



INDUSTRIAL DISPUTES ACT AND RETRENCHMENT

By Jitendra Kumar and Jutirani Talukdar
From Symbiosis Law School, Pune

Abstract

Retrenchment is the permanent measure to remove surplus staff due to some fundamental changes in the nature of the business. This will lead to a complete interruption of the relationship between the employer and the employee. This is the involuntary unemployment of workers. Until 1953, India had no statutory provisions granting such involuntary unemployment risk immunity or protection. In 1953, some provisions were incorporated into the "Industrial Disputes Act", and in 1976 some amendments got introduced. This study also includes the comparative analysis with other jurisdictions.

Keywords: *Retrenchment, surplus, business, employer, employee, workman.*

I. INTRODUCTION

A. Need for Labour Legislations

The world's major countries inherited the structure of labour law from the colonial period, with serious problems and severe contradictions as to the multiplicity of labour laws. The labour movement also increased the demand for universal labour laws in India several times, but no significant attempts were made in this direction by the government. The labour legislations enacted in India are seen to have

a negative impact and it is believed by industry experts that they increase costs for the company. Because the law increases labour costs, employers may employ 2 fewer workers than they might otherwise have, and they may not even join a specific line of products. This last effect of the law is ironic because it implies that, in terms of overall effects, the ostensibly supportive legislation will actually harm employees rather than benefit them by triggering job cuts and wage cuts. Such alleged negative side effects of current Indian law must be balanced against the expected principal effect, which is to provide Indian employees with greater labour market security.

B. Views of the National Labour Commissions

The second National Labour Commission report came into effect after a gap of almost 72 years. During these stages of immense globalization and establishment of commercial industries, the commission felt the need to amend certain structures related to retrenchment. The Commission's opinion on Chapter V B (Superior Requirements on lay-off, retrenchment and conclusion in formations employing not less than 100 workers) of the Industrial Disputes Act: The Commission found that, in the new conditions of international rivalry, certain undertakings may not be able to continue to meet the economic implications of competition. To eliminate the extensively perceived flaws in labour rules, the National Labour Commission (2002) recommended that the laws be clubbed into five or more classes related to industrial relations, employ, social security, security, healthcare and working conditions, etc.¹ In such

¹ NCL. 2002. Report of the National Commission on Labour, Volume I, Ministry of LGI, New Delhi.



situations, non-viable undertakings cannot be forced to continue to bear the financial burden which must be incurred in order to keep the concern running. Then they should be given the option to close. In these conditions, the commission decided that the safest and more reasonable option will be to require closure, offer adequate compensation for employees and, in the case of an appeal, leave it to the Labor Relations Commission to find ways of recourse by arbitration or decision.²

No prior permission is required with regard to the lay-off and retrenchment of any job size in an institution. Workers, however, will be entitled to pay a 2- month notice or payment in lieu of compensation in the event of reduction. The commission also found that in a working company the rate of retrenchment pay should be higher than in a closed organization.³ Nonetheless, the commission recommended that in the case of an institution employing 300 or more employees where the lay-off extends a 1-month period, such establishment should be allowed to obtain the relevant government's post-facto approval. The Commission suggests that the provisions of Chapter V B concerning the closure permit should be made available to all enterprises to protect the rights of employees of enterprises that are not normally covered by this clause if they hire 300 or more workers.⁴

² National Commission on Labour. 2002. Report of the National Commission on Labour, Volume1, Ministry of Labour, Government of India, New Delhi, pp. 6.87.

³ *Ibid*

⁴ *Ibid*

⁵ National Commission on Labour. 2002. Report of the National Commission on Labour, Volume1, Ministry of Labour, Government of India, New Delhi, pp. 6.88.

