the matter to a larger Bench, held that Explanation II exempted data processing or computer software development units from the definition of a factory, if no manufacturing process or activities were carried on therein. The Supreme Court, while interpreting the intention of the legislature, stated that the words “if no manufacturing process is being carried out in such premises or part thereof” in Explanation II, meant that an establishment solely engaged in electronic data processing or computer software development, could claim the benefit of Explanation II. However, if the electronic data processing or computer software processing activities were carried out along with other manufacturing processes or activities, then that establishment could not claim the benefit of Explanation II. It would then be a factory as defined under Section 2(m) of the Factories Act, 1948 and would be governed by the ID Act.

Background of Seelan Raj’s case

The company, Cholamandalam Software Limited (“CSL”), was formed in 1982 with the object of rendering computer services relating to collection and maintenance of information to develop computer software applications suited to the special requirements of customers. In March 1983, CSL set up a data processing division, which undertook data processing services, such as, preparation of pay rolls and preparation of financial accounting and inventory control related statements. On January 4, 1989, a notice was sent to the Government that the data processing unit would be closed down with effect from April 3, 1989. By October 1989, the software division of CSL had also closed. The workmen raised their dispute before the Labor Court that the management had resorted to illegal lock-out. The Labor Court held that the closure by the management of CSL was illegal and against the provisions of law. The Labor Court ordered for reinstatement of the workmen, with backwages and all perquisites.

A writ petition was filed by the management of CSL, which was allowed by a Single Judge of the High Court. The Single Judge of the High Court held that an establishment that is solely an electronic data processing unit or a computer unit, though may be a factory, would still be exempted from the application of the ID Act by virtue of Explanation II. The Division Bench, on appeal, upheld the judgment of the Single Judge.

A further appeal was filed in the Supreme Court, where it was argued on behalf of the workmen, that the activities of CSL involved a manufacturing process. It was argued that a computer data processing unit involved the manufacture of software, by virtue of use of floppies, cartridges, chips, diskettes, etc., and the floppies, etc. were sold in the market as valuable commodity.

While referring the matter to a larger bench, the Supreme Court held that while deciding whether a particular establishment was a factory or not, the meaning attributed to the words “manufacturing process” would be relevant.

“MANUFACTURING PROCESS” MEANS ANY PROCESS FOR -

- (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal;
- (ii) pumping oil, water, sewage or any other substance;
- (iii) generating transforming or transmitting power;
- (iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding;
- (v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or
- (vi) preserving or storing any article in cold storage. (Section 2(k) of the Factories Act)

The Supreme Court held that the legal nature of software was not clear in computer law. Computer software could be defined as a computer program or a non-hardware part of a computer system. A distinction could be drawn between a standard package, a custom built software and a hybrid form of software. Moreover, a distinction could also be drawn between a systems software, which made the hardware operate in a particular way and an application software, which performed certain functions. Therefore, software was intangible and difficult to classify in legal terms. It did not have a physical form, except that of a magnetic notation on a tape or disk, and therefore, could not be classified as goods. There was a distinction to be drawn between software and the medium on which software was supplied. Therefore, it was not fully accurate to treat the process of software development as one involving a manufacturing process.

The Supreme Court noticed a debate on similar aspects in the case Tata Consultancy Services v. State of Andhra Pradesh, Civil Appeal No. 2582 of 1998 decided on March 13, 2001, which had been referred to a larger Bench. For the

same reasons, the Supreme Court referred the present matter to a larger Bench for consideration.

Conclusion

Companies that are engaged in data processing and computer software development, whether or not using a manufacturing process, and employing less than one hundred workmen, will have to comply with the provisions of the ID Act relating to retrenchment and closure. The provisions pertaining to the laying-off of workmen as prescribed in the ID Act will also be applicable, if a data processing or computer software development unit has less than fifty workmen.

Companies that are engaged in data processing and computer software development, and employing one hundred or more workmen, will have to comply with the provisions of the ID Act relating to retrenchment and closure, only if they carry out a manufacturing process. Whether data processing and computer software development amounts to manufacturing will be decided by the Full Bench of the Supreme Court shortly.

Companies that are software and hardware component product developers will in all likelihood carry out manufacturing activities. Therefore, such companies will have to follow the provisions of the ID Act, regardless of the number of workmen employed.

Call centers generally provide only services and do not carry out any manufacturing process. Such call centers, employing one hundred or more employees, will not be governed by the ID Act. However, call centers that employ less than one hundred employees will have to comply with the provisions of the ID Act relating to retrenchment and closure.