TEXT BOOK ON LABOUR AND INDUSTRIAL LAW OF BANGLADESH

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CCB FOUNDATION

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To

Late Alhaj Zoinal Abedin

of Mathbaria, Pirojpur.

Who had all his love,
affection, support and assistance
during my college education in Dhaka.

On the arduous road to get education in my life the people who helped me are many and their contribution is irreparable. At the advent of this small work, which could not be possible but for their help I cannot but remember some of their names with respect and gratefulness;

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PREFACE

This Text Book on Labour and Industrial Law has been the outcome of my studies on the same subject matter for teaching in LLB classes on part time basis in the Northern University, Bangladesh. When I started teaching on the subject I planned to publish two books on the same subject matter: one as a manual of Labour and Industrial Law comprising basic laws and rules on Labour and Industrial Law which are the subject matter of LL.B. syllabus. This is because the area of labour and industrial law is very wide compared to available syllabus in universities for students of law. Available books and manuals on the subject are designed for the practitioners and in most cases they contain much more than what the students need; nor are they available with bare Acts and Rules. Accordingly the Manual of Labour and Industrial Law has already been published in October, 2004.

The other book I planned was this Text Book on Labour and Industrial Law which was in pipeline for more than seven months. Labour law is the collective name given to the social enactments which deal with the problems of capitalists and workmen, employers and employees and provide social security and justice. Labour law as such comprises a vast field of investigation into a number of legislative enactments since legal system lacks uniform Code in the area. It, has, therefore, not been possible to cover all the aspects of labour and industrial law in this book. This book just comprehends and covers the LL.B. syllabus on labour and industrial law papers prescribed in all universities in Bangladesh. The book, however, makes an earnest attempt by picking up and discussing most of the recent decisions of the Supreme Court on all six legislation contained in this book. Every effort has been made to elucidate the principles pronounced by the Supreme Court with lucid treatment. Thus the book is aimed at bringing all the readers to the up to date information on the development of labour and industrial law.

The contents of the book are divided into six parts (A, B, C, D, E and F). Part A contains the Employment of Laboour (Standing Orders) Act, 1965, Part B contains the Industrial Relations Ordinance, 1969, Part C contains the Factories Act, 1965, Part D contains the Shops and Establishments Act, 1965, part E contains the Workmen's Compensation Act, 1923 and Part F deals with the Payment of Wages Act, 1936. An introductory chapter also outlines the general ideas and principles on labour

and industrial law. Recently separate law has been made for regulating trade union activities, industrial relations and disputes in EPZ industrial areas which were so far outside the scope of Industrial Relations Ordinance, 1969 since the introduction of EPZ industries back in 1980. A chapter has been added to this end in Part B along with an appendix at the end containing the EPZ Workers Association and Industrial Relations Act, 2004. This inclusion of this Act in the appendix also provides a full coverage of the Manual of Labour and Industrial Law.

I believe that not only the students for whom the book is primarily meant but even for academicians, the members of the Bar and the Bench who somehow or other contributes to the process of Labour adjudication it will prove to be useful.

I feel highly indebted to the learned authors, I have called my aid in this book. They include Dr. V.G. Goswami, M. Shafi, S.K. Puri, P.K. Mukherjee, Rajani Kanta Das and N.D. Kapoor. Special thanks go for my chamber computer-in-charge Kamrul Hassan who gave his skillful effort from behind. I express my heartfelt gratitude to my publisher the CCB Foundation for processing and publishing this edition. CCB Foundation is a charitable organisation which has an objective to make a generation of our poor children educated up to a certain level. 100% profit of the CCB Foundation or CCB Book Centre goes for the cause of child education in villages. So buying this book will also mean contributing to the Foundation indirectly.

The views and opinions expressed in this book are absolutely mine except those which I have quoted. I do not claim that my views are correct from every point of view. There may be shortcomings, factual errors, mistaken opinion and stylistic lapses which all are mine and I alone am responsible for those. If there are mistakes in facts or otherwise I shall appreciate if readers come forward to have corrected by me so that the second edition may be a better volume.

Md. Abdul Halim

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The terms 'Industrial law' and 'Labour Law' are often used interchangeably in our legal system though the nature and scope of 'Industrial law' is much broader compared to 'Labour law'. From a broader point of view 'Industrial law' covers 'Labour law'. 'Industrial law' encompasses all laws, case laws, rules and recognised customs relating to an industry. Thus it covers not only the labour element in an industry but also taxation law, company law, safety law etc. On the other hand, labour law is used to mean that body of rules which deal with employment conditions, in particular, conditions of appointment, termination, dismissal, discharge, wages, conditions of leave, benefits, right to trade unions, social security etc of an worker in any establishment.

Both labour and industrial law are not only a body of procedural or adjective law but also a substantive law as they define rights and concepts as well as prescribe the procedure of dispute settlement.

The Object of Labour and Industrial Law

The object of both the law is to establish a continuous process of harmonious relationship between the employers and employees. They have another object of fastening together both the labour and capital in order to create an atmosphere that they are an indivisible whole in production. The ultimate object of labour and industrial law is to maintain industrial peace, security and steady growth of production.

The origin and growth of labour law may be ascribed mostly to the development of organised industry where a large number of workers including women and children are employed under conditions which tend to be detrimental to their health, safety and welfare and against which they are often unable to protect themselves.

From historical point of view, labour law has given birth to some fundamental industrial rights to labourers in the field of production. At the same time it has also provided protection for those rights.

From a practical point of view labour and industrial law provide for three types of dispute settlement measures: voluntary settlement machinery, quasi-judicial machinery and judicial machinery.

Need for Labour and Industrial Legislation

Labour and Industrial legislation is necessary for the following reasons:

(i) The individual workers are economically weak. They cannot bargain with the employers for the protection of their rights and even for subsistence wages. As such legislation for protection of labour against long hours of work, unhygienic conditions of work, low wages and exploitation is needed.

(ii) The workers are exposed to certain risks in factories, mines and other establishments. As such in order to make provisions for their health, safety and welfare, legislation is needed.

(iii) In order to increases the bargaining power of labour, legislation is necessary to encourage the formation of trade unions.

(iv) In order to avoid industrial disputes which lead to strikes and lock-outs, labour legislation is needed.

(v) To protect children and women from taking to work under hazadous conditions and at odd hours, legislation is essential.

(vi) Laws for providing compensation to workmen who die or are injured during and in the course of employment are also essential.

(vii) Labour legislation advances the interest of the working people and thus helps set up the development of the national economy on a sound and self-reliant basis.

(viii) Labour and Industrial law provides for industrial harmony in the country. Industrial harmony is indispensable when a country plans to make economic progress. It is true that no nation can hope to survive in the modern technological age unless it is wedded to industrial development and technological advance. Economic progress is bound up with industrial harmony for the simple reason that industrial harmony inevitably leads to more co-operation between employers and employees, which results in more productivity and thereby contributes to all-round prosperity of the country. Healthy industrial relations, on which

industrial harmony is founded, cannot therefore be regarded as a matter in which only the employers and employees are concerned; it is of vital significance to harmony involves the co-operation not only of the employers and the employees, but also of the community at large. This co-operation stipulates that employees and employers recoginse that though they are fully justified in safeguarding their respective rights and interests, they must also bear in mind the interests of the community. To conclude, industrial harmony is a product of goodwill and understanding between labour and management and, if for whatever reason, one or the other side fails to observe the rules of the game, the laws should be such as to take care of the offenders impartially.

Principles of Labour Legislation

Labour Lagislation is based on certain fundamental principles which are follows.

1. Social Justice: In an industrial set-up, social justice means an equitable distribution of profits and benefits accruing from industry between industrialists and workers and affording protection to the workers against harmful effect to their health, safety and morality. Mere compliance with and enforcement of legal rights may be unfair and cause hardship to the enforcement of legal rights by the workers. The Workmen's Compensation Act, 1923 and the Minimum Wages Act, 1948, for examples are attempts at securing social justice to the workers. The provisions of the Factories Act, 1948 fixing hours of work, overtime, leave privileges, welfare facilities and safe working conditions are also directed towards the same end.

Social justice is the signature tune of the Constitution of Bangladesh and this note is nowhere more vibrant than in industrial jurisprudence. The Preamble to our Constitution also lays down the objective of establishing 'economic and social justice', 'a society free from exploitation'.

2. Social Equity: Another principle on which Labour Legislation is based is social equity. Broadly speaking, social equity is a part of social justice. Legislation based on social justice fixes a definite standard for adoption for

the future, taking into consideration the events and circumstances of the past and the present. But with the change of circumstances and ideas there may be a need for change in the law. This power of changing the law is taken by the Government by making provisions for rule-making powers in the Acts in regard to certain specific matters. The rules may be modified or amended by the Government to suit the changed situation. Such legislation is based on the principle of social equity. However, from the view point of Bangladesh the principle of social equity seems to be absent in most of labour legislation. Most of the labour legislations have been made centuries ago but no timely change has been made by the Government even after 33 years of its independence. The glaring example is the Workmen's Compensation Act, 1936 where the minimum compensation payable to the dependent of a worker in case of death is Tk. 8,000 and the maximum is Tk. 21,000 which is very inadequate compared to other available figures in any other countries. In India the minimum amount is Rs. 50,000 and the maximum is fixed at Rs. 2,74 lac.

International Uniformity: International uniformity is another principle on which labour laws are based. The important role played by the International Labour Organisation (ILO) in this connection is praiseworthy. ILO is an international organisation which was founded in 1919 soon after the First World War. The main aims of the ILO are: (i) to remove injustice, hardship and privation of large masses of toiling people all over the world; and (ii) to improve their living and working conditions and thus establish universal and lasting peace based upon social justice.

ILO consists of representatives of Government, employers and workers of the member countries. There is parity of representation as between Government and non-Government groups and also between employers' and workers' groups. The structure of the Organisation has helped in welding together employers and workers in different countries into independent organisations. By its tripartite character of association of representatives of Government, employers and workers, it has produced a large number of international Conventions and Recommendations covering unemployment, general conditions of employment, wages, hours of work, weekly rest periods, holidays, employment, of children, young persons and women, industrial health, safety, social security, industrial relations and many other allied subject. The basic principles of the Labour Policy of ILO are: (a) Labour is not a commodity; (b) Freedom of expression and of association are essential

to continued progress;. (c)Poverty anywhere constitutes a danger to prosperity every where.

ILO aims at securing minimum standards on a uniform basis in respect of all labour matters. Conventions passed by ILO conferences, if and when ratified by a member-State, have to be implemented through appropriare legislation. Most of the Labour Legislation in Bangladesh is based on this principle.

4. National Economy: In enacting labour legislation, the general economic situation of the country has to be borne in mind lest the very objective of the legislation be defeated. The state of national economy is an important factor in influencing labour legislation in the country.

Constitution as the basis for Labour Legislation

The Fundamental Rights and the Directive Principles of State Policy enshrined in our Constitution need a special mention in view of their supreme importance in directing and influencing the Labour Legislation in the country.

Fundamental Rights

The Fundamental Rights cover, *inter alia,* equality before the law, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, equality of opportunity in matters of public employment, protection of rights regarding freedom of speech, freedom of assembly and freedom to from associations, freedom to practise any profession, protection of life and personal liberty, and right against exploitation.

1. **Prohibition of Forced Labour:** Article 34 of the Constitution specifically provides as one of the fundamental rights that all forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law (Article 34).

2. **Freedom of Association:** Every Citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of morality or public order (Article 38).

3. **Discrimination on ground of Religion, etc:** (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life.

(3) No citizen shall, on grounds only of religion race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

(4) Nothing in this article shall prevent the State form making special provision in favour of women or children or for the advancement of any backward section of citizens (Article 28).

Fundamental Right are enforceable in the Law Courts and create justifiable right in individuals. Article 26 of the Constitution expressly provides that all laws in force in the country immediately before the commencement of the Constitution which are inconsistent with the Fundamental Rights conferred by the Constitution shall to that extent be void.

Directive Principles of State Policy

The Directive Principles lay down the guiding principles which the State ought to follow both in framing laws and enforcing them. They confer no legal remedies. But still they provide a good guide in charting the part of the State in the governance of the country.

The relevant Directive Principles affecting, directly or indirectly, Labour Legislation are as follows:

1. **Principles of Ownership:** The people shall own or control the instilments and means of production and distribution, and with this end in view ownership shall assume the following forms: state ownership, co-operative ownership and private ownership (Article 13).

2. **Emancipation of Peasants and Workers:** It shall be a fundamental responsibility of the State to emancipate the toiling masses- the peasants and workers- and backward sections of the people from all forms of expiation (Article 14).

3. **Provision of Basic Necessities:** It shall be a fundamental responsibility of the State to attain, through planned economic growth a constant increase of productive forces and a steady improvement in the material and cultural Standard of living of the people, with a view to securing to its citizens –

   (a) the provision of the basic necessities of life, including food, clothing, shelter, education and medical care;

   (b) the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of works;

   (c) the right to reasonable rest, recreation and leisure; and (d) the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases. (Article 15).

4. **Rural Development and Agricultural Revolution:** The State shall adopt effective measures to bring about a radical transformation in the rural areas through the promotion of an agricultural revolution, the provision of rural electrification, the development of cottage and other industries, and the improvement of education, communications and public health, in those areas, so as progressively to remove the disparity in the standards of living between the urban and the rural areas (Article 16).

5. **Public Health and Morality:** The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, or alcoholic and other intoxicating drinks and of drugs which are injurious to health (Article 18).

6. **Equality of Opportunity:** (1) The State shall endeavor to ensure equality of opportunity to all citizens.
(2) The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development through out the Republic (Article 19).

7. **Work as Right and Duty:** (1) Work is a right, a duty and matter of honour for every citizen who is capable of working and everyone shall be paid for his work on the basis of the principle "from each according to his abilities, to each according to his word".
(2) The State shall endeavour to create conditions in which, as a general principle, persons shall not be able to enjoy unearned incomes, and in which human labour in every form, intellectual and physical, shall become a fuller expression of creative endeavour and of the human personality (Article 20).

Though the Directive Principles are not justifiable, they were nevertheless regarded by the founding fathers of the Constitution as fundamental in the governance of the country. To say that these principles are not justifiable merely means that a citizen will not be entitled to go to the Supreme Court asking for an appropriate order or direction calling upon the Government to take active steps to enforce one or more of these Directive Principles. But still the Directive Principles are fundamental guideposts for the State action. They envisage a new socio-economic order for the country. This has given a wholly unconventional role to the legislation.

Different Aspects of Labour and Industrial Law

a. **Labour Standards:** General Provisions, labour contracts, wages, minimum wages law, working hours, rest periods, rest days, leaves and holidays, Safety and health, minors, women and children, training of skilled labourers, accident compensation, rules of employment, inspection bodies, penal provisions etc.

b. **Labour Relations:** Trade Union Law, labour relations adjustment law, collective agreements, Labour relations Commissions, penalties etc.

c. **Labour Insurance:** Employment insurance law, Workmen's accident compensation law etc.

d. **Labour Welfare:** Provident fund, workers' savings, welfare fund, other benefits etc.