⁶<https://economictimes.indiatimes.com/news/economy/policy/labour-panel-recommends-hire->

The commission also proposed a higher 60-day wage reduction and a similarly high 45-day job closure reimbursement limit for each completed year of profit-making work. Or an institution employing fewer than 100 employees, half of the above allowance may be provided in terms of pay days. For both the retrenchment and closure cases, however, notice is required as that of major industry.⁵ The committee has also mooted the idea of removing highly paid workers such as airline pilots from worker concept. Instead, a cut of Rs 25,000 per month could be set by the government to identify employees who would qualify for protection under labour laws.⁶ The committee also proposed that supervisory workers be excluded from the purview of labor laws, regardless of salaries, and clubbed with supervisors and managers. Under the adjudication and arbitration path the rights of such workers would be taken care of. The social security programs would however be applicable to all workers.⁷

II. ANALYSIS

A. Legislative History

India has had a history of enacting special laws when it comes to protecting the rights of workers. Hence, there exists a number of laws which are protecting the trade unions, unlawful dismissal and retrenchment. The current threshold for layoffs is 100

<https://economictimes.indiatimes.com/news/economy/policy/labour-panel-recommends-hire-fire/articlehow/14803763.cms?from=mdr>. Accessed on 8th February, 2020.

⁷

<https://economictimes.indiatimes.com/news/economy/policy/labour-panel-recommends-hire-fire/articlehow/14803763.cms?from=mdr>. Accessed on 8th February, 2020.



employees. Before drawing conclusions about the changes needed in the country, the Indian regulations affecting labor flexibility and related policies were compared and compared with current regulations in major developed and emerging countries. Hence, when compared with developed countries, the labour legislations in India are still behind and somewhat standstill in nature.⁸ Most countries have legislation that makes retirement or retrenchment of staff expensive for businesses. In India, companies employing more than 100 employees must obtain government approval for their intended layoffs, and employees of these companies are entitled to three months' notice of any such actions. As for the closure of the factory, companies that employ more than 100 employees must seek permission from the government before any shutdown; the government may grant or refuse permission for this kind of closure, even if the company loses money on the project.⁹ The traditional view of these legislations is that it retains social rights but has disadvantages in reducing the flexibility of Indian industry. Initially, the Industrial Disputes Act of 1947 was the first law on dismissals, layoffs and closures, and to varying degrees applied to companies employing 50 to 100 employees and companies employing more than 100 workers. Organizations with less than 50 employees are not within the meaning of this regulation. The Industrial Disputes Act, when implemented for the first time, did not prohibit companies from laying off

or retrenching workers or closing unprofitable companies, unless they advised employees and unions of the planned changes well in advance.¹⁰

Each of the three amendments to the 1972, 1976 and 1982 Act apparently gave employees greater protection than the previous one. The table below indicates the mechanism of amendments and the progress made.

Firm Size (measured by employment range)	No. of workers 1982 - 83	No. of workers 1990 - 91	Percent Change
0 - 49	807,421	957,922	18.6
50 - 99	467,418	443,276	-5.2
100 - 199	392,592	280,631	-28.5
200 +	505,727	288,135	-43.0

Notwithstanding these rules, the employers made constant attempts to circumvent the legislation and to avoid penalties.

B. Merging of the Industrial Disputes Act to the Industrial Relations Code

The proposed Industrial Relations Code Bill, 2019 ("The Bill") merges the following statute to provide a structured reform:

1. The Trade Unions Act, 1926
2. The Industrial Employment (Standing Orders) Act, 1946
3. The Industrial Disputes Act, 1947

Lobel (eds.) Labor and Employment Law and Economics (Cheltenham: Edward Elgar).

¹⁰ In Indian legal definition, "layoff" refers to the dismissal of employees as a result of market slackness and with the intention of re-hiring these workers when the business takes over. "Retrenchment" refers to workers being more permanently laid off.

⁸ Kaushik Basu, Gary S. Fields, Shub Debgupta, IZA DP No. 2742: Labour Retrenchment Laws and their Effect on Wages and Employment: A Theoretical Investigation, April 2007

⁹ Kaufman, B. (2009) 'Labor law and employment regulation: institutional and neoclassical perspectives' in K. Dau Schmidt, S. Harris and O.



The government has approved the bill on November 20, 2019 and is pending public approvals and suggestions. The bill is the third code in the Government's effort to centralize all 44 (forty-four) labour laws into 4 (four) codes. The bill is set to be introduced in the winter session of the parliament.

Key Features of the Bill

1. *Bench of the Tribunal*

The Bill constitutes a 2 (two) member bench instead of the earlier 1 (one) member bench for the tribunal. This would help in fast tracking the process of disposal of cases. Important cases would be adjudicated upon jointly by the bench and the rest may be adjudged by a single member, hence, making the judiciary process more effective.

