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Discrimination Law

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Vikram Shroff

Nishith Desai
 Associates, New Delhi
 vikram.shroff@
 nishithdesai.com

Indian laws on employee and workplace discrimination and harassment

India, the world's second most populated country, possibly has the most varied cultures, religions and languages. At the same time, and unlike several developed countries, India lacks a comprehensive anti-discrimination law that can tackle all forms of discrimination. This article provides an overview of the basic laws in India that domestic and multinational companies need to know while dealing with employee discrimination and harassment issues in the workplace.

Introduction

Congenial employment conditions and fair working environments play an important role in determining a country's economic progress. Discrimination of employees on protected grounds results in creating a divide between employees and may be detrimental to the work environment. In the context of India, employment related inequality is an unavoidable repercussion of thriving discrimination on account of the above-mentioned grounds. The legislature has enacted civil and criminal laws to specifically address issues that might hinder productive work or availability of employment opportunities.

Anti-discrimination provisions under the Constitution of India

The advocacy for anti-discrimination can be traced to the innate provisions in the Indian Constitution. Article 15 prohibits the state from discriminating on the grounds of religion, race, caste, sex and place of birth in various day-to-day activities, including when it comes to providing equal employment opportunities. The Constitution does not, however, prevent positive discrimination or affirmative action that is based on discrepancies in gender, social or financial background or traditional caste-based disadvantage. It is for this reason that Article 15 also provides that the state can make

special reservation for women and socially and educationally backward classes of citizens including scheduled castes/tribes in educational institutions.¹

Further, Article 16 empowers the state to make reservations with respect to appointment for posts in favour of any backward classes of citizens if the state is of the opinion that such classes are under-privileged.

The socio-economic rights under Article 39 in Part IV of the Constitution also urges the state to ensure that citizens, men and women equally, have the right to an adequate means of livelihood, right to shelter, food, education and work.

Protection under the Equal Remuneration Act

The Equal Remuneration Act, 1976 (ERA) addresses employee discrimination issues with respect to recruitment, wages, work-transfers and promotion. It provides for payment of equal remuneration to men and women workers, for same work or work of similar nature and for the prevention of discrimination against women in the matters of employment.² Taking up the recruitment process, section 5 of the ERA prohibits the employer from devising a hiring process that puts women at a disadvantage on account of their gender. This is specifically in reference to work that is the same or similar to that which is offered to men and even in respect of transfers and promotions. The ERA also discourages the reduction of wages on purpose in order to fulfil the condition of equal remuneration.³

Protection for persons with disabilities

As a party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD),⁴ India is bound to integrate the principles embedded in the CRPD into laws that safeguard the rights of the disabled. In furtherance of this commitment, the Indian

legislature has brought forth three laws that exclusively deal with the protection of the disabled in India.

In 1995, Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act the ('PWD Act') was passed to provide equal opportunities in education, employment, social security and an unbiased atmosphere for the disabled. Section 47, for example, provides that a government establishment is forbidden from reducing an employee's rank if he or she acquires a disability during the course of their appointment. However, the employer can, alternatively, employ him/her in a different capacity provided the pay-scale (along with benefits) is not reduced. Moreover, the provision also prohibits citing disability as a reason to deny promotion to an employee.⁵

An important feature of the PWD Act is that it enlists the kind of disability that the PWD Act will address. Therefore, people with impairments not mentioned in the PWD Act have been denied the rights and entitlements recognised in the PWD Act. Therefore, the proposed Rights of Persons with Disabilities Bill, 2011 seeks to overcome the discrepancies of the PWD Act.⁶

Other than this, the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability Act, 1999 and Rehabilitation Council of India Act, 1992 are other legislations that take up protection of individuals with specified disabilities.

The standing orders – employer's rules and policies

In an effort to infuse uniformity in work conditions and clarity on terms of employment, the Industrial Employment Standing Orders Act, 1946 (IESOA) along with the central or the state-specific standing orders, prescribe standardised orders for certain industrial establishments. The IESOA seeks to ensure that all the workers are made aware of the standing orders and are adhered to by the employer in the interest of fair industrial practices. The IESOA specifically requires an employer to provide for appropriate means of redressal of complaints of workers against their unfair treatment which may result from discrimination in relation to the protected characteristics. The employer is bound to formulate 'standing orders' that are to be certified by the Labour Commissioner before being publicised to

the workers which, among other things, also ensure that the standardised process laid down under the orders takes care of any discrimination between employees.⁷

Industrial disputes

One of the most relevant labour statutes in India is the Industrial Disputes Act, 1947 (IDA). An important facet of the IDA is that it prohibits commission of unfair labour practices. The list of such practices is appended under the fifth schedule (Part I) of IDA⁸ and includes prohibition of discrimination against any worker for filing charges or testifying against an employer in any inquiry or proceeding relating to any industrial dispute or discriminating against workers by reason of them being members of a trade union, etc.

Prohibition of sexual harassment against female employees

In 1997, the Supreme Court of India took it upon itself to lay down the *Guidelines against Sexual Harassment at the Workplace* (the 'Guidelines') in *Vishaka and Others v State of Rajasthan and Others*.⁹ The Guidelines categorically lay down what constituted 'sexual harassment' and vest an obligation upon the employer (or other responsible persons) to provide for measures and procedures that will prevent and deter acts of sexual harassment done not only by persons within the establishments but third parties as well. The employer is also obligated to devise dispute resolution mechanisms and means to prosecute offensive acts.

The Guidelines also specify that women must be provided with 'appropriate work conditions' in the areas of work, leisure, health and hygiene. In the absence of an inclusive codified law that covers prevention of sexual harassment of women at the workplace, the Guidelines have come to be regarded as a law in this respect.

