

WORKPLACE DISCRIMINATION AND LAW: A COVID-19 PERSPECTIVE

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ABSTRACT

Discrimination is defined as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin (among other characteristics), "which has the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation".³ Since independence even though the Government of India has attempted to curb discrimination at workplace it still runs rampant among the country's workforce. Today, employees in India are facing a higher risk of being discriminated against as various labour laws are being rolled back due to the current COVID-19. This research article focuses on how India's workforce can be protected against the evil of discrimination.

Key words: Workplace, discrimination, COVID-19, law.

INTRODUCTION

Discrimination is prejudicial treatment in the workplace, which may affect hiring, firing, promotions, salary, job assignments, training, benefits and/or layoffs, based on a person's age, gender, sexual orientation, race, religion, national origins or disabilities. "Non-discrimination as a business practice has a special relevance in the context that discrimination is incompatible with human dignity, equality, human rights and justice in particular", Karandeep Bhagat from Centre for Social Equity and Inclusion said. India like many other countries does not have a specific legislation that deals with workplace discrimination, it has however enacted several labour laws that prohibit the various types of discrimination that exist in the country. The workforce of the country took the biggest hit when the Government imposed the nation-wide lockdown, extending for 2 months, in lieu of the coronavirus pandemic that shook the world economy. In such a contingency the centre as well as the state governments are taking rapid and flustered decisions

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to revive the economy and remedy the sudden unemployment. The question that is attempted to answer through this research article is, whether during the current state of affairs workplace discrimination can be allowed for the larger good of reinvigorating the plight of the economy.

TYPES OF WORKPLACE DISCRIMINATION

An employee is said to face discrimination in the workplace when he/she is treated unfavorably or by bias. There are many ways by which an employee or an applicant may face unfavourable or bias treatment. According to a survey made by TeamLease, 48 % of Indians have faced some kind of discrimination or the other at the workplace. Most of the biases are based on gender (25%), age (22%) and caste/religion (18%). Amongst the cities, employees in Delhi, Pune and Chennai faced the highest rate of discrimination, while employees in Ahmedabad faced the lowest amount of discrimination. Surprisingly, only 30 % of the surveyed companies stated that they have a clear policy on discrimination. The different ways or types of discrimination in employment include:

1) Age

This kind of discrimination happens when employers decide based on age stereotypes. Selection of only young applicants for jobs is an example of such discrimination.

2) Disability

Employees cannot be discriminated against on the basis of their disabilities if any. Disability cannot be a sole criteria for denial of jobs or termination thereof unless the jobs require physical expertise and if there is a valid reason to do so. Moreover it is the duty of the employers to take care of such employees.

3) Race

Discrimination based on race or colour is banned in the workplace. This applies to both employees and applicants.

4) National Origin

It is forbidden to discriminate against an employee or applicant based on his ethnic background.

5) Pregnancy

Discrimination against women in workplace due to pregnancy is a violation of their rights. Pregnant women must be treated equally with other employees with respect to the work they do.

6) Religion

Discrimination against employees based on their religion is a violation. The employers must accommodate employees irrespective of their religion as long as it does not present an undue burden to him/her.

7) Sex

Sex discrimination happens when employees are treated unfairly based on their gender identity. The transgender community faces a lot of gender discrimination in the workplaces.

8) Sexual Harassment

Unwelcomed verbal or physical sexual advancements or request for sexual favours is termed sexual harassment and the same is illegal in the workplace.

9) Sexual Orientation

Sexual orientation is the gender to which a person is attracted to sexually. This type of discrimination mainly deals with the rights of the LGBTQ community.

10) Equal Pay

Each and every employee is expected to be paid equally for their work irrespective of their age, race, religion, gender, national origin or sexual orientation.

