LAY-OFFS BY MULTI-NATIONAL CORPORATIONS: LEGAL ANALYSIS OF DISGUISED RETRENCHMENTS

Abstract

The year, 2023 has seen large-scale 'lay-off' for varied reasons such as cost-cutting, lack of employment, change in the location of the company *etc.* The majority of the instances of 'lay-off' intend to permanently terminate the employment relationship with its employees. Hence this paper argues that these are, in effect, fiscal retrenchment disguised as lay-offs to evade compensations and legal disputes. It is this reality that drives this paper to study the legislative origin of 'lay-off' and 'retrenchment' and its differential jurisprudential expositions. The distinction between retrenchment and lay-offs from a legal standpoint is crucial as lay-offs imply specific legal duties regarding pay and notification periods. This research aims to demonstrate that such lay-offs are 'fiscal' retrenchments with permanent severance of the employer-employee relationship and not 'lay-off', which is 'temporary unemployment of the workmen'to hire them back as the industry attains its fiscal stability.

I Introduction

IN RECENT weeks, an astounding number of tech employees have been laid off across the globe. As the world came out from the pandemic era, new obstacles for businesses have emerged, including over-hiring, cost pressures, and funding issues. Since the beginning of 2023, several high-profile companies declared lay-offsof large groups of employees. Amongst them 'zoom call lay-offs' or 'virtual lay-offs' had a devastating effect on the employees.The employees were laid off over two-minute Zoom calls or by way of pre-recorded messages without any opportunity to know the reasons in detail. Therefore, organisational psychologist, Isabel Bilotta terms remote lay-offs as a violation of 'interactional justice', denying dignity and respect to the affected individual.[1]

The start-up ecosystem in India has undergone a worse state. Alongside, it is astonishing to see established companies like Google, Twitter, Meta, and Amazon lay off tens of thousands of employees.[2] Brands such as Swiggy, Dunzo, Ola Cabs, and ed-tech giant Byjus' along with competitors such as Vedantu and Upgrad have also laid off employees, amounting to roughly 10 percent of their workforces in some cases.[3]

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1 Aaraon Drapkin, "Why being fired over a Zoom Call is a jarring experience", July 29, 2022, *available at:* https://tech.co/news/why-being-fired-over-zoom-is-a-such-a-jarring-experience (last visited on Apr. 8, 2024).

2 Bernard Marr, "The Real Reasons for Big Tech Layoffs at Google, Microsoft, Meta and Amazon" *Forbes,* Jan. 30, 2023.

3 Aryaman Gupta, "Swiggy lays off 380 employees, CEO dubs over-hiring a 'poor judgement'" *Business Standard,* Jan. 20, 2023.

Initially, companies viewed lay-offs as a measure of last resort, acceptable only under certain conditions, such as a lack of raw materials, accumulation of products, machinery breakdown, or natural disaster.[4] As time progressed, companies exercised more flexibility beyond the circumstances mentioned under section 2 (kkk) of the Industrial Disputes Act, 1947 (ID Act). Today, what was once considered a last resort has become a standard method for companies to reduce payroll and manage losses in times of cost-cutting and investment for automation. The central idea of this research is to demonstrate that these multinational corporations have strategically misclassified terminations as 'lay-offs' rather than retrenchments, with the primary aim of evading compensations and legal disputes.It is critical to distinguish between retrenchment and lay-offs from a legal standpoint. While lay-off may have fewer regulatory requirements than retrenchment, the former also implies particular legal duties including pay and notification periods.

Throughout its history, India's labour laws have been significantly shaped by the country's colonial background and the socialist ideals of the nation's founding fathers and mothers.[5] Rationalisation and redundancies of labour had become policy issues from the 1950s, especially when closures took place in cotton textiles and leather industries. In the First Five Year Plan, certain basic guidelines were provided for in the case of rationalisation. These were considerations of multiple factors such as (i) technical examination of the workload (ii) stress on natural separation (iii) liberal separation allowances for those who opt to quit, (iv) provision of alternate employment to those affected and (v) retainment arrangements.[6] It was based on the philosophy of 'rationalisation without tears' to mitigate the effect of rationalisation on workers that the ID Act was amended in 1953 and 1976.[7]

The Chapter VA and VB of the ID Act, 1947 allows lay-off, retrenchment, closure and transfer of undertaking, provided the industrial establishments follow the procedures laid down therein. It requires employers of larger industrial establishments to get government approval before the declaration of layoffs, retrenchment, or closure.[8]As per section 25C of the ID Act, a workman is entitled to lay-off compensation at the rate of 55% of total basic wages and dearness allowance. The retrenchment compensation at the rate of 15 days of salary for every continuous year of service

4 The Industrial Disputes Act, 1947, s. 2(kkk).

5 R Mitchell, P. Mahyand P. Gahan, "The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development" *Asian Journal of Law and Society* 413-453 (2014).

