

7. Employment related statutes including dispute resolution and collective agreements

The concept of Employer and Employee relations first originated from the Master and Servant relationship in England in early times. The initial judicial decisions related to Domestic employment. In modern times, the situation is quite different and we also have the United Nations body – namely the International Labour organization (ILO) situated in Geneva, spearheading the cause of labour and better relations and harmony between Employers and their employees. Sri Lanka is a respected member of the ILO because our standards of industrial law are very high when compared to other countries in our region. It is truly said that Sri Lanka leans in favour of the protection and well-being of our workers even at the expense of productivity. An obvious example is that we do not permit a “hire and fire” policy that employers in many foreign countries enjoy.

Overview of Sri Lankan legislation on Labour

Legislation in Sri Lanka relating to Industrial, Employment and Labour relations can be divided into seven categories as follows;

1. Laws on Social Security

- i. Employees provident Fund Act
- ii. Employees Provident Fund (Special Provisions) Act
- iii. Employees Trust Fund Act
- iv. Employees Trust Fund (Special Provisions) Act
- v. Payment of Gratuity Act

2. Laws on Welfare and Well-being of Employees

- i. Employment of Women, young Persons and Children Act
- ii. Maternity Benefits Ordinance
- iii. Employment of Females in Mines Act

3. Occupational safety and health and Workmen’s compensation

- i. Factories Ordinance
- ii. Workmen’s Compensation Ordinance

4. Laws relating to terms and conditions of Employment

- i. Wages Board Ordinance
- ii. Shop and Office employees’ (Regulation of Employment and Remuneration) Act
- iii. Employment of Trainees (Private Sector) Act

5. Labour relations

- i. Trade Union Ordinance
- ii. Employees Councils Act
- iii. Industrial Disputes Act
- iv. Termination of Employment of Workers (Special Provisions) Act

6. Law relating to Plantations and Estate labour

- i. Estate Labour (Indian) Ordinance
- ii. Medical Wants Ordinance
- iii. Indian Immigrant Labour Ordinance
- iv. Minimum Wages (Indian Labour) Ordinance
- v. Trade Union Representatives (Entry in Estates) Act
- vi. Estate Quarters (Special Provisions) Act
- vii. Allowances to Plantation Workers Act
- viii. Services Contracts Ordinance

7. Foreign Employment

- i. Sri Lanka Bureau of Foreign Employment Act

We now discuss each of the above areas of legislation highlighting the main provisions.

Laws relating to Social Security

Social Security of employees are addressed by three main mechanisms. They are the Employees' Provident Fund, Employees' Trust Fund and the Gratuity Fund. By them employees are granted financial benefits upon completion of a statutory period of service, change of employment or reaching the retirement age.

Employees Provident Fund (EPF)

Employees Provident Fund was established by Act No. 15 of 1958. Since then there have been nine Amending Acts on the subject. Employers have to remit every month to the Central Bank, an amount equivalent to 20% of the employee's total earnings to the Fund. The Employee's contribution is 8% and the Employer has to contribute an amount equivalent to 12% of the employee's total earnings.

"Earnings" include wages, cost of living allowances and similar allowances, payment in respect of holidays and leave, cash value of food provided by the employer and meal allowance but excludes overtime payments. Payments for work done during normal working hours on weekly holidays, Poya days or public holidays should also be considered as earnings for the computation of EPF contributions. Failure to remit EPF results in surcharges ranging from 5% to 50%.

Employees Trust Fund (ETF)

The Employees' Trust Fund Act No. 46 of 1980 (as amended) obliges the employer only to contribute monthly 3% of the employee's total wages to the Trust Fund created under it.

Gratuity

“Gratuity” to an employee is over and above the EPF and ETF payments discussed above and is governed by the Payment of Gratuity Act No. 12 of 1983. A gratuity is a lump sum payment made in recognition for services at the end of a period of employment.

Under the Act any employer who has employed more than 15 workmen in any industry during the twelve months preceding the termination of the workman in question, is required to pay a gratuity to that workman if he has completed five years of service under him. The amount for monthly paid employee is calculated at the rate of half a month's salary for each completed year of service. Gratuity is also payable to workmen who are paid weekly or daily, at the rate of 14 days salary for each completed year of service.

