

Subsistence Allowance- Study of Labour Laws of regulating Interim Measures

The term subsistence allowance refers to the allowance which is paid to a workman^[1] when he is suspended due to allegations of misconduct, and the investigation or inquiry into the allegations of misconduct is pending. The nexus behind providing this allowance is two-fold, one is to ensure that the suspended workman and his family do not face economic hardship during the pendency of inquiry, and on the other hand it also ensures that the employer completes the inquiry process timely and without any unnecessary delay.

Although the term subsistence allowance has not been defined in the statute, however, Section 10-A of the Industrial Employment (Standing Orders) Act, 1946 lays down the guidelines and circumstances when an employer is required to pay subsistence allowance to the workman and it states the following:

“10-A. Payment of subsistence allowance.--(1) Where any workman is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such workman subsistence allowance-

(a) at the rate of fifty per cent of the wages which workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension; and

(b) at the rate of seventy-five per cent of such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.

(2) If any dispute arises regarding the subsistence allowance payable to a workman under sub-Section (1), the workman or the employer concerned may refer the dispute to the Labor Court, constituted under the Industrial Disputes Act, 1947 (14 of 1947), within the local limits of whose jurisdiction the industrial establishment wherein such workman is employed is situate and the Labor Court to which the dispute is so referred shall, after giving the parties an opportunity of being heard, decide the dispute and such decision shall be final and binding on the parties.

(3) Notwithstanding anything contained in the foregoing provisions of this Section, where provisions relating to payment of subsistence allowance under any other law for the time being in force in any State are more beneficial than the provisions of this Section, the provisions of such other law shall be applicable to the payment of subsistence allowance in that State.”

From the aforementioned Section the following salient features of subsistence allowance is derived:

1. Subsistence allowance is paid when the workman is suspended pending investigation/inquiry into complaints or charges of misconduct against him.
2. The allowance is paid at the following rate:
 1. @50% of his wages for the first 90 days of suspension.
 2. @75% of his wages for remaining period of suspension, if delay is not attributable to conduct of workman.

Therefore, mere perusal of the aforementioned Section will reveal that subsistence allowance may be granted only when the **workman is suspended** and an **investigation/inquiry into charges of misconduct is pending** before the employer. However, it has also been observed that many a times an employer fails to make payment of subsistence allowance during the period of suspension, and then it is later on claimed by the workman along with interest, if the workman decides to challenge his termination before a Court. Therefore, in order to avoid such a situation, it becomes necessary that an employer ensure that a workman is duly paid the allowance during the term of his suspension pending inquiry.

Scenarios requiring departmental enquiry and payment of subsistence allowance:

1.

1. **Retrenchment:** Retrenchment, as defined under the Industrial disputes Act, means termination of the service of a workman by the employer for any reason whatsoever, **otherwise than as a punishment inflicted by way of disciplinary action**, but does not include—

- (a) Voluntary retirement of the workman; or
- (b) Retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;
- (c) Termination of the service of a workman on the ground of continued ill-health;[\[2\]](#)

Therefore, the definition itself defines retrenchment as a case where no departmental enquiry is held by the employer and the workman is terminated straight away. So, in cases of retrenchment where no enquiry is conducted by the employer, then the workman does not have any right to claim subsistence allowance.

It is also to be noted that there are various conditions precedent to retrenchment of workmen, which needs to be followed:

1.

1.

- 1. The workman has been in continuous service for not less than one year under an employer.
- 2. Workman has been paid, at the time of retrenchment, compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months
- 3. Notice in the prescribed manner is served on the appropriate Government.

2. **Termination:** As stated above, where an workman is terminated due to allegations of misconduct (as prescribed under the Company's standing orders),

then a departmental enquiry is required to be held, and as per Section 10-A of the Industrial Employment (Standing Orders) Act, 1946, the subsistence allowance is to be paid necessarily pending investigation/inquiry into the allegations of misconduct. However it is to be noted that before the employer prescribes the applicable sanction (proportionate to the misconduct), the misconduct must first be proved through an internal disciplinary enquiry process based on the principles of natural justice. Once the misconduct is established through a formal enquiry, an employer can terminate employment as a sanction, provided that the sanction applied is proportionate to the gravity of the misconduct[3].

It is also to be noted that suspension during enquiry proceedings is a security measure, and is only warranted in cases where the workman's presence in the workplace may lead to:

1.

1.

1. Evidence tampering.
2. The workman might create unpredictable difficulties in conducting an impartial enquiry into the charges levelled against them.
3. Adverse effect on the morale of the other workmans; or
4. Further loss to the company.

2.

1. **Termination due to abandonment of services:** Various judgments as passed by the Supreme Court have iterated that when absence from the duty is for a very long period, it may amount to voluntary abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer, **and in such cases there is no need for holding any enquiry by the employer and consequently paying the subsistence allowance**[4].
2. **Termination due to Redundancy:** Redundancy of position is very much a valid ground for termination of employment[5]. Courts have in the past upheld redundancies on account of reasons such as:
 1. Particular type of business activity ceases to exist.
 2. Automation and technological advancements.
 3. Corporate restructuring, as in the case of a merger and acquisition (M&A).

Although there is no clear cut guideline for paying subsistence allowance under such a termination, however, it is critical that by way of adequate documentation the following is demonstrated:

1.

