

Through this edition of the JSA Employment monthly newsletter, we bring to you some insights on the practicality (and good practices) surrounding implementation of certain provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**POSH Act**") at co-working spaces. We also discuss some of the recent interesting judicial precedents spread across several employment legislations. In our next edition, we will cover a comparative study of the Industrial Disputes Act, 1947 and the Industrial Relations Code, 2020.

Way out of the grey: Implementation of the POSH Act at co-working spaces

A co-working space is different from a regular office or workplace setup, both from a structural as well as an operational perspective. Contrary to a regular workplace utilised by employees belonging to the same entity, co-working spaces are typically utilised by (i) employees from different entities ("**Member(s)**"); (ii) individuals unaffiliated to any particular entity or organisation ("**Freelancer(s)**"); (iii) employees of the co-working space itself ("**Employee(s)**"), etc. A co-working space falls squarely within the ambit of a 'workplace' as defined and commonly understood under the POSH Act. Arguably, it can be construed as a 'workplace' in itself by virtue of being a private establishment where office-space services are provided. It may also be seen as a notional extension of a Member's workplace, since the co-working space is visited by Members during the course of their employment with their respective employer.¹

Constitution of Internal Committee ("IC")

The POSH Act mandates employers employing at least 10 (ten) employees to set up an IC at their workplace.² Where a co-working space service provider itself employs more than 10 (ten) employees at its co-working space (workplace), it would thus be required to constitute an IC of its own.

The POSH Act prescribes the manner in which an IC is to be constituted at workplace. However, there is lack of clarity on the operational, jurisdictional and functional aspects of an IC as maybe relevant in a shared work space, considering that such shared spaces can involve multiple entities or employers, aggrieved women ("**Complainant**") and individuals against whom complaints are raised ("**Respondent**"), potentially leading to overlapping jurisdictions of multiple ICs concerned.

¹ Section 2(o) of the POSH Act defines a 'workplace' as *inter alia*, "(ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service" and "(v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey."

² Section 4 of the POSH Act.

Institution of complaint

A Complainant and a Respondent in a co-working space could be either a Member, Freelancer, or an Employee. The question here is which of the ICs would be competent to take cognisance of a sexual harassment complaint and have jurisdiction over the proceedings. Would that be the IC of the Complainant, the Respondent or that of the co-working space?

Suggested way forward

A cautious and sensitive approach is to be considered in drafting of an anti-harassment policy at co-working spaces in compliance with the POSH Act ("**POSH Policy**"), to harmonise, *inter alia*, possible instances involving IC overlaps. Under the POSH Act, IC of the workplace where a Respondent is an employee, has the power to make inquiry into a complaint filed against the Respondent.³ As such, POSH Policy adopted by a co-working space can, *inter alia*, include in clear terms that a Complainant may either file her complaint before the IC of the Respondent's workplace or before the IC of her own workplace, who may then assist⁴ the Complainant by forwarding such complaint to the Respondent's IC for further inquiry and consideration. Where a Respondent is a Freelancer or a Member of an organisation which has not constituted or is not required to constitute an IC of its own, a Complainant may, file her complaint before the IC of the co-working space or file her complaint with the police, with necessary support and assistance from their IC.⁵

On receiving a complaint, such IC can then share a copy of the complaint with the other ICs, subject to the Complainant's consent and observance of appropriate confidentiality obligations under the POSH Act by all parties. On receipt of such complaint, Respondent's employer could take such measures which would facilitate grant of interim relief(s) to the Complainant (if so requested) in securing a safe working environment for the aggrieved woman. The inquiring IC may also involve members from the Complainant's IC to act as 'observers' through the proceedings, in the interest of a free and fair hearing and also to provide a degree of comfort to the aggrieved woman through the proceedings.

Lastly, from a member awareness perspective, co-working space service providers, together with other participating entities, can jointly organise workshops and trainings for all individuals within the co-working space as well as members of IC, to create general awareness of the provisions of the POSH Act and the manner in which complaint and redressal mechanism can be efficiently achieved. A collaborative approach may be taken by both co-working space service providers and organisations utilising the shared workspace to curate their respective POSH Policy such that it provides for an efficient inter-company mechanism towards redressal of workplace sexual harassment.

