

September 2022

The current edition of the JSA Employment monthly newsletter covers insights on the Industrial Relations Code, 2020 (“IR Code”), with a focus on employment termination. This newsletter highlights key differences between “lay-off” and “retrenchment”, along-with the changes introduced in light of these provisions under the IR Code vis-à-vis the Industrial Disputes Act,1947 (“ID Act”). Some of the recent interesting judicial precedents spread across several employment legislations are also discussed in this edition.

### The Industrial Relations Code, 2020

The IR Code subsumes and replaces three labour laws – the ID Act, the Trade Unions Act, 1926 and the Industrial Employment (Standing Orders) Act, 1946. While largely the concepts under the ID Act and the IR Code are aligned, the IR Code presents certain distinct elements which includes expanded scope of definition including those of “employer”, “strike” and “industrial dispute”, introduction of electronic filings and registrations, exclusion of the jurisdiction of civil courts, amongst others.

### What should you know?

<b>Employer</b>	<p>The IR Code has expanded the definition of ‘employer’ to cover contractors and legal representatives of a deceased employer. The definition also clarifies that the head of department, occupier or manager of factory, or person having ultimate control over the affairs of the establishment (where such affairs are entrusted to a manager or managing directors) are also covered within this definition.</p> <p>In other words, contractors would now be also required to observe compliances with applicable provisions of the IR Code in relation to their employees who may be deployed as contract labour in establishments of a principal employer.</p>
<b>Wages</b>	<p>‘Wages’ under the IR Code is aligned with the other labour codes; hence, bringing in consistency across all the legislations. The scope of the definition has been expanded to now include all remuneration by way of salaries expressed in monetary terms, including basic wages, dearness allowance and retaining allowance.</p> <p>Wages, however, would exclude the following: (a) statutory bonus; (b) provident fund; (c) pension; (d) house rent allowance; (e) value of house accommodation and utilities; (f) conveyance allowance; (g) overtime allowance; (h) sum paid to defray special expenses due to nature of work; (i) any commission; (j) any retrenchment compensation; and (k) gratuity.</p> <p>Also, important to note that as a proviso to the above definition, the IR Code provides that if the aggregate amount of the exclusions indicated above from (a) to (j) exceed 50% or such other notified percentage, of the total remuneration payable to an employee, the amount in excess of</p>

such threshold *will be deemed as remuneration* and will be added to wages. This principle has been incorporated under the Code of Wages, 2019 as well.

Additionally, if any part of the remuneration is provided in 'kind', then the value of such remuneration which does not exceed 15% of the total wages payable to an employee, will also form part of the employee's wages.

<b>Strike</b>	The IR Code extends the definition of 'strike' to include any concerted casual leave on a given day, taken by 50% or more workers employed in a particular industry. The rationale behind this inclusion appears to be the intent of dissuading workers from taking unannounced concerted casual leaves with the intention to disrupt the work at an establishment of the employer.
<b>Industrial dispute</b>	The definition of 'industrial dispute' has been expanded under the IR Code from its existing meaning under the ID Act, to include disputes or differences between an individual worker and an employer in connection with or arising out of discharge, dismissal, retrenchment or termination of such individual worker (" <b>IR Code Industrial Dispute</b> "). While the ID Act did in fact provide for a deeming provision in recognition of the IR Code Industrial Dispute, this did not form part of the definition of 'industrial dispute' per se.

### Separate understanding: an 'employee' and a 'worker'

As discussed in our earlier editions, the definition of an 'employee' is largely aligned under all four labour codes. The IR Code has introduced the definition of an 'employee' to include any person employed in an industrial establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and also includes a person declared to be an employee by the appropriate Government. This definition excludes: (a) apprentices engaged under the Apprentices Act, 1961; and (b) members of the Armed Forces of the Union.