It is worth mentioning that, in December 2010, The Protection of Women Against Sexual Harassment at the Workplace Bill (the 'Bill') was tabled in Parliament and was eventually sent to the Parliamentary Standing Committee for discussions. The Bill seeks to provide a safe, secure and enabling environment, free from all forms of sexual harassment to every woman, irrespective of her age or employment status (other than domestic workers).¹⁰ Once enacted, it is hoped that this will soon fill up the void of a codified law on sexual harassment of women.

Protection during maternity leave

In the spirit of giving teeth to Article 42 of the Indian Constitution,¹¹ the Maternity Benefits Act, 1961 (MBA) was enacted with respect to employment of pregnant women in establishments and to provide for maternity and related benefits. The MBA protects women from dismissal while on maternity leave.¹²

Protection under criminal law

Certain offences against women are treated as crimes and are subject to actions under the Indian Penal Code, 1860 (IPC). Section 354 of IPC specifies that *outraging* the modesty of a woman either through words or gestures will attract serious consequences such as imprisonment of up to two years or a fine or both. The victim has to prove that the accused assaulted the woman (or used criminal force) with the intention of outraging her modesty. Another penal provision is section 509 that deals with *insulting* the modesty of a woman. This may be through any words, gestures, sounds or exhibition of objects done with the intention of insulting her modesty. An offence under these provisions will make the offender liable to imprisonment of one year or a fine or both. Further, section 294 of the IPC deals with the issue of harassment due to the use of obscene language or gestures. As per the provision, an individual who, to the annoyance of others, does any obscene act in any public place, or sings, recites or utters any obscene song, ballad or words, in or near any public place, may be punished with imprisonment for a term of up to three months, or with a fine, or with both.

Other laws

The Untouchability Offences Act, 1955, which in the year 1976 was renamed as 'The Protection of Civil Rights Act', made untouchability a punishable offence under law. This is in consonance with Article 17 of the Indian Constitution which abolishes the practice of untouchability in any circumstance. Section 7 of the said statute extensively addresses offences that may arise as a result of the practice of untouchability.

In 1986, the Parliament passed the Indecent Representation of Women (Prohibition) Act to prohibit indecent representation of women through advertisements or in publications, writings, paintings or figures. The Act has elaborated

on what denotes 'indecent representation' and this includes the depiction of the figure of a woman in any way such as her form or body or any part that is portrayed in an indecent or derogatory manner and which also hurts the public's moral sentiments. There are certain exceptions as well such as engravings on ancient monuments.¹³ An offence under this Act draws imprisonment of either description for a term which may extend to two years and with a fine which may extend to 2,000 rupees, and with an enhanced punishment in the event of a second or subsequent conviction.¹⁴

Conclusion

Despite the presence of these individual central legislations that cover specific aspects of equality or the lack of it, it cannot be denied that India nevertheless needs an all-encompassing anti-discrimination law that would extensively address the varied dimensions of inequality. Moreover, an important point to note is that several of these laws provide safeguards to employees in the public sector and not in private sector undertakings. On an international front, the UN Anti-Discrimination Committee has time and again reminded India to draw up a comprehensive code to tackle workplace related discrimination.¹⁵ Every effort to combat discrimination must be taken up by India as this form of social exclusion can aggravate other societal and economic problems. In fact, there has been a proposal¹⁶ to pass a new law in respect of prohibition of discrimination, especially within the workplace, against people suffering from AIDS, or HIV positive patients.

Until such time there is more legal protection available, from a human resources standpoint, employers may consider stipulating policies in terms of ensuring equal employment opportunities and to prohibit harassment and discrimination at the workplace. Care should be taken to ensure that there is adequate guidance available to the employees to enable them to resort to the internal grievance redressal procedures. The employer should also ensure that the complaint is investigated on an immediate basis and the entire proceeding is treated as confidential, as it would give more confidence to the employees to approach the management in related matters concerning discrimination and harassment.

WORKERS' COMPENSATION SCHEME AND AGE DISCRIMINATION

Notes

- 1 The Constitution (93rd Amendment) Act, 2005.
 - 2 Section 4 of the ERA.
 - 3 Section 4(2) of the ERA.
 - 4 India signed the UNCRPD on 30 March 2007 and ratified it on 1 October 2007.
 - 5 Section 47(2) of the PWD Act.
 - 6 Refer to: <http://socialjustice.nic.in/pdf/workdraftdd.pdf>.
 - 7 See: www.shrmindia.org/end-exemption-standing-orders-industrial-employment-likely.
 - 8 See: www.ilo.org/wcmsp5/groups/public/-asia/-ro-bangkok/-sro-new_delhi/documents/publication/wcms_165765.pdf.
 - 9 JT 1997 (7) SC 384.
 - 10 'Bill to prevent workplace sexual harassment tabled', *The Hindu*, 7 December 2010; see: www.thehindu.com/news/national/article937482.ece.
 - 11 The state shall make provisions for securing just and humane conditions of work and for maternity relief.
 - 12 Section 12 of the MBA.
 - 13 Section 4 of Indecent Representation of Women (Prohibition) Act, 1986.
 - 14 Section 6 of Indecent Representation of Women (Prohibition) Act, 1986.
 - 15 See: www.un.org/News/Press/docs//2007/wom1594.doc.htm.
 - 16 See: http://articles.timesofindia.indiatimes.com/2012-04-08/india/31307960_1_hiv-positive-persons-hiv-test-anti-retroviral-therapy.
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