DISMISSAL AND DISCHARGE OF AN EMPLOYEE

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DISMISSAL AND discharge of an employee is certainly a harrowing experience for employers and as well as employees. But many times it becomes unavoidable and inevitable for the management, however reluctant it may be in taking to such recourse. Employees of today cannot be compared with those of 1950s and 1960s; they are more aware about and conscious of their rights. To top it all, the judiciary also watches every omission and commission of the management. Ignorance may be bliss for some but it is undoubtedly a bane for employers. Therefore, they must be doubly sure about the genuineness and efficacy of their steps. If disciplinary action calls for termination of an employee's service, a certain procedure has to be followed. Non-observance of the procedure correctly in this respect will *ipso facto* render the termination null and void.

Value of an Employee

It is a fact that no employer will dismiss or discharge an employee unless he is compelled to do so. An employer is always interested in production, rendering of services and performance of duties as assigned to an employee. An employee is also bound to maintain discipline and perform his duties diligently and efficiently. As long as the employee works sincerely, the employer may not disturb or dislocate him. However, when there is dereliction on the part of an employee, the employer is left with no option but to punish him or even to ge rid of him if the latter is adamant and does not adhere to norms of discipline in performing his duties.

When an employee becomes incorrigible, the law provides ways and means to an employer to dismiss/discharge him from service. The employer will have to observe certain procedures and his action should never smack of *malafide* intention, otherwise that will not stand the scrutiny of the court. It must be noted here that the labour laws in India are codified and they have been further expanded by judicial interpretations and verdicts. Once the codified law stepped in to regulate relations between unequal partners in industry, judiciary acquired a role for which it was largely unsuited.

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The traditional right of an employer to hire and fire his employees at his will has been subjected to many restraints. Labour courts/industrial tribunals can by their award make a contract which is binding on both the parties creating a new right and imposing new obligations arising out of the award. There is no question of the employer agreeing to the new contract, it is binding even though it is unacceptable to him. The creation of new obligations is not by the parties themselves. Either or both of them may be opposed to it, nevertheless it binds them.

Thus, the idea of some authority making contract for the employee and employer is a strange and novel idea and is foreign to the contract. As has already been said there is change in the concept of master and servant. One who invests capital is no more a master and one who puts in labour is no more a servant. They are employer and employees, the former may hire the latter but he can no more fire them at his will. The interest of the employees is in many respects protected by legislation. Both are now parties in an enterprise without one yielding to the higher status of another but as co-sharer in the partnership. Even the right of labour participation in the management has been given legislative recognition.

No Hire and Fire at Will

An employer has the freedom to select anybody according to his requirements but he does not have the liberty to fire a workman as per his will. After the introduction of the Industrial Disputes Act in 1947, this has become all the more difficult for an employer. Knowledge of the Industrial Disputes Act and also his rights and responsibilities is always in the interests of an employer. But those employers who care two hoots about the laws and their rights repent later. Industrial Disputes Act, is, in fact, a post independence enactment. The industrial law in pre-independence days was in a rudimentary form. But later on with the development of industry, the industrial law developed side by side. The economic growth of the country depends upon the industrial development. Therefore, the progress of a country being dependent upon the development of industry, the industrial law plays an important role in the national economy of the country. The object of the industrial relations legislation, in-general, is industrial peace and economic justice.

The development of labour laws has been a slow process. It has mainly two objectives. One is regulatory and the other is industrial peace and harmony. In fact both are intertwined. If labour laws provide a reasonable amount of social security and protection to workers, they also give rights to employers which can be exercised for maintaining the harmony in the establishment.

Although good management generally does not opt for adopting deterrent methods to curb and control indiscipline and misconduct of

workers; yet many times it becomes necessary to take recourse to harsh methods. Modem management believes more in motivation, co-operation and incentives than rigours of discipline, confrontation and detraction. However, it is absolutely necessary for a personnel manager to know the basics of labour laws to deal with contingencies.

