

LAW ANALYSIS

Do you even "WORK"?



ALFRED CHRISTOPHER D'SILVA

THE Labour Act, 2006 defines a "worker" as "... any person including an apprentice employed in any establishment or industry either directly or through a contractor, to do any skilled, unskilled, manual, technical, trade promotional or clerical work for hire or reward, whether the terms of employment are expressed or implied, but does not include a person employed mainly in managerial [or supervisory] capacity."

It is deceptively simple- The law guarantees you rights as a worker - Rights that are inherent in the maintenance of the dignity and honor in one's labour as a human being. But these rights and benefits are incumbent upon whether or

not you qualified as a "worker" within the definition of the law. But there lies the rub!

There is a recurring myth (emphasis added!) that the legal definition of the "worker" is only meant for day laborers and industrial workers. It may be opined that the Act had done wonders for the reform of conditions for labourers toiling in the industrial sector, the existence of a significant definitional gap has led to many in the tertiary/service sector from being deprived of their hard earned benefits and entitlements and often arriving at moments of great distress while struggling through the time in which they find themselves indefinitely floating in the uncertain ether of the job market.

In the case of *The Managing Director*,

Rupali Bank Ltd v Md Nazrul Islam Patwary and others, reported at 15 BLD (AD) at p.169 the learned judge explained, "The term 'worker' as in defined [...] does not contemplate only a person to be employed in the work for productive purposes in any commercial or industrial establishment, but also embraces a person who on being employed does any skilled, unskilled, manual, technical, trade promotional or clerical work for hire or reward, whether the term of employment be expressed or implied. But a person does not come within the category of 'worker' who is employed mainly in a managerial or administrative capacity, or who, being employed in a supervisory capacity, exercises either by nature of the duties attached to the office or by reason of power vested by him, functions mainly of a managerial nature." This case illustrates a fact that is to be taken into account when determining the difference between someone who is a worker and someone who is in a managerial position.

One thing to remember is that the nature of the work you are about to engage in is of prime importance, however, citing the case of *Indo Pak Corporation v Chairman, Labour Court*, reported at 21 DLR (1969) at page 285 (286), "As one swallow does not make a summer, so the mere signing of cheques...will not give one the status of a manager". A very common determinant used to determine the presence of an employee-employer relationship has been the "Master-Servant test" which has been used extensively in many jurisdictions. In the case of *V.P. Gopala Rao v Public Prosecutor*, reported at (1969) 1 SCC at page 704, a four-stage test had been adopted to determine the existence of such a relationship using such things as the extent of the "master's" power over the selection of the servant, the existence

of the payment of wages and other remuneration, the extent of control the master has over the mode and means of doing the work, the extent of the master's control over the right of suspension or dismissal.

Another myth that unscrupulous employers often exploit is that the definition of "establishment" excludes their organisations from the responsibility of providing their workers the prescribed statutory benefits and entitlements especially upon discharge. The definition of "establishment", read correctly is actually meant to encompass a wide range of work that is done with the purpose of generating revenue and profits. In fact, it should never be the intent of a legislative body to narrow down such flexible definitions owing to the fact that with time, the type and number of bodies that perform functions of a commercial nature only proliferates.

Measures need to be taken to read the labour legislations in a way that does not deprive people of what they work hard for on the basis of arbitrary readings of definitions. Commercial ventures should invest in formulating their Human Resource and Labour policies to reflect the ends of justice for both parties to the Employment Contract. As a precautionary measure, it is wise to tone down the excitement of getting a new job, so that you are not struck with tunnel vision to only look at how much you are going to get paid, or the number of days as leave you have. Take some time to read the terms and conditions of your employment contract well and understand them before you sign to it. A signature can open doors to new opportunities, but let not that same signature open you up to an undignified exit.

THE WRITER IS AN ASSOCIATE, THE LEGAL CIRCLE.

YOUR ADVOCATE



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.

Query
I am a manager (administration and HR) working at a large garments factory located in Savar. My company has recently announced that it will form a Participation Committee. Although a brief explanation has been given to us about what a Participation Committee is, I am still sketchy as to the details. It would be really helpful if you may let me know the details, as I am given the responsibility to do the needful for the formation of the committee.
Alamgir Kabir
Dhaka

Response
Dear Mr. Kabir, Thank You for your query. Firstly, I would like to congratulate your company, as forming a Participation Committee (PC) is most definitely a very positive and prudent step for any organization. It is important to understand what a PC actually is. In very simple terms, a PC is a committee made up of representatives of the workers and representatives of the employer.

