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DISCIPLINARY ENQUIRIES IN INDUSTRY: THE LAW, THE PROCESS AND DECISION-MAKING

by

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DISCIPLINARY ENQUIRIES IN INDUSTRY:

The law, the process and decision-making

The introduction of S. 11A to the Industrial Disputes Act, 1947 by an amendment in 1971 has completely changed the complexi of punishment of misconduct established through a process of disciplinary enquiry.

Prior to the amendment, the principles under which a tribuna could interfere with the decision of management were enunciated in the Indian Iron and Steel Company Ltd.[1] case in which the Supreme Court held:

> "Undoubtedly, the management of a concern has power to direct its own internal administration and discipline; but the power is not unlimited and when a dispute arises, industrial tribunals have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief. In cases of dismissal or misconduct, the Tribunal does not, however, act as a court of appeal and substitute its own judgment for that of management. It will interfere:
>
> 1. When there is want of good faith;
> 2. When there is victimisation or unfair labour practice;
> 3. When the management has been guilty of a basic error or violation of a principle of natural justice; and

4. When on the materials, the finding is completely perverse."

The perversity of findings does not depend upon the normal meaning of the term "perverse". In the context, the findings of an Enquiry Officer are perverse if such findings are not supported by evidence as recorded in the proceedings of the enquiry or if it is not possible to come to such a conclusion from the records of the domestic enquiry.

> Two employees who quarelled during working hours were chargesheeted and the blame for the incident being apportioned; one was dismissed and the increment of the other withheld.
>
> "The finding recorded by an enquiry officer may be characterised as perverse only if it is shown that such a finding is not supported by any evidence or is entirely opposed to the whole body of evidence adduced before it. In the present case such a conclusion is obviously impossible."
>
> In deciding the question as to whether a particular conclusion of fact is perverse or not, a tribunal is not justified in weighing the evidence for itself and determining the question of the perversity of the manager's view in the light of its own findings on fact.[2]

The positive test evolved by the Supreme Court regarding the perversity of findings can be described as the test of whether a <u>prima facie</u> case has been made out. Again the term has been defined!

> A prima facie case does not mean a case proved to the tilt but a case which can be said to be established if the evidence which is led in support of it was believed. While determining whether a prima facie case has been made out, the relevant consideration is whether on the evidence on record it is possible to arrive at the conclusion in question and not whether that was the only conclusion which would be arrived at on the evidence. It may be that a tribunal considering this question may itself have arrived at a different conclusion. It cannot substitute its own judgment, it has only to consider whether the view taken is a possible view on the evidence on record.[3]

The acid test that emerge is whether on the evidence on record it was possible to arrive at the conclusion made by the Enquiry Officer.

Let us examine the import of S. 11A which reads:

> "WHERE AN INDUSTRIAL DISPUTE RELATING TO THE DISCHARGE OR DISMISSAL OF A WORKMAN HAS BEEN REFERRED TO A LABOUR COURT, TRIBUNAL OR NATIONAL TRIBUNAL, AS THE CASE MAY BE, IS SATISFIED THAT THE ORDER OF DISCHARGE OR DISMISSAL WAS NOT JUSTIFIED, IT MAY BE ITS AWARD, SET ASIDE THE ORDER OF DISCHARGE OR DISMISSAL AND DIRECT REINSTATEMENT OF THE WORKMAN ON SUCH TERMS AND CONDITIONS, IF ANY, AS IT THINKS FIT, OR GIVE SUCH OTHER RELIEF TO THE WORKMAN INCLUDING THE AWARD OF ANY LESSER PUNISHMENT IN LIEU OF DISCHARGE OR DISMISSAL AS THE CIRCUMSTANCES OF THE CASE MAY REQUIRE:

PROVIDED THAT IN ANY PROCEEDING UNDER THE SECTION THE LABOUR COURT, TRIBUNAL OR NATIONAL TRIBUNAL, AS THE CASE MAY BE, SHALL RELY ONLY ON THE MATERIALS ON RECORD AND SHALL NOT TAKE ANY FRESH EVIDENCE IN RELATION TO THE MATTER.

As a result of the amendment and the introduction of the new S. 11A the jurisdiction of the Tribunal has been considerably enhanced. Where under the "common law" a tribunal could only interfere where the ratio decedendi of the Indian Iron and Steel Company case was involved and the Tribunal was fettered by incapacity to reappraise the evidence adduced in the domestic enquiry proceedings, the amendment enlarges jurisdiction to empower the Tribunal to reassess the evidence and come to its own conclusion.

The effect of the amendment is to bring in a considerable degree of uncertainty on the result of the litigation that follows dismissal or discharge of an employee as the objective test heretofore is now replaced by the subjective judgment of the Tribunal.

This paper examines the consequence of the impact of legislative change and postulates that with the mutation in emphasis, the concern of management is not merely confined to the task of holding domestic enquiries in the context of legal requirements, but to assess the impact and consequences of a decision to punish a delinquent employee with discharge or dismissal.