Dismissal of an Employee

Dismissal is the biggest punishment which an employer can give to an employee. It is the termination of services by way of punishment for some misconduct or for unauthorised and prolonged absence from duty. There is a vital difference between dismissal and discharge. Discharge is the termination of a contract by notice or payment of wages in lieu of notice, whereas dismissal implies not merely a termination without notice or payment, but essentially indicates a measure of punishment. The word, 'dismiss' or remove in Article 311 of the Constitution comprehends every termination of the services of a government servant. This becomes clear in *Moti Ram Deka* v. *General Manager, North East Frontier Railways.*[1]

The dismissal of any employee is easier said than done. The employer is bound to give an opportunity to the employee to explain his conduct and to show cause why he should not be dismissed. The general rule is that in 'this process, there should be no violation of what is known as the principles of natural justice, which ensures that punishment is not out of all proportion to the offence.

In fact, there is no provision for summary dismissal. Before dismissal the employee may be placed under suspension and a proper enquiry is conducted to enquire about the misconduct of the employee. During the suspension the employee receives a subsistence allowance. The management's action must not suffer from vincitiveness and capricious attitude. Undoubtedly, the management has power to direct its own internal administration and discipline; but the power is not unlimited and when , a dispute arises, industrial tribunals/labour courts have been given the power to see whether the termination of service of workman is justified and to give appropriate relief. In cases of dismissal for misconduct the tribunal/labour court does not, however, act as a court of appeal and substitute its own judgment for that of the management. It will interfere —

(*i*) when there is want of good faith;

(*ii*) when there is victimisation or unfair labour practice;

(*iii*) when the management has been guilty of a basic error or violation of the principles of natural justice; and

1. AIR 1964 SC 600.

(*iv*) when on the material the finding is baseless or perverse.

These are four exceptions which confer jurisdiction on industrial tribunals to interfere with managerial discretion and apply with equal force to the determination of the question of the quantum of punishment.

When a case of dismissal or discharge of an employee is referred for industrial adjudication the industrial tribunal/labour court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there was no domestic enquiry or defective enquiry is admitted by the employer, there will be no difficulty. But when the matter is in controversy between the parties then the question must be decided as a preliminary issue. On the decision pronounced it will be for the management to decide whether it will adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue.

Discharge of an Employee

It is a permanent separation of an employee from the pay-roll for violation of company rules or for inadequate performance. A discharge becomes necessary :

(*i*) when the volume of business does not justify the continuing employment of the persons involved;

(*ii*) when a person fails to work according to the requirements of the job either because of incapacity or because he has deliberately slowed down work, or because there is no suitable place where he can be transferred; and

(*iii*) when he forfeits his right to a job because of his violation of a basic policy often involving the safety of others, the morale and discipline of a group.

Causes of Discharge

A discharge seldom arises suddenly or from a single impulsive act. Many causes account for it. Some of these are :

(a) *Frequent causes* : Inefficiency, dishonesty, drunkenness, carelessness or indifference, violation of rules.

(b) *infrequent causes* : Accidents, insubordination, personal conduct, uncleanliness, infraction of rules, destructive negligence, wastefulness, and physical unfitness.

(c) *Other causes* : Lack of co-operation, laziness, tardiness in starting work, frequent absence without leave, lack of specific

skill, preventing promotion, adverse attitude towards the organisation.

Discharge Procedure

To avoid unnecessary grievances arising from discharges, proper rules should be framed to govern them. To demonstrate that a discharge is justified and does not arise out of unfair discrimination or personal prejudice of the supervisor, evidence needs to be produced on:

(1) permanent records of all merit ratings made by supervisors;

(2) permanent records of ratings of the defendant's traits maintained by persons other than the foreman;

(3) a memorandum bearing on the efforts made by the foreman/ supervisor to help the defendant to overcome his weakness;

(4) a copy of any warning that had been sent to him;

(5) the letter of discharge, especially if the letter states the cause of the discharge.