6 Government of India, Planning Commission, First Five-Year Plan, 1951-1956.

7 T.S. Papola, "Employment Growth and Social Protection of Labour in India", *Indian Journal of Industrial Relations* 30 (2) 117-143(1994).

8 Chapter V B of the Industrial Disputes Act, 1947 which is applicable on industrial establishments with more than 100 workmen.

and one-month notice are mandatory conditions to be followed by the employer before retrenchment.[9] This provision ensures that the workmen get some subsistence amount as compensation as they transit into their next employment after the loss of employment.

Since the introduction of the Industrial Disputes (Amendment) Acts, which introduced Chapter VA in 1953 and Chapter VB in 1976, these chapters have witnessed constitutionality challenges.[10] The Second National Commission on Labour, 2002 recommended the elimination of smaller industries from its application and to increase the number of workmen to 300 in industrial establishments for coverage under Chapter V B.[11] These reforms were recommended for introducing greater labour market flexibility to entice foreign direct investment.[12] Based on these recommendations, Chapter X of the proposed Industrial Relations Code, 2020 accordingly increased the number of workmen to 300 workmen for seeking government approval in cases of lay-off, retrenchment and closure. Some states have proposed revisions to the I. D. Act along similar lines, which would loosen limitations on layoffs and retrenchment in compliance with the legislative intentions of the proposed Code on Industrial Relations, 2020.[13] These amendments have been met with opposition from labour organizations and political parties as they would increase informalisation in the organised sector.[14] It is against this backdrop of already strong opposition from employers against the provisions under Chapter V A and Chapter V B, the unimaginable scale of lay-off in industries are declared on the ground of the economic downturn due to COVID-19.

The paper navigates through the historical legal corridors and judicial intricacies, unravelling the evolution of regulations under the ID Act relating to lay-off and retrenchment. This analysis demystifies the nature of the widespread lay-offs orchestrated by multinational corporations. As it develops, the study delves deeper into the issue, probing the procedural legality of layoffs and questioning the legal

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9 Industrial Disputes Act, 1947, S.25-F which mentions the conditions precedent to retrenchment in industrial establishments.

10 *Hatisingh Mfg Co Ltd.,* v. *Union of India,* 1960 AIR 923; *Excel Ware* v *Union of India,* AIR 1979 SC 25; *Workmen of Meenakshi Mills* v. *Meenakshi Mills,* 1994 AIR 2696; *Papnasam Labour Union* v *Madura Coats*, 1995 AIR 2200; *Orissa Textile and Steel Ltd* v *State of Orissa*, 2002 (1) SCR 309.

11 Ministry of Labour and Employment, "Thirty Ninth Session of the Indian Labour Conference 2003", *available at:* https://labour.gov.in/sites/default/files/39ilcagenda_1.pdf (last visited on Feb. 27, 2024).

12 Alakh N Sharma, "Flexibility, Employment and Labour Market Reforms in India" 41 *Economic and Political Weekly* 21 (2006).

13 Secki P Jose, "India's Labour Reforms: Informalsiation of Work and Growth of Semi-Formal Employment" 57 *Economic and Political Weekly* 46 (2022).

14 *Ibid.*

justification of corporate actions. It challenges the hazy boundary between temporary layoffs and hidden retrenchments, pushing readers to doubt multinational firms' compliance with the law during mass lay-offs. Finally, the study finishes with a persuasive analysis that highlights the contradiction between the legal rhetoric of procedures and the distortion of the same in reality orphaning the workforcefrom economic stability. The analysis explores the need for stricter compliance with the laws, fairness and transparencyduring rationalisation of the workforce in industries to create a just working environment.