2. *Fixed Term Employment*

The bill also furthered the concept of 'fixed term employment' providing better benefits to employees in India. Currently, workers are hired through contractors. However, when the bill becomes effective, companies would be able to hire employees directly. Such employees would be considered on the same par as the permanent employees during the term of their employment. This opposes the concept of engaging contract workers by various industries, specifically the IT industry. It is beneficial for employers as any boundaries provided by the Contract Labour (Regulation and Abolition) Act, 1970 would now be removed and direct control over such employees would be retained eliminating any intermediary level (contractors) of interference making it easier to lay off any employees if needed. However, the "continuity" aspect is lacking

in this concept as contract workers may oppose the permanency facet provided to them earlier through various contractors. Companies would also be able to modify the terms of employment based on the requirements of the industry in a more beneficial manner. The bill shall also ensure a pan-India impact as the codification would apply to all states and centre sphere establishments such as railways, ports, mines, or any other public sector undertakings.

2. *Flexibility for Retrenchment*

The requirement for retrenchment, for which government permission is required, has been kept unchanged to 100 employees. However, the same threshold can be now changed through a notification. This provides further flexibility for employers while considering laying off or downsizing (the hire and fire regime). Currently, if a company has more than 100 employees, government permission is required for retrenchment.

3. *Vesting of powers to the Government*

The powers relating to adjudication of certain disputes have been vested upon government officials. This would help in reducing the burden on the tribunals, making them more time effective. Such disputes would be pertaining to penalties as fines.

Views on the Bill

The bill provides certain interesting facts regarding employability of workers. Certain aspects of the bill favour the employers more, such as the flexibility provided in retrenchment. However, the same remains



unclear as to what limit of the threshold would be allowed in practicability. The flexibility also allows companies to follow the hire and fire regime upon their discretion and may lead to discrimination. Centralising the fixed term employment through various industries is a major step forward introduced by the government. This would help providing workers to be at a similar stage with permanent employees and the applicability of the same would have a wider reach. Further, increasing the bench to a two-member tribunal shall help in faster disposal of cases and reducing the burden on the judiciary. Powers have also been provided to government officials with respect to certain disputes pertaining to fines and would further help in efficient transaction pertaining to labour disputes. The fixed term employment concept proposed by the bill shall help in centralising hiring of employees in various industries without intermediary interference.

C. Analysis of retrenchment regulations in India

Condition precedent: Section 25-N deals with condition precedent to retrenchment of workers in India. This provision deals with conditions and procedure regarding retrenchment of workers by employers. It specifies guidelines in relation to three months prior notice to be given to retrenched workers, and application to be drafted and submitted to the proper government authorities seeking permission and informing them of the details of said retrenchment. All dues owed to the worker must also be paid prior to such action.

Where no application for permission under sub-section (1) is made, or where it has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice was given to the workman and they shall be entitled to all the benefits under any law for the time being as if no notice had been issued. The provision also states how if no reply arrives within sixty days, permission is deemed to be given. This may be said to be a handicap in the protection of workers' rights as it regards no response to be permissible to retrench the employee in question.¹¹ Although it also mentions clauses for review of permission already granted along with other safeguards, defaulting to permitting an employer to retrench an employee merely as a result of lack of communication defeats the purpose of such legislation in a big way.

Constitutional validity of Section 25N: In Workmen of Meenakshi Mills Ltd., etc. V. Meenakshi Mills Ltd. And another, the Supreme Court held that Section 25-N of the Act as constitutionally valid on the ground that the restrictions imposed on the right of employer to retrench workmen is in interest of the general public.¹² It does not infringe Article 19(1) (g) of the Constitution and duty to pass a speaking order and affording opportunity to the parties concerned with judicial power while functioning under sub-section (2) of Section 25-N and hence no appeal lies to Supreme Court against an order passes under sub-section (2) of Section 25-N.

In Uttaranchal Forest Development Corporation and Another v. Jabar Singh and Others, the services of the respondent

¹¹ La Porta R., Lopez-de-Silanes, F. and Shleifer, A. (2008) 'The economic consequences of legal origins', *Journal of Economic Literature*, 46: 285-332.

