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### ANALYSIS OF RECENT EMPLOYMENT AND LABOUR LAW CASES

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This Case Update provides a brief analysis of the recent judicial decisions delivered by the Supreme Court of India (SC) and High Court of Bombay, on certain labour and employment matters pertaining to maternity / paternity leave in surrogacy cases, wage claims by absentee employees and communication of performance appraisals to concerned employees.

➤ Surrogate Parents are entitled to Maternity and Paternity Leave

In *Dr Pooja Jignesh Doshi v. The State of Maharashtra and Another [Writ Petition No. 1665 of 2015, decided on 3 July 2019]*, the division bench of High Court of Bombay (Court) reiterated that even in case of birth of a child by surrogacy, the parents who have lent the ova and sperm, would be entitled to maternity leave and paternity leave, respectively. The Court reiterated the law laid down by the division bench of the Court in *Dr Mrs Hema Vijay Menon v. State of Maharashtra [Writ Petition No.3288, decided on 22 July 2015]*.

*Comment:* The above cases dealt with matters arising prior to 1 April 2017, at which time the government, by way of Maternity Benefit (Amendment) Act, 2017 (effective from 1 April 2017), introduced an explicit provision in the Maternity Benefit Act, 1961, providing that even a commissioning mother (i.e. a biological mother who uses her egg to create an embryo implanted in any other woman) shall be entitled to paid maternity leave of 12 weeks from the date the child is handed over to the commissioning mother. Further, the High Court of Bombay has also held that a commissioning father is also entitled to paternity leave. As of date, paternity leave is not statutorily provided in India, and is largely discretionary.

➤ Clarification on No-work No-Pay Principle

In the case of *Chief Regional Manager, United India Insurance Company Limited v. Siraj Uddin Khan [Civil Appeal No. 5390 of 2019, decided on 11 July 2019]*, the SC has reiterated that no individual can claim wages for the period that he/she remained absent without leave or justification.

In the present case, the Respondent was relieved from the Allahabad branch of the Appellant to join the Jaunpur branch of the Appellant. However, the Respondent did not join the Jaunpur branch on the assigned date and was unauthorizedly absent from work for four months. Disciplinary enquiry was conducted against the Respondent and an order for reduction of basic pay by two steps was passed in May 2009. However, the Respondent continued to be absent from work until 2012.

Consequently, the Appellant passed an order in June 2012, terminating the services of the Respondent. The Respondent preferred a series of writ petitions before the High Court of Allahabad against the above-mentioned orders. The High Court of Allahabad quashed the above-mentioned orders citing procedural lapses in the conduct of disciplinary enquiry, without specially directing the Appellant to provide back wages to the Respondent from 2009-2012. Upon refusal of the Appellant to pay back wages from 2009 - 2012, the Respondent filed another writ petition before the High Court of Allahabad. The High Court of Allahabad directed the Appellant to pay salary for the period 2009 - 2012, along with 18% interest. The Appellant preferred the present appeal before the SC against this order of the High Court of Allahabad.

The two-judge bench of the SC held that, setting aside of the termination order does not automatically entitle the Respondent to the salary for the period 2009 - 2012. The SC differentiated the present case from a situation where an employee was dismissed from service and when such dismissal was set aside, he would automatically be entitled for back wages. The SC noted that since the Respondent was not kept away from the work on account of dismissal or by any order of the Appellant, the Respondent was not eligible to claim arrears of wages. Therefore, the SC partly allowed the appeal and directed the Appellant to consider the claim of back wages of the Respondent and pass appropriate orders with reasons.

*Comment:* While the SC in this case did not conclusively determine whether the Respondent was eligible for wages or not, it referred to judicial precedents dealing with the principle of 'no work no pay'. The SC referred to the decision of the SC in *Airports Authority of India and Others v. Shambhu Nath Das [(2008) 11 SCC 498]* wherein it was held that if a person was absent from work without authorized leave or valid justification, he would not be eligible for wages for that period. On the other hand, the SC has also referred to the judgement of *Shobha Ram Raturi v. Haryana Vidyut Prasaran Nigam Limited and Others [(2016) 16 SCC 663]* wherein the SC held that where an employer has restrained the employee from working, the employer cannot plead 'no work no pay'. Therefore, the SC has attempted to reiterate that the principle of 'no work no pay' applies only in instances where the employee has voluntarily absented himself from work, and not where the employer has restrained the employee from attending work.

➤ Mandatory Communication of Annual Performance Appraisal Reports to Public Servants

In *Pankaj Prakash v. United India Insurance Company Limited and Another [Civil Appeal No. 5340-5341 of 2019, decided on 10 July 2019]*, the SC held that all public servants are entitled to know their grades in an annual performance appraisal report (APAR).

The Appellant was aggrieved by the fact that the entries in his APAR for two years were not disclosed, as a result of which he was unable to submit a representation for promotion at the particular time. The Appellant filed a writ petition before the High Court of Allahabad against such action of the employer i.e. Respondent. The High Court of Allahabad held that in the absence of an adverse entry or an entry below the benchmark, the failure to communicate the grade in an APAR did not result in an actionable grievance. The Appellant preferred an appeal against this judgment of the High Court of Allahabad.

The SC held that as per the decisions of the SC in *Dev Dutt v. Union of India [(2008) 8 SCC 725]* and *Sukhdev Singh v. Union of India [(2013) 9 SCC 566]*, it is mandatory that every entry in the APAR of a public servant must be communicated to him/her within a reasonable period. Apart from ensuring transparency in the system, such disclosures also ensure that a public servant is given reasonable opportunity to make representations against the gradings if he /

she is dissatisfied with the results. Further, the Union of India had also issued Office Memoranda on 14 May 2009 and 13 April 2010 seeking compliance by all ministries and departments. Moreover, on 19 October 2012, a specific communication was also addressed to public sector insurance companies.

Therefore, the SC disagreed with the reasoning given by the High Court of Allahabad and held that non-communication of the entries in an APAR, whether good or bad grades, is a matter in respect of which a legitimate grievance can be made by the Appellant. Accordingly, the SC directed the Appellant to communicate the details of the APAR to the Respondent within a period of one month from the date of receipt of this order.

*Comment:* While performance appraisals are essential for every organisation to function efficiently, different mechanisms are adopted by the public and private sector, respectively. Performance appraisals in the public sector are guided by specific procedures and directions issued by the appropriate government and concerned departments, which are not applicable to private sector establishments. While there have not been judicial precedents dealing with similar issues in case of private sector employers, private establishments may adopt performance appraisal procedures to ensure transparency in recording and communicating the remarks relating to an employee and conformity to the principles of natural justice.

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