II The legislative history of lay-off

Defining 'Lay-Off'

The definition of lay-offs has been the subject of debate and widespread comprehension. Initially, there was no law governing lay-offs, which meant they were unregulated and occurred at the employer's discretion, causing hardships for workmen. This legal vacuum was resolved through the new amendment in 1953 and it added Chapter VA to the ID Act of 1947. Consequent to this Chapter VB was added in 1976 to carve out a separate route for bigger industrial establishments to be followed during lay-off, retrenchment and closure.[15] The next impending modification to the law of lay-off, retrenchment and closure is by way of the Industrial Relations Code, 2020. The term "lay-offs" is defined in section 2(t) of the proposed Industrial Relations Code which is a verbatim reproduction of the definition of layoff under section 2 (kkk) of the ID Act.[16] Lay-off is defined asan employer's incapacity to continue employing employees for a variety of reasons, including a lack of basic materials, coal, or electricity, stockpiling, equipment failure, *etc.* The Supreme Court has interpreted to clarify that it is not temporary discharge or temporary suspension of contract of service, but merely temporary unemployment of a few workmen on one of the grounds mentioned in section 2 (kkk) of the ID Act.[17] The court further held that lay-off isthe inability of the employer to provide employment and therefore no conferment of power on the employer to declare lay-off under the ID Act.[18]

One of the major judicial debates around lay-off was whether the employer has a common law right to declare lay-off. In *M.A. Veiyra* v. *Fernandez*, Justice Chagla held that: [19]

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15 The Industrial Disputes (Amendment) Act, 1976.

16 Ministry of Labour and Employment, "Annual Report 2020-21",7(2022), *available at:* https://labour.gov.in/sites/default/files/Annual_Report_202021_English.pdf(visited on Mar. 23, 2024).

17 *Workmen of Firestone Tyrev Management*, 1976 AIR 1775, 1976 SCR (3) 369.

18 *Ibid.*

19 *Mervin Albert Veiyra* v. *C.P. Fernandes (S)* AIR 1957 Born 100

> we no longer live in the age when the rights of workers were regulated by the contract between the employee and the employer. Whatever the provisions of the contract might be, the industrial law interferes with those provisions in the interest of labour, and it is futile to suggest today that the Legislature enacted Chapter VA in order to confer rights upon the employers and not upon the employees.

Therefore, the definition was clarified to state that this temporary unemployment arises from the failure or inability of the employer to give employment for the reasons stated in section 2 (kkk). This was further made clear in *Central Spinning India Weaving* v. *Industrial Court,* wherein it was held that the definition does not include the failure to employ for reasons not specified in the definition or their equivalents.[20] So the obligation of the employer to pay layoff compensation under section 25 C of the ID Act arises when the following conditions are complied with:

a) An employer must reject, refuse, or be incapable of hiring a candidate.

b) This abandonment, denial, or incapacity must result from a dearth of coal, electricity, or raw materials, an accumulation of inventories, a machinery malfunction, a natural calamity, or any other unrelated cause.

c) The identities of terminated employees must be included in the muster records of the business. (Must be on the payroll of the organization).

d) They should not be retrenched.

In *Workmen of Firestone Tyre and Rubber Co., Ltd* v. *Management*,[21] the Supreme Court held that either the term of the contract of service or provisions in the Standing Orders should empower the employer to declare layoff. In case, the employer is not empowered in such a manner, then "the employer will be bound to pay compensation for the period of lay-off which ordinarily and generally would be equal to the full wages of the concerned workmen".[22] This reading of the court further clarifies that there is no legalright to lay off a workman unless the law, either in the contract of service or in the statute or the statutory rules or standing orders, provides so.[23]

No workmen of larger establishments can be terminated either temporarily or permanently without the prior approval of the appropriate authority.[24] Additionally, copies of the pertinent application must be distributed to workmen. If the workers were laidoff due to a fire, flood, an excess of flammable gas, or an explosion, the employer must applyfor permission within thirty days of the date of lay-off.[25] Both

20 AIR 1959 Bom 225.

21 1976 AIR 1775.

22 *Ibid.*

23 *Hotel Imperial* v. *Hotel Workers' Union* (1959) II LLJ 544 (SC).

24 The Industrial Disputes Act, 1947, Ch. V B, s. 25 (M) (1).

25 *Id*, s. 25 (M) (3).

the employer and the applicant will have equal opportunity to introduce themselves and be heard during the application evaluation. It is up to the relevant government, after considering the antecedent factors, to decide whether or not to grant the company permission to cease. It is noteworthy to mention that even in this situation, permission is presumed to be obtained if the government fails to respond within 60 days.

