

HumanCapital

REALISING BUSINESS STRATEGY THROUGH PEOPLE

Vol. 25 Issue No. 5 Oct 2021 ₹ 130

COVER STORY

**Effectuation: 7 Start-Up
Lessons For HR**

Raj Dharmaraj

Taking A Cue!

Mona Cheriyan

INTERVIEW

**Leading
Organisations To
Greatness**

Douglas Conant

PERSONA

An Agile Leader

Sanjeev Sahgal

CASE STUDY

**(Un) Justification Of
Performance Evaluation**

Dr. Prageetha G Raju



CULTIVATING A START-UP MINDSET

Quantification Of Gratuity: An Employer's Conundrum

BY JEEVAN BALLAV PANDA, RISHAV DUTT & MEHER TANDON



Of the various components of income payable to an employee under the employment laws of this country, gratuity payable to an employee is governed by the Payment of Gratuity Act, 1972 (Gratuity Act). Gratuity is essentially a sum or a benefit which is payable to an employee at the end of their tenure with an employer, proportionate to the number of years of service. Such a sum is subject to the completion of a minimum period of 4 years and 240 days of continuous service with the concerned employer (barring cases of death, where completion of the qualifying period of service is not obligatory).

In today's era of multi-national corporations which operate through their wide network of sister companies across nations, it is common for an employee based out of one country to be deputed/seconded/transferred to another location, on a temporary basis, for work. As a corollary to such deputation,

the salary structures of the concerned employee are often temporarily modified to align with the structure and quantum that is payable at their new workplace. For instance, an employee based out of an office in Mumbai may be sent to work out of an associate company's office in London, for a period of 2 years, post which he/she returns to work out of the Indian office in his/ her place of original employment. During his/ her deputation at the office in London, the employee's wages and allowances are likely to be structured as per the office in London and which may then subsequently be realigned as per the structure being followed in the office in Mumbai.

Such cross-border deputation and movement of employees gives rise to certain questions as to: -

- (a) Whether the deputation to an associate company in a foreign location implies a break in employment/ continuous service; and



(b) Whether once the gratuity amount is payable, it will be computed as per the altered components of salary paid to the employee during such deputation/ transfer/ secondment.

Determination of “Continuous Service”

As stated earlier, for an employee to be eligible for payment of gratuity, he/she must have been in continuous service with the concerned employer for a period of 4 years and 240 days. The term “continuous service” has been defined under Section 2(c) of the Gratuity Act to mean uninterrupted service and includes service which may be interrupted, amongst others, by leave or cessation of work not due to any fault of the employee concerned. However, the Gratuity Act is silent on whether gratuity is payable during the course of an employee’s secondment/deputation abroad to a sister concern/associate company by the employer. This gives rise to some form of ambiguity.

In the absence of any express provision under law, one can turn to the Delhi High Court’s judgment in the case of *Prem Sagar Sharma v Central Warehousing Corporation* reported in 1998 (45) DRJ 611. The High Court, while placing reliance on the decision of the Supreme Court in *State of Mysore v M.H. Bellary*, reported in 1964 (7) SCR 471, held that the service of an employee on deputation/foreign assignment has to be treated as equivalent to service in his parent department.

Consequently, if such secondment/ deputation is not pursuant to any severance/ termination of services by the employer, an employee cannot be denied payment for the periods during which he/she was on foreign assignment. Given the socio-beneficial nature of the Gratuity Act, a reasonable inference from the ratio laid down by the Delhi High Court would be that, even if the concerned employee is deployed to work with a sister/ associate concern of the

employer company, he/she would be considered to be in service of the employer during such period for the purpose of determining his/her eligibility for gratuity and such will be extended the benefit of gratuity.

Having established the eligibility of the employee to receive gratuity, the next question pertains to the calculation of gratuity payable, if the employee's service terminates during or just after such deputation. For instance, after 4 years and 240 days of service in India, the concerned employee is deputed to a foreign location (where his/her salary is restructured/realigned as per the new location) and during such deputation, the employee resigns, or alternatively, he/she resigns immediately post his/her return from such deputation. The underlying reason for such question is the likely difference in the salary which is last drawn by the employee during his/her tenure with the employer in India as compared to the one during his/her deputation with the foreign affiliate or associate entity (outside India).

Quantification of Gratuity

The Gratuity Act stipulates that the gratuity is payable to an employee in respect of his/her 'last drawn salary' or 'last drawn wages' actually drawn by the concerned employee. The term 'wages' has been defined under the Gratuity Act to mean, "*all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other employment.*" The term 'wages' is to be construed synonymously with the term 'salary'.

