

NALSAR Advanced Diploma in Labour Laws and Employee Management

- Constitutionality of Non-Disclosure Agreement/Non-Compete Clauses
- Fixed Term Contracts: From standing orders to labour codes

Key Clauses in an Employment Contract

- Exclusivity - Ask for full time attention, without consent won't act as director/ employee/ KMP/ agent/ consultant/ professional activity elsewhere, won't be interested in another trade or business, provide services to other persons, etc.
- Section 27, Indian Contract Act: Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
- ***Exception 1.*** Saving of agreement not to carry on business of which good-will is sold.

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- Distinction between restrictive covenants during and post term

Key Clauses in an Employment Contract

- Niranjan Shankar Golikari v The Century Spinning And Mfg. Co. Ltd

....considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under [section 27](#) of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided...

Key Clauses in an Employment Contract

- Superintendence Company of India v. Krishan Murgai

The agreement in question is not a "good will of business" type of contract and, therefore, does not fall within the exception. If the agreement on the part of the respondent puts a restraint even though partial, it was void, and, therefore, the contract must be treated as one which cannot be enforced.

Key Clauses in an Employment Contract

- Percept D'Mark v. Zaheer Khan:
- "The legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallised in our country is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable, unless it falls within express exception engrafted in Section 27"

Key Clauses in an Employment Contract

Garden Leave Clauses

VFS Global v. Suprit Roy

“The Company reserves the right to require you to remain away from work/employment for a period of 3 (three) months after termination or resignation of your services with the company. You shall agree to comply with all conditions that may be laid down by the Company at the time of such resignation or termination. The Garden Leave period shall commence after you have served the notice period and have ceased to be on the rolls on the Company.”

Key Clauses in an Employment Contract

Garden Leave Clauses

The clause defines the period of three months to commence after the employee has served the period of notice and upon his having ceased to be on the rolls of the Company. The measure of compensation is three months of last drawn wages. The payment of this compensation however, does not renew the contract of employment which has come to an end. The Garden Leave Clause is therefore, prima facie in restraint of trade and is hit by Section 27 of the Contract Act. The effect of the clause is to prohibit the employee from taking up any employment during the period of three months on the cessation of the employment.

Key Clauses in an Employment Contract

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Key Clauses in an Employment Contract

Training Bonds

Section 79, Indian Contract Act:

Compensation for breach of contract where penalty stipulated for.—1 When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for..

Key Clauses in an Employment Contract

Training Bonds

Kailash Kumar v. Syndicate Bank

If that be so, Rs. 2 Lakh amount stipulated could have been only, if against any training or for any other reason expenses have been incurred by the Bank. This cannot include the expenses incurred by the respondent Bank for carrying out the process of appointment including advertisement, which resulted in the appointment of the petitioner or for that matter incurring expenses in future for making appointment against the vacancy arisen because of his resignation. That apart, the terms of the Bond cannot be at variance with the terms of appointment. The same stipulated the amount to be claimed if any training is given or any expenses incurred which is not the case of the respondent.

Key Clauses in an Employment Contract

Non Solicitation Clauses

Wipro Ltd. v. Beckman Coulter International SA

Both parties agree that for a period of two (2) years from the date of termination of the agreement to which this appendix is attached, including termination by either party with or without cause, either directly or indirectly solicit, induce or encourage any employee(s) to terminate their employment with or to accept employment with any competitor, supplier or customer of the other party, nor shall either party cooperate with any other in doing or attempting to do so. As used herein, the term 'solicit, induce or encourage' includes, but is not limited to (a) initiating communications with an employee relating to possible employment, and/or (b) offering bonuses or additional compensation to encourage employees to terminate their employment with and accept employment with a competitor, supplier or customer of the soliciting party, or (c) referring employees to personnel or agents employed by competitors, suppliers or customers of the soliciting party. General advertising of positions and other general means of recruitment shall not be considered solicitation; and neither party shall be restricted from responding to unsolicited applicants who are employees of the other party.

Key Clauses in an Employment Contract

Non Solicitation Clauses

- 1) Negative covenants tied up with positive covenants during the subsistence of a contract be it of employment, partnership, commerce, agency or the like, would not normally be regarded as being in restraint of trade, business of profession unless the same are unconscionable or wholly one-sided;
- 2) Negative covenants between employer and employee contracts pertaining to the period post termination and restricting an employee's right to seek employment and/or to do business in the same field as the employer would be in restraint of trade and, therefore, a stipulation to this effect in the contract would be void. In other words, no employee can be confronted with the situation where he has to either work for the present employer or be forced to idleness;

Key Clauses in an Employment Contract

Non Solicitation Clauses

3) While construing a restrictive or negative covenant and for determining whether such covenant is in restraint of trade, business or profession or not, the courts take a stricter view in employer-employee contracts than in other contracts, such as partnership contracts, collaboration contracts, franchise contracts, agency/distributorship contracts, commercial contracts. The reason being that in the latter kind of contracts, the parties are expected to have dealt with each other on more or less an equal footing, whereas in employer-employee contracts, the norm is that the employer has an advantage over the employee and it is quite often the case that employees have to sign standard form contracts or not be employed at all;

4) The question of reasonableness as also the question of whether the restraint is partial or complete is not required to be considered at all whenever an issue arises as to whether a particular term of a contract is or is not in restraint of trade, business or profession.