Law on lay-off compensation and its exemptions

Section 25 C under the Chapter V-A of the Industrial Disputes Act, of 1947, specifically deals with the compensation payable to workmen during lay-offs. Lay-off compensation is paid at the rate of 50% of total basic wages and dearness allowance for the period of lay-off. The Fourth Schedule of the ID Act mentions a list of conditions of service which cannot be changed without giving notice of change to the workmen, who are likely to be affected. Section 9 A read with the Fourth Schedule clarifies that 21 days' notice is mandatory while any rationalisation or standardisation measure that may lead to retrenchment is undertaken by the employer. Therefore, the employer must provide notice to the workmen in industrial establishments about the impending reduction of workmen at work. The industrial establishments where more than 100 workmen are working, prior approval of the appropriate government is mandatory before lay-off.

Section 25 E of Chapter V-A exempts the employer from providing lay-off compensation in certain situations, such as if the workmen refuse to undertake alternate employment within a five-mile radius of the original establishment on similar work with the same wages, or workmen fail to appear once in a day in normal working hours or if the lay-off is due to strike from the part of workmen or another part of the establishment.[26] While reading section 25 C and section 25 E together, there are flexibilities available to the employer to decline compensation if the loyalty of the workmen to pursue employment with the same employer is not proved to his/her satisfaction. Therefore, even during the days of unemployment, the worker needs to ensure their presence at the workplace to become eligible for compensation. Though it is only 50% of the wages are paid as lay-off compensation, the worker cannot engage in any other work under a different employer to bridge the income gapdue to lay-off.

III Distinguishing 'legal' lay-off and 'justified' lay-off

The procedural compliance under section 25 C answers the question of legality in lay-off and justifiability of lay-off in judicial debates anchored around the grounds for lay-off. Procedural compliance such as payment of compensation and notice brings forth the question of legal compliance arising from provisions reading together section 9 A, section 25 C and section 25 E of the Industrial Disputes Act, 1947. The

26 The Industrial Disputes Act 1947, Chapter VA, s. 25 E.

question of justifiability of lay-off was raised before the court on the grounds of lay-off mentioned in section 2 (kkk). The litigation was on payment of wages for the period of lay-off declared on malicious grounds beyond "the failure, refusal or inability of an employer on account of the shortage of coal, power or raw materials or the accumulation of stocks or the break-down of machinery or natural calamity or for any other connected reason".[27]

In the case of *Tatanagar Foundry Co. Ltd.* v. *Their Workmen*,[28] the Supreme Court examined the justifiability of lay-off. In this case, the tribunal found that the company was in financial difficulties and hence there was no *malafide* intention or ulterior motive in laying off the workmen. However, the tribunal stated that the efficient management could have avoided the instance of a lay-off of the workmen. Based on this reasoning, it was held that the lay-off could not be altogether justified and awarded compensation to the respondents over the amount fixed by the statutory provision under section 25 C. The Supreme Court, in appeal, held that the tribunal had exceeded its jurisdiction by examining the prudence of the management in handling its affairs which is beyond the mandate of section 2 (kkk). The inquiry stops at whether there was adequate reason along the lines of the grounds for declaring lay-off. While deciding this case, Gajendragadkar J., laid down the following: [29]

> If the lay-off is *malafide* in the sense that the employer has deliberately and maliciously brought about a situationwherelay-off becomes necessary, it is not a lay-offwhich is justified under s. 2(kkk) and the relief provided unders. 25C is not the only relief to which the workmen are entitled.The *malafides* of the employer in declaring a lay-off really means that no lay-off has in law taken place and a finding as to the *malafide* of the employer in declaring lay-off takes the lay-off out of the definition of s. 2(kkk).If lay-off is declared in order to victimiseworkmenor for some, ulterior purpose, the position is the same.

Two years later, in the case of *Workmen of Dewan Tea Estate* v. *The Management,*[30] the Supreme Court examined the question of whether 'financial position or trading reason' would fall within 'any other connected reason' under the definition of lay-off and hence the declaration of lay-off was justified. While deciding the matter, Justice Gajendragadkar did not refer to the *Tatanagar Foundry* case, and held that the financial position disclosed cannot be described as constituting 'a cause beyond the control of the employer.' Therefore, the court allowed full wages for 45 days of lay-off declared in 11 tea gardens. In 1966, in *Cachar Chah Sramik Union* v. *Tea Estates of Cachar, etc.*[31],

27 The Industrial Disputes Act, 1947, s. 2 (kkk).

28 1962 I LLJ 382 (SC).

