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Rethinking Equal Pay for Equal Work: A Socio-Legal Perspective and Study

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ABSTRACT

Article 39 of the Constitution of India which is a part of the Directive Principles of State Policy is an instrinsic part of its Basic Structure. Inter alia, this Article mandates that equal pay for equal work for both men and women is to be secured by the state by implementing this policy. The Equal Remuneration Act 1976 is a law that implements Article 39, as a suitable response to mitigate past injustice done to women workers who typically had lower wages and limited opportunities in workplaces. The Code on Wages 2019 – as a Labour Code is expected to carry forward this equitable principle. This article probes from a research perspective how modern employers are displaying a silent reluctance, often citing how a multitude of non-negotiable leaves such as Child Care Leave, maternity leave and now menstruation leave often means that women workers are putting in lesser number of working days and HR has a tough time to keep the workplace running. HRIS systems and payroll functions often interpret this positive discrimination as additional workload for male counterparts. Is this Inclusion and Diversity or protected bias? This article will explore the neo-socio-cultural and postmodern socio-economic perspectives associated with this conundrum.

Keywords: *Child Care Leave, Equal Pay for Equal Work, Maternity Leave, HRIS, pay parity, Inclusion and diversity*

I. INTRODUCTION

The Metaphor of Equal Work – Counterarguments

Given the profusion of statutory leaves granted to women employees in modern workplaces today, the other genders in office often feel that the prosaic ardor of 'equal pay for equal work' is a misnomer. The quintessential HR debate rages on as to whether women employees have too much leaves? This author circulated a questionnaire of 25 questions to a sample size of 50 organisations and in response received chequered answers that stated 'bias'. There were suggestions that AI will soon replace many women in their jobs due to chronic absenteeism and protective discrimination may not come to the rescue when commercial productivity

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depletes in an organization due to several women employees who are on Child Care Leave, Maternity Leave, Menstruation Leave etc. In the light of Article 39, in today's environment of single parenthood and surrogacy, there are also issues as to whether paternity leave should be of an equivalent duration or not.

Employers in India are well-aware of the legislative pressure implemented by the Equal Remuneration Act 1976. Today all public and private sector companies and entities cannot deny fair payment to both genders for 'equal work'. In the case of Randhir Singh vs Union of India it was clearly stated that equal pay for equal work is a practical and fundamental right.

Nowadays many employers such as smaller companies and startups may analyse and perceive that due to the cost of maternity leave and subsequent child care leave etc, having a member of staff away for extended periods may not be financially viable for it. So, silently, they direct their policy towards the recruitment of a human resource with a similar curriculum-vitae, preferably male.

Non-Negotiable Legal Position

Under Section 4 of the Equal Remuneration Act 1976, it is duty of all employers to mete out equal remuneration to men and women workers for same work or similar nature, whether in cash or kind. Reduction of rates of remuneration is also totally illegal. Prior to this enactment coming into force, if different rates of remuneration were being paid out, only the higher rate of payment would be carried out post-enactment.

According to Section 5 of the Equal Remuneration Act 1976, no discrimination or distinction can be made while recruiting men and women workers in an organisation. The same applies to promotions, training or transfer of women employees vis-à-vis male employees in office, particularly with respect to similar work being done by both genders

The only exception being, there are some professions or forms of work, where women cannot be employed and it is legally forbidden. In such instances, the ERA is not applicable.The proviso to the Equal Remuneration Act states that, the above provisions of this section shall not affect any priority or reservation for scheduled castes or scheduled tribes, ex-servicemen, retrenched employees of any other class or category of persons in the matter of recruitment to the posts in an establishment or employment.

II. GENDER BIAS

In a subtle manner, employers often have the thought process that attrition among female employees is very high and women employees are not properly committed to their jobs and

putting in long working hours is often an issue with them due to the pressure of family commitments. Discrimination at the workplace that is fuelled with gender bias towards the female employees is illegal and the employer is punishable with penal provisions that exist in the present labour and industrial laws.

Many companies like Tata Consultancy Services(TCS) have returnee programmes to attract employable and skilled female resources who took career breaks due to motherhood, thereby creating a gender-friendly image in the job market and share markets.

However due to the costs of Employee State Insurance (ESI) , Employee Providend Fund (EPF) and the urgent need to hire temporary help as well as paying 26 weeks of full salary to the woman employee on maternity leave a silent prejudice is seeping in.

Paucity of Awareness and Training

Diversity and inclusion is now a mandate of any modern workplace. Lack of awareness and training often creates a hostile environment in the workplace, that affects the mental health of women employees.

Data Collection

Extraction of date from the HRIS systems of companies was never a problem. Two key and separate sets of data extraction on payroll is crucial. Equal pay review process by the HR Department almost always needs trained professionals.Trained Inclusion and Diversity professionals are also crucial to an organization to achieve a balance. Using AI or Artifical Intelligence in future is also a viable option.

Legislative Position: Penalty upon Companies

The answerability of corporate entities is quite a serious one under the terms of the statute.