Classification of Labour Legislation

Labour Legislation at present in Bangladesh may be classified in the following broad categories though this classification is neither exhaustive nor exclusive; they may be classified from different view points:

A. Laws on Establishments:

(i) Factories Act 1965,
(ii) Factories Rules, 1977,
(iii) Shops and Establishments Act, 1965
(iv) Shops and Establishments Rules, 1970.

B. Laws on Conditions of Service:

(i) Employment of Labour (Standing Orders) Act, 1965
(ii) Employment of Labour (Standing Orders) Rules, 1970
(iii) Employment (Record of Services) Act, 1951
(iv) Employment (Record of Services) Rules, 1957
(v) Apprenticeship Ordinance, 1962
(vi) Apprenticeship Rules, 1967.

C. Laws relating to Association of Workers: Trade Unions and Settlement of Industrial Disputes:

(i) Industrial Relations Ordinance, 1969
(ii) Industrial Relations Rules, 1977.

D. Laws on Wages and other Benefits:

(i) The Payment of Wages Act, 1936
(ii) Payment of Wages Rules, 1937

(iii) Minimum Wages Ordinance, 1961
(iv) Minimum Wages Rules, 1961.

E. Laws on Compensation and Social Insurance:

(i) The Workmen's Compensation Act, 1923,
(ii) Workmen's Compensation Rules, 1924,
(iii) Employer's Liability Act, 1938
(iv) Fatal Accidents Ac, 1855.
(v) Maternity Benefit Act, 1939
(vi) Maternity Benefit Rules, 1953.
(vii) Companies Profits (Worker's Participation) Act, 1968
(viii) Companies Profits (Worker's Participation) Rules, 1976
(ix) Workmen's Protection Act, 1934

F. Laws on Child Labour:

(i) The Employment of Children Act, 1938
(ii) The Employment of Children Rules, 1955

G. Laws on Export Processing Zones:

(i) Bangladesh Export Processing Zones Authority Act, 1980
(ii) Bangladesh Private Export Processing Zones Act, 1996
(iii) Bangladesh Private Export Processing Zones Instruction No. I of 1989
(iv) Bangladesh Private Export Processing Zones Instruction No. II of 1989.
(v) The EPZ Workers Association and Industrial Relations Act, 2004

Likewise, there are many other divisions of laws on labour like laws on Boilers, laws on Dock Workers, laws on Mine Workers etc. This book will deal with some basic laws from the first five categories as these are included in labour laws syllabus in universities in Bangladesh.

PART-A

THE EMPLOYMENT OF LABOUR (STANDING ORDERS) ACT, 1965

Chapter I

THE NATURE, SCOPE AND APPLICABILITY

Background of the Act

From the view point of legislative history the Employment of Labour (Standing Orders) Act, 1965 owes its origin to the Industrial Employment (Standing Orders) Act, 1946 which was passed with a view to avoiding friction amongst the employers and workmen employed in an industry. Before this legislation the conditions of employment of workmen were governed by the terms and conditions of contract entered into between the employers and workmen which often led to considerable friction and confusion. In the absence of any mandatory law protecting legitimate interests of workmen, it was usual on the part of the employers in the industrial establishments to victimise the workmen. Employment conditions were governed by the harsh weighted law of hire and fire; the employers were the supreme masters in every point of employment. With the advent of Trade Unionism and collective bargaining new problems of maintaining industrial peace and production for the society were created. The developing notions of social justice and expanding horizon of socio-economic justice necessitated statutory protection to the unequal partners in the industry, namely, those who invest blood and flesh against those who bring in capital. It was, therefore, considered that the society had vital interest in the settlement of terms of employment of industrial labour.

After independence and separation in 1947 this legislation was repealed by the Industrial and Commercial Employments (Standing Orders) Ordinance, 1960 which brought the commercial establishments other than industries within the ambit of the Ordinance. This Ordinance was again repealed by the present Employment of Labour (Standing Orders) Act 1965.

Application of the Act

First, the preamble of the Act specifies that the Act has been framed with a view to regulating the conditions of service of workers employed in shops and commercial and industrial establishments and for matters connected therein. Thus the only concern of the Act is 'worker'. If an employee does not come under the definition of 'worker', his service conditions will not be

determined under this Act (*Senior Manager, Messrs Dost Textile Mills Ltd. and another Vs. Sudansu Bikash Nath* 8 BLD (AD) 66).

Second, as to its application section 1(4) specifies that the provisions of this Act shall to –

(a) every shop or commercial establishment to which the Shops and Establishments Act, 1965 applies;

(b) every industrial establishment in the areas in which the Shops and Establishments Act 1965 applies;

(c) every industrial establishment in all other areas of Bangladesh in which five or more workers are employed, or were employed on any day of the preceding twelve months.

Third, the question of 'worker' is the fundamental determining factor for the application of the Act and for the jurisdiction of the Labour Court (*Senior Manager, Messrs Dost Textile Mills Ltd. and another Vs. Sudansu Bikash Nath* reported in 8 BLD (AD) 66) (See more about this case in chapter III, p. 48).

Non-applicability of the Act

The proviso to section 1 postulates that the provision of this Act shall not apply to any shop or commercial or industrial establishment, owned and directly managed by the Government and the persons employed therein are governed by the Government Servants Conduct Rule.

The provisions of Employment of Labour (Standing Orders) Act are not applicable to Bangladesh Inland Water Transport Authority in view of the nature and function of such authority as enumerated in section 15 of the Inland Water Transport Authority Ordinance of 1958. *Director of Ports & Ports Traffic Vs. Chairman* (1980) 32 DLR 104.

Nature: Two Aspects of the Act

(i) The Employment of (Standing Orders) Act 1965 is a special legislation creating separate forum for labour dispute and grievances and therefore usually the application of the CPC and normal jurisdiction of the civil court is ousted (*Senior Manager,*

Messrs Dost Textile Mills Ltd. and another V's. Sudansu Bikash Nath 8 BLD (AD) 66).

Where a right is created by a statute which also prescribes the manner in which that right may be enforced, the party complaining of any infringement of such right can only seek such remedy as is provided by that statute. The forum of labour court has been created by special statutes, as distinguished from a general law, the Civil Procedure Code. As such the provisions of the special statutes shall prevail over those of the general law (*Jogesh Chandra Datt v. Government of Bangladesh, 30 DLR 219*), (*Senior Manager, Messrs Dost Textile Mills Ltd. and another V's. Sudansu Bikash Nath* 8 BLD (AD) 66).

Chapter II

STANDING ORDERS OR SERVICE RULES

Standing Orders

The term 'standing orders' may be used in different senses in different situations. Generally it means orders and regulations framed by the government or the House of Parliament or the Council or assembly for permanent guidance and order of their proceedings. For instance, standing order of the House of Commons and House of Lords (equivalent to the Rules of Procedure of our Parliament). In the field of labour and industrial law this term has different meaning. As far as labour and industrial law is concerned, standing orders mean a set of rules regulating the employment of workers in any shop, commercial or industrial establishment. In other words, it means the service rules for workers. An industrial or commercial worker has the right to know the terms and conditions under which he is employed and the rules of discipline which he is expected to follow. Standing Orders or Service Rules are the provisions of determining such conditions of service and work for the employers and employees.

Standing Orders/ Service Rules: Concept and History

The short title of the Act (the Employment of Labour (Standing Orders) Act, 1965) specifies 'standing orders' in brackets but interestingly it does not define the word anywhere; nor does it refer to anywhere in the body of the legislation about them though the main theme of the Act is to provide guidelines for standing orders to be framed and submitted from commercial and industrial establishments. The Industrial Employment (Standing Orders) Act, 1946 which is the long predecessor of the present legislation defines 'standing orders' outlining guidelines for framing them in its schedule. No reasoning is available why the Act is silent about the definition of 'standing orders'. However, section 3 of the Act provides for conditions of employment, though it is the section which is supposed to provide for standing orders and their submission. Nevertheless, a close scrutiny of section 3 of the Act will substantiate that it speaks about service rules in shop or commercial or industrial establishments and their submission to the

Inspector. These service rules may be said to stand for 'standing orders' which are the main subject matter of the Act.

The absence of Standing Orders or Service Rules clearly defining the rights and obligations of employer and the worker in respect of recruitment, discharge, disciplinary action, holidays, leave etc. was found to be one of the frequent cause of friction between managements and workers. With a view to minimising the friction many employers, therefore, introduced Standing Orders on their own accord in the Indian Sub-Continent. Along the line of this trend and with a view to formalising service conditions on equal and standard footing initiative was taken at the Governmental level. As a result, the Industrial Employment (Standing Orders) Act, 1946 was enacted which required all employers to of industrial establishments formally to define the conditions of employment.

Conditions of Employment and Standing Orders

A worker has the right to know the terms and conditions under which he is employed and the rules of discipline which he is expected to follow. Standing Orders or Service Rules are the provisions of determining such conditions of service and work for the employers and employees. Rights, facilities and benefits given to workers in the Employment of Labour (Standing Orders) Act are minimum in the sense that it is compulsory for every employer of shops, commercial and industrial establishment to provide these to workers in their Service Rules.

Section 3(1) substantiates that even if a shop or commercial or industrial establishment does not make or have a service rules, the employment conditions of its workers will be regulated in accordance with the provisions of the Employment of Labour (Standing Orders) Act, 1965. The proviso to section 3(1) further states that any shop or commercial or industrial establishment may have its own rules regulating employment of workers or any class thereof, but no such rules shall be less favourable to any worker than the provisions to the Employment of Labour (Standing Orders) Act, 1965. In *Managing Director, Sonali Bank v Md. Jahangir Kabir Mollah* 48 DLR 395 the High Court Division held that the Sonali Bank may have its own Service Rules but that will not take it outside of the ambit of the Employment of Labour (Standing Orders) Act, 1965. In *BFDC v Chairman, 1st Labour Court* 49 DLR 396 the High Court Division further held that a Service Regulation,

even if statutory one, cannot exclude or supersede the Employment of Labour (Standing Orders) Act, 1965. The FDC may have its own Service Regulations but it cannot be beyond the ambit of the Employment of Labour (Standing Orders) Act, 1965. If any provision of the Service Regulations of the FDC is less favourable to the express provisions of the Standing Orders Act, the provision is *void ab initio.*

Procedure for Certification of Service Rules and Operation thereof

Who is to submit the Draft Service Rules?

(i) Under section 3 of the Employment of Labour (Standing Orders) Act, 1965 read with rules 13 and 14 of the Employment of Labour (Standing Orders) Rules, 1968 the employer of a shop, commercial or industrial establishments have a legal duty to submit five copies of draft service rules to the Inspector of Factories and Establishments for its approval.

(ii) The employer of every shop or commercial establishments to which the Shops and Establishments Act, 1965 applies; the employer of every industrial establishments in the areas in which the Shops and Establishments Act applies; and the employer of every industrial establishment in which five or more workers are employed have the burden of preparing draft service rules (Ss. 1(4)(a)(b)(c) and 3)

When Service Rules becomes Effective?

(iii) A service rules framed by an employer shall not be effective unless and until the same is approved by the Inspector (Section 3(2)).

(iv) Rule 14(7) of the Employment of Labour (Standing Orders) Rules, 1968 provides that the service rules shall not come into force until after expiry of thirty days from the date on which the Inspector puts his seal and signature of approval under sub-rule (6) or if any appeal has been preferred against the order of the Inspector under sub-section (3) of section 3 of the Act, until the disposal of the appeal.

Substance and Conditions of the Draft Service Rules

(i) In every draft service rules the particulars of the workers employed in any establishment shall be in duplicate and shall be in form 'K' as specified in Appendix XI of the Rules (Rule 13).

(ii) Provisions shall be made in the draft service rules for every matter set out in the Act excepting the provisions regarding eviction from residential accommodation under section 24 of the Act and grievance procedure under section 25 of the Act which shall be applicable to the workers of the establishment and these provisions shall not be less favourable to any worker than the corresponding provisions of the Act (Rule 13).

(iii) The draft service rules shall be accompanied by a statement giving the number of the workers employed in the establishment in Form "L" including the particulars of the trade unions, if any, operating in the establishment (Rule 13).

(iv) A group of employers in similar establishment desirous of submitting joint draft service rules may, through a person authorised in this behalf by the group, submit such draft service rules to the Inspector (Rule 13).

Procedure for Approval of Service Rules

Step 1: Duties of the Inspector on Submission of Draft Rules

(i) Within thirty days of receipt of the draft service rules, the Inspector shall forward a copy thereof by registered post with acknowledgment due together with a notice in *Form "M"* to the employer requiring him to publish, within seven days of receipt of the same, the notice along with the draft service rules in his notice board and to certify that the publication has been duly made, mentioning the actual date of publication (Rule 14).

(ii) Copies of the draft service rules shall also be forwarded by the Inspector to the registered and recognised trade unions of the

establishment requiring them to submit within thirty days of receipt of the draft rules of such unions, their objects or suggestions, if any, in respect of the draft service rules.

Step 2: Suggestions from Interested Groups

(iii) Workers or the trade unions may submit the suggestions or objections, if any, in *Form "N"*

Step 3: Duties of Inspector on Submission of Suggestions etc

(iv) On receipt of objections or suggestions from the workers or trade unions concerned, the Inspector shall proceed to hear the objections or suggestions on the date, time and place already notified to workers and the trade unions, the employer shall be furnished with copies of objections or suggestions submitted by the workers or the trade unions immediately on receipt of the same by the Inspector.

(v) The Inspector shall take into consideration the objections and suggestions and decide whether the draft service rules shall be adopted with or without modifications. While. making his decision, he shall ensure that the provisions of the draft service rules, with or without amendments, are not less favorable than the corresponding provisions of the Act. Then he will make an order approving the draft service rules.

(vi) The Inspector may withhold his approval to the draft rules if he considers that the same, with or without amendments, are contrary to the provisions of the Act or are otherwise inadequate or unacceptable. While withholding approval, the Inspector may also direct the employer to submit a fresh draft of the service rules incorporating such suggestions of the workers or trade unions as are considered proper.

Step 4: Re-Submission of Draft Rules

(vii) The employer shall re-submit the draft service rules refereed to in sub-rule (4) within fifteen days, and the Inspector shall finalise the same after giving joint hearing to the parties concerned. The provisions of sub-rule (6) and (7) shall follow thereafter.

Step 5: Duties of the Employer after Approval

(viii) The employer shall, within seven days of the approval of the draft service rules by the Inspector, submit to the Inspector at least 5 fair copies of the service rules written on one side of the paper only duly signed and sealed by the employer with date.

(ix) Certified copes of the service rules may be supplied to any person applying for them on them on payment of a fee of Taka one for the first 200 words or less and Paisa Fifty for every additional hundred words or less.

(x) One copy of the attested service rules shall be maintained in the officer of the Inspector, one copy shall be sent to the office of the Chief Inspector, one copy shall be maintained by the employer and one copy each by the registered and or recognised trade unions.

(xi) A register shall be maintained in the office of the Chief Inspector in *Form "O"* and a copy thereof may be supplied to any person applying therefor on payment of Taka one for first 200 words or less, and Paisa fifty for every additional 100 words or fraction thereof.

Appeal Against the Inspector's Decision on Approval of Draft Rules

First Appeal: Section 3(3) of the Employment of Labour (Standing Orders) Act, 1965 provides that any person aggrieved by the order of the Inspector may, within thirty days of the issue of order of approval, appeal to the Chief Inspector who may either confirm, modify or set aside the order of the Inspector.