29 *Ibid.*

30 1964 AIR 1458.

31 1966 I LLJ 420 (SC).

Justice Ramaswamy distinguished the case from the *Workmen of Dewan Tea Estate case* on the ground that in this case there was sudden slump in the world market contributing to financial difficulties and held that the lay-off on the ground of financial difficulties faced by the employer is justified. Reading together these judgments, the understanding is that *malafide* intention, malicious motive and ulterior purpose are decisive criteria in determining (un)justified lay-off and accordingly, full wages for the period of lay-off.

Another leg of the justifiability of lay-off was discussed when the period for lay-off was discussed. In the definition of lay-off, there is no specificity about the period for which lay-off can continue. However, the first proviso to section 25 (c) talks about 45 days of lay-off period in the last 12 months, for which lay-off compensation can be claimed if there is no agreement to the contrary. As the law is silent on the duration of lay-off, the employer can declare lay-off for an indefinite period and keep the employee on the expectation of continuation of employment. Sometimes, to prepare a plan for winding up capital in one industry to transit to the other or to avoid initial backlash from the workmen against retrenchment, a lay-off is declared with a promise of re-employment. But this often leads to an indefinite lay-off period and subsequently retrenchment. Such instances have an 'ulterior purpose' of retrenching workmen, though termed as 'lay-off' to avoid immediate conflict or to take preparatory time before winding up. The workmen have challenged indefinite lay-off on the grounds of malicious or *malafide* intentions,being illegal or unjustified. In *Veiyra* v. *Fernandez*,[32] the court held that it is not illegal to continue lay-off for an indefinite period as the legal provisions are silent on this. However, one relies upon justifiability tests in lay-off – *malafide* intention, malicious motive and ulterior purpose- if there is an intention not to retain the workmen, to call it a 'lay-off' raises a justifiability question. In such cases, the workmen have to go without full wages or any wages for an indefinite period without joining any other work or service. This is harsh on the workmen as they lose continuity in service under the original employer once they choose to take up other employment during the period of lay-off, as per the law now. Therefore, the lay-offs which are without any time period or indefinite in character,require particular inquiry and full wages for the period of lay-off, if there is a *malafide* intention to prolong the lay-off without any compensation.

IV Lay-offs leading to retrenchment: requirement of a nuanced approach

The majority of lay-offs declared in the current context raise the 'question of lawfulness' as from the face of it there is an intentional permanent severance of employment relationship on the ground of 'cost-cutting'. In popular human resources literature, mass lay-offs are explained as strategically planned elimination of the

32 1956 I LLJ 547 (Bom).

downsizing of workers to enhance organisational effectiveness.[33] It is this synonymous use of 'lay-off' with firing, terminating, eliminating or permanent reduction in the workforce that brings a conflict with the well-defined legal categories of job losses such as retrenchment and closure, which are permanent in character. More profoundly as in most instances of mass lay-offs reported around the globe, the industry intends for permanent termination of the workforce or retrenchment. Therefore, it is not lay-off leading to retrenchment, which is legally valid, but termed wrongly as 'lay-off' to avoid the stigma and legal consequences of retrenchment to the company. The goodwill of the company also depends on the severance quotient of the employees in the job market. Sucher and Gupta argue that in the long term,lay-offs damage employee management and company profitability. Their study based on casestudies of many industries proves that a "better approach to workforce transitions is avoidance of staff reductions and ensures that when they do happen, the process feels fair, and the company and the affected parties are set up for success".[34]

The landmark case of *Pipraich Mills*[35]: Defining retrenchment

The Supreme Court was tasked with determining whether the termination of employees due to the closure of a business constituted retrenchment.[36] In the cases of *Barsi Light Railway Company Ltd.*, v. *K.N. Joglekar*[37] *and Benaras Ice Factory* v. *Their Workmen,*[38] an identical issue arose. The court took a narrow view of the legal issue decided in these cases; it could be said that all that was decided was that the cessation of an enterprise's operations does not constitute retrenchment under section 2(oo) of the Industrial Disputes Act. However, the Supreme Court reached its conclusion by avoiding a literal interpretation of the definition's scope and by assigning it a more restricted meaning. In doing so, it relied on the standard definition of retrenchment, which is the dismissal of a surplus workforce due to rationalisation or standardisation in the industry.