Discharge should be made in accordance with the standing orders/ service rules. The action taken should be *bonafide*. It should be neither a punitive measure nor a case of victimisation. It may be further noted that :

(*a*) the reasons for discharge should be clearly stated;

(*b*) the individual concerned should be adequately informed about the reasons for his discharge;

(*c*) the supervisor, in charge of initiating discharge action, should be fully conversant with rules and regulations of the organisation;

(*d*) the facts regarding the violation of rules and regulations should be carefully analysed;

(e) line officials should handle the discharge affairs;

(*f*) adequate provision should exist for review of the discharged employee's case; and

(*g*) a discharged employee needs a reasonable notice or an equivalent pay in lieu of notice. It carries with it certain penalties, such as difficulty of re-employment, loss of benefits and, in certain cases, the loss of a part of the provident fund, etc.

When Dismissal Justified

The dismissal of workman has been held as justified :

(*a*) for unauthorisedly driving the vehicle;[2]

(*b*) for suppression of material facts of the previous conviction;[2a]

(*c*) refusal by a driver to work on weekly off days on emergent duty;[3]

(*d*) for forging signatures of customers;[4]

(*e*) for assaulting a customer;[5]

(*f*) for being guilty of assaulting the managing director even when it is a solitary act;[6]

(*g*) for adopting 'go slow' tactics;[7]

(*h*) for presenting false medical bills;[8]

(*i*) for abusing threatening and beating the personnel officer;[9]

(*j*) for being a bus driver and causing wilful damage or sabotage or loss to the goods or property of the employer;[10]

(*k*) for being a bus conductor and not issuing tickets to 41 passengers;[11]

(*l*) for being a bus conductor for collecting excess fare but not issuing tickets;[12]

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2. *Prakash Chand* v. *The Labour Court, Patiala & Ors.*, 1994 LLR 447 (P&H).

2a. *Tara Chand* v. *Maharashtra State Transport Corp.*, 1994 LLR 382 (Bom).

3. *Mohan Singh* v. *Jaipur Metals & Electricals Ltd., Jaipur*, 1996 LLR 448 (Raj).

4. *Godrej & Boyce Manufacturing Company Ltd., Madras* v. *Principal Labour Court, Madras and Ors.*, 1997 LLR 70 (Mad).

5. *Hindustan Petroleum Corpn.* v. *Y.S. Chaudhary & Anr.*, 1997 LLR 580 (Bom).

6. *Harendra Singh* v. *The National Thermal Power Corpn., New Delhi and Ors.*, 1997 LLR 672 (All).

7. P.J. *Gangadaran* v. *Second Additional Labour Court*, 1997 LLR 245 (Mad); *Carona Sahu Co. Ltd.* v. *Mansoor Ahmed Norrmiya & Ors.*, 1997 LLR 534 (Bomb).

8. *Indian Oil Corporation Ltd. and Ors.* v. *Ashok Kumar Arora*, 1997 LLR 335 (SC).

9. *M.C. Gupta* v. *Labour Court at Meerut and Anr.*, 1997 LLR 389 (All).

10. *Municipal Corporation of Greater Bombay* v. *BEST Workers Union & Ors.*, 1997 II LLR 1042 (Bom).

11. *Ram Sahai Yadav* v. *M.P. State Road Transport Corpn. & Ors.*, 1998 LLR 154 (MP).

12. *U.P. State Road Transport Corpn. & Ors.* v. *Musai Ram & Ors.*, 2000 LLR 1 (SC).