Second Appeal: Section 3(4) stipulates that a second appeal from the order of the Chief Inspector shall lie to the Government if made within thirty days of the issue of the order of the Chief Inspector and the decision of the Government shall be final.

Chapter III

WORKERS AND THEIR CLASSIFICATION

Definition of Worker

According to section 2(v) worker means any person including an apprentice employed in any

-shop

-commercial establishment; or

-industrial establishment

to do any

-skilled

-unskilled

-manual

-technical

-trade promotional; or

-clerical work for hire or reward, whether the terms of employment be expressed or implied.

Who are not Workers within the Definition:

Section 2(v) stipulates that the following persons are not workers:

(i) a person who is employed mainly in a managerial or administrative capacity; or

(ii) a person who, being employed in a supervisory capacity, exercises, either by nature of the duties attached to the office or by reason of power vested in him, functions mainly of managerial or administrative nature.

Thus the definition of worker is a general definition and it covers any person employed in any shop or commercial establishment who is not employed in any managerial or administrative capacity (*Sonali Bank v Chandon Kumar Nandi* 48 DLR (AD) 62).

"Mere designation is not sufficient to indicate whether a person is a 'worker' or an 'employer' but it is the nature of the works showing the extent of his authority, which determines whether he is a 'worker' or an 'employer'.

In *Senior Manager, Messrs Dost Textile Mills Ltd. and another Vs. Sudansu Bikash Nath* reported in 8 BLD (AD) 66 (see the detail of the case below) the Appellate Division held that "Mere designation is not sufficient to indicate whether a person is a 'worker' or an 'employer' but it is the nature of the works showing the extent of his authority, which determines whether he is a 'worker' or an 'employer'. Even if it is taken that he has supervisory functions, still mere supervisory capacity will not bring him to the category of 'employer'. Sub-clause (ii) of clause (v) of section 2 of the Act shows that a person, who being employed in a supervisory capacity, 'exercises functions mainly of managerial or administrative in nature".

In another case reported in 15 BLD (AD) 169 (1995) the Appellate Division held that the term "worker" contemplates not only a person to be employed in the work for productive purposes in any commercial or industrial establishment, but also embraces a person who on being employed does any skilled, unskilled, manual, technical, trade promotional or clerical work for hire or reward, whether the term of employment be express or implied (*Managing Director, Rupali Bank Limited vs Md Nazrul Islam Patwary and others* 48 DLR (AD) 62, 1 BLC (AD) 159, 15 BLD (AD) 169 (1996). (Thus this case has overruled the decision of High Court Division reported in 44 DLR 406 with regard to the same matter). (See more critical evaluation of this case at pages 96-99).

This above case was again relied on in *Pioneer Garments Ltd v Md. Abul Kalam Azad* 20 DLD (AD) 62 (2000) by the Appellate Division where the apex court has reiterated the same principle that mere designation is not sufficient to indicate whether a person is a 'worker' or an 'employer' but it is the nature of the work showing the extent of his authority which determines whether he is a worker or not.

It has also been held that a worker when on very solitary occasions doing the function of a Manager or an Administrative Officer does not cease to be a worker (*Indo-Pak Corporation Ltd. Vs Chairman,* (1969) 21 DLR 285).

The High Court Division also held that what is important in determining whether a person is 'worker' or not is to see the nature of the job done by him and not so much his designation. A person does not cease to be a worker only because he is employed in a supervisory capacity. It depends on the nature of the job done to say whether he is a worker or not (*Mujibur Rahman Sarkar v Labour Court, Khulna* (1981) 31 DLR 301).

An armed Guard or a Security Guard of a Bank who is in no way connected with the management of the Bank has been held to be a worker (*Managing Director, Rupali Bank Ltd vs Nazrul Islam Patwary and others I BLC (AD) 159, Tozammel Hossain Akonda v Deputy General Manager, Rupali Bank,* 5 BLC(AD) 114 (2000)). (See detail of theses cases at pages 97-100).

Pesh-Iman of a Mosque has been held not to be a worker within the meaning of section 2(v) (*Manager, Shahjibazar Power Station Vs. Md. Gulam Hossain Khan.* (1981) 33 DLR 29). Likewise, an employee under a trust has been held not to be a worker within the meaning of the Act. Privilege conferred on the workers under the Employment of Labour (S.O.) Act cannot, therefore, be invoked by a worker serving in the Dhaka Improvement Trust (*Chairman, D.I.T. Vs. Chairman, 2nd Labour Court.* (1982) 34 DLR (AD) 37).

The respondent was working as Chief Inspector of a Company and the nature of his work was to collect demands from different organizations and establishment of worker and supply the guards. He was not in anyway connected with management of the company. In view of the definition of worker and the recent decision of the Appellate Division it is clear that the respondent was a worker and the Labour Court acted within its jurisdiction in giving the termination benefit to the respondent. *MR Chowdhury, GM, Shield Limited vs. 1st Labour Court, Dhaka and another* 2 BLC 366

The Question of 'Worker' is the fundamental determining factor for the application of the Act and for the jurisdiction of the Labour Court.

This is the theme of the decision of the Appellate Division of the Supreme Court in *Senior Manager, Messrs Dost Textile Mills Ltd. and another Vs. Sudansu Bikash Nath* reported in 8 BLD (AD) 66. One Mr. Nath was appointed by the Dosta Textile Mills- an enterprise of the Bangladesh Textile Mills Corporation as a junior manager. While he was in charge of the store of the Mill, he along with one of his colleagues misappropriated 138 Ring Travelers from the Store. A criminal proceeding was started against them. Mr. Nath was, however, discharged on Final Report submitted by the police. The Mill authority, however, started a departmental proceeding against him under section 18 of the Employment of Labour (Standing Orders) Act. He was asked to show cause why he should not be dismissed from service. He did not show any cause and consequently he was dismissed from service on 22 October 1977 under section 17 of the Act. Mr. Nath filed a Title Suit in the 2nd Court of Munsif, Feni, challenging the order of dismissal. He claimed that he was a member of the management and was not a worker. He further claimed that he was an employee of the Bangladesh Textile Mills Corporation since the Dost Textile Mills was a nationalised enterprise placed under the management and control of this Corporaion and as such his service was governed by the Corporation's Employees Service Rules rather than the Employment of Labour (Standing Orders) Act. Therefore, he contended that his dismissal as a worker was invalid. The Munsif Court dismissed the suit holding that Mr. Nath was a worker. Mr. Nath filed an appeal in the Sub-judge's Court, Feni which allowed the appeal holding that Mr. Nath was not a worker but an employee of the Corporation and he was to be governed by the Service Rules of the Corporation. The Dost Textile Mills, as defendant filed a revisional application before the High Court Division. The High Court Division dismissed the revision application maintaining the findings of the appellate court. The Dost Textile Mills filed an application for leave to appeal before the Appellate Division and the Appellate Division granted leave and heard the appeal. The main issue before the Appellate Division was- whether Mr. Nath was a worker under the Employment of Labour (Standing Orders) Act or whether he was an employee of the Corporation governed by its Service Rules.

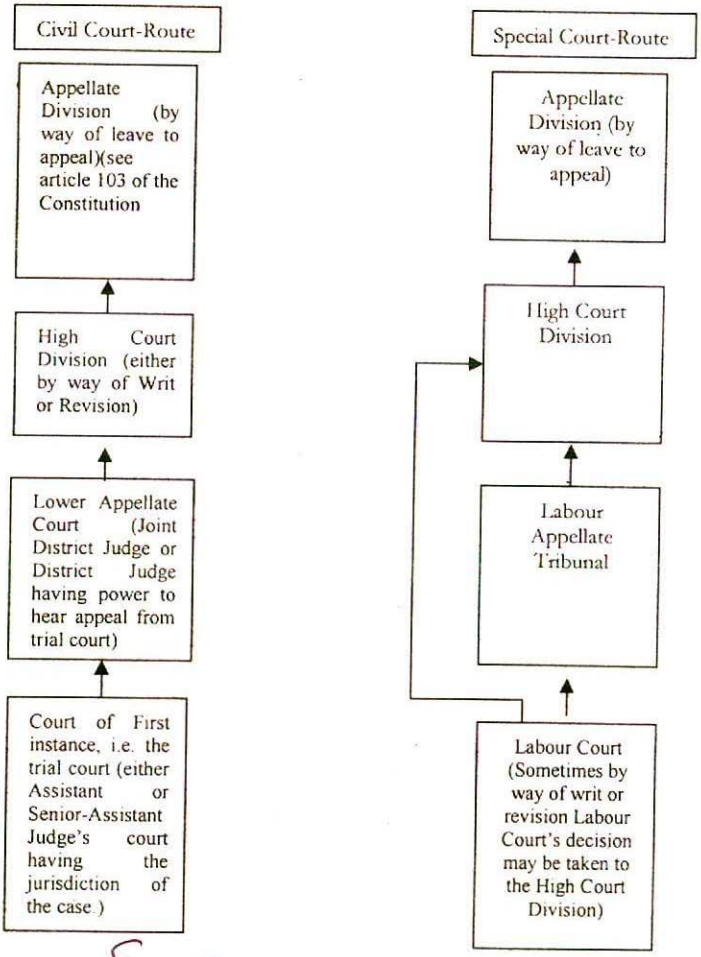
The Appellate Division allowed the appeal setting aside the judgments of the High Court Division and the lower appellate court holding Mr. Nath as a worker rather than an employer. The main part of the judgment is as follows:

> "Mere designation is not sufficient to indicate whether a person is a 'worker' or an 'employer' but it is the nature of the works showing the extent of his authority, which determines whether he is a 'worker' or an 'employer'. Even if it is taken that he has supervisory functions, still mere supervisory capacity will not bring him to the category of 'employer'. Sub-clause (ii) of clause (v) of section 2 of the Act shows that a person, who being employed in a supervisory capacity, 'exercises functions mainly of managerial or administrative in nature. Mr. Nath (respondent) does not exercise any functions managerial or administrative in nature. He got no power to control or to supervise the work of any other person. So the nature of his work does not bring him within the category of 'employer' which has been defined in clause (8) of section 2 as a person who is concerned with the "management and responsible to the owner for control of the industrial establishment". It is therefore clear that the respondent is not an 'employer' but is a 'worker'.
>
> "The very moment it is found that the plaintiff is a worker, he is non-suited, because his suit filed under the Civil Procedure Code is not maintainable, specific remedy of his grievance lying in a separate forum, the Labour Court."

In *Tozammel Hossain Akonda v Deputy General Manager, Rupali Bank*, 5 BLC (AD) 114 (2000) the Appellate Division also held that if it is found that the petitioner was a worker within the meaning of section 2(v), his remedy lies before the Labour Court and not before any other Civil Court meaning that it is the Labour Court which will have jurisdiction over the matter.

In another recent case *A.K.M. Ehsanul Kabir v. M/s Adamjee Jute Mills and others* 6 MLR (AD) 221 (2001) the Appellate Division held that a jute purchasing officer of the Adamjee Jute Mills who was engaged in supervisory capacity and under whose jurisdiction a large number of persons were engaged is not a worker within the definition of 'worker' and as such the Labour Court has no jurisdiction to entertain the complaint and interfere with his dismissal from service.

The diagram below shows how a lavour or civil matter comes to the Appellate Division passing through different intermediate adjudicatory organs (see more in chapter VIII of Part B, page 193 footnote):



Classification of Workers

Section 4 of the Standing Orders Act classifies workers into following 6 groups. Not only that the section has further given a sort of guideline that

this classification has been made according to the nature and condition of work:

a. Apprentices;
b. Badlis;
c. Casual;
d. Permanent;
e. Probationer; and
f. Temporary

Apprentices: Section 2 specifies that apprentice is a learner who is paid an allowance during the period of his training (s. 2(a)).

Badli: Badli means a worker who is appointed in the post of a permanent worker or of a probationer who is temporarily absent (s. 2(b)).

Casual Workers: Casual worker means a worker whose employment is of casual nature (s. 2(c)).

Permanent Worker: Permanent worker means a worker who has been engaged on a permanent basis or who has statistically completed the period of his probation in the shop or the commercial establishment (s. 2(m)).

Probationer: Probationer means a worker who is provisionally employed to fill a permanent vacancy in a post and has not completed the period of his probation (s. 2(p)).

Temporary Worker: Temporary worker means a worker who has been engaged for work which is essentially of temporary nature and is likely to be finished within a limited period (s. 2 (s)).

"Mere appointment on a temporary basis is not the sole criteria for holding the work as temporary one"

This was the observation of the High Court Division in *Managing Director Rupali Bank Vs. First Labour Court* 46 DLR 143 and *Samir Malaker v The Chairman, Divisional Labour Court, Khulna and another* which have been discussed in detail below. The court held that having regard to the language employed in the sub-section of the Act, a worker in order to be treated as permanent worker need not require appointment on permanent basis. It will be sufficient if he has satisfactorily completed the period of probation. The court also held that mere mentioning of the fact that a job is of temporary nature does not render it to be of temporary nature or necessarily give rise to inference that work is likely to be finished within limited period.

Samir Malaker v The Chairman, Divisional Labour Court, Khulna and another, 23 BLD (HCD) 417, 11 BLT (HCD) 380

On 1.12.1985 Mr. Samir was initially appointed by a Jute Mill on casual or ad-hoc basis for a period of three months to work as a comptist; he was performing the job of clerical nature. Mr. Samir's temporary appointment on casual basis was subsequently extended three times by letters from his employer. It was made clear in those letters that he would get normal increment and his appointment may be ceased at any time but he would not be entitled to provident fund and gratuity until he was made permanent. Mr. Samir, in fact, was given increment and his pay scale was also raised from time to time. He was also given yearly bonus like a regular employee. On this ad-hoc basis Mr. Samir served the company for as may as ten years though he was not made a permanent worker. Suddenly on 02.10.1996 Mr. Samir was informed by his employer that he would be appointed afresh without counting his 10 years service on ad-hoc basis. Can Mr. Samir claim himself to be a permanent worker and take action against the decision of his employer?

The court held that the petitioner was to be treated as a permanent worker. Some important part of the judgment is as follows:

> "The term 'temporary worker' has a connotation which is different from popular and dictionary meaning of the term. The term temporary worker as defined in section 2(s) of the Employment of Labour (Standing Orders) Act, 1965 means 'worker' who has been engaged for work which is essentially of a temporary nature and is likely to be finished within a limited period.
>
> There is no provision in the Act to appoint a worker on ad-hoc basis under section 4 of the Act but still the employer appointed him on ad-hoc basis.
>
> If he is treated as 'temporary worker' then his period of probation will be 6 months as his function was clerical in nature and on completion of 6 months probation period he would be treated as permanent worker and entitled to get all benefits of his service including his gratuity".

The court relied on the judgment in the *Managing Director, Rupali Bank Ltd and others v. Chairman, First Labour Court and others* reported in 46 DLR 143. It was held in that case that having regard to the language in section 4 it is clear that the worker in order to be treated as permanent worker need not require appointment on permanent basis. It will be sufficient if he has satisfactorily completed the period of probation. The mere fact that the petitioner was appointed on ad-hoc basis or as casual worker will not disentitle him from getting the benefit under section 4 of the Employment of Labour (Standing Orders) Act 1965.