The ruling in *Pipraich Sugar Mills Ltd* v. *Pipraich Sugar Mills Mazdoor* is still pertinent to understand the concept of retrenchment. The court clarified the definition to state that: [39]

33 Milton Jack, "Employee lay-offs and its effect on employees", Feb. 122021, *available at:* https://www.thehumancapitalhub.com/articles/Employee-Layoffs-And-Its-Impact-On-Employees (last visited on Apr. 8, 2024).

34 Sandra J Sucher and Shalene Gupta, "Downsizing: Lay-offs that don't break your company" *Harward Business Review* (2018), *available at https://hbr.org/2018/05/layoffs-that-dont-break-your-company* (last visited on Jan. 20, 2024).

35 [1956] S.C.R. 872.

36 *Ibid.*

37 *K.N. Joglekar* v. *Barsi Light Railway Co. Ltd.,* AIR 1955 Bom 294.

38 *Benaras Ice Factory* v. *Their Workmen,* 1957 AIR 168 1957.

39 *Supra* note at 35.

> …retrenchment connotes in its ordinary acceptation that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplusage and the termination of services of all the workmen as a result of the closure of the business cannot therefore be properly described as retrenchment.

This clarified that while there is a real or *bonafide* closure of an industry, it is not retrenchment, but closure. Likewise, while there is a temporary closure of work or unemployment of workmen due to reasons connected with production,[40] it is lay-off. The intention of reorganisation and its consequencesmust be clear before it is declared as either a lay-off, retrenchment or closure. These three instances are different from each other in terms of the nature of the reduction in the workforce and its future consequences for the industry as a whole. Though lay-off leading to retrenchment is legally possible, declaring indefinite lay-off without any intention to recall the workers after the financial impasse or taking advantage of the option of lay-off to get rid of workers is unjustified or substantially illegal as according to the jurisprudence and from fair procedures relating to job losses.

Legal position relating to lay-off leading to retrenchment

Due to factors such as cost-cutting, reorganization, and shifts in business strategy, reduction in the workforcehas become common in many industries. Initially, they declare mass lay-off and later proceed to either indefinite lay-off or retrenchment. In the case of lay-off compensation, the provisos to section 25 C explain the connection between lay-off and retrenchment. The first proviso section 25 (c) states that the compensation shall be payable only for forty-five days during twelve months unless there is an agreement to the contrary. The second proviso to section 25 (c) states that if workers are laid down for more than forty-five days, it shall be lawful for the employer to retrench the workmen. In the case of such a retrenchment, the retrenchment compensation under section 25 F shall be set off against the lay-off compensation that is already paid. To make this provision applicable, the proviso mandates that the retrenchment shall be legal as contemplated by section 2 (oo) and comply with the requirements under section 25 F.

There were cases initially lay-off was declared and later as the industries could not save from fiscal deficits, the employers resorted to retrenchment of the workforce. In *Ravikrishna Weaving Mills Pvt. Ltd.* v. *State of Kerala,*[41] the High Court of Kerala found that the retrenchment followed by lay-off was legal and hence, the employer can set off the retrenchment compensation from the already paid lay-off compensation. In *Satya Prakash Giri.* v. *Presiding Officer, Industrial Tribunal,*[42] it was argued by the petitioners that the initial layoff for 48 days which ultimately led to the retrenchment

40 *Supra* note at 28.

41 1959 2 LLJ 760 (Ker.).

42 1995 (70) FLR 445.

of workmen, was unjustified and illegal. The court while deciding this matter looked at the reason for lay-off and retrenchment separately. It was found that 'accumulation of goods' is a legally valid reason under section 2 (kkk) for lay-off and upheld the justifiability of lay-off. In both cases,the critical factual scenario is that the retrenchment follows lay-off. This set of cases where lay-off and retrenchment are subsequent actions requires a careful examinationin the modern labour market.

Indefinite lay-off and subsequent retrenchment or lack of clarity on the question of fiscal challenge leading to retrenchment of the workforce requires 'harm' analysis from the part of workers. Lay-off provides an expectation for the workmen to re-join employment and precludes workmen from doing alternate employment at their will for the duration of lay-off.There is complete dependency on the employer for sustenance. Therefore, if fiscal retrenchment is a survival strategy of the organisation in a financial crisis, a well-informed decision at the outset while declaring lay-off initially would help the workers to decide their survival strategies to bear unemployment and reduction in income.