The main reason why a PC is required, is because workers need a voice. A very important lesson from the Rana Plaza disaster was that the workers needed a voice against unsafe working conditions. Even though the workers were reluctant to enter the building, they were unable to resist the compulsion. At the Tazreen factory fire, the workers were not allowed to leave their workstation, even though they wanted to leave after hearing the fire alarms. It is believed that an effective workers' voice would have been able to raise workers' safety concerns and insisted on their right to leave the Tazreen factory or to stay outside the Rana Plaza building.

Furthermore, PC is required by the Bangladesh Labour Act 2006 (BLA). According to Section 205 of BLA, the

employer of every factory, in which at least 50 workers are employed shall have to constitute a participatory committee in his factory within 3 months of starting operations. The PC must consist of representatives of the employer and the workers. The number of representatives



of the workers cannot be less than the number of representatives of the employer. The representatives of the workers shall be appointed on the basis of nomination given by the trade unions in the factory. In case the factory does not have any trade union, the representative of the workers in the PC shall be elected from amongst the workers working in the factory. In such a factory, the worker representatives of the PC may carry out the activities related to the interest of the workers, until a trade union is formed in that factory. From the employer's side, usually the chief executive or chief of

the division or branch or welfare officer will be the representative of the employer on behalf of the organization. The Bangladesh Labour Rules 2015 sets out the details about the size, election method and other requirements of a PC.

The main function of a PC is to develop a sense of belonging to the establishment among the workers and employers and to make the workers aware of their commitments and responsibilities to the establishment. Some of the other functions of the PC include, trying to promote mutual trust and faith, understanding and co-operation between the employers and the workers, ensuring the application of labour laws in the factory, fostering a sense of discipline and to improve and maintain safety, occupational health and working condition, to encourage vocational training, workers' education

and family welfare training, to adopt measures for improvement of welfare services for the workers and their families; and to fulfill production target, increase productivity, reduce production cost, prevent wastage and raise quality of products.

The PC meetings are held once every 2 months to discuss and exchange views and recommend measures for performance of the functions mentioned above. The minutes of every meeting of the PC shall have to be submitted to the Director of Labour and the Arbitrator within 7 days of the date of the meeting. The employer and the trade union shall take necessary steps to implement the specific recommendations of the PC within the period specified by the committee. If for any reason, the employer or the trade union finds difficulties to implement the recommendations within the specified time, they shall inform the committee about it and make all possible efforts to implement the same as early as possible.

Factories that have already established PC in their establishments have all given very positive feedbacks as to the great effectiveness of the same. PC is seen as a mechanism to create mutual trust and faith, co-operation and collaboration between the workers and the owner of a factory. If PC can operate properly, labour disputes can be reduced to a significant extent. It gives an opportunity to address and possibly remedy the concerns of both the employers and the employees at the earliest possible time.

I hope this information has given you a basic understanding of how PC works and how it can help both the workers of a factory and its owner.

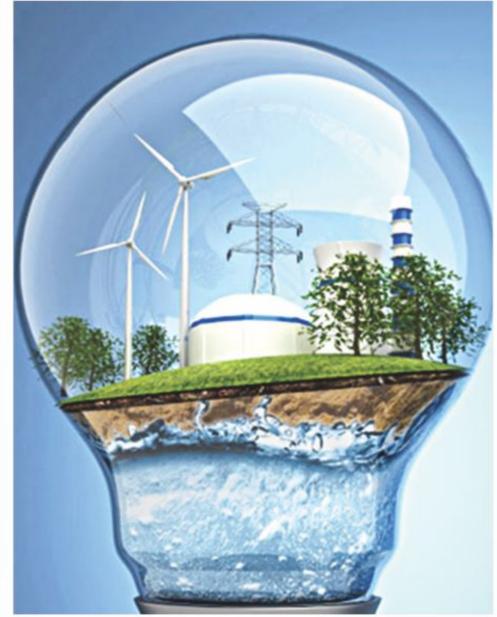
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LAW LETTER

Balancing the energy trilemma

Bangladesh, being a lower middle income country is struggling to balance the energy trilemma and energy governance simultaneously. This is also reflected from the Energy Trilemma Index 2016 released by the World Energy Council, a UN accredited global energy body where Bangladesh secured 111 positions among 125 countries. Energy trilemma is often termed as energy triangle which denotes balance among (i) energy security and accessibility to energy, (ii) affordability or economics, and (iii) decarbonisation or climate change mitigation. Some author describes this as interplay between carbon emissions, the security of energy supply and energy costs. However, these three horns have repulsion against each other and that is why balancing them is quite challenging. Particularly it is difficult for Bangladesh to ensure equilibrium among these aspects in producing high range of electricity to mitigate the huge amount of deficiency. Nonetheless, such transformation can only be achieved through effective energy governance.

