This edition of the JSA Employment Monthly Newsletter discusses some of the recent interesting judicial precedents spread across several employment legislations, and broadly focuses on one of the most talked-of topics in recent times – 'Nuances and way-forward surrounding a 'work from home' hybrid work culture in India'.

Case Law Ratios

Dismissal to be set aside when misconduct not proved

In the case of *Allahabad Bank and Ors. vs. Krishan Pal Singh (2021 LLR 1038),* the respondent was dismissed from service on account of an alleged misconduct and the employer's suspicion of the respondent's foul play, leading to destruction of bank records. The respondent's misconduct, however, was not proved subsequent to the departmental disciplinary proceedings. The Allahabad High Court found that although there was a strong suspicion, yet there was no sufficient evidence to prove the respondent's misconduct to dismiss from service. Accordingly, the Allahabad High Court held that suspicion, however, high may be, can under no circumstances be held a substitute to legal proof.

The Apex Court upheld the decision of the High Court and observed that while reinstatement with full back wages is not automatic in every case, where termination/ dismissal is found to be not in accordance with procedure prescribed under the law, ends of justice need to be met. To that end, the Apex Court awarded a lump sum monetary compensation to the respondent (re-instatement was not considered, as the respondent had reached superannuation).

Recommendation of Internal Committee without any reasoning is unsustainable

In the case of *Aditi Bramta vs. State of H.P. and Ors., 2021 LLR 1059 (HP HC)*, the Internal Committee ("the **IC"**), on the finding that one of the witnesses in relation to a complaint of sexual harassment filed by the petitioner, was threatened by the respondent in the course of the investigation, unanimously submitted that the respondent be shifted to another department.

The High Court upheld that the IC's recommendations were bereft of any reasoning, and in the absence of due process being followed under Sections 11 (*Inquiry into complaint*) and 13 (*Inquiry report*) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("the **POSH Act"**), the IC's submission to transfer the responded to another department is not tenable. It further directed that a new IC be constituted and that fresh proceedings be conducted in due compliance with the POSH Act. It is further clarified that the inquiry that was conducted earlier will have no relevance on the fresh inquiry to be held.

Principal employer supervising employee of service provider has to extend maternity benefit

In the case of *Manorama Singh vs. State of U.P. and Ors. 2021 (170) FLR65*, on the question of whether the petitioner, a contractual woman employee engaged by the respondent through a service provider, ought to be provided the benefits under the Maternity Benefit Act, 1961 ("Act of 1961"), the Apex Court held that the principal employer would be obliged to grant benefits in terms of the Act of 1961 to a female worker, who is working in its premises. The Apex Court further laid down principles earlier discussed, that benefits under the Act of 1961 would be admissible not only to a regular employee but also to a muster roll employee. The status of an employee engaged on contract basis cannot be inferior to that of a muster roll employee.

Reinstatement with back wages on every illegal termination is not automatic

In the case of *Ranbir Singh vs. Executive Eng., P.W.D., 2021 LLR920*, discussing one of the contentions in relation to reinstatement of a worker (with full back wages and other benefits) whose service was terminated illegally, the Apex Court confirmed that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal, is not applied mechanically in all cases. Such maybe the case where services of a regular/ permanent workman are terminated illegally and/ or mala fide and/ or by way of victimisation, unfair labour practice, *etc*. However, for an illegal termination of a daily-wage worker on account of a procedural defect (i.e., in violation of Section 25-F of the Industrial Disputes Act,1947, reinstatement with back wages is not automatic and instead the workman should be given monetary compensation.

The Apex Court, however, caveated that there may be cases where a worker's termination is found to be illegal on the ground that it was resorted to as unfair labour practice or in violation of the principle of last-come-first-go. There may also be a situation that persons junior to a worker are regularised under some policy but the workman concerned terminated. In such circumstances, the Apex Court held that "*the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied*".

Work from home – normalising the unforeseen

There are currently no specific Indian labour and employment legislations that regulate, prohibit or restrict a work-from-home ("**WFH**") working model. However, the existing legal framework has been consistently examined and re-examined, particularly on a case-to-case basis, to understand the manner in which the extant laws will apply in a WFH scenario.