The relevant question today is whether all kinds of cost-cutting of the industry at the cost of unemployment of the workforce can be legitimised. Noe, states that "many organizations are looking to reduce costs, and because labour costs represent a big part of a company's total costs, this is an attractive place to start".[43] If lay-offs are approached as a cost-cutting mechanism, it can also be used as a profit-making mechanism by employers. Tech Giants such as Amazon, Microsoft, Apple, Dell, SAP, Meta are accused of following hard and fast lay-offs amidst their profiteering graph.[44] Payal Zaveri's chart shows the trend of hiring new employees replacing the laid-off workers with no intention of hiring them back.[45] This tells us that though it was declared as lay-off, in reality, it was retrenchment without following its legal procedures. Temporary reduction of the workforce on account of surplusage or financial incapacity of the employer to provide employment is a valid lay-off whereas it is not approached as a mere 'cost-cutting' measure through the lens of law against job losses contained under Chapter VA and Chapter VB of the ID Act, 1947.

The Supreme Court of India in principle hasn't entertained any 'sham' approach to eliminate a person from employment. In *Ranbir Singh* v. *Executive Engineer PWD*[46] the

43 Noe, R. A., Hollenbeck, J. R., *et.al. Human Resource Management: Gaining a Competitive Advantage* 11 (New York: McGraw-Hill, 2018).

44 Payal Zaveri, "These Six Charts show how lay-off at Google, Meta and Other Tech Giants still leave them with more employees than before Pandemic" *Business Insider*, Feb. 14, 2023, *available at:* https://www.businessinsider.in/tech/news/these-6-charts-show-how-layoffs-at-google-meta-and-other-tech-giants-still-leave-them-with-more-employees-than-before-the-pandemic/slidelist/97921354.cms, (last visited on Nov. 30, 2023).

45 *Ibid.*

46 *Ranbir Singh* v. *Executive Engineering PWD,* (2021)14 SCC 815.

court held that if an employer wishes to terminate an employee irrevocably, it must comply with the ID Act by providing retrenchment compensation. In the case of *Alok Kumar* v. *Oriental Bank of Commerce*, the High Court of Delhi ruled that an employee who was terminated under the guise of a "voluntary retirement scheme" (VRS) was eligible for retrenchment compensation because the circumstances suggested that the termination was not voluntary but rather a disguised retrenchment.[47]

A business may refer to a retrenchment as a "temporary lay-off" or a "furlough," insinuating that the employee will be recalled once the situation improves. However, this would be considered a retrenchment if the company has no intentions to rehire the employee. MNCs have manipulated the legal framework in a variety of ways to avoid or minimize their obligation to compensate laid-off employees. The misclassification of the termination of employment as a lay-off when in reality it is a retrenchment or dismissal. By doing so, they can avoid the higher compensation requirements associated with retrenchment (15 days' average pay for each completed year of continuous service) and the dismissal notice requirements.

Convention 158 of the International Labour Organisation (ILO) establishes 'termination of employment' standards or rules that member nations are required to incorporate into their labor law systems.[48] Article 12 of ILO Convention 158 specifies the element of compensation to be granted to a worker whose employment is terminated due to exceptional circumstances.[49] In establishing termination compensation or severance pay, the aforementioned law gives national governments or the competent authority discretion. Nonetheless, it specifies that the reimbursement must be reasonable and equitable. This fairness standard varies by jurisdiction, and as a result, each state has its social security requirements that employers must satisfy for their employees.

While understanding the augmented lay-off culture, a recent case brings in an interesting view from the labour court. In the case of *Thirumalai Selvan Shanmugam* v. *Tata Consultancy Services Limited*,[50] the petitioner claimed that retrenchment by TCS was illegal as it violated the compensation requirement under section 25F(b) of the Industrial Disputes Act, 1947. TCS argued that (i) the petitioner's employment had been terminated due to inadequate performance and (ii) the petitioner was not a 'workman' and, therefore, the provisions of section 25F of the Act did not apply. The court held thatthe nature of the principal duties performed by an employee, rather than the nomenclature of the designation, is relevant in determining whether the employee is a workman under the ID Act. It also found that the TCS has violated

47 *Alok Kumar* v *Oriental Bank of Commerce,* (2008) 111 FLR 928.