1.

1.

1. Relevancy of the role, and its elimination due to relevant business reasons.
2. Guideline for selection and shortlisting of each workman.
3. No possibility of re-training the workman, or providing other opportunities by way of an internal transfer.

If the aforementioned criteria is fulfilled by way of adequate documentation, then the need for holding and enquiry and paying subsistence allowance do not arise. It is necessary that a foolproof case of redundancy is made before termination. Although not legally required, it helps in demonstrating the bona fides of an employer, and the genuineness of the reasons behind the termination should the workman challenge the termination in a Court of law or if they raise an allegation of victimization.

1.

1.

2.

3. **Termination due to non-performance:** There are no specific list of performance or capability reasons for which an employer may terminate the employment. Typically, in cases of non-performance, it is advisable to document the following:

1.

1. Workman's non-performance.
2. Regular feedback has been provided to the workman regarding the non-performance in writing.
3. Opportunity has also been provided to improve performance

Although not a legal requirement, typically a performance improvement process is implemented, whereby the employer's performance is documented. A performance improvement plan may be helpful to prove that the employer made sufficient efforts by providing opportunity to improve performance before the decision for termination was taken. There is no legally stipulated period for the performance improvement process, but it generally ranges from 30 to 60 days. If the workman consistently fails to show improvement in performance, the employer may adequately document this and initiate a process of termination, if deemed necessary.

It is to be noted here that termination due to non-performance is different from termination due to misconduct^[6]. Therefore, in cases of non-performance, once proper

documentation is done then there is no need for conducting an enquiry, suspending the workman pending enquiry, and thereby paying of subsistence allowance to the workman.

3. **Lay-off:** Under the Industrial Disputes Act, 1947 a workman is said to be laid-off when an employer fails, refuses or is unable to provide employment to the workman whose name is mentioned in the muster roll of an industrial establishment due to reasons beyond the employer's control. These reasons generally include insufficiency of raw material, accumulation of stocks, breakdown of machinery, natural calamity or any other same or correlated reason.

Under the Industrial Disputes Act, 1947, there are provisions regarding compensation to the workman in certain circumstances that allow the workman to avail compensation from the employer, subject to some restrictions. The workman is allowed to take compensation from his employer if he has been laid off under the ambit of Section 2 (kkk) of the Act, subject to certain conditions that need to be fulfilled.

Therefore, in case of lay off wherein specific provisions for compensation to the workman are given, then there arises no consideration of paying of subsistence allowance, as there is no specific need to suspend the workman and hold a departmental enquiry before laying him off.

Conclusion

In conclusion, it all necessary boils down to the fact that whether there are any allegations of misconduct against the workman. For cases of misconduct, it becomes necessary for the employer to hold departmental enquiry before terminating the workman. Further, if the employer finds that impartial enquiry cannot be held if the workman reports at the workplace, then the employer may suspend the workman pending enquiry and then only, the payment of subsistence allowance arises.

Therefore, if the workman is not suspended, then there is no need of paying subsistence allowance to him, and the same cannot be demanded by workman or granted by the Labor Court. In summary, the different instances as discussed above are as follows:

1. **Retrenchment:** The definition itself defines retrenchment as a case where no departmental enquiry is held by the employer and the workman is terminated straight away. So, in cases of retrenchment where no enquiry is conducted by the employer, then the workman does not have any right to claim subsistence allowance.
2. **Termination:** As per Section 10-A of the Industrial Employment (Standing Orders) Act, 1946, the subsistence allowance is to be paid necessarily pending investigation/inquiry into the allegations of misconduct.
3. **Termination due to abandonment of services:** When absence from the duty is for a very long period, it may amount to voluntary abandonment of service and in such cases there is no need for holding any enquiry by the employer and consequently paying the subsistence allowance.
4. **Termination due to Redundancy:** Although there is no clear cut guideline of holding enquiry under such a termination or paying subsistence allowance, however, it is critical

that the employer demonstrates relevancy of the role, non-possibility of re-training the workman etc. The employer should create a foolproof case of redundancy before employment termination.

5. Termination due to non-performance: Termination due to non-performance is different from termination due to misconduct, therefore, once proper documentation is done then there is no need for conducting an enquiry, suspending the workman pending enquiry, and thereby paying of subsistence allowance to the workman.
6. Lay-off: In case of lay off wherein specific provisions for compensation to the workman are given, then there arises no consideration of paying of subsistence allowance, as there is no specific need to suspend the workman and hold a departmental enquiry before laying him off.

[1]As defined under Section 2(s) of the Industrial Disputes Act, 1947

[2] Section 2 (oo) of the Industrial Disputes Act, 1947

[3] *B.C. Chaturvedi v Union of India*, (1995) 6 SCC 749)

[4] *Vijay S. Sathaye v. Indian Airlines Ltd.*, (2013) 10 SCC 253, *Syndicate Bank v. Staff Assn.*, (2000) 5 SCC 65, *Aligarh Muslim University v. Mansoor Ali Khan* (2000) 7 SCC 529, *Banaras Hindu University v. Shrikant* (2006) 11 SCC 42

[5]*India Type and Rubber Co v Their Workmen*, AIR 1958 Mad 205.

[6]Abhujit Gupta vs S.N. B. National Centre, Basic Sciences, 2006 (4) SCC 469