Rupali Bank v The Chairman, Second Labour Court, Dhaka
22 BLD (HCD) 143

4 persons were appointed by the Rupali Bank on temporary basis as Temporary Godown Keepers. Petitioners' contention was that they have rendered service continuously to the Bank since their joining and they were getting their salary and other benefits from the Bank and so they should be treated as permanent workers. The Bank on the other hand, contended they were temporarily appointed by the Bank on the account of the borrowers and their service ceased with the adjustment of the borrowers loan account. The court held that the petitioners were not permanent workers but they should be treated as regular (temporary) workers and are entitled to benefit as are payable to such category of employees of the Bank. The important part of the decision is as follows:

> "There is specific class of employees known as temporary employees, who are appointed for a specific period or as specific project or job, like that of temporary godown keepers. The appointments of such employees cannot be termed as probationers as such as the appointments were not given against any permanent or sanctioned post of the Bank. .However, in view of continuous service rendered by the petitioners to the Bank, their service should be regularised in the Bank service, not in the category of permanent employees but in the category of temporary employees".

Probationer and Probation Period

Probationer: Section 2(p) defines probationer as a worker who is provisionally employed to fill a permanent vacancy in a post and has not completed the period of his probation. The High Court Division in

M.D.Rupali Bank v The Chairman, Second Labour Court, Dhaka 22 BLD (HCD) 143 held that probationers are those employees who are given appointment against any permanent or sanctioned post. The difference between temporary and probationer worker lies in that the temporary workers unlike probationers are not given appointment against any permanent or sanctioned post. The purpose of the provision of probation is to assess the quality and suitability of a particular worker to a particular post.

Period of Probation: Section 4(2) lays down the period of probation which is as follows:

(i) If the function of the worker is clerical in nature, his probation period will be six months;

(ii) If the function of the worker is other than clerical in nature, his period of probation will be three months including breaks due to leave, illegal lock-out or strike (not being an illegal strike);

(iii) The above period of probation may be extended in case of a skilled worker. In case of a skilled worker the period of probation may be extended by an additional period of three months if for any circumstances, it has not been possible to determine the quality of his work within three months period of his probation.

(iv) If any worker, whose service has been terminated during his probationary period, including the extended period of three months in case of a skilled worker as mentioned in sub-section (2), is again appointed by the same employer within a period of three years, he shall, unless appointed on a permanent basis, be deemed to be a probationer and the period or periods of his earlier probation shall be counted for determining his total period of probation.

(v) If a permanent worker is employed as probationer in a new post, he may, at any time during the probationary period, be reverted to his old permanent post.

Chapter IV

LEAVES AND HOLIDAYS

Provisions of Leaves and Holidays

The Employment of Labour (Standing Orders) Act, 1965 does not deal with the substantive provisions of leaves and holidays in shops, commercial or industrial establishments. They are dealt with in the Shops and Establishments Act, 1965 and the Factories Act, 1965 mainly which have been discussed in relevant part of this book. The Employment of Labour (Standing Orders) Act, 1965 deal with the application for, consumption and effect of holidays of workers.

Heading	Shops and Establishment Act, 1965	Factories Act, 1965
Weekly holiday	1 and half day (sec. 4)	1 day (sec. 51)
Casual leave	10 days a year (sec. 15)	10 days a year (sec. 80)
Sick leave	14 days a year (sec. 16)	14 days a year (sec. 80)
Festival leave	10 days a year (sec.10)	10 days a year (sec. 79)
Annual leave	1 day for every 18 days of work in the previous year (sec. 13)	1 day for every 22 days of work in the previous year (sec. 78)

Application for Holidays

Section 5(2) of the Employment of Labour (Standing Orders) Act, 1965 lays down the following procedure of applying for leave absence:

(a) **Application to the Employer:** A worker wishing to obtain leave of absence shall apply to his employer in writing stating his leave-address therein. It is a legal obligation for every employer to maintain a Leave Register for the purpose of leave of its workers.

(b) **Issue of order by the Employer:** On submission of application, the employer or his authorised person shall issue order on the application a within a week of its submission to two

days prior to the commencement of leave applied for. The order may be of granting, refusing, or postponing of leave.

(c) **Urgent Leave:** If, due to emergent reasons the leave applied for is to commence on the date of application or within three days thereof, the order shall be given on the same day.

(d) **Leave Pass:** If the leave asked for is granted, a leave pass shall be issued to the worker.

(e) **Refusal:** If the leave is refused or postponed, the fact of such refusal or postponement and the reasons thereof shall be recorded into the Leave Register.

(f) **Extension of Leave:** If the worker, after proceeding on leave, desires an extension thereof, he shall, if such leave is due to him, apply sufficiently in advance before the expiry of the leave to the employer who shall, as far as practicable, send a written reply either granting or refusing extension of leave to the worker to his leave-address.

Payment of Wages for unavailed leave: If the services of a worker, to whom any annual leave is due under the provisions of any law, is dispensed with whether as a result of retrenchment, discharge, dismissal, termination, retirement or by reason of his resignation before he has availed of any such leave, the employer shall pay his wages in lieu of the unavailed leave at the rate he is entitled to the payment of wages during the period of leave in accordance with the provisions of those laws and such payments shall be made before the expiry of the second working day after the day on which his employment is dispersed with.

Effect of unauthorised Leave of Absence

The effect of unauthorised leave has been mainly dealt with in section 5(3) of the Act, 1965. However, section 17 also deals with it in the definition of 'misconduct':

(i) **Unauthorised Leave is Misconduct:** Clause (d) of sub-section (3) of section 17 provides that absence without leave for

more than ten days is a kind of misconduct. For such a misconduct a worker may be dismissed under section 17 of the Act. Thus to dismiss a worker for unauthorsied leave on the ground of misconduct, the worker must be absent without leave for more than ten days. If a worker is absent without leave ten days or less, he cannot be dismissed under section 17 on the ground of misconduct.

Absence without leave for more than ten days may constitute misconduct for which a worker may be dismissed from service. In that event a proceeding is required to be drawn under the law to comply with the rule of principle of natural justice (*Glaxo Bangladesh Ltd. Vs. Chairman Labour Court and others* 32 DLR (1980) (HCD) 134).

(ii) **Suspension by the Employer:** The second proviso to section 5(3) provides that if the worker remains absent beyond the period of leave originally granted or subsequently extended and he fails to explain to the satisfaction of the employer the reason of his failure to return at the expiry of the leave, the employer may, on consideration of extenuating circumstances, if any, suspend him, as a measure of punishment, for a period not exceeding seven days from the date of his return. In this case the worker shall not be entitled to wages for such periods of unauthorised absence and of suspension. However, he shall not lose the lien to his appointment. Thus, the suspension from service due to unauthorised leave is a discretionary punishment on the part of the employer and an employer may enforce this measure even for one day's unauthorised leave.

(iii) **Loss of Lien to the Appointment:** If the worker remains absent beyond the period of leave originally granted or subsequently extended, he shall be liable to lose his lien to his appointment unless he returns within ten days of the expiry of his leave and explains to the satisfaction of the employer his inability to return earlier. Thus, unlike the above two effects which are almost automatic, loss of lien to the appointment is not automatic on his failure to return within 10 days of the

expiry of his authorised leave. If the worker returns within 10 days and explains the cause of his inability to return, his right of lien will not be lost though he may be proceeded for punishment under section 5(3) (the second effect as mentioned above).

Worker's Right of Lien to the Appointment

What is right of Lien?

Right of lien means the title of an employee to hold substantively either immediately or on the termination of a period or periods of absence, an appointment to which he has been appointed substantively. A lien on a post is acquired only when the employee has been confirmed and made permanent on that post but not earlier (*M.P. Tewari v Union of India* 1974 ALJ 427). Lien connotes the right of an employee to hold the post substantively to which he is appointed (*Ramlal Khurana v State of Punjab* (1989) 3 SCC 99). A workmen's lien is a statutory lien created by the Employment of Labour (Standing Orders) Act, 1965.

When a Worker would lose his lien to Appointment?

(i) Section 5(3) provides that if the worker remains absent beyond the period of leave originally granted or subsequently extended, he shall be liable to lose his lien to his appointment unless he returns within ten days of the expiry of his leave and explains to the satisfaction of the employer his inability to return earlier.

(ii) If the worker returns within 10 days and explains the cause of his inability to return, his right of lien will not be lost though he may be proceeded for punishment under section 5(3).

A worker does not automatically lose his lien to his appointment on his failure to return within 10 days of the expiry of his leave. In the event of such unauthorised absence departmental proceeding is required to be taken under the law to comply with the rule of the principle of nature justice (*P. W.V. Rowe Vs. Chairman Labour Court. (1979) 31 DLR (AD)120*).

When a Worker would not lose his lien to Appointment?

(i) The second proviso to section 5(3) provides that if the worker remains absent beyond the period of leave originally granted or subsequently extended and he fails to explain to the satisfaction of the employer the reason of his failure to return at the expiry of the leave, the employer may, on consideration of extenuating circumstances, if any, suspend him, as a measure of punishment, for a period not exceeding seven days from the date of his return. If this measure of suspension is adopted by the employer, the worker shall not be entitled to wages for such periods of unauthorised absence and of suspension. However, he shall not lose the lien to his appointment.

Consequences of Loss of Lien:

(i) If a worker loses his lien to appointment, the employer may proceed to dismiss him under clause (d) of sub-section (3) of section 17 on the ground of misconduct. However, dismissal would not be automatic. Departmental proceeding or some departmental action is required to be taken under the law to comply with the rule of the principle of nature justice (*Glaxo Bangladesh Ltd. Vs Chairman and other,* (1980) 32 DLR 134),. *Manager, McGregor and Balfour (Bangladesh) Limited, Dacca Vs. Chairman, First Labour Court, Dacca and others*; 3 BLD (AD) 8.

(ii) Even if a worker loses his lien to his appointment, he shall not be deprived of the benefits and privileges which have already accrued to him under the law due to his past services.

(iii) In addition to the right of benefit and privileges as mentioned above, the worker shall also be kept on the badli list, if any, in case he loses his lien to the appointment. The Appellate Division in the *Manager, McGregor and Balfour (Bangladesh) Limited, Dacca Vs. Chairman, First Labour Court, Dacca and others*; 3 BLD (AD) 8 held that a worker to be kept on the 'badli list' only if there is a 'badli list'. The law does not warrant the maintenance of a 'badli list as a matter of compulsion.

The Manager, McGregor and Balfour (Bangladesh) Ltd. v Chairman, First Labour Court, Dhaka and Others
3 BLD (AD) 8 (1983)

One Mr. Awal who was a worker of the McGregor and Balfour Company went on leave but remained absent from duties without permission for a period exceeding 10 days whereupon the employer by notice terminated his lien in the service. The notice of the employer was as follows: "We find that you were granted casual leave for two days with effect from 17.02.1978 to 19.02.1978. Subsequently you prayed for one month's leave with effect from 22.02.1978 to 23.03.1978 on grounds of your illness. Since you have failed to return within ten days from the date of expiry of leave, you have lost lien to your appointment under section 5(3). You may collect your dues from our Accounts department on any day during office hours." Mr. Awal challenged this action before the Labour Court. The Labour Court held that loss of lien is not automatic but some positive action on the part of the employer is warranted. According to the Labour Court this action was not done by the employer and hence it directed the reinstatement of Mr. Awal. The Company filed a Writ Petition against the judgment of the Labour Court. The High Court Division considered two specific points in the case: first, the question of loss of lien; and second, the question of putting Mr. Awal in the Badli list when he has lost his lien. On the first point, the High Court Division observed that the employer served the notice informing the worker that he has lost his lien because of his unauthorised absence over 10 days. The High Court Division was satisfied that the lien was lost and formality that was to be done on the part of the employer was also fulfilled by serving notice to the worker Mr. Awal. On the second point, the High Court Division considered the first proviso to section 5(3) requiring the employer to keep the worker after loss of lien in the Badli list. On this point the High Court Division held that the requirement of this provision was not complied with by the employer. The Company took the matter to the Appellate Division which upon hearing from both the sides upheld and confirmed the decision of the High Court Division on its first point. However it rejected and turned down the decision of the High Court Division on second point. The Appellate Division held specifically that the law has not warranted the maintenance of a Badli list as a matter of compulsion.

Chapter V

STOPPAGE, CLOSURE, LAY-OFF AND RETRENCHMENT

Stoppage of an Establishment

Section 6 of the Employment of Labour (Standing Orders) Act, 1965 gives an employer almost an unfettered power to close down his shop, commercial or industrial establishment which certainly expose the workmen to frequent risk of involuntary unemployment. As per conditions laid down in section 6 an employer may stop any section, or section of shop or commercial or industrial establishment, wholly, partly or for any period. The conditions are given below:

(i) In the event of fire, catastrophe, breakdown of machinery, or stoppage of power supply, epidemics, civil commotion the employer may stop any section or sections wholly or in part for any period;

(ii) In addition to above situations, the employer may also go for stoppage on the ground of "other cause beyond his control" as specified in section 6(1). This second ground has given the employer almost a sweeping power.

The High Court Division in *Virgina Tobacco Co. Vs. Labour Court* (1994) 45 DLR 233 held that the right of an employer to stop or discontinue the industry at any time if it is satisfied that there is no prospect to continue the industry is available to the employer and the workers for that matter have no say in this regard and are not entitled to seek a direction from the Labour Court to open the industry by instituting a case under section 34 of the Industrial Relations Ordinance and the Labour Court has no such power to make such order and the workers are left with no remedy except that as provided in section 9 of the Act during the period they were laid off.

The Court also held that employer's financial inability is covered by the expression "other cause beyond his control" appearing in section 6 and his right to take action thereunder cannot be fettered with limitation. We will see later that this decision of the High Court Division, on principle, is not based on sound reasoning and in the light of a recent judgment of the Appellate Division this decision seems to have been wrong (Karim Jute Mills 17 BLD (AD) 204, see at p. 68).

Procedure following Stoppage

(a) **Notice to the Worker:** If the stoppage occurs at any time beyond working hours, the employer shall notify the workers affected, by notice posted in the notice board or in any other convenient place. In the notice the employer also have to indicate as to when the work will resume.

(b) If the stoppage occurs during working hours, the workers shall be notified as soon as practicable, by notice posted in the notice board or at a convenient place before the work is due to begin next. In the notice the employer also have to indicate as to when the work will resume.

(c) **Stoppage and the Payment of detained Workers:** In the event of detention of workers following stoppage-

(i) the workers so detained may not be paid for the period of such detention if it does not exceed one hour.

(ii) the workers so detained shall be paid wages for the whole period of such detention if it exceeds one hour.

(d) **Stoppage and Payment of Wages to Workers:** Where the workers are not detained and the period of stoppage exceeds one working day, the employer will have to pay wages to the workers according to the rules below:

(i) if the period of stoppage does not exceed one working day, a worker may not be paid any wages;

(ii) if the period does exceed one working day, a worker affected (other than casual and badli worker) shall be paid wages for the day or days by which it will exceed one working day;

(iii) if the stoppage extends beyond three working days, the workers may be laid-off in accordance with rules laid down in section 9. If workers are laid-off, it will take effect from the first day of stoppage and any wages paid to a worker for the first three days may be adjusted against the compensation payable for such subsequent lay-off.