(*m*) for aiding and abetting the fraud;[13]

(*n*) when by an authority lower than the appointing authority but with his approval;[14]

When dismissal unjustified

Dismissal has been held to be unjustified :

(a) for theft of a hammer;[14a]

(b) for mere attempt by an employee to assault a superior officer;[15]

(c) when without adequate reasons for rejection of an appeal by the delinquent employee;[16]

(d) for bigamy;[17]

(e) for flouting instruction about getting uniform stitched as per pattern;[18]

(f) for lack of proper opportunity to meet the accusations;[19]

(g) on a bus conductor's failure to issue tickets to few passengers and possessing Rs. 2 and odd;[20]

(h) for negligence in the absence of effective evidence in support of the charge;[21]

(i) for absence during the illegal strike.[22]

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13. *Madhusudan Dey* v. *The Managing Director, Durgapur Steel Plant & Ors.*, 1998 LLR 136 (Cal).

14. *Ibid.*

14a. *S. Nailasamy* v. *Second Addl. Labour Court, Madras & Ors.*, 1996 LLR 330.

15. *A. Venkata Ramana* v. *The Chairman, Industrial Tribunal-cum-Labour Court, Anathapur & Anr.*, 1996 LLR 1117 (AP).

16. *A.B. Singh* v. *The Chairman, Dena Bank & Anr.*, 1996 LLR 308 (MP).

17. *Prafulla Kalita* v. *Oil & Natural Gas Commission & Ors.*, 1996 LLR 362 (Gau).

18. *M/s. Raj Kumar Transport* v. *Rajendra A. Pardiwale and Anr.*, 1997 LIC 2617 (Bom)

19. *K.V. Panduranga Rao* v. *Karnataka Dairy Development Corpn.*, 1997 (77) FLR 221 (Kar).

20. *Management of Delhi Transport Corpn.* v. *G.C. Jain*, 1998 LLR 118 (Del).

21. *R.K. Bhatia* v. *Delhi Vidyut Board & Ors.*, 1999 LLR 590 (Del).

22. *Morarjee Gokuldas Spinning and Weaving Co. Ltd.* v. *Maruti Yeshwant Narvekar and Ors., 2000 LLR 63 (Bom).*

Setting aside dismissal on the ground that it is difficult to get employment will not be justified.[23]

Procedure for Initiating Disciplinary Action

Amazingly there is no procedure prescribed for disciplinary action either in Industrial Disputes Act or in the rules made thereunder, which should be complied with, before inflicting punishment on industrial workers. Even if holding of a domestic enquiry is prescribed under standing orders non-compliance with that prerequisite does not *ipso-facto* give right to the delinquent workmen of a reinstatement. The procedure is evolved by various high courts and the Supreme Court in appeal on principles of natural justice.

Misconduct

The first and foremost duty of every employee is to obey the order which the employer is justified in giving under the terms of employment either express or implied. All orders concerning the work which the employee is required to do and the time, the manner and the place of performing it are presumable and in the absence of any special circumstances, are within the control of the employer. Thus, doing some act which an employee should not do, or not doing something which he is required to do amounts to misconduct.

Charge Sheet

The ordinary meaning of "charge-sheet" is a memorandum of charges, i.e., acts or omissions alleged to have been committed by an employee. It consists of facts and allegations which the person issuing wants to establish against the employee committing a breach of rules or misconduct in terms of the standing orders or any act inconsistent with the fulfilment of the obligations implied in the contract of employment. In short, a charge-sheet is an allegation of misconduct, misbehaviour, indiscipline, lack of interest in work, negligence, etc. on the part of the employee. It is not used in the sense in which it has been used in section 410 of the Criminal Procedure Code. It, therefore, follows that a charge-sheet is a memorandum of accusations which are levelled against an employee who commits a breach of any rules, regulations, standing orders or an implied term of contract. In other words, a charge-sheet is nothing but a paper or document containing the alleged acts of

23. *Godrej & Boyce Manufacturing Co. Ltd., Madras* v. *Principal Labour Court, Madras and Ors.*, 1997 LLR 70 (Mad).

misconduct against an employee. The core of the matter is that no disciplinary action can be initiated against an employee or a workman unless he is first served with a charge-sheet containing all charges and their essential particulars.

