Educational Administration: Theory and Practice
2022, 28(3), 425-430
ISSN: 2148-2403
https://kuey.net/

Research Article

Emerging Contours of the Policy of Hire and Fire in the Indian Industrial Sphere

Mir Mubashir Altaf [1], Irshad Ahmad Malik[2*], Nazia Nisar[3]

[1*]Research Scholar and Assistant Professor, Department of Law, University of Kashmir, Srinagar, India
[2]Assistant Professor, Department of Management Studies, University of Kashmir, Srinagar, India
[3]Research Scholar, School of Law, University of Kashmir

***Corresponding Author:** Irshad Ahmad Malik
*Email: irshadmfc@fmail.com

Citation: Mir M. A., et.al (2022). Emerging Contours of the Policy of Hire and Fire in the Indian Industrial Sphere, *Educational Administration: Theory and Practice*, 28(3) 425-430
Doi: 10.53555/kuey.v28i03.8777

ARTICLE INFO

ABSTRACT

The rule of hire and fire was characteristic of the laissez-faire economy which set out an ecosystem for the freedom of contract. A flipside to this free contractual regime was the underlying inequity between the employer and the employee in the industrial sphere. Consequentially, the working conditions of the employees were delineated by the whims of the employer who could extract hard labour from the employee while paying negligible recompense to them for expending their sweat and blood. This state of affairs led to a clamor for recalibrating the relationship between the employer and the employees by striking out an equitable bargain for the employee. With the advent of the social welfare state, the era of free contractual regime in the realm of industrial employment came to be circumscribed by the active intervention of the State. But in recent times, there has been an increasing demand to implement the hire-and-fire strategy in the economic environment, ostensibly to increase the competitiveness of Indian firms. In order to determine if the hire-and-fire concept should be implemented in India, this article looks at the timing of the change. As an alternative, the study will discuss whether the current social security system has to be strengthened in order to support this policy change, particularly in light of the unemployment situation.

Keywords: emerging contours, policy, hire, Indian industrial sphere

INTRODUCTION

In the laissez-faire era the state was mainly concerned with maintaining the law and order, it was an era characterized by a free contractual regime which meant the freedom of a party to enter into a contract. The freedom of contract was one of the cornerstones of the nineteenth-century laissez-faire economies[1]. In the matters of employment this freedom of contract meant that the employer and the employee were free to incorporate any terms or conditions in the contract of employment without any state interference. Normally this contract used to be heavily loaded in favor of the employer in the sense that the employer, due to his strong economic position, could easily dictate the terms of contract. On the flip side the employee owing to his weak economic position was unable to bargain with the employer, he could not even insist on just and reasonable working conditions, which would mean either losing the job or not getting a job even at the initial stage. This contractual relationship between the employer and the employee which came to be known as the master and servant relationship was essentially an agreement between unequals wherein the scales were heavily tilted in favor of the employer.

The concept of master and servant relationship was symbolized by the Infamous law of hire and fire wherein the employer was the supreme master. The phrases 'hire and fire' in their most common signification imply to engage or dismiss somebody at will, in many legal systems this concept of employment is known as "At Will" employment[2]. The principle of hire and fire which was a rule settled beyond doubt in the era of laissez faire, meant that an employer could arbitrarily discharge an employee with or without any reason. This traditional principle of employment was justified on the basis of contractual principle of mutuality of obligation, it was reasoned that if the employee can quit his job at will, then so too must the employer have