Gratuity is payable whether termination was by the employer or employee, except if the termination was for reasons of fraud, misappropriation of the employer's money or willful damage to the employer's property, the amount of the loss or damage may be deducted from the amount of gratuity due under the Act. If the workman dies while employed, any gratuity due to him must be paid to his legal heirs.

Laws relating to Welfare/Well-being of the Employees

Employment of Females in Mines Ordinance

No female of any age at any time, who have not been exempted by regulation, shall perform or be employed on any underground work in a mine or enter a mine for the performance of any work.

Maternity Benefits Ordinance

This is a law that was first enacted as far back as 1939. Subsequently, there were seven other amending Acts passed in this regard from 1952 to 1985.

An employee is restricted from knowingly employing any women during the period of four weeks immediately following her confinement.

“Maternity benefits” mean the amount payable under the provisions of this Ordinance to a woman worker. A woman worker who has no children or has only one child is entitled to a period of twelve weeks for which maternity benefits must be paid by the employer. However, in the event the woman has two or more children, she will be entitled for a 6 weeks period of maternity benefits.”

Employment of Women, Young Persons and Children Act

There are three Acts on this subject. They are in relation to employment of Women, Young Persons and Children at,

- Night
- Industrial Undertakings and at sea
- Other than Industrial Undertakings and at sea.

Employment of Women and Young Persons at Night

The legislation prohibits employment of any person under the age of 18 years at night whether in a public or private industrial undertaking or branch.

Women can be employed at night subject to certain basic requirements. It must be voluntary and written authority must be got from the Labour authorities for working after 10.00 p.m.; for night work she must get 1.5 times the normal pay; female wardens must ensure the worker's welfare; there must be availability of rest rooms and refreshments and not more than ten days of night work can be allocated per month.

Exemptions are granted to women holding a management or technical nature position, or those who are employed in health and welfare services and in an industrial undertaking in which only members of the family are employed.

Employment in Industrial Undertakings and at Sea

No employer can employ a child of age 15 or below unless otherwise the undertaking or the ship is one which only members of the same family are employed or children from a technical school with the approval and under the supervision by an authority of the technical school.

Employment other than Employment in Industrial Undertakings and at Sea

This part of the Ct applies in relation to employment other than employment in industrial undertakings and at sea.

Children under 14 cannot be employed during school hours and in the nights (8.00 p.m. to 6.00 a.m.) and must not be made to lift or move heavy items which can injure the child. Nor can such children be given work in any occupation injurious to their health, education or well-being as spelt out in the relevant provisions. Importantly, no such child can be employed in that are called "street industry".

Occupational Safety and Health, Factories Ordinance and Workmen's Compensation

Occupational health is regulated by the Factories Ordinance of 1942 and all persons operating factories are conversant with the comprehensive provisions of this legislation first enacted in 1942. There have been over seven amendments to the law. Three main areas covered are health, safety and welfare as follows;

Health

Every factory must be kept clean with a conducive work environment. It must not be overcrowded; there must be proper temperature, fresh air and ventilation. Floors must not be wet and there must be suitable and sufficient hygiene and sanitary convenience recognizing the different sexes.

Safety

Every possible area of safety appears to have been covered since these provisions are taken from well tested English legislation. For example, proper fencing of machinery, protection against dangerous substances, stairways, gangways to the property to be fenced, proper training before an employee is asked to work on machines and preventive measures in handling items like hoists, lifts, cranes, boilers and explosives etc. Provisions are also made against accidents by fire.

Welfare

Some of the key areas covered in this part of the statute is the supply of safe drinking water, clothing for factory work, washing facilities, proper restrooms and seating facilities etc.

Workmen's Compensation

The Workmen's Compensation Ordinance, first enacted in 1934, provides for the payment of compensation to workmen who are injured in the course of their employment. Since its enactment it has been amended several times especially by Act No. 15 of 1990. The Ordinance specifies and regulates the employer's liability to pay compensation and specifies the instances in which the compensation should be paid. The compensation has to be paid for

- a) An injury to a workman by accident arising out of and in the course of his employment
- b) An occupational disease contracted by an employee whose service is not less than six months in any process which is directly attributable to the nature of his employment.

The amount of compensation is to be determined by the Commissioner of Labour or his Authorised Officers depending on the nature of injury to the workman.