As also discussed below, the IR Code now uses the term 'worker' in contrast to the definition of a 'workman' under the ID Act and includes in its ambit: (a) working journalists as defined in clause (f) of section 2 of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955; and (b) sales promotion employees as defined in clause (d) of section 2 of the Sales Promotion Employees (Conditions of Service) Act, 1976. Additionally, the salary thresholds for exemption of 'supervisors' from the purview of 'workers' has been increased from INR 10,000 (Indian Rupees ten thousand) per month to INR 18,000 (Indian Rupees eighteen thousand) per month (or an amount as notified by the Central Government).

### "Lay-off" and "retrenchment" – how similar, how different.

Often misunderstood and used interchangeably in common parlance, the concepts of 'retrenchment' and 'layoff' have in fact distinct meanings under Indian labour laws. While both are statutorily recognised concepts of disengaging services of a 'workman' or 'worker', broadly speaking, retrenchment is *termination of a worker for any reason* (other than for specific instances laid down in the ID Act<sup>1</sup>), and layoff is akin to a *temporary suspension of service of a worker* on account of an employer's failure or inability or refusal to give employment to such worker for reasons beyond their control including, *inter alia*, breakdown of machinery, natural calamity, or a shortage of raw materials. In other words, both concepts of 'retrenchment' and 'layoff' indicate a resultant no-work scenario for a worker and each of the scenarios contemplate different consequential payout, notice and procedural requirements.

<sup>1</sup> These include: (a) voluntary retirement of the workman; or (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or (c) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or (d) termination of the service of a workman on the ground of continued ill-health ("**Excluded Retrenchment Conditions**").

## So, what changed under the IR Code?

We have attempted to note some of the key provisions relevant in the context of ‘retrenchment’ and ‘layoff’ under the ID Act vis-à-vis the IR Code.

Particulars	IDA	IR Code
<b>‘Workman’ v. ‘Worker’</b>	Workman meant persons performing (a) non-supervisory work, i.e., skilled, unskilled, operational, technical, clerical; or (b) supervisory work and drawing less than INR 10,000 (Indian Rupees ten thousand) per month as wages. Persons performing supervisory work and drawing more than INR 10,000 (Indian Rupees ten thousand), and persons performing managerial functions were excluded from this definition.	Uses the term ‘worker’ in place of ‘workman’ and is largely aligned, other than for the salary threshold per month by persons performing supervisory functions (excluded from ‘worker’ category), which is now increased to INR 18,000 (Indian Rupees eighteen thousand). The definition also includes working journalists, and sales promotion employees, as discussed above.
<b>Definitions of ‘retrenchment’, ‘layoff’</b>	Retrenchment is termination of a workman for ‘any reason whatsoever’, other than termination (a) as a result of disciplinary action and (b) for Excluded Retrenchment Conditions. Layoff is the failure, refusal, or inability of an employer to give employment to a workman whose name appears on the muster rolls, for shortage of coal, power, raw materials, breakdown of machinery and natural calamity; which are out of control of the employer.	Both these definitions are largely aligned. However, in addition to the Excluded Retrenchment Conditions, the IR Code also excludes termination of service of worker on completion of tenure of fixed term employment, from the ambit of retrenchment.
<b>Applicability in case of certain establishments</b>	Under the IDA, lay-off and retrenchment of workmen in factories, mines and plantations employing more than 100 (one hundred) workmen need to seek prior governmental approval.	This threshold and consequent requirements have now increased to 300 (three hundred) workers under the IR Code.
<b>Calculation of compensation</b>	Layoff compensation is calculated at 50% of total basic wages and dearness allowance payable for the period during which the workman is laid off. Retrenchment compensation equivalent to the average pay of 15 (fifteen) days for every completed year of continuous service is payable to workmen having completed not less than 1 (one) year of continuous service.	The position remains the same under the IR Code, however, given that the definition of ‘wage’ being altered under the new labour codes, the quantum of payments, may vary.