Case Law Ratios

Availing of maternity benefit for non-biological children does not disentitle a female employee from seeking maternity benefit for her biological children

In the case of *Deepika Singh v. Central Administrative Tribunal, Chandigarh*⁶, the Supreme Court reviewed the denial of maternity leave by the petitioner's employer for her own biological child, on the ground that the petitioner had previously availed maternity benefits for one of her two non-biological children from her spouse's previous marriage. The Court held that such denial of maternity benefit was in contravention of Rule 43 of the Central Civil Services (Leave Rules), 1972 that provides that a female employee with less than 2 (two) surviving children can seek maternity leave. Purposively interpreting this provision in light of the Maternity Benefits Act, 1961, the Supreme Court

³ Section 11 of the POSH Act.

⁴ Section 19(h) of the POSH Act.

⁵ Section 11 of the POSH Act requires an employer to provide necessary support and assistance to a complainant who chooses to file a complaint with the police.

⁶ SLP(C) No. 7772/2021 (SC).

held that the petitioner would be entitled to maternity benefit in the present case and noted that grant of maternity benefits is intended to encourage women to join and continue employment in workplaces.

Termination of employee on expiry of contract term does not amount to retrenchment

In the case of *X v. IndexT/ C Industrial Extension*⁷, the Gujarat High Court held that the dismissal of the petitioner from service upon expiry of her contractually agreed fixed term of employment would not amount to retrenchment under the Industrial Disputes Act, 1947 (“ID Act”) and was hence not entitled to payment of retrenchment compensation from her employer. The court also noted that temporary employees are not entitled to the same benefits as permanent employees of an establishment under the ID Act.

Restraint on disclosure of confidential information by former employees is not in restraint of trade

In the case of *Dr. Sudipta Banerjee v. L. S. Davar & Company*⁸, the Calcutta High Court upheld an order against former employees of an organisation restraining them from divulging confidential information gathered during the course of their employment with the organisation. The court indicated that restrictions on disclosure of confidential information and other restrictive covenants are necessary in the present day, in light of which Section 27 of the Contract Act, 1972, that deems agreements restraining trade as void in toto – must be relooked into.

Employees resigning before the completion of 5 (five) years of service are not entitled to payment of gratuity

In the case of *BEML Limited v. Appellate Authority under Payment of Gratuity Act*⁹, the Karnataka High Court considered the entitlement to gratuity of an employee who resigned after service of 4 (four) years and 240 (two hundred forty) days. The employee claimed gratuity on the ground that his period of service of 4 (four) years and 240 (two hundred forty) days was deemed as 5 (five) years of continuous service by virtue of Section 2A (2) of the Payment of Gratuity Act, 1972 (“PGA”). This provision of the PGA deems 240 (two hundred forty) days of service as a period of continuous service of one year, considering interruptions that arise in the course of employment. Rejecting such contention, the court observed that interruption of service by way of resignation is not a valid ground to seek benefit of deemed continuous service under this provision. In view of the same, the court held that the employee was disentitled from payment of gratuity on account of his non-fulfilment of 5 (five) years of continuous service under the PGA.

Occupier, not Managing Director, is liable for the offence under Factories Act, 1948

In the case of *Sabu M. Jacob v. State of Kerala and Another*¹⁰, the Supreme Court held that the managing director of the company cannot be treated as an occupier of the factory in the absence of specific documents indicating the same and is hence not liable for prosecution under Section 92 of the Factories Act, 1948, which contemplates prosecution against the occupier of the premises.

Dismissal of employee based on disciplinary hearings is justified

In the case of *Karnataka Power Transmission Corporation Limited v. C. Nagaraju & Another*¹¹, the Supreme Court held that the acquittal of the respondent by criminal court does not restrict an employer from dismissing from service such employee based on the findings of the departmental inquiry in the course of disciplinary proceedings initiated against the employee.

⁷ C/SCA No. 12240/2008 (Guj. HC).

⁸ FMAT 735/2021 (Cal. HC).

⁹ WP 11678/2018 (Kar. HC)

¹⁰ 2022 LLR 756 (Ker. HC).

¹¹ 2020 LLR 238 (SC).

Did you know?

The state of Karnataka, in a cabinet meeting recently cleared the Karnataka Employment Policy, 2022-2025. As per publicly available information, this policy is aimed at reducing unemployment in Karnataka and provide inter alia, guidelines and thresholds in relation to the employment of local persons in various industrial units and mandates on generation of new jobs in proportion to the size of the industrial unit and quantum of working capital of the industrial unit.

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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14 Practices and
23 Ranked Lawyers



15 Practices and
18 Ranked Lawyers



7 Practices and
2 Ranked Lawyers



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