Key Clauses in an Employment Contract

- Non-Disclosure/ Confidentiality Clauses

VFS Global v. Suprit Roy

A clause prohibiting an employee from disclosing commercial or trade secrets is not in restraint of trade. The effect of such a clause is not to restrain the employee from exercising a lawful profession, trade or business within the meaning of Section 27 of the Contract Act.

Tapas Kanti Mandal vs. Cosmo Films Ltd.

A negative covenant, which oppresses a person either to perform personal service or to remain idle or starve is considered inequitable, onerous and oppressive term and tends to obliterate the object underlying section 27 of the Indian Contract Act forbidding a compelled servitude. An employee seeking better employment would not be enjoined on the ground that he has confidential information and under the garb of confidentiality employer cannot be allowed to perpetuate forced employment. Freedom to change employment is a vital and important right of an employee, which cannot be curtailed on the ground of confidentiality and such a restriction will be hit by section 27 of the Contract Act. As such, injunction would not issue.

Fixed Term Contracts

Contracts of Employments are typically of indefinite term, i.e. till retirement.

However, due to changes in nature of work, employers may want to engage employees for shorter duration, which may be extended or come to an end automatically.

Fixed Term Contracts

Regulated by Industrial Disputes Act and Industrial Standing Orders Act

Model Standing Orders: Schedule I, 2 (3A) – fixed term employment workmen

A "fixed term employment workman" is a workman who has been engaged on the basis of a written contract of employment for a fixed period:

Provided that-(a) his hours of work, wages, allowances and other benefits shall not be less than that of a permanent workman; and (b) he shall be eligible for all statutory benefits available to a permanent workman proportionately according to the period of service rendered by him even if his period of employment does not extend to the qualifying period of employment required in the statute'

Fixed Term Contracts

Code on Social Security:

53. Payment of gratuity.—

Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,— (d) on termination of his contract period under fixed term employment

Provided further that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to.... expiration of fixed term employment...

Fixed Term Contracts

Regulated by Industrial Disputes Act and Industrial Standing Orders Act

Unfair Labour Practice:

10. To employ workmen as “badlis”, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen

Fixed Term Contracts

Termination:

13 (2) – Subject to provisions of Industrial Disputes Act:

(ii) no workman employed on fixed term employment basis as a result of non-renewal of contract or employment or on the expiry of such contract period without it being renewed, shall be entitled to any notice or pay in lieu thereof, if his services are terminated:

Fixed Term Contracts

- (oo) "retrenchment" means the termination by the employer of the service of a workman 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
 - (c) termination of the service of a 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; or
 - (d) termination of the service of a workman on the ground of continued ill-health;"

Fixed Term Contracts

(a) "25.F Conditions precedent to retrenchment of workmen.—

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government [or such authority as may be specified by the appropriate Government by notification in the Official Gazette]."

Fixed Term Contracts

S.M. Nilajkar and Ors. vs. Telecom, District Manager, Karnataka (31.03.2003 - SC) : MANU/SC/0261/2003

It is common knowledge that the Government as a welfare State floats several schemes and projects generating employment opportunities, though they are short-lived. The objective is to meet the need of the moment. The benefit of such schemes and projects is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for such schemes or projects. If the workmen employed for fulfilling the need of such passing-phase-projects or schemes were to become a liability on the employer-State by too liberally interpreting the labour laws in favour of the workmen, then the same may well act as a disincentive to the State for floating such schemes and the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting-in onerous obligations entailed upon it by extended application of the labour laws. Sub-clause (bb) in the definition of retrenchment was introduced to take care of such like-situations by Industrial Disputes (Amendment) Act, 1984 with effect from 18.8.1984.

Fixed Term Contracts

The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of Sub-clause (bb) subject to the following conditions being satisfied:-

- (i) that the workman was employed in a project or scheme of temporary duration;
- (ii) the employment was on a contract, and not as a daily-wager simplicitor, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project; and
- (iii) the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract.
- (iv) the workman ought to have been apprised or made aware of the abovesaid terms by the employer at the commencement of employment.

Fixed Term Contracts

(a) Ram Kishan vs Management Of M/S American Express

Appointed on fixed term basis for 3 years. Contract not renewed. Alleged unfair labour practice.

Single Judge Bench of High Court: Workers were not badly or casual or temporary. Workers accepted and acted upon the contract and not fall within retrenchment.

Division Bench: Argument that contract was camouflage was not supported by any material. Clause bb of 2(oo) of ID Act get attracted and hence it does not amount to retrenchment.

Decision in SM Nilajkar was in context of casual and daily workers, where termination resulted from project coming to an end. Here, worker was informed purely contractual nature and employment will come to an end. Further, in the case, engagement of casual workers in a project without any indication of the period of employment whereas in the present case admittedly the appointment of the Appellant was on a contract basis for a fixed term.