According to International Energy Agency (IEA) the concept of security of energy supply or energy security mean the incessant availability of energy resources at an affordable cost. Although Bangladesh is a naturally resourceful country considering natural gas and coal specially but due to lack of adequate technical expertise it cannot utilise its resources in generating energy. That is why it is highly dependent on fuel importation from overseas. Nonetheless, energy security is entwined with national security also. National security may be compromised for disrupted supply of energy. It may bring heavy consequence for Bangladeshi national security. Therefore, conservation of national energy resources and sustainable use of them is essential to diminish the national security dilemma.



However, accessible energy is a potential tool to empower mass people. Here comes the question of universal access to energy. According to the World Bank data, more than one-third populace of the country has no access to electricity yet. On the contrary, demand is escalating everyday while supply is not uninterrupted due to many factors including shortage of fuel, power scarcity, old supply line, etc. Situation is now better because of the initiatives taken by the current government. However, none of those initiatives can ensure minimum balance among those triangles rather some power projects are highly criticised which neglected all these angles. Moreover, most of the power plants use fossil fuels like natural gas or oil as the major primary energy sources instead of diversified low carbon primary sources, e.g. solar, wind, tidal, hydro, biomass, etc. Massive use of natural gas alone (almost 85%) in energy sector is another threat to energy security. All these contributed to poor access to energy. Although the government has initiated giant project for nuclear power plant but there is also safety concern. Hence this is high time to focus more on eco-friendly renewable energies and ensure good governance in dealing with these.

Then the question of economics will come to intervene. The government has frequently increased the price of basic household energy like gas and electricity last couple of years even in contravention of law which ultimately diminish the affordability and accessibility as well. For this reason, despite of having power supply marginal people are become unable to afford that costly energy for their livelihood. This is another challenge for Bangladesh to make energy affordable to all. Accountable and transparent government machineries relating to power sector and effective energy regulatory commission can play vital role to reduce the charge over energy.

High carbon energy sources, i.e. fossils are still cheap in comparison with the renewable technologies but it could become more pricy due to global demand. It has also severe impact on environment. So we need to divert our concentration from high carbon to low carbon energy production gradually. Nevertheless, ensuring competitive energy investment policy can play a crucial role in mitigating tension between cost and low carbon energy. Additionally, imposition of heavy duty on high carbon fuels and confirming maximum tax incentives to renewable machineries may bring success to reduce dependency on fossils.

The European Environmental Energy (EEA) opines that energy production and consumption have huge impact upon environment. Reducing carbon emission and preserving environment are equally important in generating affordable energy. The energy sector should be green in compliance with the criteria. Hence, the policy makers have to maintain a harmony among continuous and sustainable energy supply, access and affordability to energy vis-a-vis environmental impact in producing energy.

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PEOPLE'S VOICE



CASUAL indifference to sexual harassment is unacceptable, the head of the United Nations entity mandated to promote gender equality said, urging women and men

to change their response to acts of sexual aggression. In an opinion piece, Phumzile Mlambo-Ngcuka, UN Under-Secretary-General and Executive Director of UN Women, pointed to the

"pain and anger" of more than a million people who posted #MeToo on social media.

"What we are seeing currently, as women build and reinforce each other's accounts, and as men join in to acknowledge their role, is a validation of the rightness of speaking out," Ms. Mlambo-Ngcuka said. She added that "we are seeing also the strength in numbers that comes from accumulated individual experiences that are characteristically undeclared."

We need to have all women empowered to speak, their rights and bodies respected, and behaviours established and entrenched as normal that let no one off the hook. No more impunity. We salute the thousands of

women who have been fighting against all violations of women's and girls' rights and call for renewed investment in the fight to end all violence against women, she remarked.

The #MeToo hashtag started with Tarana Burke, a New York community organizer serving women of colour, and reached fame when actress Alyssa Milano picked up the message, with people around the world writing #MeToo if they also have been sexually victimised. The critical mass shows "how much goes wrong when people can act with impunity in a culture of silence" and calls on "good men" to speak out and not be quiet spectator

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