the right to terminate the relationship for any or no reason. To terminate the services of an employee is the biggest right wielded by the employer and this is the highest punishment which could be meted out to any employee.[3] The right to hire and fire was grossly abused by the employers and was employed to exploit the workmen trampling over his basic rights. The policy of hire and fire proved to be a bane for the workmen in every sense of the term. People build much of their lives around their jobs. Their income and prospects for the future inevitably founded in the expectation that their jobs will continue[4]. This policy virtually left the worker at the mercy of the employer who could at any time truncate the contract of employment leading the worker into penury. This policy would spell doom not only for the worker but also for his family especially children which would inevitably lead to industrial unrest. During the Industrial Revolution, the notion that laissez-faire or the freedom of contract would automatically control the relationship between the employer and the employer was completely disproved. It was realized that the state should do something to get rid of all kinds of exploitation and economic instabilities perpetuated by the policy of hire and fire.
One of the principal ways through which the State sought to buttress the bargaining power of the employee was to introduce a statutory regime that would offer robust protection to the employee while entering upon a contractual relationship with the employer. With the statutory regime coming into play, the State assumed an active role in the relationship between the employer and the employee which hitherto was governed purely by the covenants of a contract. Thus, the power of the employer to remove the employee at will was circumscribed by the State by bringing in limitations through a gamut of statutory enactments. The statutorily imposed restraint on the power of an employer to hire and fire his employee at will has been characterized as a primary impediment in the growth of the industrial sector in India.

The era of globalization brought with it the integration of the world economies which inevitably exposed the Indian economy to the world. The concept of open economy ushered in by the globalization led to the liberalization of the labour laws in most of the developed countries making their industries more competitive putting countries with stringent labour laws at an obvious disadvantage. It is being contended that the growing competitiveness of the industrial sector has made it difficult for Indian industries to compete at the international level owing to stringent regulatory framework. This stringent regulatory framework with reference to the hire and policy has been perceived to be a major hurdle in lack of competitiveness of the Indian industries[5]. It is argued that with the growing competition in the industrial sector the employer is forced to rationalize his force which would imply getting rid of the surplus labour. However, the existing labour laws make it difficult for an employee to hire and fire his employee at will thereby forcing the employer to shoulder the burden of the surplus labour which drastically impedes his ability to compete in the market. It therefore, becomes imperative to dwell in some detail with the origins of the principle of hire and fire. This attitudinal shift received a major impetus with the onset of the workers revolution in Russia which established the first workers state in the world.[6] The theory of hire and fire as well as the theory of supply and demand which were allowed free scope under the doctrine of laissez faire[7] came in for sharp criticism for being antithetical to the notions of human rights. The old theory of freedom of contract was proving to be a stumbling block for development of harmonious and amicable relations between the employers and the employees. The realization slowly dawned upon the nations that in order to establish industrial peace they needed to intervene in the master and servant relationship. There came about a realization that the employer can hire but cannot fire a workman as the termination of services has social and economic consequences. It was now realized that though an employer has the right to discharge the employee for failing or refusing to do his work in accordance with the employers' directions but such a right could not be expanded to cover cases where the employee Is terminated on wholly unjustifiable reasons. Similarly, there came about a change in the concept of master and servant. One who invests capital is no more a master and one who puts in labour is no more a servant. They are employer and employees, the former may hire the latter but he can no more fire them at his will[8].The international labour organization recommended that a worker aggrieved by the termination of his employment should be entitled to appeal to some neutral body such as an arbitrator or court, such body should be empowered to order adequate compensation.[9] This attitudinal shift led to the erosion of the doctrine of laissez faire, and led to greater state intervention in industrial relations improving the lot of the workers[10].

STATUTORY LANDSCAPE CIRCUMSCRIBING THE RULE OF HIRE AND FIRE IN INDIA

In India the policy of hire and fire suffered the same fate as in the rest of the world moreover, with emergence of the country as a sovereign nation and coming into force of the Constitution the hire and fire policy descended into oblivion. The common law right of the employer to discharge the employee has been subject to statutory restrictions in India through a gamut of labour legislations. Justice Desai has succinctly explained the rationale behind imposing statutory limitations of this common law right. The learned judge had observed
the developing notions of social justice and the expanding horizon of socio-economic justice, necessitated statutory protection to the unequal partner in the industry namely, those who invest blood and flesh against those who bring in capital[11].