LEGISLATIVE BACKGROUND

India has a comprehensive framework of employment legislation, which is aimed to provide social justice to the working class. The inception of laws against the discrimination of the

working force arises from the supreme law of the land, the Indian Constitution. Article 14 of the Indian Constitution guarantees the right to equality according to procedure established by law.⁴ Article 16, of the Indian constitution states that No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.⁵ The socio-economic rights guaranteed by the Directive Principles of State Policy urges the state to ensure that citizens, men and women equally, have the right to an adequate means of livelihood and right to work.⁶ In 73 years of being the largest democracy the Indian legislature has enacted various laws and policies to curb workplace discrimination of all kinds. There is, however, no uniform, centralized law that provides victims of workplace discrimination in the private sector with a legal recourse. As mentioned before there are sector specific laws that deal with particular types of discrimination in the workplace.

The earliest Act that dealt with discrimination is the Industrial Disputes Act passed in 1947. One of the most important aspects of the IDA is that it prohibits labour practices that are unfair in nature. The list of such practices is appended under the fifth schedule (Part I) of IDA⁷ 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. Discrimination in the payment of compensation to the employee which includes salary, overtime pay, bonus stock options, life insurance and other benefits existed unnoticed and unaccountable in India until the Parliament passed the Equal Remuneration Act in 1976. 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.⁸

With regards to discrimination in workplace one of the most progressive Acts passed was that of the , Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act which establishes in unambiguous terms that there shall be no discrimination in Government

4 Article 14, Constitution of India

5 The Constitution (93rd Amendment) Act, 2005.

6 Article 39, Constitution of India

7 www.ilo.org/wcmsp5/groups/public/---asia/---robangkok/---sro-new_delhi/documents/publication/wcms_165765.pdf

8 Section 4, Equal Remuneration Act

employment against persons with disabilities. The RPD Act includes private companies in the definition of ‘establishment’⁹, and there is an argument to be made that the ‘non-discrimination for promotion’ principle may apply to private entities too.¹⁰ Therefore, every establishment is required to formulate an ‘Equal Opportunity Policy’, and every Government establishment must appoint a Grievance Redressal Officer as well .

As mentioned above gender discrimination is the most rampant form of employment discrimination. Specific aspects of women equality are mentioned in the Constitutional laws but anti-discrimination code is missing. Sexual harassment is the most egregious form of discrimination against women. In recognition of this, The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act 2013 (“PoSH Act”) empowers the Internal Complaints Committee to recommend a compensatory sum to be deducted from the wages of the perpetrator and provided to the victim. PoSH Act is fully applicable to private sector organisations,¹¹ and is currently the only legislation in India entitling a victim of discrimination in the workplace to avail of compensation, even if such discrimination does not occur at the hands of the employer himself. The Maternity Benefit Act 1961 (“MB Act”) aims to provide paid maternity leave to women employees and related aspects. The MB Act prohibits termination of employment of pregnant woman employee and mandates maternity benefit to such women.

JUDICIAL INTERPRETATIONS

Every citizen has the right to live with human dignity and it is the duty of the state to protect this right as said in *Maneka Gandhi v. Union of India*.¹² One of the earliest cases on employment discrimination and the first ever case on discrimination against women in workplace was *Vishaka v. State of Rajasthan*.¹³ Opposed to what one might think, over the years several other types of employment discrimination cases have come in. Unlike what it would mean normally, in India, the reasons for employment discrimination still existing are not that there are no legislations on the matter. The fact that these matters still persist only shows that the

9 Section 2(I)

10 Section 20(3)

11 Section 2(o)(ii)

12 1978 AIR 597

13 (1997) 6 SCC 241

implementation process is not very efficient. The judiciary in its role as the final protector of employee rights(as they are the ones who are mostly discriminated) against discrimination has done its best to keep a constant check on both legislations and their implementation. In *Air India v. Nargesh Mirza*¹⁴, a clause was struck down because it gave unquestionable powers to the Managing director of the company. The court found that “the words 'at the option' are wide enough to allow the Managing Director to exercise his discretion in favour of one Air Hostess and not in favour of the other which may result in discrimination.” Regulation 47 which said so was accordingly struck down. The Delhi HC in its most recent judgement on 12th May, 2020¹⁵ held that people with mental illness cannot be discriminated in matters of employment and declared a candidate with bipolar disorder as fit for judicial service.