Most employees take out insurance policies with insurers to cover this risk.

An issue that normally arises is whether the accident to the workman arose "in the course of his employment". An accident that occurred when the workman was at his own home or at a time after or before work will not be covered.

Also, the workman will not be covered for accidents caused when he was under the influence of liquor or drugs or was guilty of willful disregard of the safety equipment and procedures provided at the workplace. A claim for workmen's compensation must also be made within two years of the accident.

If an employer fails to pay, the workman or his dependant can apply to the Commissioner of Labour within one year of the accident. An employer who fails to pay within thirty days is liable to a surcharge, while wrongful refusal to pay can also result in a fine.

A claim under the Workman's Compensation Ordinance does not prejudice the right of a workman or his dependants to institute proceedings in a District Court of the area where the accident occurred for the recovery of damages. However, in such a case he will be bound by the general principles of delictual liability that usually require proof of negligence unless the employer was in breach of some duty imposed on him by statute. Any award for damages by the court will normally take into account any sum already paid to the workman under legislation.

Wages Boards

Wages Boards are bodies set up under the Wages boards Ordinance of 1941 (as amended) to ensure minimum wages and a few other conditions such as holidays, leave and overtime rates in respect of specified trades. As at 2009, Wages Boards had been set up for 43 trades such as Banking, Beedi manufacturing, Brick and Tile trade, cinema, coconut and rubber, garments, hotel and catering, janitorial services, metal quarrying, security services, textile, tobacco etc. These Wages boards comprise an equal number of representatives of employers and employees in a given trade and upto three persons appointed by the Minister of Labour. Their principal function is to determine the minimum wage payable to Workers in a particular trade. Many employees pay more than the minimum wage.

The minimum wage may be prescribed as a basic rate plus a special living allowance based on the cost of living index or a consolidated amount. Failure to pay at least the minimum wage is an offence. Employees can, however, receive a higher wage by agreement with the employer. They often do.

Shop and Office Employees

One of the most important and relevant statues in Sri Lankan Labour law is the Shop and Office Employees' (Regulation of Employment and Remuneration) Act No. 19 of 1954.

This legislation was the result of a report of a Committee of Inquiry appointed in the 1940s to examine the employment conditions of the country's mercantile employees. The Act applies to all employees within the definition of a "shop" or "office" and is in five parts as follows;

Part I Regulation of hours of employment in shops and offices: health and comfort of employees

Part II Payment of remuneration

Part III Regulation of remuneration

Part IV Closing order for shops

Part V General matters

The Act does not apply to the State as an employer. Unlike, the Wages Boards Ordinance, this Act specifically defines the entitlements of workmen, and does not vest decision making power in a separate autonomous body except under certain circumstances which is limited to wage fixation.

The following main provisions of the Act are highlighted.

Hours of Work

The normal day's work is limited to 8 hours and a normal working week is limited to 45 hours, excluding 1 hour for meals. Persons employed in different classes of shops and different classes of offices may have different hours of work, subject however, to several restrictions.

Work in excess of the normal hours has to be treated as overtime and paid for at a rate not less than one and one-half times the hourly rate, calculated by dividing the monthly rate by 240. Executives in State Corporations are not entitled to overtime. The maximum amount of overtime is limited to 12 hours per week.

Weekly Holidays

On completion of 28 hours of work in a 'week', the law provides for the granting of one and half days' holidays with pay, 'Week' is defined to mean the period between midnight on any Saturday night and midnight on the succeeding Saturday night.

Annual Holidays

The total annual leave entitlement is 14, and provision is made when employment commences between certain specified periods for the granting of the corresponding number of days as leave, in the succeeding year. Public holidays are granted with remuneration. Full moon poya days should be observed as holidays. Employment on such days is strictly on an overtime basis.

Casual Leave

The entitlement of casual leave for a calendar year is 7 days. This is to be utilized on account of private business or ill-health. In the commencing year of employment, one day is granted for every two completed months.

Maternity Leave

Female employees are entitled to maternity leave as provided in the statute. These entitlements are now well known. Maternity leave shall be in addition to other leave or holiday entitlements.

Salary payments and Deductions

The Act placed time limited within which employees salaries should be paid and the deductions that may be made from such payments. Employers must strictly observe these conditions.