Termination of employment in India is not only governed by individual contractual arrangements but also by a number of legislations like the Industrial Disputes Act of 1947 and the Industrial Employment (Standing Orders) Act (IEA) 1948. The Industrial Employment Act makes it obligatory upon all the employers covered by the Act to define conditions of employment in order to reduce incidents of employees being arbitrarily removed. The Act marked a movement from status to contract, the contract not being left to be negotiated by two unequal persons but statutorily imposed[12]. The Industrial Disputes Act of 1947 makes it very hard for firms to fire workers. The Industrial Disputes Act (IDA) contains numerous provisions calculated to limit the power of the employee to lay off or retrench his workmen.[13]Further, an amendment made to the IDA in the mid-1980s requires that any firm employing more than 100 workers needs to get permission from the state government before retrenching workers (and in practice that permission is seldom given)[14]. The lDA was a legislative response to the laissez faire rule of hire and fire at sweet will. In *Glaxo Laboratories (India) Ltd. V. Presiding Officer*[15], the learned court adumbrated upon the historical settings necessitating a proactive state response in according protection to the vulnerable labour class. The apex court in the instant judgment observed

In the days of laissez faire when industrial relation was governed by the harsh weighted law of hire and fire the management was the supreme master, the relationship being referable to contract between unequals and the action of the management treated almost sacrosanct. The developing notions of social justice and the expanding horizon of socio-economic justice necessitated statutory protection to the unequal partner in the industry, namely, those who invest blood and flesh against those who bring in capital[16].

Furthermore, in the instant case, the Supreme Court explained the underlying reason for enacting the Industrial Disputes Act 1947. The Court summed up the object of the Act in the following words:

Moving from the days when whim of the employer was suprema lex, the Act took a modest step to compel by statute the employer to prescribe minimum conditions of service subject to which employment is given. The Act was enacted as its long title shows to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them. The movement was from status to contract, the contract being not left to be negotiated by two unequal persons but statutorily imposed[17].

In *Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd*.[18] A three judge bench) of the Supreme Court while deliberating upon the rationale for enacting the Industrial Employment (Standing Orders) Act (IEA) 1948 observed

It was an act to require employers in industrial establishments to formally define conditions of employment under them. The preamble of the Act provides that it is expedient to require employers in industrial establishments to determine with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them..... The Act was a legislative response to the laissez-faire rule of hire and fire at sweet will. It was an attempt at imposing a statutory contract of service between two parties unequal to negotiate on the footing of equality[19].

The enactment of IEA and IDA was an attempt at imposing statutory limitations on the power of the employer to terminate the services of an employee. These legislations have at least balanced the scales in an otherwise unequal relationship flowing from the contract of service between the employer and the employee. Each of these legislations contain elaborate provisions with respect to the termination of the employment as result termination can only be effected under specified circumstances and not at the will of the employer.

RULE OF HIRE AND FIRE AND JUDICIAL APPROACH IN INDIA

The Indian judiciary has played a proactive role in putting limitations on the power of the employer to terminate the services of the employee at his own sweet will even in absence of statutory protection. In *Tara Oil Mills Co. Ltd. v. Workmen & Anr*[20], the Supreme Court emphatically declared that an industrial employer cannot "hire and fire" his workmen on the basis of an unfettered right under the contract of employment. The court further added that the right of an employer to terminate the services of the employee is subject to industrial adjudication thereby pointing out that employer has to prove before the court of law that the termination of the services of employee was done on reasonable grounds. In a ruling in 1968 in *Management Shahdara (Delhi) v SS Railway Workers' Union*[21], the Supreme Court emphasized the fact that the doctrine of hire and fire, is now completely abrogated both by statutes and by industrial adjudication, and even where the services of an employee are terminated by an order discharge simpliciter the legality and propriety of such an order can be challenged in industrial tribunals. In *Government Branch Press v. D.B. Belliappa*[22], the employer invoked the theory of hire and fire by contending that the respondent's appointment was purely temporary and his service could be terminated at any time in accordance with the terms and conditions of appointment which he had voluntarily accepted. While rejecting this plea as wholly misconceived, the Court observed that the doctrine of hire and fire is borrowed from the archaic common law concept that employment was a matter between the master and servant only. In this case the court ruled that in the first place, this rule in its original absolute form is not applicable to government servants. Secondly, even with regard to private employment, much of it has passed into the fossils of time.