(e) **Strike and Closure of Establishment:** Section 6(6) prescribes that in the event of a strike by any section or sections the employer may close down wholly or partly the establishment or section thereof. In such a case workers affected may not be paid any wages. However, the employer must notify the workers about the closure as soon as practicable.

Lay-Off and its Procedure

'Lay-off': The term 'lay-off' generally means temporary suspension from service of worker on the ground of stoppage of work in commercial establishment. It is also termed as stoppage of work due to some specified reasons. The term has been defined in section 2(l). It means the failure, refusal or inability of an employer on account of shortage of coal, power or raw material or the accumulation of stock or the break-down of machinery or for any other reason, to give employment of a worker whose name is borne on the muster-rolls of his shop, commercial establishment or industrial establishment. Thus the definition makes it clear that lay-off is occasioned by the employer's failure or inability on account economic reasons to give employment to the workmen. The words 'any other reason' used in the definition mean reasons which are allied or analogous or similar to those enumerated in the definition. This is the view taken by the Indian Supreme Court (*Kairbetta Estate v Rajamanikam*, (1960) AIR (1960) SC 893). However, in our jurisdiction the High Court Division's judgment in *Virgina Tobacco Co. Vs. Labour Court* (1994) 45 DLR 233 on the point does not seem to be based on a very sound and pragmatic reasoning given the massive development in other jurisdictions. In neighbouring country India an employer can neither close down nor make stoppage to his establishment without the permission of the Government except in some specific reasonable grounds.

Conditions of Lay-Off:

The conditions of lay-off have been stipulated in sections 2(1)(l) and 6 of the Employment of Labour (Standing Orders) Act, 1965 which are as follows:

(1) There must be failure, refusal or inability of the employer to give employment to a worker;

(2) The names of the workmen laid off must be on the muster rolls of the establishment;

(3) The failure, refusal or inability to give employment must be on account of one or more of the following:

(i) shortage of coal;
(ii) shortage of power;
(iii) shortage of raw materials;
(iv) accumulation of stock;
(v) break-down of machinery; or
(vi) for any other reason

Conditions under Section 6:

Apart from the above conditions for which an employer may lay-off his workers there are some other conditions which also empowers an employer to lay-off his workers. These are as follows:

(i) If an employer puts his establishment under stoppage and if the stoppage extends beyond three working days, the workers may be laid-off in accordance with rules laid down in section 9.

(ii) If workers are laid-off, it will take effect from the first day of stoppage and any wages paid to a worker for the first three days may be adjusted against the compensation payable for such subsequent lay-off.

Rights of Laid-Off Workers for Compensation:

(1) Whenever a worker who has completed a minimum of one year of continuous service under an employer is laid-off, he shall be paid by the employer for all days during which he is so laid-off, compensation which shall be equal to half of the total of the basic wages and dearness allowance, and the full amount of housing allowance, if any, that would have been payable to him had he not been so laid-off;

(2) However, a worker so laid-off would not be entitled to any compensation for weekly holidays as may intervene during period of lay-off (section 9).

(3) A badli worker whose name appears in the muster rolls and if he has completed one year of continuous service in the shop, he will be entitled to compensation for lay-off period (second proviso to section 9(1)).

(4) Maximum period for entitlement of lay-off compensation is 45 days during any period of twelve months (second proviso to section 9(1)).

(5) In case workers are laid-off for more than 45 days, they will be paid, for any more days other than first 45 days, compensation which will be equal to one-fourth of the total of the basic wages and dearness allowance and the full amount of housing allowance, if any (section 9(2)).

(6) **When a Laid-off worker will lose Compensation:** No compensation shall be payable to a worker who has been laid-off-

(i) if he refuses to accept, on the same wages, any alternative employment in the same or other establishments belonging to the same employer;

(ii) if he does not present himself for work at the establishment at the appointed time during normal working hours at least once a day if so required by the employee;

(iii) if such lay-off is due to strike in another part of the establishment (section 11).

(7) **Retrenchment instead of Lay-Off:** If a worker is to be laid-off even after first 45 days in a calendar year, the employer may, instead of laying-off such a worker, retrench him under section 12.

The Lay-off in question should not be made with *mala fide* or ulterior motives

This condition is nowhere written down in the Act. However, this view has been taken by the Indian Supreme Court with a view to creating a balance between the whim of employer and the protection of rights of workers. The Indian Supreme Court held in *Tata Nagar Foundry Co. Ltd v Their Workmen*, AIR 1962 (SC) 1633 that if the lay-off is *mala fide* in the sense that the employer has deliberately and maliciously brought about a situation where lay-off became necessary, then it would not be a lay-off which is justified under section 2(l) and the relief provided to the laid-off workmen under section 9 would not be the only relief to which they are entitled. *Mala fide*

intention of the employer in declaring lay-off really means that no lay-off has taken place and the workmen laid-off cannot be confined to the compensation prescribed in section 9 only. However, the attitude of the High Court Division in this regard seems very frustrating in our jurisdiction. The High Court Division in *Virgina Tobacco Co. Vs. Labour Court* (1994) 45 DLR 233 held that the right of an employer to stop or discontinue the industry at any time if it is satisfied that there is no prospect to continue the industry is available to the employer and the workers for that matter have no say in this regard and are not entitled to seek a direction from the Labour Court to open the industry by instituting a case under section 34 of the Industrial Relations Ordinance and the Labour Court has no such power to make such order and the workers are left with no remedy except that as provided in section 9 of the Act during the period they were laid off.

The Court also held that employer's financial inability is covered by the expression "other cause beyond his control" appearing in section 6 and his right to take action thereunder cannot be fettered with limitation.

It is evident that not a single case from Indian jurisdiction or from any other jurisdiction was referred to before their Lordships; nor was any social side of the labour legislation argued and Their Lordships did neither tried to come out of the bounds of strict interpretation of statutes which is almost unknown in the modern jurisprudence of labour and industrial law. They should have followed here the principle of *ejusdem generis*. The Indian Supreme Court held in *Kairbetta Estate v Rajamanikam*, (1960) AIR (1960) SC 893) that the words 'any other reason' used in the definition mean reasons which are allied or analogous or similar to those enumerated in the definition. Thus the words, "other cause beyond control" or "any other reasons" cannot be construed to mean 'any reason whatsoever'; it must have relevance with other parts and context of the statute.

It is true that the Appellate Division did not have any opportunity to examine the meaning of the term "any other reasons"; nor did it have any opportunity to examine the term "other cause beyond his control" specified in section 6(1) in case of stoppage by the employer. However, in *Karim Jute Mills Ltd. v Chairman, Second Labour Court, Dhaka* 17 BLD (AD) 208 the Appellate Division had an opportunity to examine the term 'such other reasons not amounting to misconduct' occurring in section 16. The Appellate Division held that the words 'such other reasons not amounting to

misconduct' occurring in section 16 should be construed *ejusdem generis* with the words 'physical or mental incapacity'. In the light of this decision by the Appellate Division it may be argued that the High Court Division's decision is wrong as far as the principle of *ejusdem generis* is concerned. The decision of the Appellate Division has been discussed in the next chapter.

The principle of *'ejusdem generis'* (of the same kind) in interpretation of statutes has been held to apply in respect of general words following particular words in statutes (*Gregory v Fearn* [1953] 1 WLR 974). In other words, when the legislature has used general words following some particular or specific words, those general words will not include anything of a class superior to that which the particular words belong (Craies on Statute Law, 7th edn, 182). In sections 2(l) for 'lay-off' and section 6(1) for 'stoppage' the legislature has used first some specific words, like shortage of coal, power or raw material, break down of machinery etc. and then it has used a general word, like 'for any other reasons' or 'other causes beyond his control'. Now the question is whether these general words, like 'for any other reasons' or 'other causes beyond his control' can be used to mean 'any reason whatsoever' disregarding those specific words.. Certainly not. They must be construed in the light and context of those specific words; they should be used to mean those reasons which are allied, similar or analogous to those specific words. Even if the statute uses the words, like 'other reasons whatsoever' or 'other persons whatsoever', still they are to be construed *ejusdem generis* with those which precede them (Lord Evershed M.R. in *Gregory v Fearn* [1953] 1WLR 974).

Breaking down Conditions of Right of Compensation for a laid-off Worker:

(i) The shop or commercial or industrial establishments must have employed 5 or more in an average on any day of the preceding twelve months (sec. 8);

(ii) The establishment in question must not be of seasonal character or in which work is performed intermittently (sec. 8);

(iii) The claimant must come within the definition of a 'workman' (sec. 9);

(iv) He should not be a badli or casual worker (sec. 9);

(v) His name must be borne on the muster rolls (sec. 9);

(vi) He must have completed minimum of one year of continuous service with the employer (sec. 9);

(vii) A badli worker whose name appears in the muster rolls and if he has completed one year of continuous service in the shop, he will be entitled to compensation for lay-off period (1st proviso to section 9);

(viii) Lay-off compensation must be half of the basic wages and dearness allowance plus full amount of housing allowance, if any (section 9);

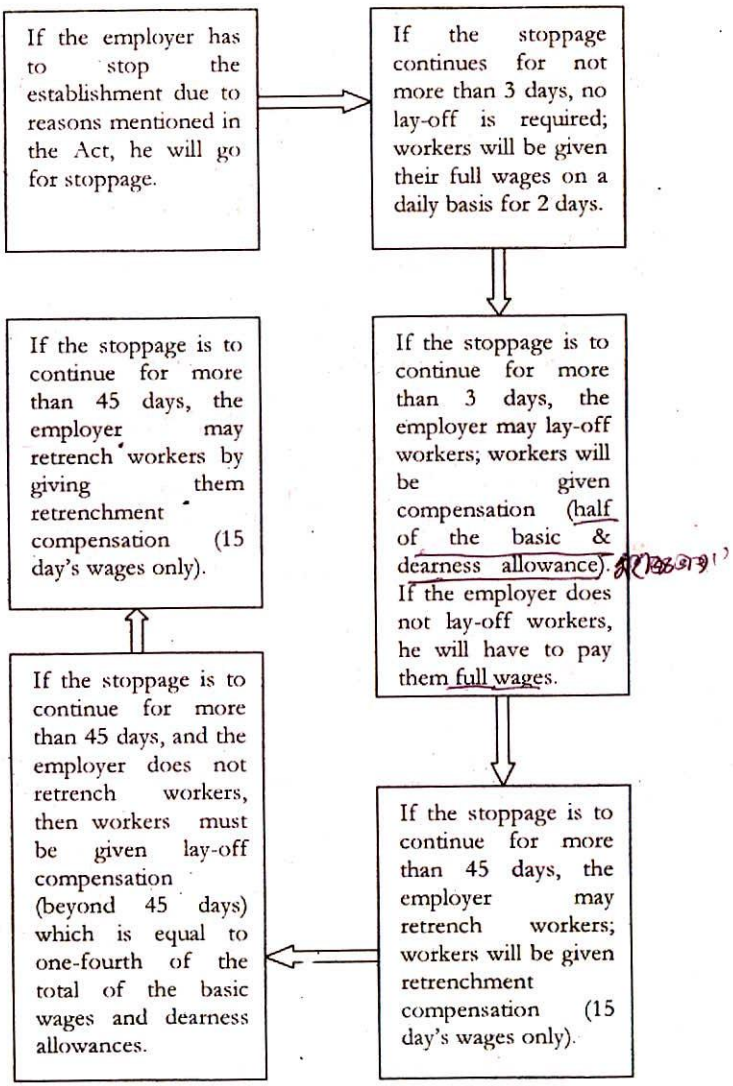
(ix) Maximum period for entitlement of lay-off compensation is 45 days during any period of twelve months (second proviso to section 9) ;

(x) A worker may get lay-off compensation for more than 45 days during 12 months if there is an agreement between him and the employer to that effect (second proviso to section 9);

(xi) Beyond 45 days the employer may escape liability by resorting to retrenchment after payment of retrenchment compensation (Sec. 9(3)); or

(xii) Beyond 45 days of lay-off, the worker will be paid, for any more days other than first 45 days, compensation which will be equal to one-fourth of the total of the basic wages and dearness allowance and the full amount of housing allowance if any (sec. 9(2)).

Stoppage, Lay-off and Retrenchment: Relationship and Interlinks: (the following chart describes only one of the grounds (stoppage) of lay-off and retrenchment; for other grounds, see below).



Rationale behind the Lay-Off Compensation:

The right of workmen to lay-off compensation is designed to relieve the hardship caused by unemployment due to no fault of the employee. Involuntary unemployment also causes dislocation of trade and may result in general economic insecurity. Therefore the right is based on human public policy and the statute which gives such right should be liberally construed, and where there are disqualifying provisions, the latter should be construed strictly with reference to the words and used therein (*Associated Cement Co. Ltd v Their Workmen*, AIR 1964 SC 1458).

Effect of Lay-Off/ Employer-Employee Relationship during the Lay-Off period:

Lay-off does not mean termination of employment. A close scrutiny of section 11 of the Act makes it clear that the relationship between the employer and workers during the lay-off period is only suspended and the workers continue to be on the muster rolls of the employer and they have to be reinstated as soon as normal work is resumed. Second, under section 10 the employer is duty bound to maintain muster roll of all such workers who have been laid-off so that they may claim reinstatement once the lay-off is lifted. Third, once lay-off is declared the employer is under liability to pay compensation, provided the workmen laid-off report themselves for duty everyday. Fourth, Since the employer's liability to pay compensation is confined to only those days laid off, a corresponding duty is cast on the workers to present themselves for work everyday on the appointed time. If the workman laid-off fails to report for duty as above the employer is not liable to pay compensation for such days not so reported.

RETRENCHMENT

Section 2(q) defines the term 'retrenchment' as the termination by the employer of services of workers, not as a measure of punishment inflicted by way of disciplinary action, but on the ground of redundancy. Thus retrenchment is a permanent measure to remove surplus staff; it results in a complete severance of employer-employee relationship. The definition also makes it clear that retrenchment is a kind of termination but every termination is not retrenchment. To be retrenchment the termination must be on the ground of redundancy.

Conditions for a Valid Retrenchment:

According to section 12 read with section 2(q) the conditions of a valid retrenchment are as follows:

(i) The worker to be retrenched must be given one month's notice;
(ii) The notice must be given in writing;
(iii) The notice must contain reasons for retrenchment;
(iv) Alternative to condition (ii) above, instead of giving one month's, a worker may be retrenched instantly by giving him payment of wages for the period of notice;
(v) A copy of the notice of retrenchment must be sent to the Chief Inspector;
(vi) There must be termination of services of a workman on the ground of redundancy or surplus labour.

Procedure of Retrenchment:

Section 13 of the Act incorporates the well recognised principle of retrenchment in industrial law, namely, the "last come first go" or "first come last go". The principles laid down in section 13 for retrenchment procedure are to be adhered to by every employer. The conditions which this section prescribes for the procedure of retrenchment are as follows:

(i) The person claiming the protection of retrenchment procedure under section 13 must be a 'worker' within the definition in clause (v) of section 2;
(ii) The person must belong to a particular category of workers in the establishment concerned;
(iii) There should not be any agreement between the employer and employee contrary to the procedure of 'last come first go'.
(iv) The employer is bound to comply with all the above conditions while retrenching a worker. However, the employer can deviate from this procedure on justifiable reasons which must be recorded.