Letter of Appointment

It is a fundamental requirement under this act that an employer issues a letter of appointment to the employee detailing the conditions of employment. This ensures to the employee certain inalienable rights under the law. The letter of appointment so issued becomes a contract between the parties. The minimum requirements of a letter of appointment are spelt out in the Act. However, most employers have developed terms and conditions over and above what is required by the legislation. It is expected that if the letter of appointment is in English it be explained to the employee in his language (Sinhalese or Tamil) and he or she acknowledges that its terms and conditions were clearly understood. The employee is entitled to a copy of the letter of appointment.

Records of Employees

Employers are obliged to maintain certain specified records in respect of their employees as provided by the legislation. This is normally done by maintaining a Register of staff and also a Personal file in respect of each employee which has a record of all details from date of joining etc.

Apprenticeship, Probation and Training

General rules applicable

This is an important area because many employees commence their career as apprentices, probationers and/or trainees. A contract of Apprenticeship is one where the employer agrees to instruct or teach the apprentice in his trade and to pay him an allowance during the existence of the relationship. The apprentice in turn agrees to serve the master and to learn from him.

The case of the Probationer is different and the assessment during the period of probation relates to his all round suitability, which includes both his ability to perform the job and his conduct. In the case of an apprentice, the emphasis is on the learning of a skill and it follows that a person engages in a period of apprenticeship only in respect of a job which requires a certain degree of skill, which has to be acquired to perform the job. A probationer would also require some training but it would not necessarily be for the purpose of making him skilled as such.

Under the common law of employer and employee, an apprentice or trainee does not have a contract of service and is therefore not an employee. Yet, many of our statutes such as the Industrial Disputes Act, the Employees Provident Fund Act, the Termination of Employment of workmen (Special Provisions) Act and the Gratuity Act defines a “workman” to include an apprentice or trainee. Employers must be conscious of this.

Probation is a period during which an employer assesses the conduct and suitability of an employee for continued employment and the employee similarly assesses the suitability of the conditions of service from his point of view. The period of probation is a contract of service can therefore be taken as a communication by the employer that in the event of the employee proving himself within the period of probation to the satisfaction of the employer that the probationer is a

fit and proper person to perform the duties for which he has been engaged. The probationer would be entitled to be confirmed in employment at the end of the probation period and if not, his services can be terminated without notice.

It should be noted that a probationer is a permanent employee in the sense that he is on a monthly contract of employment and the period of probation is strictly relevant only to the question of termination in the event of the probationer being unsatisfactory.

As regards Trainees, a statute that employers currently resort to is the Employment of Trainees (Private) Sector) Act No. 8 of 1978. This legislation was enacted to boost training of unemployed persons. Those employing 'trainees' under this Act are provided specified monetary incentives to pay such trainees but most employers pay more than what is statutorily provided.

Under it, without any prejudice to any scheme of training of, or to the employment of apprentices in any other law, an employer may enter into a contract of training with a person for a period not exceeding one year for the purpose of providing practical training to the trainee in any of the vocations specified in the Act and on the payment of a specified allowance. The vocations specified include:-

- a) Clerks, stenographers, book-keepers, typists, supervisors, salesmen, shop assistants, storekeepers, telephone operators, cashiers, foremen or any other similar vocations;
- b) Watchers, caretakers, bicycle orderlies, peons, liftmen, office and shop labourers, outside messengers, tea boys or other similar vocation.

The legislation excludes the application of the following statutes to such trainees;

- i. The Shop and Office Employees Act
- ii. Industrial Disputed Act
- iii. Wages Boards Ordinance
- iv. Trade Unions Ordinance
- v. Termination of Employment Act and
- vi. Any collective Agreement

The Act also provides for the employer to terminate such training on disciplinary grounds. After the training is over, the employer is expected to provide the 'trainee' with employment in a vocation in which he was trained or in other suitable employment. Neglect or refusal to do so amounts to an offence and the Labour Department can initiate action.

Owing to the special requirements of the above legislation a distinction should be drawn between contracts of training specifically entered under the provisions of the above law and those which are fixed term contracts of training not governed by the law. In the case of the latter, the provisions of Trainees (Private Sector) Act of 1978 will have no application. Consequently, the requirement of obtaining the approval of the Commissioner of Labour will not arise, as such contracts will be governed by the terms specified in such contracts.