48 Convention 158, International Labour Organisation, 1982.

49 Convention 158, International Labour Organisation, 1982, art. 12.

50 Decided by Principal Labour Court, Chennai on June 8, 2022.

the prerequisite for retrenchment under Section 25 F(b) of the ID Act. The court set aside the termination order and directed to reinstate the petitioner with continuity of service and to pay full back wages and all other attendant benefits from the date of his termination of service till his date of reinstatement.[51] Considering that there are multiple references of disguised or perpetual lay-off from the IT companies, any procedural and substantive violation should amount to the court's scrutiny and high wage island shouldn't save the employers from evading their liabilities under the Chapter VA and Chapter VB.

V Conclusion

The clarity in jurisprudence on job losses, especially the difference between lay-off and retrenchment, has not translated into corporate lay-off actions of the current times. Even though companies lay off workers to streamline operations and save money, they frequently disregard the cascading effect on the workforce. The rampant violation of 'interactional justice' during lay-offs through virtual terminations has shown that trend. The normalisation of this trend has increased distrust in management and a decline in job performance among the surviving workforce.

In addition, although employees have access to legal remedies, these remedies have their limitations. Companies continue to terminate employees by referring to them as mass layoffs on the grounds of cost-cutting, and the repercussions are widespread, affecting not only unskilled but also qualified workers. Over the past two years, more than 30,000 individuals in India's technology sector have lost their employment, and the figure is only anticipated to increase. There must be a legal intervention to prevent unlawful retrenchments disguised as lay-offs.[52]

According to the ID Act, employers are required to give preference to retrenched workers who apply for re-employment.[53] If employees continue to be retrenched under the guise of lay-off, retrenchment laws must be crafted to avoid such manipulation of the law. Legal provisions should make sure that lay-off is not used as an easy measure to avoid procedural and financial obligations that derive from the law relating to retrenchment. Employers must also differentiate between redundancies and retrenchment to provide employees with the proper compensation. Employers must provide notice, pay severance, and adhere to the "last in, first out" principle in cases of retrenchment. In the event of a layoff, employers must obtain prior approval from the appropriate government authority, pay severance, and ensure that the termination was caused by circumstances beyond the employer's control. Any ambiguity regarding a definite period of lay-off is a disguised way of keeping workers in limbo

51 *Ibid.*

52 Sangita Bhalla, "Virtual Proscription of Unilateral Lay-offs", 7 *Journal of Indian Law Institute* 549-556(1995).

53 The Industrial Disputes Act, 1947, s. 25 H.

without regular work and hence, as the courts have held reading of justifiability of lay-off becomes an important jurisprudence.

The paper has attempted to analyse the character of *malafide* lay-offs in the current context. The current records state more than 2.61 lakh people were laidoff during 2023 globally and India stands second after the US in the list. Therefore, we require stricter compliance with the law during the severance of employer-employee relationships. Lay-off is never a pleasant action in an industry, especially for the workers. The provision of advance notification about impending lay-off and a definite period about the impasse would calm down the uncertainty that pervades the workers' lives. Any lay-off that was declared with the intention to lead to retrenchment is unjustified *ab initio* and hence, the lay-offs that are declared currently haven't shown any interest in calling the laid-off workers back. The research has also shown that the recent lay-offs are permanent and there is no intention on the part of the employer to call them back. Instead, the employer has resorted to hiring new workers in junior posts with less cost to the company or less wage package.[54]

Any lay-off to permanently terminate the workmen is retrenchment and the justifiability of new lay-offs is an important inquiry to ensure legal understanding of retrenchment is not trivialised. The law of retrenchment considers the employer's liability on retrenchment more seriously and there is more rigour attached to the procedures of retrenchment. As it involves permanent severance of the employer-employee relationship, the payment of compensation increases equivalent to the number of years spent at employment. Therefore, the employer considers financial liability and disputes on permanent severance to be huge for the industry and resorts to lay-off initially and retrenchment later to avoid immediate payment or responsibility. The fairness of the lay-off is part of procedural justice for workmen. The nature of lay-off intended to permanently terminate the workmen does not entail fairness and hence it cannot be considered legitimate. This is specifically for the reason that Indian industrial relations laws don't contain any provisions to encourage outplacement services and anyother social support that could ease workers' return to employment with the help of employment exchanges, collectives, trade unions or solidarity networks.

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54 Jose Maria Barrero, Nick Bloom and Steven J Davis, "Covid-19 is also reallocation shock", *BFI Working Paper*, (2020) *available at:* https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_202059.pdf (last visited on Apr. 8, 2024).

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