



# Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820  
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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## A critical approach to the provisions of lay-off and retrenchment under the Indian Labour law Regime

Anirudh Grover<sup>a</sup>

<sup>a</sup>OP Jindal Global University, Sonipat, India

*Received* 16 December 2021; *Accepted* 04 January 2022; *Published* 07 January 2022

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*The code of Industrial Relations, 2020 and the Industrial Dispute Act, 1947 has a fundamental aim of maintaining healthy ties between the employer and the worker. However, the provisions relating to lay-off and retrenchment do not picture the underlying foundational intent of the legislation. The lack of having a broader approach in these provisions such as, not defining the period of lay-off or providing the employer with a discretionary right to retrench the worker, encourages the employer to exploit the helpless workers. This lacuna in the Labour law regime of India gives the employer a levy to keep the employment of the worker in suspension for a prolonged period of time and thereby depriving the workman of a full wage. The researcher through this paper would analyze the issue pertaining to the said provisions by citing cases highlighted by various courts in India, moreover this paper will also provide a cross-jurisdictional analysis of provisions relating to lay-off and retrenchment. In light of all these cases and cross-jurisdictional analysis, the paper will provide certain suggestions which must be incorporated in the Indian labor law mechanism.*

**Keywords:** *layoff, retrenchment, labour law.*

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## INTRODUCTION

The labor law systems across jurisdictions have broadly classified that there are in general two objectives that need to be at the forefront before enacting or implementing a new policy or a legislation vis a vis labor laws in any jurisdiction. The first of these purposes is to protect the interest of workers from the unequal power relationship between capital and labour so as to bring industrial peace which would in turn help in the promotion of productivity.<sup>1</sup> The second broad objective has been social prosperity and economic development in order to improve the service conditions of the Industrial labour and thereby provide the fundamental amenities of life.<sup>2</sup> Keeping these broad principles in mind and the idea of social righteousness and welfare state preserved in the Constitution of India<sup>3</sup> various labour law legislations have been put into practice such as the Industrial Dispute Act 1947 whose fundamental purpose is to maintain healthy ties between the employer and the employee and to explore any practicable means of settlement between them.<sup>4</sup> Moreover, in addition to this, in the case of the *Workmen of Dimakuchi Tea Estate v/s Management of Dimakuchi Tea Estate*<sup>5</sup>, the Hon'ble Supreme Court laid down the object of the Industrial Dispute Act 1947 in the following five ways:

*"(1) The Promotion of measures for securing amity and good relations between the employer and workmen;*

*(2) An investigation and settlement of industrial disputes between employers and employees, employers and workmen or workmen and workmen with a right of representation by a registered Trade Union or Federation of Trade Unions or Association of employers or a federation of association of employers;*<sup>6</sup>

*(3) The prevention of illegal strikes and lock-outs;*

*(4) Relief to workmen in the matter of lay-off, retrenchment, and closure of an undertaking;*

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<sup>1</sup> Richard Mitchell and others, *The Evolution of labour law in India: An Overview and Commentary on Regulatory Objectives and Development* 1 Asian JLS 413 (2014)

<sup>2</sup> *Ibid*

<sup>3</sup> Nicole Lillibridge, 'The Promise of Equality: A Comparative Analysis of the Constitutional Guarantees of Equality in India and the United States' 13 *Women & Mary Bill Rights Journal* 1301 (2005)

<sup>4</sup> *Ibid*

<sup>5</sup> *Workmen of Dimakuchi Tea Estate v Management of Dimakuchi Tea Estate* AIR 1958 SC 353 (India)

<sup>6</sup> *Ibid*

(5) *Collective bargaining.*"<sup>7</sup>

Thus, it can be stated that the principle of industrial democracy is the bedrock of the Act and it should be one of the foremost measures while dealing with any industrial dispute between an employer and the workman.

## **ANALYSIS OF PROVISION OF LAYOFF**

The underlying purpose behind the enactment of provisions with respect to layoff was due to the presence of freedom of contract, a principle derived from the concept of *laissez-faire*<sup>8</sup>, which authorized an employer to discharge the duties of the employee whenever an uncertain situation arose.<sup>9</sup> This created an environment of unfettered discretion on the part of the employer to discharge the employment of a worker in the name of situations or reasons beyond its control, thereby leading to mass unemployment. Thus, it was imperative on the part of the state to intervene and regulate such situations so as to promote the social and economic development of both the employer and the worker. With this precise objective in mind the provision relating to layoff was incorporated in the Industrial Disputes Act 1947 under section 2(kkk)<sup>10</sup>. This section renders the definition of the term layoff by providing certain situations as beyond the employer's control, such as shortage of coal or raw material or natural calamity or any connected reason thereof, and in such situations, if the employer fails to provide work to the workman, then it must be assumed that the worker or the employee has been laid off.<sup>11</sup> However, initially, the provision of the layoff was leaning more towards one side of the Industrial democracy viz the employer as discussed above, and therefore the legislature via a subsequent amendment enacted section 25c<sup>12</sup> of the Industrial Disputes Act 1947 which gave the worker a right to be compensated during the layoff period provided certain conditions have complied,<sup>13</sup> such as the name of the worker must be in the muster rolls