The basic requirement of drafting a charge-sheet is that it should give to the employee a fair idea of the case which he is to face. So, while drafting a charge-sheet, care must be taken to see that it contains all the facts and for this, the standing orders as well as the service rules which define various misconducts must be read carefully. If a particular act, e.g., absence without leave; late attendance or negligence is misconduct only when it is habitual then the word "habitual" is an essential constituent of the charge and must be mentioned in the charge-sheet.

Normally, the charge-sheet should be drafted in a language which the employee can easily understand, and while drafting a charge-sheet care must also be taken to see that it satisfies the conditions, as:

(*a*) the charge-sheet must specify the charges in the clearest possible language with full particulars;

(*b*) the facts in the charge-sheet must disclose the misconduct with which the employee is charged;

(*c*) the language to be used in the charge-sheet must be clear, precise, unambiguous and free from vagueness;

(*d*) if the employee is charge-sheeted for wilfully slowing down the performance it is incumbent on the employer to furnish all necessary particulars showing that he was wilfully slowing down performance;

(*e*) the charge-sheet should not contain unnecessary matters though mentioning of such unnecessary matters may not be fatal to the charge-sheet;

(*f*) the use of abbreviations, viz., "etc. etc." or "any other document" should be avoided and instead, reference should be made to specific things or person;

(*g*) whenever, it is necssary to give the time of an incident in the charge-sheet then the word, "about" must be mentioned;

(*h*) it must also be seen that there is no misdescription of any charge;

(*i*) in case of disobedience, the order disobeyed must be mentioned;

(*j*) in case of theft, full particulars of the goods stolen must be given;

(*k*) in case of "mis-appropriation", all particulars regarding the amount mis-appropriated must be given;

(*l*) when the charge is of falsification of accounts then the details of the particular items in respect of which the act of falsification of accounts was committed must be mentioned; and

(*m*) the charge-sheet should not be devoid of essential particulars.

Powers to Suspend Pending Enquiry

It is now well settled that the power to suspend, in the sense of right to forbid a servant to work, is not an implied term in an ordinary contract between the master and sevant. Such power can only be the creature either of a statute governing the contract or of an express term in the contract itself. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman 'and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the so called period of suspension.[24]

Generally where there are 'standing orders' there is a provision in such standing orders for payment of subsistence allowance to the suspended workman. For instance, model standing orders 14(4) in schedule 1 to the Industrial Employment (Standing Orders) Rules, 1946, framed under 'Industrial Employment Standing Orders Act', 1946 makes such provision.

Procedure of Holding Domestic Enquiries

In domestic enquiries most of the law is not codified and at each stage the employees, representatives of employers and the enquiry officers are faced with a dilemma whether a particular procedure adopted is or is not consistent with the principles of natural justice. In the absence of any enunciation or the applicability of these principles in varying circumstances they are likely to suffer serious consequences.

Appointment of Enquiry Officer

The enquiry can be held either by an officer of the establishment or by an outsider, including a lawyer appointed by the management for holding such an enquiry. But it must be presided over by a person who is not disqualified from holding the enquiry on any personal grounds such as bias, personal interest or being an eyewitness or victim of the

24. *Hotel Imperial* v. *Hotel Workers Union*, 1959 II LLJ 544.

incident, etc. An enquiry held by a person so disqualified is not a fair enquiry and the order passed thereafter is bad in law.