Retrenchment Compensation

Under clause (c) of section 12 payment of compensation for retrenchment is mandatory. The provisions of compensation for retrenchment are as follows:

(i) At the time of retrenchment the worker must be paid, compensation equivalent to thirty days' wages for every

completed year of service or for any part thereof in excess of six months, or gratuity, if any, whichever is higher;

(ii) To claim compensation for retrenchment the worker must show that he has been in continuous service for not less than one year under that employer who has retrenched him;

(iii) If a worker who is to be laid-off even after first 45 days in a calendar year under section 9(3), is retrenched instead of laying-off, no notice will be required. However, he shall be paid 15 days' wages in addition to the compensation or gratuity which may be payable under clause (c) of section 12;

(iv) Wages as compensation for retrenchment will mean the average of the basic wages plus dearness allowances, if any, paid during the period of twelve months immediately preceding the date of retrenchment.

Re-employment of Retrenched Workers

Retrenchment of surplus workers causes undue sufferings not only to the retrenched worker but to all his dependents. Therefore, in order to avoid hardship to the worker and his family, the provisions have been made in Section 14 of the Employment of Labour (Standing Orders) Act, 1965 that such workmen should be given an opportunity to join service whenever an occasion arises to employ another hand. This principle was regarded as of general application in industrial adjudication on the ground that it was based on considerations of fair play and justice. The section provides that after effecting retrenchment, if the employer proposes to take into his employment any person:

(i) he shall give opportunity to the retrenched workers who offer themselves for re-employment; and

(ii) these retrenched workers will have preference over the new applicants. Thus section 14 imposes legal obligation on the employers to give preference to retrenched workers when he subsequently employs any person.

Conditions of re-employment for Retrenched Workers:

A retrenched worker may claim preference under section 14 on the fulfillment of the following conditions:

(i) To apply for preference under section 14 the worker concerned must have been retrenched in last one year time prior to re-employment (thus a dismissed or discharged worker cannot claim preference in employment);

(ii) The worker must offer himself for re-employment in response to the notice by the employer;

(iii) Workers will have priority according to the length of his service under the employer.

Distinction between Lay-Off and Retrenchment

(i) In case of lay-off there is failure, refusal or inability of the employer to give employment to a workman for a temporary period while in retrenchment the workman is deprived of his employment permanently by his employer.

(ii) The grounds of lay-off are many. In lay-off the failure, refusal or inability to give employment is on account of one or more of the reasons specified in section 2(l) such as shortage of coal, shortage of power, raw materials, break down of machinery etc. while in retrenchment the termination of service is on the ground of surplus labour only. Thus the ground of retrenchment and lay-off are completely different.

(iii) The reasons of lay-off are completely different as compared to reasons of retrenchment. The situation of surplus labour may arise due to economic drive, rationalisation in the industry, installation of new labour saving machinery etc. But in lay-off reasons of non-employment are mainly non-availability of power, raw materials, coal or break down of machinery etc.

(iv) In lay-off labour force is not surplus but in retrenchment labour force is surplus which is to be retrenched.

(v) In lay-off employment relationship of employer and employees is not terminated but suspended while in retrenchment relationship is terminated.

Chapter VI

DISCHARGE, DISMISSAL AND TERMINATION

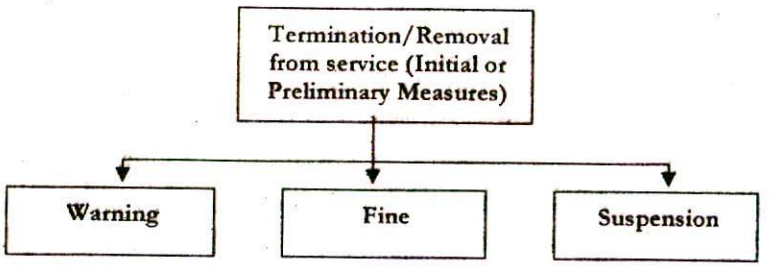
Introduction

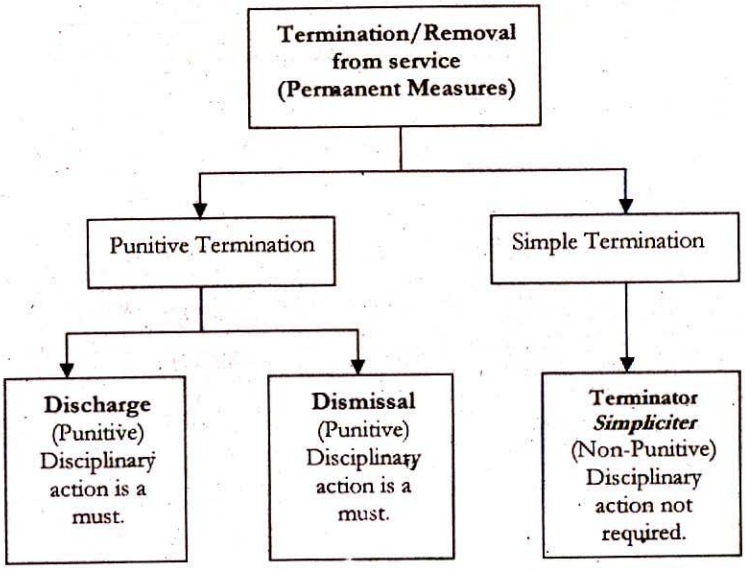
One of the vexing problems that continue to generate tension and friction in industrial relations is the area of disciplinary action. The Employment of Labour (Standing Orders) Act, 1965, the Employment of Labour (Standing Orders) Rules, 1968 and the Industrial Relations Ordinance, 1969 are some of the major steps towards reducing tension and industrial strife and thereby maintain industrial peace and harmony.

Depending upon the gravity of offence committed the following punishments are generally inflicted in disciplinary action against misconduct of a workman by his employer in his disciplinary jurisdiction:

(i) warning;
(ii) fine;
(iii) demotion;
(iv) suspension;
(v) discharge;
(vi) dismissal;
(vii) termination

The first four of these are routine punishments whereas the last three are severest punishments.





The above diagram makes it clear that under the Employment of Labour (Standing Orders) Act, 1965 has created two distinct powers of an employer with regard to removal of a worker. In other words, an employer has two alternatives with regard to an erring or wrong-doing workman whom he wants to remove from the service: either to act under section 19 by way of simple termination (termination *simpliciter*) which is a non-punitive measure and without mentioning any grounds, or to adopt a punitive measure under sections 16 or 17 by way of discharge or dismissal for which the employer is to take disciplinary action and hold a domestic inquiry before the punitive measures can be effected upon the worker concerned.

Discharge

According to section 2(f) 'discharge' means the termination of services of a worker by the employer for reasons of physical or mental incapacity or continued ill heath of the worker or such other similar reasons not amounting to misconduct.

Nature:

Though discharge is considered to be a punishment; a punitive measure, it is a punishment not with any stigma or misconduct on the part of the worker. The distinction between discharge and dismissal is both of substance and degree. The distinction on point of substance lies in the sense that though both are termination from service and are punitive measures, the grounds of them are completely different. On the other hand, the distinction on point of degree lies in the sense that dismissal is a termination with a stigma; whereas discharge is a termination without any stigma. Again, discharge is not a termination *simpliciter*, it is a termination with specific grounds. In *Assam Oil Company v Its Workmen* ((1960) 1 LLJ 587 (SC) the Indian Supreme Court held that though the order of discharge is couched in words which do not impute any misconduct to the employee, in substance it is based on facts of which according to the employer the employee has been guilty of, and that would make the impugned discharge a punitive dismissal.

Grounds of Discharge:

Section 16 further outlines the grounds of discharge. A worker may be discharged from service on following grounds:

(i) physical incapacity; or

(ii) mental incapacity; or

(iii) continued ill heath of the worker; or

(iv) such other similar reasons not amounting to misconduct.

Conditions of Discharge:

(i) The person concerned must come under the definition of a 'worker' within the meaning of the Act;

(ii) The order of discharge by the employer can only be based on either physical or mental incapacity of the worker or his continued ill-health or such other reasons not amounting to misconduct;

(iii) Before a discharge can be effected upon a worker, a full departmental proceeding must be drawn in accordance with section 18 of the Act.

Procedure of Discharge:

The procedure of both discharge and dismissal is same (see below in 'dismissal' topic).

Rights of a Discharged Worker:

(i) A discharged worker who has completed one year of continuous service will get compensation at the rate of 30 days' wages for every completed year of service or any part thereof in excess of six months, or gratuity, if any, whichever is higher.

(ii) A discharged worker who has not completed one year of continuous service will not get any compensation for discharge.

(iii) Thirty days' wages means the average of the basic wages and dearness allowance, if any, of the preceding one year.

(iv) A discharged worker's right over provident fund will not be affected because of discharge (section 20).

(v) A discharged worker will have a right to get a certificate of service from his employer (section 21).

Discharge instead of Dismissal:

A worker found guilty of misconduct under section 17 may be, instead of dismissal, discharged in consideration of any extenuating circumstances (s. 17(2)). The High Court Division held in *Shaukat Ali v The Chairman, Labour Court, Khulna*, (44 DLR (1992) 410) that considering the length of service and previous good record an employee's dismissal can be converted into discharge by the court.

Definition of 'Continued Ill health' and 'such other similar reasons not amounting to misconduct'

The expression 'ill health' has not been defined in the Act; nor has it been stated in the Act what period of illness would be regarded as 'continued ill health'. The Appellate Division in *Karim Jute Mills Ltd. v Chairman, Second Labour Court, Dhaka* [17 BLD (AD) 208, 5 BLT (AD) 285, 2 BLC (AD) 113, 2 MLR (1997) (AD) 203] held the following:

"Section 16 does not connect "continued ill-health" with "physical or mental incapacity". If the said two expressions were of the same import and consequence it was not necessary to use the second expression "continued ill-

health". Physical or mental incapacity and continued ill-health are two distinct and separate states or conditions of physical and mental well-being. The High Court Division was not well founded in law in holding that "continued ill-health" must be interpreted along with the condition resulting from physical or mental incapacity of a worker. An incapacity and an ill-health are neither akin nor similar to one another. The former incapacitates, the latter gravely undermines the capacity of a worker to work. In the case of mental or physical incapacity the disability of the worker is complete and in case of continued ill-health, the capacity is impaired, not totally eliminated".

Dismissal

According to section 2(g) 'dismissal' means the termination of services of a worker by the employer for misconduct. Thus as opposed to discharge which is on the ground of incapacity or ill-health, dismissal is the termination of service of a worker on grounds of misconduct. Thus dismissal is a kind of termination of service but this termination is on the ground of misconduct or on the ground of conviction of an offence. Now we need to see what is misconduct and other rules relating to dismissal.

Grounds of Dismissal:

A combined reading of sections 2(g) and 17 of the Employment of Labour (Standing Orders) Act, 1965 reveals that there are following grounds of dismissal:

(i) If a worker is convicted of an offence; or

(ii) If a worker is found guilty of misconduct under section 18.

Conditions of Dismissal:

(i) The person concerned must come under the definition of a 'worker' within the meaning of the Act;

(ii) The order of dismissal by the employer can only be based on either conviction for an offence or guilty of misconduct as enumerated in section 17 of the Act;

(iii) Before a dismissal can be effected upon a worker, a full departmental proceeding must be drawn in accordance with rules under section 18 of the Act.

What is Misconduct?

The Act does not give any substantive definition of misconduct. The High Court Division held in *Abdul Jalil Vs. Bangladesh Steel and Engineering Corporation and others*; (11 BLD (HCD) 35) that the word 'dismissal' in the ordinary meaning as found in the Oxford Dictionary connotes dishonorably removed or sent away from service or office while the expression 'terminable on the ground of misconduct' carries the same meaning and stigma. The Court also held that the two expressions namely, 'dismissed on the ground of misconduct' and 'termination of service on the ground of misconduct' have the same connotation. Though the Act has not defined the term 'misconduct', it has, however, provides in section 17(3) a list of acts and omissions which will constitute misconduct. They are as follows:

(a) willful insubordination or disobedience, whether alone or in combination with others to any lawful or reasonable order of a superior;

(b) theft, fraud or dishonesty in connection with the employer's business or property;

(c) taking or giving bribes or any illegal gratification in connection with his or any other worker's employment under the employer;

(d) habitual absence without leave or absence without leave for more than ten days;

(e) habitual late attendance;

(f) riotous or disorderly behaviour in the shop or regulation applicable to the shop or commercial or industrial establishment;

(g) habitual negligence or neglect of work;

(h) frequent repletion of any act or omission for which a fine may be imposed;

(i) resorting to illegal strike or 'go-slow' or inciting others to resort to illegal strike or 'go-slow';

(j) falsifying, tampering with, damaging or causing loss of employer's official records.

Procedure of Discharge and Dismissal

1. Show Cause Notice and/ or Charge-Sheet:

Section 18 does not specify anything about the requirement of show cause notice though in practice usually a show cause notice follows the charge-sheet. Section 18, however, is very specific about framing of charge-sheet when it says that no order of discharge or dismissal of a worker shall be made unless the allegations against him are recorded in writing (s.18(1)(a)). The phrase "the allegations against him are recorded in writing" means that a charge-sheet must be drawn against the worker before he cane be discharged or dismissed **(16 BLD (HCD) 211** *Kustia Sugar Mills v. Chairman, Labour Court Khulna* **(49 DLR 236),** *Hafiz Jute Mills v. Second Labour Court, Govt. of East Pakistan* **(22 DLR 713).** The charge sheet must be clear, specific and definite as to charges against the worker. If there is any vagueness in the charge sheet, no punishment on the basis of it would be valid. The worker will also not be in a position to prepare his reply if the charge is vague and in that case the right of the worker to prepare a reply in the form of explanation as mentioned in section 18(1)(b) would be meaningless to him. The court has also held that dismissal cannot be based on a ground not stated in the charge sheet. The court can also interfere with the finding of the Inquiry Officer or Inquiry Committee if it is found that inquiry was held unfairly, with bad faith, without complying with the principles of natural justice and without following the procedure laid down in section 18 of the Employment of Labour (Standing Orders) Act, *Nurul Amin Chowdhury Vs. Chairman Second Labour Court* 42 DLR 217.

2. Giving Copy to the Worker:

A copy of the charge-sheet must be given to the worker concerned and he must also be given at least three days time explain the charge (s. 18(1)(b)). Thus the object of giving the copy of the charge to the worker is to give him opportunity to prepare a reply against the charge. This is an essential part of the principle of natural justice which requires that nobody should be condemned unheard. The Court also held in *Mansor Ahmed Vs. Burmah Eastern Limited* (1968) 20 DLR 120 that 3 days' time for giving notice by the employer to the employee is to enable the latter to show cause against any proposed punishment referred to in clause (b) of section 18 (1) is the minimum

time allowed, and there is no embergo on giving more time for the purpose.