¹² *Meenakshi Mills, Ltd. v. Meenakshi Mills Ltd.*, [1992 (1) L.L.N 1055]



workman were retrenched by notices in compliance with Section 6-N of the U.P. Industrial Disputes Act, 1947. Labour Court gave an award holding the retrenchment as valid. The award was challenged in the High Court and the Court directed reinstatement with back-wages.¹³ The question for consideration was whether the corporation was an industrial establishment within Section 25-L of the Industrial Disputes Act, 1947 and if so whether the retrenchment was not valid for non-compliance of Section 25-N of the Industrial Disputes Act, 1947.

The Supreme Court observed that the process of cutting tress by axe and changing the shape by saw and conversion of tress into logs for purpose of sale and disposal fell within the scope of manufacturing process under Section 2-K of the Factories Act, 1948. The establishment of appellant was therefore, held, to be an industrial establishment under Section 25-L of the Industrial Disputes Act, 1947 and Section 25-N was applicable. The appellant did not comply with the two requirements of Section 25-N of the Industrial Disputes Act, 1947 namely giving three-month notice or wages in lieu of notice and taking permission from the appropriate government. The retrenchment notices were therefore illegal and workmen were held entitled to be reinstatement with full back wages and continuity of service.

In the case of **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (2013)** it was held by the Court as under:¹⁴

“The propositions which can be culled out from the aforementioned judgments are: In cases of wrongful termination of service,

reinstatement with continuity of service and back wages is the normal rule. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments. In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised.

It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service

¹³ Uttaranchal Forest Development Corporation and Another v. Jabar Singh and Others (2007) 2 SCC 12

¹⁴ Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324



and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame.”

IV. Effect upon Industries

Some decades ago, the clear-cut division between master and servant meant that an employer could generally sever ties with the employees at will, as the latter works at the former's pleasure.¹⁵ This in turn encourages flexibility of business in modern times, as being restricted as to when and whom to cut loose in their company, employers may not be able to plan ahead with as much surety as they would otherwise.¹⁶ The rigid retrenchment laws increased the costs of adjusting a firm's employment level and led firms to consider not only current market conditions, but also future labour needs while making their decisions. A firm will therefore be reluctant to hire additional workers during an economic upturn if it anticipates significant costs in reducing its work force during a subsequent downturn.¹⁷ This is, however an outdated view in some regards as now with the advent and power of trade unions and equality within the

workplace on the rise, a balance needs to be struck between allowing industry to flourish along with safeguarding the job security of employees. Hence, the admittedly flawed provisions in the Amended Industrial Act earlier mentioned put in place some form of control and supervision when retrenching workers, and employers may not simply use this tactic at will.¹⁸ They also add benefits such as compensation to be paid in a timely manner, along with the retrenched workers being given first preference whenever vacancies open. It is also included in the protective provisions that workers who have served more time in the business must be the last preferred when it comes to retrenchment. All of these perks along with set procedures for employers to go through to initiate retrenchment, aim to protect workers' rights and not have them dissatisfied or insecure, while simultaneously not sacrificing the industry's effectiveness and efficiency as a whole. While the above cases still show how loopholes in legislation are sometimes exploited by employers, the existing retrenchment provision have stayed on the right track and although in need of constant improvement, have limited the damages to both sides of the spectrum.

V. COMPARITIVE ANALYSIS WITH OTHER JURISDICTIONS

Disputes, frequent protests and work

¹⁵ Kaufman, B. (2009) 'Labor law and employment regulation: institutional and neoclassical perspectives' in K. Dau Schmidt, S. Harris and O. Lobel (eds.) *Labor and Employment Law and Economics* (Cheltenham: Edward Elgar).

¹⁶ Gahan, P., Mitchell, R., Cooney, S., Stewart, A. and Cooper, B. (2012) 'Economic globalisation and convergence in labour regulation: an empirical assessment' *American Journal of Comparative Law*, 60 (forthcoming).

¹⁷ Sarkar, Prabirjit (1992) "Industrial Growth and Income Inequality: An Examination of 'Stagnationism' with Special Reference to India" *Journal of Quantitative Economics* 8: 125- 38.