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<sup>7</sup> *Ibid*

<sup>8</sup> KM Pillai, *Labour and Industrial Laws* (11th edn, 2007)

<sup>9</sup> *Ibid*

<sup>10</sup> Industrial Dispute Act 1947, section 2(kkk) (India)

<sup>11</sup> *Ibid*

<sup>12</sup> Industrial Dispute Act 1947, s 25c (India)

<sup>13</sup> *Ibid*

of the employer and the worker must have been in continuous service of not less than one year with the employer. Albeit the workman had the right to be compensated in lieu of layoff however there was an exception to this right, which was provided in the proviso to section 25c<sup>14</sup> wherein it has been stated that the employer can restrict the right of the workman for compensation after a period of forty-five days if there is an agreement to this effect. This exception though was enacted with the objective of safeguarding various industries from economic instability has however been used as a tool for exploiting the workman due to their illiterateness and lack of awareness vis a vis their rights.<sup>15</sup> This premise can be substantiated with the case of *P. Virudhachalam and Ors. vs Management of Lotus Mills and Ors*<sup>16</sup> wherein the appellants were denied layoff compensation after a period of forty-five days even though their union was against the settlement agreed upon which provided for no compensation. The appellants were the minority in settlement and therefore they were denied the right to get compensated, the Hon'ble Supreme Court unfortunately in this case also sided with the majority as the legislation does not provide for any relief to the minority, thus in effect leaving the laid-off workers in a dismal situation because of lack of exit opportunities or lack of additional rights in the labor law ambit of India. This clearly establishes that there prevails a lacuna in the provisions of layoff which in effect gives more power to the employer in cases of layoff thereby proving to be contradictory with one of the fundamental aims of providing reliefs to the workman. Therefore, it is imperative for the legislature to take cognizance and enact certain provisions which give the workman an opportunity to hedge their rights in cases of layoff.<sup>17</sup> The agency problem of majority vs minority has been one of the core issues in corporate laws today in India and therefore there have many amendments in the corporate regime which provides for an exit opportunity or additional rights to the minority<sup>18</sup> and therefore it is asserted that some reference can be drawn from the corporate mechanism in the labor law regime by enacting provisions which help the workers of hedging their right in cases

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<sup>14</sup> Industrial Dispute Act 1947, s 25 Proviso (India)

<sup>15</sup> *Ibid*

<sup>16</sup> *P Virudhachalam & Ors v Management of Lotus Mills & Ors* AIR 1998 SC 554 (India)

<sup>17</sup> *Ibid*

<sup>18</sup> Naveen Kumar & JP Singh, 'Corporate Governance in India: Case for Safeguarding Minority Shareholders Rights' 2 IJMBS (2012)

of layoff.<sup>19</sup> In addition to this issue, there is another aspect that is problematic in the Indian Labour ambit i.e., not providing a particular period till which a workman can be laid off. This levey given to the employer was also highlighted as an issue in the case of *M.A. Veirya v C. P. Fernandez*<sup>20</sup> wherein it was observed that by not providing a time period till which a workman can be laid off, the economy as a whole is indirectly getting affected as the workman is losing the opportunity cost of getting full wages in some other establishment.<sup>21</sup> Albeit the employer has a right to retrench the workman after a period of forty-five days however it is merely a discretionary right which further substantiates the premise of legislations of layoff being antithetical to the objective of the act. This gives the employer edge over the workman in cases of layoff in the Indian labour law mechanism and thereby it distorts the industrial democracy.

## CROSS JURISDICTIONAL ANALYSIS

### International Labour organization standards

The International Labour Organisation vide the Convention 158<sup>22</sup> has laid down certain guidelines or provisions with respect to termination of employment which members states must adopt in their respective labour law regime.<sup>23</sup> Article 12<sup>24</sup> of the Convention 158 governs the aspect of compensation to be provided to the workman in cases of termination of their employment by the employer due to some extraordinary circumstances.<sup>25</sup> The said provision has given the national governments or the respective authority flexibility in order to determine the compensation or severance pay in cases of termination.<sup>26</sup> However, it has provided that the compensation shall be just and reasonable. This reasonableness is different in every

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<sup>19</sup> *Ibid*

<sup>20</sup> *MA Veirya v CP Fernandez* (1956) ILLJ 547 Bom (India)

<sup>21</sup> *Ibid*

<sup>22</sup> Termination of Employment Convention 1982, Convention No 158.