One must agree that many judgements of the courts have helped in reducing discrimination in employment, if not completely eradicated. But it is to be noted that these discriminations have increased in times of diseases/pandemics in the past. In times of a disease/pandemic, courts themselves have discriminated by carrying or establishing a stigma. For example, in a 1913 case in India, where the matter for discussion was what kind of leprosy was grounds for divorce, one judge stated “deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test.”¹⁶ This appalling line has been widely cited and relied upon by subsequent courts, including as recently as 1974.¹⁷ There have been many cases in India where people have been denied employment or terminated from their employment after they were found to have HIV/AIDS.¹⁸ The US supreme court in the case of *Wong Wai v. Williamson*¹⁹, struck down a resolution during the bubonic plague that quarantined Chinese citizens alone as according to them, “that particular race was more liable to the plague than any other”²⁰.

COVID-19 AND IT'S IMPACT

14 1981 AIR 1829

15 Bhavya Nain v. High Court of Delhi

16 Madras High Court, Kayarohana Pathan v Subbaraya Thevan (1913)

17 Swarajya Lakshmi v GG Padma Rao (1974 AIR 165)

18 Chhotulal Shambahi Salve v. State of Gujarat; Mr. Badan Singh v. Union of India(2002 (64) DRJ 849)

19 103 F. 1 (N.D. Cal. 1900)

20 Id. at 15

COVID-19 is severe acute respiratory disease caused due to infection from the novel corona virus which originated from Wuhan province in China and has now turned into a global pandemic. Within three months from its first instance, COVID-19 has spread across the globe and has already started causing severe economic repercussions. The ILO in its report, describes COVID-19 as ‘worst global crisis since World War II’.²¹ As COVID-19 continues to spread, countries are enacting legislation and issuing guidance to support employers and employees as they confront the global crisis. In particular, Brazil, with a population of over 211 million, and India, with a population of approximately 1.3 billion, each has enacted measures to combat the ongoing economic and financial troubles caused by the COVID-19 pandemic. Taking notes from other countries and after deciding it is the only way to control the pandemic, the Indian Government imposed a nation-wide lockdown on March 24th, 2020.

The lockdown has indeed resulted in massive economic disruption. For an economy that was already in the grip of a slowdown, the near-closure of almost all activity has meant a steep rise in unemployment. According to the Centre for Monitoring Indian Economy (CMIE) over 120 million Indians have lost their jobs, with three-fourths of them being small traders and wage labourers. The number of unemployed will only go up in the medium-term. India has imposed broad employee protections that require employers to bear the heavy economic burden to support employees during the national lockdown. The Ministry of Home Affairs has issued an order dated March 29, 2020²², among other things, directing all public and private establishments to make payment of wages to their workers without any deduction for the duration of the lockdown. While several employers have been providing work from home facilities to their employees during the lockdown period, due to the uncertainty over the scope of the COVID-19 public health emergency and the impact on the economy, employers are now considering options for saving labour costs for business viability reasons, including by reducing salaries of employees and/or terminating their employment.

In a desperate attempt to revive the economy, states are rolling back or suspending various labour laws within their territories. The Uttar Pradesh government approved an ordinance to exempt various industries from certain labour laws for three years to revive the state's economic

21 ‘ILO Monitor 2nd edition: COVID-19 and the world of work’

22 The Order, March 29th, 2020, Ministry of Home Affairs

activities. Madhya Pradesh government announced some startling labour law exemptions to new investors for 1,000 days. Gujarat has extended the time period in its territory up to 1200 days followed by Assam and several other states.