Legal considerations in a WFH scenario

In a typical organisational set-up, compliance in terms of applicable laws is determined based on the location where such organisation is situated, and where an employee is required to render services from. Given that the current position with respect to applicability of laws in case of a WFH set-up is grey, we have broadly examined some of the key legislations which may have an implication in case an organisation chooses to adopt a WFH or a hybrid working model:

- **Compliance under the shops and establishments (S&E) acts**

  The applicability of an S&E act to the employees (workmen, including non-exempted non-workmen) working out of a location where an employer does not have an office is likely to depend on the definition of "commercial establishment"/ "establishment" under the relevant S&E act of the State where the employee is located, or provides

services from. In certain States like Telangana and Tamil Nadu, the term 'commercial establishment' is not linked to the existence of a premise/ fixed place, thus employees could be covered under the S&E act of the state in which they work, even though the employer may not have a presence in that State.

On the other hand, in certain States like Haryana and Delhi, the definition of "commercial establishment"/ "establishment" under the relevant S&E act is linked to there being a premise and accordingly, provisions of the local S&E act may not apply to employees who work in such States where the employer does not have any premises (and the employees could accordingly be regulated under the S&E act applicable to the establishment they are linked/ tagged to in their offer letter)[1]. This position has also been upheld by courts in India, in certain instances[2].

- **Compliance with anti-harassment laws**

  The definition of a "workplace" under the POSH Act includes "*any place visited by the employee arising out of or during employment*" and is wide enough to cover situations of sexual harassment that occur when an employee is on a formal WFH set-up. In the case of *Saurabh Kumar Mallick v. Comptroller & Auditor General of India*, *Delhi HC – CWP No. 8649 of 2007*, the Delhi High Court held that in a scenario where employees are working remotely, any activity within a close proximity of place of work or under the control of management/ employer, can be termed as an extension to the term "workplace."

  While an employer may not at all times exercise a direct control over the actions and work environment of an employee working remotely (for eg., in instances where an employee works from an outside location such as a restaurant or a public library or a hotel – unauthorised or not approved by the employer), it may be argued that any form of sexual harassment on the employee while performing services for the employer at such unauthorised or unapproved locations, may not amount to sexual harassment at 'workplace'. This position, however, may need to be examined on a case to case basis.

- **Compliances for Special Economic Zone ("SEZ"), Software Technology Park of India ("STPI") and Other Service Provider ("OSP")**

  For establishments located within SEZ, or STPI, or those registered as an OSP, certain specific legal compliances may need to be adhered to in case an employer permits its employees to work remotely (for eg., providing express permit/ authorisation to the employees to undertake any work pertaining to the establishment outside its premises, provision of suitable network/ connectivity such as virtual private network to establish connection between the employee and the work of the unit, *etc*.).

Do's and don'ts of a WFH policy

It is crucial for employers adopting a WFH (or, hybrid) model to adopt and implement a comprehensive WFH policy in anticipation of the changes in workplace dynamics on account of the potential WFH set-up. While of course such WFH policy would be more management-centric, we have, for reference and general guidance, laid down some of the following key aspects which may be deliberated on/ considered as part of a WFH policy:

- **Productivity monitoring and management**: Unlike a typical (physical) workplace setup, employees who may work from home may choose to spread their work hours across the day, in place of the standard/ prescribed work hours or schedule. It is incumbent to indicate an employee's functionality in a structured manner to prevent employees working extended hours to potentially expose employers to claims for overtime.
- **Office assets and property**: If employees working remotely are provided with the office assets or properties, and are required to render services using only such assets, the permissibility and/ or restrictions, as the case may be, can be considered in the WFH policy. Appropriate insurance for such assets may also be considered.

[1] *Bayer (India) Ltd. V. The Appellate Authority 1980(1) APLJ (HC) 360*
[2] *Rallis India Ltd. v. Assistant Commissioner for Workmen's Compensation & Anr. (19820 IILIJ 328 Mad)*

- **Reporting requirements**: WFH policy should allow flexibility in terms of an employer's right to require the employees working remotely to report to any of the office premises, depending on business needs. Management may examine aspects such as costs, allowances, reimbursements, etc., which may arise in such situations.
- **New forms of misconduct**: A WFH scenario may introduce additional disciplinary issues. It is therefore required to revisit the existing policies to address these potential new misconducts. For example, some new forms of misconduct may include - unprofessional etiquette during audio/ visual meetings, unreachable for repeated instances during work hours, pursuing other activities during work hours, working under the influence of alcohol or drugs etc.

For more details, please contact km@jsalaw.com

Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi

