YOUR ADVOCATE

Query

I worked three years with a private company which is involved with Jute export. I had an agreement (appointment letter in official pad) of not being involved (neither disclose information nor job/business) with Jute sector for 2 years after leaving the company. There was a mistake in salary clause, it is written Tk. 20000(Taka twenty thousand)). The actual salary was Tk.12000 in the beginning. I suffered a lot during my service, worked at odd time till 9,10, 11pm, faced some discrimination like afterward I got promotion as asst. marketing manager but pay was less than some executive in the company. The company also under invoice some times and directly transfer the extra value from foreign to Singapore (Is it money laundering?). In these circumstances I left the job and become involved with another jute company. Now my ex-employer started threatening me for legal action/notice. After leaving the company the Managing Director has to come to know that I have become involved so he sent me an email asking about it. I replied straightly admitting the truth. Because I believe I have the fundamental right to work any sector which is not illegal. I know that any law conflicting with fundamental right of constitution is void. Now I am a bit worried about his threats. Can he do something against me? What he can do so far? I would like to know what the law says on this regards. Please let me have an answer.

An ex-employee
Dhaka.

This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies. Our civil and criminal law experts from reputed law chambers will provide the legal summary advice.

Restraint of trade

Response

I would like to thank you very much for asking me to provide opinion regarding the contractual matters related to your previous employment. Having gone through your query, we have understood that you are willing to know whether your previous employer has any cause of action in consequence of his threat.

Considering the term of the agreement preventing you from being involved in any subsequent job in similar sector for two years after leaving and concerning non-disclosure of information related to the job or business appears to be one related to restraint of trade. In English law, a contract which is in restraint of trade is void and unenforceable, unless it can be shown to be reasonable. As far as the restraint of trade within the context of a contract of employment is concerned, the reasonability may be determined by the few relevant factors which include public interest, place, time etc. On the other hand, as far as the local law is concerned, the Contract Act of 1872 is the one dealing with such situation.

The Contract Act 1872 specifically deals with Restraint of Trade and renders any agreement preventing anyone from carrying out any lawful profession, business void subject to an exception concerning the selling of good will of a business. Besides, considering the case law providing interpretation of this section it appears that employment contracts, whereby the employer restricts the right of the employee to join a competitor or set up similar business falls within this section and consequently void. Such restraint cannot operate beyond the employment contract period. Therefore, if your former employer goes for any action on account of your new job, it is likely to be void as you entered into the new job after leaving the earlier one.

However, the employer is entitled to protect trade secrets and confidential information provided the worker has access to trade secrets. Thus, the clause of the agreement concerning non-disclosure of information is likely to be valid. Disclosure of information may take place in many ways even involving any third party. Therefore, in case of any loss or damage resulting from such disclosure, your former employer may go for an action for breach of contract claiming damages. Much depends on the term containing in the employment contract as the breach of such terms are often considered as serious. Even if any such term is not expressly contained in the agreement, it may even be implied.

As far as the mistake in the salary clause is concerned, it appears that you have performed your contractual obligation by accepting the salary although it is not clear how did you receive it. In law of contract acceptance is possible by way of conduct.

Considering the issue of discrimination that was inflicted upon you, it is not entirely clear. However, such discrimination may amount to the breach of the contract which depends on the terms of the employment contract. You may have the option of having recourse to the competent court in case there is any possible cause of action.

Hence, it may be opined that as you are no longer in that private company, the clause concerning with Restraint of Trade is no longer effective and any action taken by the Managing Director relying on such clause is likely to have no prospect of success. But care must be taken as far as confidential information is concerned.

I hope that the above reply shall help you to understand your position and to take the appropriate next course of action(s). Please feel free to revert back to us, should you require any further clarification.

For detailed query contact: omar@legalcounselbd.com.

HUMAN RIGHTS MONITOR

Work-safety at risk

ERSHADUL ALAM *and* SHARMILA ISLAM

(*...From previous issue*)

INTRODUCING safety law is not a new dimension in employment sector. Some countries have introduced a high standard of safety measures for their employees in accordance with the law. Beside the law, both short-term and long-term policies were taken by those countries. Laws on occupational health and safety at work have derived from the theoretical concept of rights-based approach pioneered by the western jurisprudence. That's why it is more popular in western jurisprudence than in other school of thoughts. Britain, in 1974, has enacted the Law on Health and Safety at Work to focus the rights of the employees at work. The objective of the Act was to make necessary arrangements to ensure safety for the large amount of the population who are engaged in different jobs in the country.

The role of the judiciary is vital in protecting the rights of the workers and their safety. The positive approach of the judiciary in some countries has paved the way for employment safety. The limitations of the law have been overcome by the progressive judicial interpretation by the judges. The judiciary of India has been playing such role by interpreting different legal and constitutional provisions in its delivery of judgment. The rights and realities of the workers have been recognized in some judgments like Consumer Education Research Center Vs. Union of India. The court has given a very wider explanation of article 21 of the constitution. Rights of the workers have also been preserved in the preamble and in the directive principles of state policy chapter of the constitution of India. Though the rights in this chapter are not fundamental in nature, but in directive in nature. The constitution suggested for required enactments to be made by the state to ensure safety and health of the workers.

State responsibility is also ensured in the US. A safe and secured working place is ensured in the country by way of law. There is a provision for an administrative authority to monitor any breach of the law in the work place and if any breach is observed, the offended or any employee can report to it.

The peculiarity of most European law on employment safety is the pre-assessment of the risk in a particular factory or work place. Based on the production pattern and risk factor involved in the job, pre-assessment is made and specific requirement of safety measures are suggested accordingly. The assessment is to be made periodically as per requirement. The idea of assessment and periodical review is also found in the ILO convention of 1981 (Article 7).

ILO is the umbrella organization to deal with the workers' rights and employers' duties all over the world. The organization has accepted the Occupational Safety and Health Convention in 1981. Under article 4 of the convention, all member states are responsible to formulate, implement and periodically review a coherent national policy on occupational health, safety and working conditions. As per Article 4 of the Convention, the member states need to formulate necessary laws and regulations to protect the rights of the employees. Adequate penalties are also prescribed in the convention (Art 9). At least a tri-partite form of responsibility involving employer, employee and state has been set-up in the Convention.

The Labour Inspection Convention of 1947 is the key instrument to monitor observance of law in the work place. Bangladesh has ratified it in 1972. But the role of the labour inspection is not visible in our country.

Without replacing national laws and accepted national standards, 'ILO Guidelines' on Occupational Safety and Health Management System has been accepted. The OSHMS was accepted to set up a unique international model of workplace in national level. Beside those conventions, guidelines etc, ILO has issued more than 30 Codes of Practice on OHS.

Relation between occupational safety and employment is an established tool in modern international labour rights instruments. Without realizing the rights of the workers, the concept of human rights cannot be materialized, rather it will remain as rhetoric. Ensuring employers' safety and compensation is most important factor to reach at a level of sustainable human development. The responsibility lies with the modern democracies those bear respect for human rights.

The writers are Lawyer and Journalist respectively.

LAW WEEK

Hearing on Yunus' writ starts

Hearing on a writ petition Nobel Laureate Dr Muhammad Yunus on Thursday filed challenging the government notice to relieve him of his duties at Grameen Bank has begun. The HC bench of Justice Momtaz Uddin Ahmed and Justice Gobinda Chandra Thakur is likely to hear the petition. Yunus was unceremoniously relieved of his duties through a Bangladesh Bank letter sent to Grameen Chairman Khondoker Muzammel Huq. The central bank said Yunus failed to seek its approval when he was reappointed as the managing director in 2000, violating one of the statutes of the partly state-owned (25 percent) Grameen Bank. Grameen Bank however said his position was legal. With his forced exit, the microfinance institution's journey of over 30 years enters a different stage. -*The Daily srar online edition March o3 2011.*

Fatwa illegal, goes against constitution

The constitution and the laws of the republic do not permit any extra-judicial punishment in the name of fatwa, eminent jurist Dr Kamal Hossain told the Supreme Court on March o2. Some people indulge in illegal practice of fatwa for personal gains in the country's rural areas, he said while making submissions during the hearing of an overdue appeal against a High Court verdict that had declared fatwa illegal. Mentioning a few incidents of issuing fatwa against girls, he told the court that such acts of barbarism must be stopped. Advocate Nazrul Islam, counsel for the appellants, pleaded against the HC verdict and told the court that fatwa has been a "part and parcel of Islam." The lawyer, however, said the misuse of fatwa has to be stopped. The Appellate Division on March 1 started hearing the appeal against the HC verdict. On January 1, 2001, the HC declared illegal all punishments in the name of fatwa. The verdict came following a hearing on a suo moto HC ruling after a report on Hilla marriage (marriage with a third person) was published in a newspaper. -*The Daily star online edition March 03 2011.*

HC asks govt to ensure preservation of Mahasthangarh

The High Court on 2 March issued a set of directives upon the government to protect and preserve the Mahasthangarh archaeological site and its adjacent mosque and shrine in Bogra. The court also reconstituted a committee formed earlier to recommend ways to protect the historical archaeological site and its adjacent mosque and shrine. The HC removed the deputy commissioner of Bogra from the committee and replaced him by the head of the department of history of Government Azizul Huq College in Bogra. The move came as the court was informed that the DC was not sincere in protecting the archaeological site from grabbers. The HC bench of Justice AHM Shamsuddin Chowdhury Manik and Justice Sheikh Md Zakir Hossain asked the committee to submit a report before it within two months. During hearing of a writ petition, the court directed the authorities concerned to stop construction of structures near the archaeological site for the next two months.-*The Daily star March 3 2011.*

Appeal hearing against 13th amendment verdict starts

The Supreme Court on March 01 started hearing a long pending appeal against a High Court verdict that declared valid the thirteenth amendment to the constitution allowing general elections under caretaker government. The HC on August 4, 2004 had declared thirteenth amendment to the constitution legal and observed the changes those do not distort basic structures of the constitution. A larger bench of the HC had delivered the verdict following a writ petition by SC lawyer advocate M Sollimullah and Abdul Mannan Khan challenging the thirteenth amendment to the constitution. The writ petition was filed on January 25, 2000 saying that a democratic structure of the government is basic principal of the constitution and people's elected representatives have to run the administration of every pier of the republic, according to the preamble and article eight and 69 of the constitution. The writ petition was filed with an appeal against the HC verdict in 2004. -*The Daily star online edition 01 March 2011.*

Govt allowed to appeal against HC verdict on CTH regional council

The Supreme Court on Thursday allowed the government to move an appeal with the court against the High Court verdict that declared illegal the Chittagong Hill Tracts Regional Council.

The seven-member bench of the Appellate Division headed by Chief Justice ABM Khairul Haque also stayed the HC verdict till disposal of the appeal.

The apex court passed the order after granting a leave-to appeal petition filed by the government challenging the HC verdict that pronounced on April 13, 2010.- *The Daily star online edition 01*

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