¹⁸ Heckman, J. and Pagés, C. (2004) 'Introduction to law and employment: lessons from Latin America and the Carribean', in J. Heckman and C. Pagés (eds.) *Law and Employment: Lessons from Latin America and the Carribean* (Chicago: NBER and University of Chicago Press).



stoppages have marked the labour market in India. The working days lost per thousand employees in India as a result of labour conflicts in 2018 were 1280 compared to 10 in Sweden, 60 in Japan, 200 in France, 370 in West Germany, 840 in UK. Even if Chapter VB of the Industrial Disputes Act is totally inconsistent with the concepts of a market economy implemented in the country, slowly but surely, by the economic reforms of 1991-92 and subsequent years, it may be politically difficult to put an end to this provision in one stroke without any significant steps to mitigate the impact of the reform on workers. In a globalized world, however, it is important to make sure that India remains competitive as a destination for foreign direct investment, and our laws should not be out of step with other countries, particularly emerging countries. The minimum for retrenchment pay in both China and Korea is 30 days for each year of work. In Thailand, it is the same if the work provided is 10 years or more, although if the job is between three and 10 years, it is somewhat more generous. In Malaysia, work for five years or more requires 20 days' salary. If the working hours are shorter, the standard is lower. The law does not stipulate the severance payment rate of major industrialized countries in Japan and the United States, while in the United Kingdom, France and Germany, the law requires that the severance payment rate should be lower than or the highest equal to the current rate in India. In view of the trends in major global economies and the need to maintain the competitiveness of the Indian economy in foreign direct investment, we propose to increase the compensation for reduction and/or closure from the current two weeks to the four-week completion year.

VI. CONCLUSION AND SUGGESTIONS

The versatility to be implemented is in relation to the retrenchment provision on seniority (Sec 25G). It would be necessary to substitute 'the last come first go' law by a general condition such as rational and fair selection criteria. It is not especially obvious whether a program of deregulation and business subsidization by tax exemptions is sustainable in the longer term. This approach will yield some quick wins for governments interested in attracting inward investment, but it won't lead to sustainable growth when combined with institutional capacity investment. This means supporting the institution through which human capital is created and sustained for the labour market, especially the education and training systems and social insurance. Without such reforms it is unlikely that for more than a small minority of Indian workers, as it is now, access to jobs will be a formal reality. There may be an argument for modulating the strict controls on terminations of jobs provided for in Part V-B of the Industrial Disputes Act. Nonetheless, it is unlikely that eliminating all oversight of the termination decision and leaving staff with a limited financial argument after dismissal would encourage investment in firm-specific skills.

VII. BIBLIOGRAPHY

- Heckman, J. and Pagés, C. (2004) 'Introduction to law and employment: lessons from Latin America and the Caribbean', in J. Heckman and C. Pagés (eds.) *Law and Employment: Lessons from Latin America and the Caribbean* (Chicago: NBER and University of Chicago Press).
- Sarkar, Prabirjit (1992) "Industrial Growth and Income Inequality: An Examination of 'Stagnationism' with Special Reference to



India" Journal of Quantitative Economics 8:
125- 38.

- Gahan, P., Mitchell, R., Cooney, S., Stewart, A. and Cooper, B. (2012) 'Economic globalisation and convergence in labour regulation: an empirical assessment' American Journal of Comparative Law, 60 (forthcoming).
- Kaufman, B. (2009) 'Labor law and employment regulation: institutional and neoclassical perspectives' in K. Dau Schmidt, S. Harris and O. Lobel (eds.) Labor and Employment Law and Economics (Cheltenham: Edward Elgar).
- Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324
- Uttaranchal Forest Development Corporation and Another v. Jabar Singh and Others (2007) 2 SCC 12
- National Commission on Labour. 2002. Report of the National Commission on Labour, Volume1, Ministry of Labour, Government of India, New Delhi, pp. 6.88.
- [https://economictimes.indiatimes.com/news/economy/policy/labour-panel-recommends-hire-fire/article-show/14803763.cms? from=mdr](https://economictimes.indiatimes.com/news/economy/policy/labour-panel-recommends-hire-fire/article-show/14803763.cms?from=mdr). Accessed on 8th February, 2020