The courts have time and again through various dictums reiterated the fact that the principle of hire and fire is not applied in its strict sense in the Indian jurisprudence. The Apex Court has in a number of judgments justified these restrictions on the absolute right of an employer to hire and fire his employee. *In Buckingham & Carnatic Mills Ltd case v Their Workers Labour Appellate Tribunal*[23] the court laid down the philosophy behind restricting the power of the employer. It observed

The power of the management to direct its internal administration, which includes the enforcement of discipline of the personnel cannot be denied but with the emergence of the modern concepts of social justice an employee should be protected against the vindictive or capricious action on the part of the management which may affect the security of service.

Recently, the Apex Court reiterated the preposition that the doctrine of hire and fire is not recognized in the Indian jurisprudence especially in reference to the Public Sector Units wherein it strongly disapproved the hire and fire policy adopted by the appellant company[24].

The pro-employee attitude of the Indian Judiciary is based on the realization that the unemployment is an acute phenomenon and therefore wherever the limited employment opportunities are available the terms of services should afford some degree of security of employment. The other motivating factor is the fact that the security of employment is pivotal for maintaining the industrial peace which is a prerequisite for stimulating the economic growth of the nation.

A cumulative understanding of the statutory enactments and judicial dictums leads to the conclusion that the doctrine of hire and fire in its absolute sense is not recognized under the Indian jurisprudence. These statutory and judicial interventions have tended to curb the management prerogatives increasingly changing the complexion of the nature and content of the contract of employment in India[25]. In the words of K.K. Mathew, J. (in his treatise: "Democracy, Equality and Freedom) the employer's dominion over his employee may have been in tune with the rustic simplicity of bygone days but in the present times much of this old, antiquated and unjust doctrine has been eroded by judicial decisions and legislation[26]. The modern day labour legislations in India have imposed fetters on the power of the employer to terminate the services of the employee. Nowadays an employer is not free to hire and fire his employee at his own sweet will rather the employer has to show just cause before he can terminate the services of an employee.

CONTEMPRORY DISCOURSE

The existing legal framework regulating the industrial relations in India is heavily loaded in favor of the workers. However, with the advent of the era of globalization these stringent labour regulations are being vehemently criticized for impeding the economic development of the country. There has been a growing demand from the industrial employers in favor of re-introducing the common law doctrine of hire and fire in India. Some of the proponents of the policy of hire and fire have tried to justify its re-introduction by floating the theory of labour flexibility which they suggest will lead to efficient functioning of the market. This theory is based on the premise that if the labour is treated as a commodity like any other, with the company able to hire and fire workers just as they might buy and sell a piece of machinery then the market will function efficiently[27]. This theory presents an extreme view by relegating the labour to the status of a commodity which is completely antithetical to the notions of human rights. The extreme views propounded by some of the advocates of the doctrine of hire and fire necessarily do not reflect the view of all those who support the re-introduction of the rule of hire and fire. The fact remains that the need for re-introduction of the doctrine has also been emphasized by many entrepreneurs in India who may not entirely agree with the above mentioned theory but are motivated purely by economic reasons. It has been pointed out that the major reason for the lack of competitiveness in the industrial sector in India is largely due stringent labour laws in India especially with reference to the constraints on right of the employer to hire and fire his employee. In this context the Second Labour Commission in its report acknowledged the fact that there is a segment of industrialists who favor bringing back the doctrine of hire and fire in India. The labour commission in its report observed