Suspending all but a few labour laws by states governments such as UP and MP is an understandable contemporary reaction to the massive unemployment and production slowdown over the last two months but it is a known fact that these labour laws are what provide specific protection to the employees against impending discrimination. Although the constitution has provisions that prohibit discrimination at workplace, those provisions apply only to Government jobs and postings, private sector employees on the other hand are only protected by the various labour laws that are existent. As we have discussed above Indian employees face discrimination in various forms, women not only face discrimination but they also face harassment at workplace. Once these protective laws are rolled back, private sector companies are given the full authority to exercise their choice without the caution of anti-discrimination.

INTERNATIONAL ACTIONS ON WORKPLACE DISCRIMINATION

The United States of America has been the worst hit by the Coronavirus pandemic. It has also carried along with it various kinds of discrimination and xenophobia, especially against Asian-Americans in the workplace. There have been cases in the US where people of Asian origin have been cursed at, spit on or purposely avoided. The USA has seen a lot of such pandemic situations in the past and has a fair idea of how to deal with such situations in the workplace during a pandemic. The EEOC has released a set of guidelines²³ regarding the impact of COVID-19 in the workplace and guidance has to how to deal with it. This pandemic publication was made during the prior H1N1 outbreak and has been released with a few updates for the COVID-19 situation. Recently, Janet Dhillon²⁴ warned that discriminative actions in the workplace could result in “unlawful discrimination on the basis [of] national origin or race.” The Asian Pacific American Labor Alliance in Washington, D.C. has also released certain guidelines for its workers to prevent them from facing discrimination.

23 Pandemic Preparedness in the Workplace and the Americans With Disabilities Act

24 The chair of the Equal Employment Opportunity Commission

The International Labour Organisation, in its policy brief on impacts and responses during COVID-19²⁵, has laid down its guidance to protect workers in the workplace. The brief said, “Protecting workers is more challenging than usual, particularly for workers in diverse forms of employment and in the informal economy”. It also mentioned that a large majority of women lack adequate labour and social protection. Many of these people are young and come from particular groups. They already face a lot of discrimination at work, such as people with disabilities, indigenous peoples, people living with HIV or migrants²⁶.

HOW TO PREVENT DISCRIMINATION

Discrimination in the current climate could arise in relation to worker protections, paid time off, job protections, reasonable accommodations, or harassment. It is however the duty of the employers and the Government to ensure that even in such dire times the employees do not face any sort of discrimination and even if classifications are made they should be reasonable and not discriminatory in nature.

1. An employer can implement different measures for employees based on whether they pose a risk of infection, such measures should be implemented in a manner that does not discriminate based on these protected classifications.
2. It is the responsibility of the employer to prevent and protect employees from any harassment, including those suspected of being infected.
3. Following the example of the United States of America, The Equal Opportunity Commission in India should also take active steps to ensure that opportunities provided are not on the any discriminatory basis
4. The State Governments should ensure that although labour laws are being suspended or amended, no discrimination results out of such and action and those clauses that provide recourse for discrimination should be held intact.
5. All employees must be made aware of their rights against unfair discrimination and they should be provided with legal remedies in case they face any sort of unreasonable discrimination

²⁵ https://www.ilo.org/global/topics/coronavirus/impacts-and-responses/WCMS_739049/lang--en/index.htm

²⁶ ILO [Policy Brief: Protecting migrant workers during the COVID-19 pandemic](#) (April 30, 2020)

6. Women who face not only discrimination but also harassment should be given appropriate protection and security in their workplace and in no circumstance should the sexual harassment at workplace be breached.

CONCLUSION

India is the second largest country in the world in terms of population and the most ethnically diverse subcontinent. With over 10 million people employed in the private sector alone there has always been a lot of room for direct or indirect discrimination against various sects of the society. In 2 months of lockdown the Indian economy has taken a hit like never before and the ultimate burden has fallen on all the employers trying to revive their businesses. However, such a situation has also become a chance or rather provided a free path for those keen on misusing the circumstance and practising discriminatory methods. The authors of the paper strongly believe that even in times wherein the economy is plunging and employers are struggling to accommodate their employees, it does not excuse the recourse to discrimination.