Section 10 on penalities to be imposed upon he employers is quite serious. Any employer who does not maintain proper recordkeeping in office i.e. documentation/registers on the leave granted and documentation regarding leave granted as per the laws of the land and cannot produce any register, muster-roll or any other document pertaining to the same on the employment of workers, shall be punishable with upto one month of imprisonment or fine which may extend to Rupees ten thousand or more. Accordingly, any unequal rates of payment done to a woman worker or non-compliant recruitment or non-compliance with the provisions of the Act, will saddle the employer with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with imprisonment for a term which shall be not less than three months but which may extend to one year or with both

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for the first offence, and with imprisonment which may extend to two years for the second and subsequent offences.

The failure to produce any document or register requested by the Inspector or any competent authority by the employer speaks also attracts a fine of upto five thousand rupees upon him.

Under Section 11 of the Equal Remuneration Act 1976 where an offence of gender discrimination in terms of "equal pay for equal work" has been committed by a company and evidence suggests that the offence has been committed, every person in charge of implementing the HR strategy envisaged by the act will be equally guilty irrespective of rank. He shall be open to be proceeded against and be punished in terms of the Act.

The proviso to section 11 strictly states that if it is proved before the appropriate legal forum i.e. the Labour Commissioner, that the offence was committed without his knowledge and that he or she did everything to prevent it, the official concerned may be absolved of liability.

In the same tone and timbre, under Section 12 of the Equal Remuneration Act 1976, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

However, a Court shall take suo motu cognizance of an offence punishable under this Act if it has knowledge of a similar offence being committed in an organisation by an employer.A complaint may also be filed by the affected party or by a recognized welfare institution or organisation . The condition being, such an organisation will be recognised by the State or Central Government.

Employer to Honour Section 13 of the ERA

Under Section 13 of the Equal Remuneration Act 1976 the Central Government, after issuance of an official notification,can make rules for implementing the above Act in workplaces. It can also make rules with respect to the manner or nature in which the complaint is made or the claim is preferred by the complainant employee.

Under Section 14 of the same Act, the Central Government can also give directions to the State Government to make rules to carry out any specific rules related to the Act.

Bias of Employers towards Child Care Leave

In a landmark judgment on April 26, 2024, in the case (2018) 10 SCC 1 Chief Justice DY Chandrachud in a case on child-care leave stated : "Participation of women in the workforce is a matter not just of privilege but a constitutional entitlement protected by Article 15 of the Indian Constitution. The state as a model employer cannot be oblivious to the special concerns

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which arise in case of women who are part of the workforce." This was when the Apex Court was hearing a plea filed before the Apex Court by Shalini Dharmani – an Assistant Professor in the Government College Nalagarh – who was denied childcare leave (CCL) for her child who was unfortunately suffering from a genetic disorder.

This judgment happened when the low participation rate of women in the workforce are on the rise. Many state and central governments have admitted the requirement for childcare services to motivate women's participation in paid work.Employers do carry the cross for this.

Prejudice of Employers to Implement Period Leave

According to many employers today, the new paradigm of menstrual leave may lead to absenteeism, low productivity, operational difficulties, potential discrimination, and additional questions about fair use of such leave and its fair enforcement.

Smaller businesses could face operational challenges in planning and adjustments in workflow. Privacy issues and gender stereotyping may actually obstruct the attainment of gender justice and gender equality in office. Not all women employees may feel like disclosing details about their menstruation cycles etc to the HR Department in office.

Menstrual leave granted to women colleagues may increase workload on male colleagues and this may create resentment in office. Also make colleagues may feel that their female counterparts in a team are actually on a vacation or unnecessary leave.

III. RECOMMENDATIONS AND SOLUTIONS

i. Employers need to conduct widespread awareness programmes and sensitization campaigns through their HR Department to mitigate the resentment of male colleagues who may feel a sensation of additional work burden due to 'equal pay for equal work' policy when their female colleagues are on maternity leave, child care leave or menstrual leave.

ii. Employers should be properly counselled so that they can mitigate any prejudice towards qualified female applicants because of the potential leave workscape.

iii. A proposed amendment to the Equal Remuneration Act 1976 should be on the anvil which involves the cause of 'equal pay for equal work' towards not just men and women, but towards people from the third gender and the LGBTQ community as well.

iv. Challenges in collecting and analysing data regarding pay disparities if any should be addressed.

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v. This is the only way how we may overcome any bias in our organisations and workplaces.

vi. Proper use of AI or Artificial Intelligence is also a future measure in our quest for equitable solutions.

IV. CONCLUSION

The road to be travelled and the miles to be walked are many. Workplaces in India have recently accepted that inclusion and diversity, ERGs (Employee Resource Groups) with shared interests, identities and backgrounds can be a good solution. However, a need of the hour is a quick evaluation of existing HR practices that root out all types of bias. Let us also acknowledge that a plethora of leaves taken by female employees does affect motivation for the rest of the employees who may not be entitled to the same leave privileges. The idea is to minimise bias. With no notification about the Labour Codes from the Central Government in sight, the time has come to do a re-think on both the Act and the devising of a middle path acceptable to most legal metaphors and stakeholders like employers, employees and the rest.

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