There are some entrepreneurs who believe that no economic progress can be made without the right “to hire and fire” workers at will.[28]

It is on account of these concerns brought its notice that the Second Labour Commission Report has tacitly acknowledged the fact that the doctrine of hire and fire may need to be introduced in India though it added a number of conditionalities to it. The Commission in its report enumerated the following conditions

(i)the evolution of a socially accepted consensus on the new perception of jobs (ii) the evolution of a system of constant upgradation of employability through training in a wide spectrum of multiple skills; (iii) the setting up of a system of social security that includes unemployment insurance and provisions for medical facilities; and (iv) the institution of mandatory system of two contracts that each employer signs with the employees – one, an individual contract with each worker, and two, a collective contract with the workers’ union in the undertaking.

However, the Commission observed that even if the existing legal framework which is limiting the prerogative of the employer to hire and fire his employee is scrapped there will still be room left to restrain the power of

the employer by seeking judicial redress against the employer's action. In this context the Commission observed

We cannot ignore the fact that even if the labour court does not have jurisdiction, and the existing laws are amended to provide for the right to hire and fire, the Constitutional rights of the citizen to seek justice according to the principles of natural justice cannot be taken away. So, the worker, who is terminated, can knock at the doors of the judiciary.[29]

Many commentators have expressed the view that the existing regulatory framework does not offer a conducive environment for making the Indian industries competitive in a globalised economy. They express the view that the stringent regulatory framework is an anathema in an era of globalization which symbolized by minimal state intervention. Some of the entrepreneurs have expressed fears that if the laws relating to the industrial relations are not brought in tune with the requirements of a globalised economy there is a real danger that industrial houses will relocate to countries with less stringent regulatory framework. Such fears are not misplaced, with the growing competition in the industrial sector it has become difficult for the industries to survive unless they do not rationalize their workforce by removing the surplus labour.

In the Indian context this process of rationalization is severely impeded because of the conditions attached by the labour laws in relation to the employer's right to lay off or retrench his workers. Those who advocate reviving the doctrine of hire and fire rest their case on the basic premise that the fetters imposed by the various statutory enactments on the power of the employee to hire and fire his employee are primary hurdles in India's quest to become a developed country. They advocate the re-introduction of this doctrine so that the Indian industry could compete with industries of other developed countries that thrive in a free contractual regime.

CONCLUSION

In this case, a thorough policy change must take into consideration the drawbacks of completely reworking the current statutory framework. Within the "At will employment" system in the United States, the rule of hiring and firing has been deeply ingrained. Nonetheless, the "at will employment" system has significantly reduced employees' ability to bargain. In this regard, it would be instructive to reproduce an excerpt of the Roosevelt Institute paper on "At-will employment" below.

The consequences of at-will employment are especially acute in today's economy. Union-bargained contracts, which often include just cause provisions curbing at-will employment, now cover a much smaller proportion of the workforce than in previous decades. A business-friendly judiciary has diminished the scope of workers' civil and labor rights through the expansion of mandatory individual arbitration agreements, which waive workers' access to federal courts or collective arbitration in the case of violations of workplace rights (e.g., Colvin 2018). And in the face of weakened labor standards, employers now possess greater economic clout over their workers[30]

Keeping in view the American scenario;anyattempt at introducing this doctrine has to be complimented by bringing in a massive change in the perception of employment in the Indian society. The Indian society has grown up with the belief that the employment is a perennial thing especially with reference to the public employment. Unless this mindset is changed any drastic change in the current legal framework viz employment security will be hard to come. Secondly, the doctrine of hire and fire can only be crafted in the present legal framework if avenues of alternative employment are readily made available. India has been grappling with the problem of unemployment according to the official statistics provided by the ministry of labour, the unemployment rate for the year 2024 in the month of June in India has been pegged at 9 percent[31]. Moreover, during the past three years India has been witnessing an upward trend in the unemployment rate[32]. In such a scenario introducing the policy of hire and fire would not only be an unwelcome step but will not augur well for the electoral prospects of any dispensation in power at the centre or states. In addition to it, the policy of hire and fire can only work if it is complimented by providing of un-employment insurance as is the practice in most of the modern developed countries wherein such benefits are extended to the citizenry. However, any scheme for providing for unemployment insurance would amount to a severe strain on the state coffers which are already stretched. More importantly, there is one more stumbling block, all the major trade unions that enjoy massive political leverage in India have openly vented their opposition to the introduction of this doctrine on the basic premise that such an attempt would be totally against the interests of the workers. In such a scenario a complete shift towards the policy of hire and fire does not seem to be forthcoming in the foreseeable future.