On a bare reading of the relevant provisions of the Gratuity Act, there cannot be any scope to declassify the different salaries paid to the employee, to contract out of the express provisions and pay an *ad-hoc* sum of rupees as a gratuity. It is trite law that payment of gratuity is a statutory obligation and the same cannot be waived. Even hypothetically, in the event the employee agrees to accept gratuity payment computed at different last drawn salary for each period (*i.e.*, tenure in India and during deputation), the same may be amenable to challenge and is prone to risk.

In case of such a challenge or complaint before any authority or court, the terms of the agreement, to the extent they are contrary to his entitlement under the Gratuity Act, would be construed to be wrongful, illegal and not binding. While the general principle of law is that a statutory right can be waived if it is a private right, the labour legislations in India, being beneficial in nature, explicitly provide otherwise. In the same vein, the Gratuity Act, under Section 14, expressly bars a person from contracting out of the statutory right that has been granted. This provision has also been retained under Section 161 of the Code on Social Security, 2020 proposed to be implemented in the near future (barring Section 142 thereof which is already in force).

Further, the law stipulates that gratuity shall have to be paid on the last drawn salary of the employee keeping in mind the principle of continuity in employment. In such a case, the employer cannot segregate or cull out the salary based on any increase or decrease in the salary when its employees are engaged on an assignment with a foreign affiliate or associate entity, especially when

the employee was on deputation at the instance of the employer. Consequently, the amount of gratuity payable to the employee concerned ought to be computed strictly on the basis of the last drawn salary irrespective of whether the same was lesser or higher vis-à-vis the last drawn salary which such employee was drawing at the time of his service period within India (before his deputation).

Keeping the above conundrum in mind, employers must be mindful that they are well within their rights to restructure the salary components of employees in such a manner so as to avoid any enhancement in the gratuity liability. In other words, for those employees who are deputed to affiliates and associate entities (outside India) resulting in some components of the salary being added to the basic pay, resulting in a higher outflow in the form of gratuity, it may be advisable to consider structuring the compensation paid to the employee, so that the liability of gratuity payment does not change. This position, of course, would be subject to revisiting upon the implementation of the labour codes, and the Code on Social Security, 2020 in particular.



Views expressed in this article are personal and are not to be attributed to the Firm in any manner.

About the Authors

Jeevan Ballav Panda is a Partner with the Dispute Resolution and the ELB Team of Khaitan & Co. He can be reached at jeevan.ballav@khaitanco.com.

Rishav Dutt is a Principal Associate with the Dispute Resolution and the ELB Team of Khaitan & Co. He can be reached at rishav.dutt@khaitanco.com

Meher Tandon is an Associate with the Dispute Resolution and the ELB Team of Khaitan & Co. They can be reached at meher.tandon@khaitanco.com.



Q Which are the establishments that the Payment of Gratuity Act 1972 (Act) apply to?

A The Act is applicable to every factory, mine, oilfield, plantation, port and railway company; shop or establishment as defined under the applicable state specific Shops and Establishments Act or as notified by the Central Government, in which ten or more persons are employed or were employed, on any day of the preceding twelve months.

Q How can an employer treat the number of months for the purpose of gratuity calculation after a completion of 5 years?

A For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned. To clarify, at the time of calculation of gratuity, if an employee has worked for six years and seven months, then the gratuity amount shall be determined on the basis of seven years of service. On the other hand, if an employee has worked for six years and five months, then the gratuity amount shall be determined on the basis of six years of service.

Q What is the maximum gratuity amount/benefit that an employee can receive?

A As per notification S.O. 1420 (E) published in the Gazette of India dated 29th March 2018 and in exercise of the powers conferred by sub-section (3) of Section 4 of the Payment of Gratuity Act, 1972, the Central Government has specified that the amount of gratuity payable to an employee under the said Act shall not exceed twenty lakh rupees.

Q Can gratuity benefit be withheld by the employer?

A The gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer may be withheld/forfeited to the extent of the damage or loss so caused. Additionally, the gratuity payable to an employee 18[may be wholly or partially forfeited if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

Q What is the penalty for violation of the provision of the Act and the Rules framed thereunder?

A An employer who contravenes, or make default in complying with, any of the provisions of this Act or any rule or order made thereunder is punishable with imprisonment for a minimum term of three months extendable up to one year, or with a minimum fine of ten thousand rupees extendable up to twenty thousand rupees, or with both.

Additionally, whoever, for the purpose of avoiding any payment to be made by himself under this Act or for enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation is punishable with imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.