Procedure of Recording Evidence

The evidence in an enquiry can be recorded in a narrative form of a statement. But it is advisable to record it in question-answer form so as to bring out the true implications of the questions and the answers thereto and the proper analysis of the evidence. The procedure relating to holding enquiries, as given above, is lengthy and complicated for a layman. But it has to be followed as closedly as possible, if the management intends to exercise its right of punishment on delinquent employees without fear of its being upset later on by an industrial tribunal, or should it be made a subject mater of an industrial dipsute. However, it does not mean that unless the above procedure is followed strictly, the decision of the management, punishing the delinquent employee, is bound to be upset. The rules and procedure are only handmaids of justice and unless it could be shown that the employee was misled in his defence and consequently there has been a failure of justice on account of some error or omission on the part of the enquiry officer in the observance of the correct rules of procedure for holding an enquiry, such error or omission would not be deemed to be material enough to vitiate the enquiry proceedings and becomes cause for upsetting of the decision of the management based thereon. Moreover, it is generally realised by the tribunals that the persons holding domestic enquiries are usually not well versed in law and as such a rigid observance of the rules and procedure prescribed by the Criminal Procedure Code or the Evidence Act cannot be expected of them. As a matter of fact, as long as it can be shown that a fair opportunity was given to the accused workman, to remain present at the enquiry, to examine his own witnesses, and cross examine the witnesses of the employer, minor irregularities will not vitiate the enquiry proceedings, which, nevertheless, should be avoided.

The enquiry should be held in the presence of the charge-sheeted employee. If, however, the employee fails to participate in the enquiry at the appointed time, despite reasonable opportunity, the enquiry officer may proceed with the enquiry *ex parte* provided the charge-sheet or the notice of the enquiry includes a specific provision to that effect. If, after the enquiry has started, the charge-sheeted employee turns up and puts forward sufficient cause for his failure to report for the enquiry at the appointed time, the enquiry may be proceeded with *de novo* after making appropriate notes in the proceedings to this effect.

Punishment

For every misconduct punishment is a must. Any establishment or nation as a whole cannot progress without strict discipline in every walk of life. For smooth functioning of any industry and its progress discipline must be maintained at any cost. Nowadays various theories of punishment are being propagated. It may be retributive, deterrent or reformative in character. Looking at labour scene today, we in the present context of economic affairs cannot afford the luxury of reformative punishment and invite the trouble very often. Good human relationship cannot and should not always be just sweetness and light. To be good it should have some spine and firmness. It is always best to keep people under discipline. There should be no relaxing from the fundamental rule which must be enforced without fear and favour. It has been proved beyond doubt that employees will feel absolutely secure under the iron-claw of discipline. The whole organisation is helped if you tell some trouble monger 'to go to hell' or even fire him, instead of trying to solve his inferiority complex or compensate him for his wife's unfaithfulness. There can be no quarrel with those who treat their employees as human beings with hopes and desires, fears and tribulations, their wants and needs, their strengths and weakness. But we are remodelling our employees and spelling them beyond repair, all in the name of good human relations. We have, therefore, our quarrel with those responsible for enforcement of discipline who try and appease disrespectful and indisciplined employees because they threaten to go up to the highest boss. This kind of fear, which paralyses many good intentioned officers is bound to sap office discipline. This is bad human relations. Office discipline must be maintained, come what may and if this is done then whatever we wish to do fulfilling good objects of human relations, such as, philanthrophy, kindness, humanitarianism, all will automatically follow. People forget that human relation is not a cult to be blindly followed; it is rather a methodical way of thinking and working together, so as to achieve the best results. It does not mean putting a premium on indiscipline. It is a language of discipline which enables us to reach the hearts of our employees. It has got to be learnt, studied, and applied everyday in all walks of life.

Under the common law, punishment to be awarded was supposed to be entirely within the discretion of management. Under the industrial law also quantum of punishment until recently was held to be management's function to decide. Labour court or industrial tribunal had no power to interfere with management's order, when misconduct proved, except in a case where punishment is so disproportionate that a perversity can be inferred or punishment is to victimise an employee because of his union activity or other things. But where the punishment

is shockingly disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the tribunal may treat the imposition of such punishment as itself showing victimisation or unfair labour practices.

Position has now been changed after enactment of section 11 A of the Industrial Disputes Act, 1947 under which power is given to adjudicating authority to interfere with the quantum of punishment.