## Case Law Ratios

### An employer has the right to change its promotion policy, unless malafide/arbitrary

In the case of *Vidya Bhushan v. State of Chhattisgarh*,<sup>2</sup> the Chhattisgarh High Court while assessing changes brought about by the state government in the Chhattisgarh Secretariat Service Recruitment Rules, 2012, observed that it is a well settled position that the employer has power to change its policy in giving promotion to its employees. Noting the lack of malafide exercise of such power to change its promotion policy, the court further held that it is not within the domain of the court to test the degree of such policy’s beneficial or equitable disposition.

<sup>2</sup> WP(S) No.4190/2016

## **A freelancer is his own master, and employer-employee relationship between a freelancer and his employer must be determined on a case-to-case basis**

In the case of *Kaushal Kishor Singh v. Sita Kuoni World Travel India Limited*,<sup>3</sup> the Delhi High Court while examining if the relationship between a freelancer and his employer formed an employer-employee relationship, observed that there is no master-servant relationship in freelancing as the freelancer is his own master who has the ability to pick and choose his assignments, thereby enabling him to work for himself as well as multiple employers and that the burden of proving the existence of an employer-employee relationship rests with the individual alleging such existence of employer-employee relationship.

## **Claim for employee benefits must not be made after expiry of reasonable time**

In the case of *Anand Shankar v. The Jodhpur Vidhyut Vitran Nigam Limited*,<sup>4</sup> the Rajasthan High Court while assessing claims of an employee seeking grant of pay under a higher pay dismissed such claim on the ground that the same was brought by the employee after an inordinate delay of 40 (forty) years after such entitlement to payment and held that equity must be claimed within reasonable time.

## **Temporary official appointed on a work charge basis cannot claim regularization or seniority for such service period**

In the case of *Bses Yamuna Power Limited v. The Presiding Officer*,<sup>5</sup> the Delhi High Court examined the case of a workman initially appointed on a work charge basis, who was terminated by his employer, and subsequently reinstated and regularized pursuant to an award passed by the industrial tribunal. The court setting aside such award regularizing the services of the workman, held that a temporary official appointed on a daily rated or work charge basis cannot claim to be a regular employee and consequently the seniority for the period of his services rendered.

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<sup>3</sup> WP (Civil) 11631/2018

<sup>4</sup> WP (Civil) 11631/2018

<sup>5</sup> WP (Civil) 5746/2003

## Employment Practice

JSA has a team of experienced Employment Law specialists who work with clients from a wide range of sectors, to tackle local and cross-border, contentious and non-contentious employment law issues. Our Key areas of advice include (a) Advising on boardroom disputes including issues with directors, both executive and non-executive;(b) Providing support for business restructuring and turnaround transactions, addressing employment and labour aspects of a deal, to minimize associated risks and ensure legal compliance, (c) Providing transaction support with reference to employment law aspects of all corporate finance transactions, including the transfer of undertakings, transfer of accumulated employee benefits of outgoing employees to a new employer, redundancies, and dismissals, (d) Advising on compliance and investigations, including creating Compliance Programs and Policy, Compliance Evaluation Assessment and Procedure Development and providing support for conducting internal investigations into alleged wrongful conduct, (e) Designing, documenting, reviewing, and operating all types of employee benefit plans and arrangements, including incentive, bonus and severance programs, (f) Advising on international employment issues, including immigration, residency, social security benefits, taxation issues, Indian laws applicable to spouses and children of expatriates, and other legal requirements that arise when sending employees to India and recruiting from India, including body shopping situations.

JSA also has significant experience in assisting employers to ensure that they provide focused and proactive counselling to comply with the obligations placed on employees under the prevention of sexual harassment regime in India. We advise and assist clients in cases involving sexual harassment at the workplace, intra-office consensual relationships, including drafting of prevention of sexual harassment (POSH) policies, participating in POSH proceedings, conducting training for employees as well as Internal Complaints Committee members, and acting as external members of POSH Committees.

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23 Ranked Lawyers



15 Practices and  
18 Ranked Lawyers



7 Practices and  
2 Ranked Lawyers



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