REFERENCES

[1] Guest, A. G. (1988). *Anson's Law of Contract* (-25th ed., p. 4). Oxford University Press.s

[2] See, Kate Andrias and Alexander Hertel-Fernandez, *Ending at-will Employment: A Guide for Just Cause Reform*, https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf (Last visited 3rd March, 2021).

[3] Kumar, H.L.(1996) *Employers Rights Under Labour Laws* (1996., pp 14, 15). Universal Law Publishing Co Ltd.

[4] Mir, A.A and Kamal,N.A (2003) *Employment Law in Malaysia* (2003., p.69) International Law Book Services.
[5] https://www.insightsonindia.com/indian-economy-3/indian-financial-system-ii-money-and-capital-market-in-india/regulatory-framework-of-capital-market-in-india (Last visited 3rd March, 2024).
[6] R.K.Sabharwal, *Job Security of Industrial Workers- Law and Practice of Termination of Service and Safeguards to Industrial Workers* (2001) P.3.
[7] Mishra, S.N. (2011) *Labour and Industrial Laws* (26th Ed., p.15.) Central Law Publications.
[8] Ibid. P.1.
[9]See International Labour Organization- Recommendation No.119.
[10] Srivastava, S.C. (2007) *Labour Law and Labour Relations-Cases and Materials* (3rd Ed.,p.445) Vikas Publishing House.
[11] Glaxo Laboratories (I) Ltd. V Presiding Officer, Labour Court 1983 Lab IC 1909 at P. 1914.
[12] Malhotra. (2004) The *Law of Industrial Disputes* (Sixth Ed., p.238.) Lexis Nexis.
[13] See Ss. 25-C; 25-F;25-FF,25-FFF,. See also Ss. 25-T; 25, 30.
[14] See Ss.25-K;25-0;
[15] (1984) 1 SCC 1
[16] Ibid at Para 34.
[17] Ibid.
[18] (1984) 3 SCC 369
[19] Ibid.
[20] [1964] 2 SCR 125
[21] 1969 AIR 513
[22] (1979) 1 S CC 477
[23] (1951) 2 L.L.J 314. LAT.
[24] See Balmer Lawrie & Co. Ltd. & Ors vs Parthasarthi Sen Roy & Ors. (2013) LLR 337 at P. 346.
[25] Chander, Harish. (1993) *Contract of Employment and Management Prerogatives* (p.5). Vijaya Publications.
[26] Cited from the judgment in Government Branch Press v. D.B. Belliappa 1979 SCC (1) 477
[27] See, Carlson, Beverely A. (2002) *Jobs, Multinationals and Globalisation*: *the anatomy of disempowerment* (p.13) retrieved July 20, 2014 from http://www.cepal.org/publicaciones/xml/6/11836/lcl1807.pdf
[28] See Report of the Second National Labour Commission (2002) P.307.
[29] Ibid. P.303
[30] See, Kate Andrias and Alexander Hertel-Fernandez, *Ending at-will Employment: A Guide for Just Cause Reform*, https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf (Last visited 3rd March, 2022). P.5.
[31]See https://www.forbesindia.com/article/explainers/unemployment-rate-in-india/87441/1 (last visited 31st July, 2024)
[32] Ibid