3. Domestic Enquiry into Charges and the right of Hearing of the Worker concerned:

A close scrutiny of sub-sections 1 and 4 of section 18 reveal that for discharge or dismissal a departmental or domestic enquiry also called disciplinary proceeding is a must. The body or the officer conducting the enquiry will examine the charge-sheet; will hear the worker concerned if he so desires; will hear or collect relevant evidences; and finally it will come out with a report of either guilty or not guilty of the charge. The worker against whom the charge will be enquired has a right to be heard personally by the enquiry body as specified in section 18(1)(c).

Omission to hold a domestic enquiry will have serious consequences. The domestic tribunal (enquiry body or official) will consider not only whether there is a *prima facie* case, but also decide for itself on the evidence adduced whether the charges have been made out. A defective enquiry stands on the same footing as no enquiry (*Workmen, Motipur Sugar Factory v Motipur Sugar Factory*, AIR 1965 SC 1803).

4. Order of Punishment and its Approval:

On the basis of the enquiry body's findings the employer will impose punishment on the worker. The order of such punishment in the form of either discharge or dismissal must be approved by the employer or the manager. Without such approval the order of discharge or dismissal will be invalid (s. 18(1)(d)). Section 18(3)(c) also stipulates that in case of punishment, a copy of the order inflicting such punishment shall be submitted to the worker concerned.

5. Suspension of the Worker pending Inquiry:

As per section 18(2) a worker charged for misconduct may be suspended pending enquiry into the charge against him and the period of such suspension shall not exceed sixty days. An order of suspension shall be in writing and may take effect immediately on delivery to the worker.

Suspension

Suspension pending enquiry and Suspension as a Punishment:

Under the Employment of Labour (Standing Orders) Act, 1965 suspension may be of two types: suspension as a measure of punishment and temporary suspension pending enquiry. The total period of suspension that can be passed under the Act is 67 days of which 60 days for the purposes of enquiry and 7 days for as a measure of punishment (*Secretary, Bangladesh Jute Corporation v 2nd Labour Court*, Dhaka (1989) 41 DLR 265).

Suspension as a Punishment:

(i) Section 17(2) stipulates that any worker found guilty of misconduct but not dismissed in consideration of any extenuating circumstances, may be suspended, as a measure of punishment, without wages as well as subsistence allowance, for a period not exceeding seven days;

(ii) The above period of suspension may be within or in addition to the period of suspension of the worker for enquiry under sub-section (2) section 18;

(iii) If a worker is put under suspension under section 17(2) as mentioned above, he will not get any compensation for such suspension.

Suspension pending Enquiry:

(i) Section 18(2) further stipulates that a worker charged for misconduct may be suspended pending enquiry into the charges against him;

(ii) The period of such suspension pending enquiry shall not exceed sixty days. Thus the departmental enquiry has to be finished within 60 days;

(iii) An order of suspension shall be in writing and may take effect immediately on delivery to the worker;

(iv) During the period of such suspension, a worker shall be paid by his employer a subsistence allowance equivalent to half of his average wages including dearness allowance, if any;

(v) If, on enquiry, the worker is found not guilty, he shall be deemed to have been on duty for the period of suspension for enquiry and shall be entitled to his wages for such period of suspension and the subsistence allowance shall be adjusted accordingly.

Rights of a Worker put under Suspension:

(i) If a worker is put under suspension under section 17(2) as measure of punishment, he will not get any compensation for such suspension;

(ii) If a worker is put under suspension pending enquiry under section 18(2), he shall be paid by his employer, during the period of such suspension, a subsistence allowance equivalent to half of his average wages including dearness allowance, if any;

(iii) If, on enquiry, the worker is found not guilty, he shall be deemed to have been on duty for the period of suspension for enquiry and shall be entitled to his wages for such period of suspension and the subsistence allowance shall be adjusted accordingly.

(iv) The worker against whom the charge will be enquired has a right to be heard personally by the enquiry body as specified in section 18(1)(c).

Rights of a Dismissed Worker for Compensation:

(i) A dismissed worker who has completed one year of continuous service will get compensation at the rate of 14 days' wages for every completed year of service or any part thereof exceeding six months or gratuity, if any, whichever is higher.

(ii) A dismissed worker who has not completed one year of continuous service will not get any compensation.

(iii) 14 days' wages means the average of the basic wages and dearness allowance, if any of the preceding one year.

(iv) If a worker is dismissed on the ground of conviction of an offence, no prior notice or pay in lieu of notice or any compensation would be required to be given (17(1)(a).

(v) If a worker is dismissed on the ground of misconduct, no prior notice or pay in lieu of notice would be required to be given.

However, he would be given compensation at the rate of 14 days' as mentioned above.

(vi) In awarding punishment the employer shall take into account the gravity of the misconduct, the previous record, if any, of the worker and any other extenuating or aggravating circumstances that may exist (section 18(6).

Discharge or Dismissal for Go-slow or Illegal Strike

Section 18(7) of the Employment of Labour (Standing Orders) Act, 1965 provides for discharge and dismissal on the ground of 'go-slow' or 'illegal strike' by workers. However, if an employer wants to discharge or dismiss or inflict any other punishment to one or more workers individually or collectively, he must obtain permission from the Labour Court and give notice to the workers by posting the same in the notice board. This has been reinforced by the Appellate Division in *General Manager Bogra Cotton Spinning Co Ltd. Vs. Chairman, Rajshahi Labour Court* (1979) 31 DLR (AD) 329 when it says that disciplinary action by a Company against its employees for illegal strike or go slow can only be taken after obtaining permission from the Labour Court. No agreement between the employer and employees can override this statutory provision of s 18(7).

It has also been held by the High Court Division in *Saheb Ali Vs. Chairman* (1980) DLR 16 that section 18(7) of the Employment of Labour (Standing Order) Act, 1965 gives an alternative power to the employer to dismiss collectively or individually any worker in case of misconduct or tactics or illegal strike without following the procedure of holding enquiry as laid down in section 18(1) of the Act.

Termination

The term 'termination' has not been defined in the Act. However, the term may be used in two senses. In ordinary sense it is a general word which includes discharge, dismissal and termination *simpliciter*. In this sense it means removal of the service of a worker for whatever reasons. In another sense, i.e. in specific sense the term means termination *simpliciter* which is the subject matter of section 19. In other words, termination as understood in section 19 means removal from the service with termination benefits but this will not amount to discharge or dismissal and the employer will not have to show any reason or grounds for such removal. Thus termination *simpliciter* is the safest

step for the employer to remove a worker. However, though it is the safest step, it is the most expensive method of removing a worker in the sense that the employer will have to give a three month's notice or wages in lieu of the same period and also compensation which is much higher compared to discharge and dismissal.

Conditions of Termination:

(i) The employer must give one hundred and twenty days notice in the case of monthly rated worker and sixty day's notice in case of other workers;

(ii) The notice must be in writing;

(iii) In lieu of notice wages for one hundred and twenty days notice in the case of monthly rated worker and sixty day's notice in case of other workers will have to be given;

(iv) A terminated worker will have to be given compensation at the rate of thirty day's wages for every completed year of service for any part thereof in excess of six months;

Termination of a Temporary Worker:

(i) To terminate a temporary worker the employer will have to give one month's notice in the case of monthly rated worker and 14 day's notice in other cases;

(ii) The notice must be in writing;

(iii) This termination must not be due to the completion, cessation, abolition or discontinuance of the temporary work which he was appointed to perform. In these cases there will be required no notice and no question of compensation;

(iv) Wages for one month or fourteen days as the case may be, may be paid in lieu of such notice.

Termination by the Worker:

(i) If a permanent worker desires to terminate his employment, one month's notice in the case of monthly rated workers, and fourteen days' notice in the case of other workers shall be given by him to his employer;

(ii) The notice must be in writing;

(iii) A worker who terminates his employment shall not be entitled to the payment of any compensation but he shall be entitled to other benefits, if any, under this Act or under any other law for the time being in force.

Lifting the Veil of the Termination Order: Punitive or Simpliciter Test

In *Gujarat Steel Tubes* (1980) 1 LLJ 137 (SC) the Indian Supreme Court held that the form of the termination order or the language in which it is couched is not conclusive. The court will lift the veil to see the true nature of the order to determine whether the order of discharge amounted to simple termination or punitive dismissal notwithstanding the provisions in the Standing Orders empowering the employer, *inter alia*, to terminate workman found guilty of misconduct.

For example, even if there is suspicion of misconduct, the employer may not bother to go into such guilt by conducting enquiry; again he may not feel to keep the worker as he is not happy with his continuance. He may terminate his service and this may not be dismissal, but only a termination *simpliciter* if no injurious record of reasons or punitive pecuniary cut back on his full terminal benefits is found. In this case the discharge or termination would not be found on misconduct. If the basis or foundation for the termination order is clearly not turpitudinous or stigmatic or rooted in misconduct or visited with evil pecuniary effects, then the order of termination as to what is the true ground of for the termination if there is an allegation of misconduct and there is a live nexus.

If the termination of service was a colourable exercise of the power or as a result of victimisation or unfair labour practice, the labour court or tribunal would have jurisdiction to intervene and set aside such termination. The form of the order in such a case is not conclusive and the labour court or tribunal can go behind the order to find the reasons which led to the order and then consider for itself whether the termination was colourable exercise of power or as a result of victimisaiton or unfair practice (*U.B. Datt & Co. v Workmen*, AIR 1953 SC 411).

The Appellate Division of our Supreme Court has also held in *Bangladesh Tea Estate Ltd. v Bangladesh Tea Estate Staff Union* (1976) 28 DLR (AD) 190)

that Court can go behind the order of a service termination to see if it is really a victimization.

Bangladesh Tea Estate Ltd. v Bangladesh Tea Estate Staff Union (1976) 28 DLR (AD) 190)

Facts: One Mr. Nurul Abser Chowdhury was appointed as a clerk by the Bangladesh Tea Estate Ltd. on 1st June, 1964. He was subsequently promoted to Grade II, Gardener clerk on 3-7-67. The employer Company terminated his service under section 19 of the Employment of Labour (Standing Orders) Act, 1965 by a letter with all termination benefits. The employee instead of receiving his dues raised a labour dispute through the Union under the East Pakistan Labour Dispute Act, 1965 (now the Industrial Relations Ordinance, 1969). The Labour Court on consideration of evidence held that the termination of service of Nurul Abser was *malafide*, a case of victimisation for his trade union activities and accordingly made an award directing his reinstatement with back wages. Nurul Abser was found to be a unit representative of the Union.

On appeal by the employer Company, the High Court of East Pakistan made an elaborate discussion of evidence and dismissed the appeal (concurred with the decision of the Labour Court) on the ground that Nurul Abser was victimised for his trade union activities. Because of his participation in trade union activities, the order of termination was passed by the management in disapproval of such activities.

The employer company obtained leave from the Supreme Court of Pakistan.

Issues:

(i) Whether the question of termination under section 19 should only be decided under section 25 of the Standing Orders Act, 1965 and cannot be raised as an 'industrial dispute' under the Labour Dispute Act (presently IRO) or it can be raised as an industrial dispute?.

(ii) Can the Court go behind the order of termination to see if it is really a victimization or not?

Judgment:

The ratio decidendi of the two cited decisions reported in 25 DLR (SC) 85 and in 13 DLR (SC) 280 (PLD 1961 (SC) 403) appear to be that the employer has a right to terminate the service of a worker under section 19 of the Standing Order Act without disclosing any cause, and that the Court should not go behind an order of termination *simpliciter* to find out whether the order was *malafide* or not.

There is however, an exception to the rule that Court not to go behind the order of a service of termination to see if it really was a victimisation. This exception is contained in section 19 itself when read with section 25. It says that if purported termination is in reality victimization of an officer of a registered Trade Union for his trade union activities, the Court can go behind the order to see the real purpose of termination and grant such relief as it thinks fit. The two propositions should be read together in order to arrive at the true import of section 19 of the Standing Orders Act.

Labour dispute is broad enough to include a dispute of a terminated worker under section 19 of the Standing Orders Act, 1965, if the dispute centres round the victimisation of the worker for his trade union activities. It is to be remembered that section 25 of the Standing Orders Act has clearly provided that an individual worker can claim relief before the Labour Court under the said Act, unless the grievance has been raised as a labour dispute under Labour Dispute Act (IRO). Though section 25 bars all complaints against the order of termination under section 19 of the said Act, yet it authorises the worker to claim relief if the termination is of an officer of the registered trade union for his trade union activities or the worker is deprieved of his benefits under section 19. The two Acts are *pari materia* and the provision in section 25 indicates that if the termination of a worker is for his trade union activities and if he is an officer of a registered trade union, his case may be raised as an industrial dispute.

Clause (b) of sub-section (1) of section 25 of the Standing Orders Act clearly provides that an individual worker can come to the Labour Court for relief in respect of any matter covered by the Act.

The Pakistan Supreme Court has also decided in *Pakistan Tobacco Company Ltd v. Pakistan Tobacco Company Employees Union, Dhaka*, 13 DLR (SC) 280 to the following effect:

> Termination of service of a worker may lead to a dispute which may be a labour dispute. The terminated worker obviously is a person in whose employment or non-employment the workers have some interest. The termination of service may lead to a dispute between the employee and employer, and may in cetin circumstances be a labour dispute. For example, the termination may be a cloak to victimise a worker who is an officer of a registered trade union of his trade union activities.

Aminul Islam v James Finlay Co. Ltd

26 DLR (SC) 33

Mr. Aminul Islam was a Head Clerk-cum-Accountant under James Finlay Company Ltd at Khulna. His service was terminated allowing him wages in lieu of 90 days notice. The Company preferred to pay his wages for that period in addition to compensation at the rate of 14 days wages for every completed year or part thereof in excess of six months. It was asserted that the termination was for trade union activities of the workers and that it was a case of victimisation. The Labour Court upheld the contention of the worker. On the appeal before the High Court no opinion was expressed on merits as the case was remanded to the Labour Court since the opinion of a member was not obtained. On further appeal to the Appellate Division, it was held on fact that the worker's service was terminated without any stigma or charge and it was a termination simpliciter.

Judgment:

> It has been contended that the service of Aminul Islam were terminated due to his trade union activities and as such it was an act of victimisation and the termination virtually amounted to dismissal under the cloak of the term 'termination'. But contention does not hold good as on examination of the impugned order it has been found that the termination of the services of Aminul Islam without any charge or stigma was termination simpliciter under section 19 and as such he was no longer a worker within the meaning of the Act.

To be noted that neither in the decisions of *Aminul Islam v James Finlay Co. Ltd* 26 DLR (SC) 33, nor *Khulna News Print Mills v. Khulna News Print Employees Union* 25 DLR (SC) 85 did the Supreme Court held expressly that court cannot go behind the order of termination to see if it is really a matter of victimization or not. Secondly, in view of the recent decision by the Appellate Division in *Bangladesh Tea Estate Ltd. v Bangladesh Tea Estate Staff Union* (1976) 28 DLR (AD) 190) the above two decisions seem to have lost much of their significance in some points.

If the dismissal is wrongful what is the remedy?

The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right of the worker contrary to the relevant law or in breach of contract and deprived the worker of his earnings. In such a case the normal rule would be full back wages with reinstatement in the service.