<sup>23</sup> *Ibid*

<sup>24</sup> Termination of Employment Convention 1982, Convention No 158, art 12

<sup>25</sup> *Ibid*

<sup>26</sup> 'Note on Convention No 158 and Recommendation No 166 concerning termination of employment'

<[https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/meetingdocument/wcms\\_171404.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_171404.pdf)> accessed 01 July 2021

jurisdiction and thereby every member has laid certain social security measures which need to be complied with by the employer for the workman.<sup>27</sup>

### **United Kingdom & Ireland**

The workman or employees are entitled to the maximum amount of £ 30 for a day for five days and this may continue for three months in cases of layoff, this right to get compensated is a statutory right that every workman is guaranteed.<sup>28</sup> In addition to this, the workman can also claim a redundancy payment in cases where prolonged layoffs are undertaken by the employer. In order to claim this redundancy payment, a workman must be on layoff for a period of 4 or more weeks in a row or 6 or more weeks in a 13-week period where no more than 3 weeks are in a row.<sup>29</sup> This additional right to claim redundancy essentially hedges the risk of a prolonged suspension by the employer. Moreover, it also provides an exit opportunity for workman who wants to join other organisations and thereby claim full wages. The situations vis a vis layoff are governed by the Redundancy Act, 1967 in Ireland which also entitles compensation to a worker in cases of layoff. In addition to the compensation, a workman can also claim a redundancy payment if the layoff continues for a period of 4 weeks or more in a row or 6 weeks or more in a 13-week period.<sup>30</sup> The provision is similar to what is prevalent in the United Kingdom.<sup>31</sup>

### **India**

Social welfare schemes in cases of termination are essentially governed by two statutes in India viz the Payment of Gratuity Act 1972 and the Industrial Dispute Act 1947. Section 6 <sup>32</sup> of the Payment of Gratuity Act provides that in cases of termination of employment of the workman an amount equal to 15 days' wages for every completed year of service or part thereof in

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<sup>27</sup> *Ibid*

<sup>28</sup> Anonymous, 'Making Staff Redundant' (*United Kingdom Government*, 24 June 2021)

<<https://www.gov.uk/staff-redundant/layoffs-and-shorttime-working#:~:text=Getting%20help-Lay%2Doffs%20and%20short%2Dtime%20working,than%20half%20a%20week's%20pay>> accessed 01 July 2021

<sup>29</sup> *Ibid*

<sup>30</sup> Redundancy Payment Act 1967, s 7 (Ireland)

<sup>31</sup> *Ibid*

<sup>32</sup> Payments of Gratuity Act 1972, s 6 (India)

excess of six months shall be paid to the workman. The 15 days wages shall be based on the last drawn wage by the concerned workman.<sup>33</sup> This right only arises if the concerned workman has completed at least five years of continuous service with the employer.<sup>34</sup> Furthermore, section 25F<sup>35</sup> of the Industrial Disputes Act 1947 renders a right of redundancy payment to the workman who has completed at least one year of service. This right only arises when the employee has been retrenched by the employer. Thus, it can be stated that in case of a prolonged layoff, a workman is helpless as it does not have a right to claim a redundancy payment. Albeit the employer has a right to retrench the workman after forty-five days of layoff however this right is discretionary and not a mandatory right as discussed above. This essentially gives a leeway to the employer, under the cloak of lay-off, to keep the employees or workman in a state of permanent suspension and thereby deprive the workman of the full wages it is entitled to earn in a different organization.<sup>36</sup>

## CONCLUSION

Defining a period and giving exit opportunities to a workman in cases of layoff is extremely pertinent especially in a jurisdiction like India wherein the practice of leveraging the loopholes in legislation is so prevalent. It is asserted that the legislature should take cognizance of the aforementioned issues and thereby incorporate some measures for a workman. A strong measure would be to take reference from the provisions in the United Kingdom and thereby enact certain exit opportunities or additional rights in the Indian Labour law mechanism so as to prevail the concept of Industrial democracy. Moreover, looking at the present circumstance of temporary lockdowns and boom in the economy, the researcher believes that it is in the need of the hour to give more clarity to the workman as there is a great deal of uncertainty amongst the workforce and the practice of downsizing the workforce is becoming a norm.

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<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

<sup>35</sup> Industrial Dispute Act 1947, s 25F (India)

<sup>36</sup> *Ibid*