Chapter VII

GRIEVANCE PROCEDURE

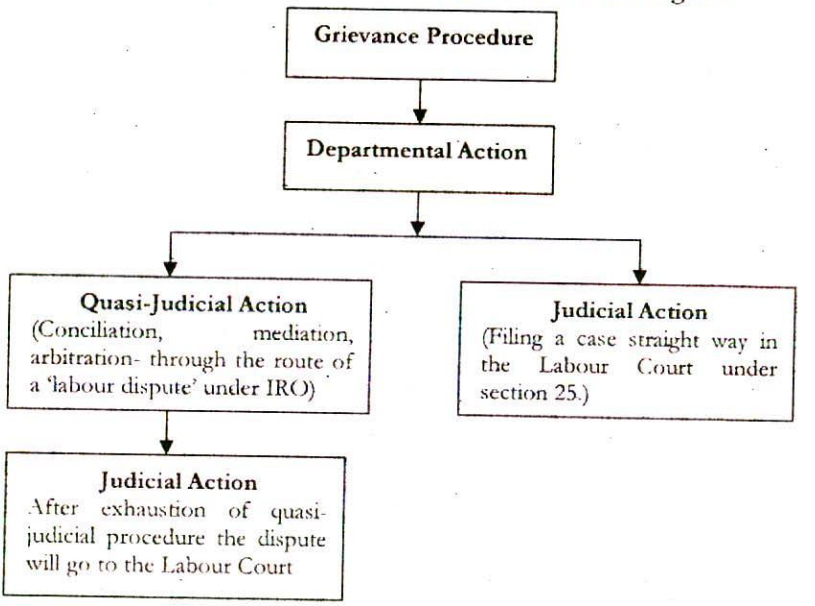
Introduction

The plain language of section 25(1)(a) stipulates that the worker concern shall submit his grievance to his employer, in writing, by registered post within fifteen days of the occurrence of the cause of such grievance. Thus sending grievance by registered post is a mandatory requirement of the legislation. However, the Appellate Division in a very recent decision has held that sending grievance to the employer by registered post is not always necessary. When submission of grievance by hand is established, there is sufficient compliance with the requirement of law (*BRTC v Esken Mollick and Another* 9 MLR (AD) 161). The Court categorically held that it is the unambiguous obligation of the worker concerned to bring his grievance to the notice of in writing within fifteen days no matter how it is submitted. The legislature in their wisdom put an obligation on the shoulder of the worker to inform the grievances within the time specified; and to guarantee actual sending of the grievance to the employer, the requirement of submitting by registered post has been mentioned. It does not mean that the submission of the grievance must necessarily be made by registered post, provided of course that there is material to prove that such grievance in writing has in fact been submitted within the time as specified. In case of admitted 'service of grievance petition within specified time' the formality of sending the same by registered post should not hinder the process in substance.

It was, however, decided by the High Court Division in another case that the petition filed by hand could not be considered to be a grievance petition. At best, the same could be considered as an appeal or a petition for review of the order of dismissal passed by the respondent No. I but by no means a grievance petition as meant by section 25 of the Employment of Labour (Standing Orders) Act (*Sultan Ahmed vs. Chairman, Divisional Labour Court, and others 49 DLR 215*). What would be the effect of this case now in the light of the recently decided BRTC case? To be noted that this case was not referred to in the BRTC case and the Appellate Division did not have opportunity to say anything about the effect of this case. However, given the BRTC case decided by the Appellate Division, the *Sultan Ahmed* case would be impliedly overruled.

In another case *Abdul Karim Khan v Mujibur Rahman* (1979) 3 DLR 269 the High Court Division held that if a grievance petition is sent by registered post within the period mentioned in the section it would be treated as having been filed within the period.

Steps of Grievance Procedure shown in Diagram



Steps and Conditions of Grievance Petition

Section 25 of the Act lays down the conditions of grievance procedure. This procedure applies to a worker who has been removed from his service and has a grievance for redress. This is a three-staged procedure: Departmental, Quasi-judicial and Judicial.

A. Departmental Grievance Procedure

(i) **Submitting Grievance Notice/Petition:** Any worker dismissed, discharged, retrenched, laid-off or otherwise removed or terminated from his employment must submit his

grievance to his employer, in writing, by registered post within fifteen days of the occurrence of the cause of action of such grievance. Submitting a grievance notice within 15 days is a *sinequanon* for filing a case under section 25 to the Labour Court (*Karim Jute Mills v Chairman, 2nd Labour Court*, 42 DLR 255). However, it has recently been held by the Appellate Division in *BRTC v Esken Mollick and Another 9 MLR (AD) (2004) 161* that sending grievance to the employer by registered post is not always necessary. When submission of grievance by hand is established, there is sufficient compliance with the requirement of law. Thus by sending a grievance notice within 15 days of the cause of action of grievance against removal a worker sets grievance procedure in motion.

(ii) **Consideration of Grievance Notice/Petition by the Employer:** As per section 25(1)(a) the employer shall, within 15 days of receipt of a grievance petition, enquire into the matter; give the worker concerned an opportunity of being heard and communicate his decision, in writing, to the said worker. If the worker is satisfied with the decision of the employer regarding the grievance petition then the matter will end here. If, on the other hand, the employer fails to give any decision within 15 days or the worker is dissatisfied with such decision, then the judicial procedure will start.

B. Quasi-Judicial Grievance Procedure

(i) As specified in section 25(1)(b) the grievance petition may be raised as a 'labour dispute' (either by an employer or CBA) or may otherwise be taken cognizance of as labour dispute under the provisions of the Industrial Relations Ordinance, 1969.

(ii) If the grievance is raised as a 'labour or industrial dispute', it will proceed through the stages of conciliation and mediation as provided for in the Industrial Relations Ordinance, 1969 up until the Labour Court. To be noted that the scope of this route would be limited in view of the fact that individual grievance of a worker would not be considered as a labour dispute.

C. Judicial Grievance Procedure

Judicial procedure may take two routes: Complaint to the Labour Court under section 25 of the Employment of Labour (S.O.) Act; or application to the Labour Court under section 34 of the Industrial Relations Ordinance, 1969. This second route is contemplated in second part of section 25(1)(b) though its scope would be limited.

(i) **Complaint to the Labour Court under section 25:** Section 25(1)(b) stipulates that if the employer fails to give a decision within 15 days or if the worker is dissatisfied with such decision, he may make a complaint to the Labour Court having jurisdiction, within 30 days from the last day of 15 days as mentioned in clause (a) of section 25(1) within which the employer is to make a decision. He may also file the complaint within 30 days from the date of the decision given by the employer.

(ii) **Labour Dispute and Application under section 34:** The second part of section 25(1)(b) stipulates that the grievance petition may be raised as a 'labour dispute' (either by an employer or CBA) or may otherwise be taken cognizance of as labour dispute under the provisions of the Industrial Relations Ordinance, 1969. If this is the case, then the matter will come to the Labour Court via conciliatory stages as mentioned above. Again, if this route is taken, then judicial action through section 25 of the Employment of Labour (Standing Orders) Act, 1965 would be barred. (This is because of the use of conjunction 'unless' in second part of section 25(1)(b) and as such it will go under section 34 of the IRO).

Exception to Judicial Grievance Procedure

The proviso to section 25(1)(b) makes an exception in case of termination under section 19 of the Employment of Labour (Standing Orders) Act, 1965. It states that no suit lies if a worker is terminated for a cause other than his trade union activities or for the causes other than of his termination benefits. Thus if a worker is terminated for his trade union activities or he is deprived from his termination benefits, he can file a complaint to the Labour Court. If he is terminated under section 19 for any other reasons, e.g. termination *simpliciter*, he cannot file a compliant to the Labour Court. (see detail of the Appellate Division's decision in *Managing*

Director, Rupali Bank v Nazrul Islam Patwari, 1 BLC (AD) 159, 48 DLR (AD) 62 as mentioned below).

Jurisdiction of the Labour Court and Civil Court

"If someone is found to be a 'worker' within the meaning of section 2(v), he cannot file a civil suit; his remedy lies in the Labour Court." Is there any exception to this statement?

Is section 25 of the Employment of Labour (Standing Orders) Act 1965 is a bar for maintaining a suit under section 9 of the CPC as far as labour matter is concerned?

Managing Director, Rupali Bank v Nazrul Islam Patwari, 1 BLC (AD) 159, 48 DLR (AD) 62, 15 BLD(AD) 169 (1996)

Facts: One Mr. Patwari was appointed as a security guard of Rupali Bank. While serving he was terminated from his job by an order dated 15th September 1981 by the Bank with all termination benefits. Mr. Patwari challenged the termination order in the Assistant Judge's Court, Ramgonj (ordinary civil court as opposed to special Labour Court which is normally ousted within the contemplation of the Act) and got a decree in his favour. The Bank appealed to the District Judge's Court which dismissed the appeal upholding the trial court's decision. The Bank made a revision application to the High Court Division. From the Bank side objection was raised as to the maintainability of the suit on the ground that a security guard of the Bank clearly falls within the definition of "worker" under section 2(v) of the Act and that he cannot maintain any civil suit (in other words, he can only file a suit in the labou court). The High Court Division also upheld the trial court's decision. However, the High Court Division's reasoning is very important as this has been found wrong by the Appellate Division. The learned Judge of the High Court Division held that the plaintiff was not a 'worker' within the meaning of section 2(v) as employees of the Bank are not meant for productive purposes and as such the suit by the plaintiff in the ordinary civil court was maintainable.

The Appellate Division held that the learned High Court Judge has made an error by importing qualification of the person to be employed only with the work for productive purposes. The term 'worker' as is defined in section 2(v) of the Act does contemplate not only a person to be employed in the work for productive purposes in any commercial or industrial establishment,

but also embraces a person who on being employed does any skilled, unskilled, manual, technical, trade promotional or clerical work for hire or reward, whether the term of employment be express or implied. Thus the Appellate Division held that the plaintiff was certainly a worker within the meaning of section 2(v). How could the plaintiff then file a suit in the civil court the contemplation of which is ousted in the special legislation the Employment of Labour (Standing Orders) Act 1965? The reasoning of the Appellate Division is as follows:

> "Even if the plaintiff is a worker, still the civil suit is maintainable in view of the fact that the proviso to section 25(1) of the Act does not provide him any scope for lodging any complaint seeking any redress thereunder, as the order of termination of employment of the plaintiff, although made under section 19 of the Act was not passed for his trade union activities or did not deprive him for all the benefits specified un section 19 of the Act."

Problems with the Appellate Division's Judgment:

Analyse carefully the provisions of the proviso to section 25(1) which is a 'ouster of jurisdiction' provision (otherwise called 'ouster clause') providing that no suit lies if a worker is terminated for a cause other than his trade union activities or for the cause other than of his termination benefits. Thus if a worker is terminated for his trade union activities or he is deprived from his termination benefits, he can file a complaint to the Labour Court. In other cases he does not have a remedy. ((is not it a labour dispute? Yes, in some circumstances (28 DLR (AD) 190, see pp. 89-91 of this book); then obviously there is remedy. Why should it then go to the civil court?) Think about a worker like Mr. Patwari as mentioned in the above case who is terminated not for any trade union activities or has been deprived of termination benefits. Can a worker in such a situation have any grievances? Certainly he may have. Where will he ventilate his grievances if the law does not provide for one? Because section 25 has not provided for any such scope of ventilating grievances the Appellate Division in the above case decided that maintaining a civil suit would not be barred. This is one side of the coin. It has, however, another aspect to consider seriously which has the likelihood of frustrating the purposes of a special legislation like the Employment of Labour (Standing Orders) Act 1965. The flood gate of litigation must be stopped. If the decision of the Appellate Division is correct, then certainly there is a flaw in the law; a fundamental lacunae for which the Act may be

challenged for not providing protection of rights of workers. Do you think that this is the case?

Think deeply also about the termination *simpliciter*. This point was raised by the Counsel for the appellants before the Appellate Division that the plaintiff's suit was not maintainable for want of cause of action. There was no cause of action because the Bank in the impugned order of termination had expressly allowed him all his termination benefits. However, the Appellate Division did not consider this point on the ground that the question related to the merit of the case which could not re-opened at that stage.

The proviso to section 25(1) is limited to only termination under section 19 of the Act. Thus if a worker is dismissed, discharged or suspended he will have remedy in the labour court. It is mainly in case of termination *simpliciter* that a further remedy is barred given that the terminated worker has been given all his termination benefits. This is nothing illogical. If the Appellate Division's decision is correct, then there will be flooding of litigation in ordinary civil courts and the purpose of the special law will be fraustrated. Also is the fact that termination *simpliciter* may be a labour dispute which has been decided by the Appellate Division ((28 DLR (AD) 190) and hence it is not true in spirit that section 25(1) has left a worker without any remedy.

It is to be noted with particular emphasis that the above decision goes counter to a recent decision of the Appellate Division which is as follows:

Tozammel Hossain Akonda v Deputy General Manager, Rupali Bank, 5 BLC(AD) 114 (2000)

One Mr. Hossain was appointed as an Armed Guard by the Rupali Bank on 19.01.1977 and discharged his duties honestly and faithfully. On 9.9.1981 the Bank Employees Federation for realisation of their demands went on strike. Mr. Hossain did not take part in the strike but the Bank without allowing any opportunity to explain his conduct terminated him. Mr. Hossain filed a civil suit in Additional Assistant Judge's court in Gaibanda. The learned Assistant Judge dismissed the suit on the ground that Mr. Hossain was a worker within the meaning of section 2(v) (this was proved on examination of witnesses, both oral and documentary) and as such, the civil court had not jurisdiction to try the matter. Mr. Hossain filed an appeal to the District Judge, Gaibanda who allowed the appeal setting aside the decision of the trial court. Against the decree by the Appellate court the Bank filed a civil revision to the High Court Division and a single Bench upon hearing both

the sides set aside the decree and judgment of the appellate court and upheld the decision of the trial court. Mr. Hossain filed a petition for leave to appeal in the Appellate Division. The Appellate Division dismissed the appeal upholding the decision of the High Court Division and the trial court's decision.

The reasoning of the Appellate Division's decision (ratio decidendi) was two-fold: first, Mr. Hossain was a worker within the meaning of section 2(v) and therefore his remedy lay before the Labour Court and not before the Civil Court; second, since Mr. Hossain's termination was without any stigma, a termination *simpliciter*, **there was no cause of action under section 25.**

Now, compare this decision with the decision of the same Appellate Division's decision in the above Nazrul Islam's case (*Managing Director, Rupali Bank v Nazrul Islam Patwari*) which was decided in 1996. They are certainly contradictory. Interestingly not a single decision was cited before their Lordships while arguing on points of law. Advocate for the petitioner (Mr. Hossain) argued before their Lordships the effect of the proviso to section 25(1) which left the petitioner without with no scope for filing a grievance petition. However, Their Lordships did not make any comment on this law point though it is clear from their reasoning that there cannot be any cause of action in case of a termination *simpliciter*, be it a Labour Court or ordinary Civil Court. Their Lordships made it clear that since the petitioner was a worker, his remedy lay before the Labour court and not any civil court. If this is the law laid down by the Appellate Division, then certainly the decision in Nazrul Islam's case as mentioned above would be impliedly overruled. (for detail on how overruling take place, see the author's book on *Legal System of Bangladesh*, Chapter XI).