The scope has enlarged from technical requirements to comply with the law to realms of decision-making in management. We will examine disciplinary enquiries in industry in the three dimensions of the law, the process and decision-making it involves.

Part I

The law governing domestic enquiries in industry

Reviewing the gamut of decisions of the Supreme Court on the subject Vaidialingam J., succintly summarized the law in The Workmen of Firestone Tyre and Rubber Co. of India (Pvt) Ltd v The Management and Others, 1973 I L.L.J. 278 (S.C.):

> "From these decisions, the following principles broadly emerge:
>
> (1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.
>
> (2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the standing orders, if applicable, and the principles of natural justice. The enquiry should not be an empty formality.

(3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fides.

(4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, has to be given an opportunity to the employer and employee to adduce evidence for the first time justifying his action; and it is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing.

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only if no enquiry has been held or after the enquiry conducted by employer is found to be defective.

(7) It has never been recognized that the Tribunal should straight away, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) An employer, who wants to avail himself of the opportunity adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimization.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is ...within the judicial decision of a Labour Court or Tribunal.

The learned Judge went on to consider the summation of the law in the light of S. 11A. The Tribunal is now empowered to reappraise the evidence and satisfy itself that the charge stands established. The test of a "plausible conclusion has transcended" and he has to satisfy the Tribunal that the "finding of misconduct is correct." Where an employer has held an enquiry, Vaidialingam J., held:

> "The Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct, but also to differ from the said finding if a proper case is made out. What was once largely in the realm of satisfaction of the employer, has ceased to be so, and now it is the satisfaction of the Tribunal that finally decides the matter."

Where the employer did not hold an enquiry, the Court opined that the right vested in it by a series of decisions has not been abrogated. "The employer can still continue to do so." The employer can also adduce further evidence before the Tribunal when the enquiry is held vitiated. Vaidialingam J., defined "materials on record" in the proviso to the section to include:

"(1) The evidence taken by the management at the enquiry and the proceedings of the enquiry, or

(2) The above evidence, and in addition any further evidence led before the Tribunal, or

(3) Evidence placed before the Tribunal for the first time in support of action taken by an employer as well as the evidence adduced by the workmen contra."

What is misconduct? - Standing Orders

No letter of appointment which is the contract between an amployer and the employee sets out what is, and what is not misconduct. They are normally found in Standing Orders. Standing Orders set out a large number of terms that govern the day to day relationship of employer and employee including a list of do's and dont's that amount to misconduct. Standing Orders are normally framed in factories but need not be there in all offices. In the office situation there may or may not be agreed rules that cover what Standing Orders do.

1. One of the three charges against Hari Chand a conductor of the Delhi Transport Undertaking was that contrary to "instruction 12" he had in his possession five used tickets of 5 P. and six used tickets of 10 P. each. This instruction had been framed to ensure that no conductor should have an opportunity to dispose of used tickets. After an enquiry Hari Chand's services were terminated. As a dispute was then pending in which Hari Chand was concerned, an application for approval of the action taken was sought from the tribunal. The tribunal refused approval on the ground that instruction 12 was not a part of the Standing Orders and that Hari Chand had not issued any used tickets to passengers. Mere possession of the used tickets did not merit dismissal. The Supreme Court was not impressed with that view. It held that even though "instruction 12" was not part of the Standing Orders and such conduct had not been spelt out in as many words; the misconduct enumerated as: "...Any other activity... which is prima facie detrimental to the interests of the organization", was wide enough to embrace the situation contemplated in "instruction 12" 4

2.Where there are Standing Orders, they would constitute the terms and conditions of service. But it does not follow that what is not embodied in the Standing Orders can never be a misconduct. The Standing Orders cannot be considered to be exhaustive from this standpoint. If an employee commits murder, which is not listed in the Standing Orders as a misconduct, it cannot be said that he was not guilty of a misconduct making him liable to disciplinary action. Sambandam, a cashier of the Bank of Madura, could not apply for and obtain leave on false grounds. It would be misconduct even if it was not listed in the Service Rules.[5]

Some misconducts, though enshrined and included in Standing Orders or Rules, cause confusion and may be ambiguous. One such misconduct is the one that is called the disobedience of the lawful order of the superior. The following instances illustrate the confusion:

Disobedience of Lawful Order of Superior:

1. "The servant is not, however, bound to obey the order to do something not properly appertaining to the character or capacity in which he was hired": (Halsbury's Laws of England - Vol. 25, 3rd Edn. 485.) Could persons normally engaged in composing types in a press refuse to do "joining" which essentially consists of the arrangement of matter set up in type, in such a form as to enable the printing to commence? These individuals did not disclaim knowledge of the work of "joining", nor did they plead they did not have the necessary skill. The only reason for their refusal to do so was because the management did not give them additional remuneration. "Several interlinked parts of a technical process cannot be rigidly delimited. The correct perspective would be to allow management freedom to move labour from one technical process to another closely linked process provided labour had the necessary skill to do the job". Refusal to do the "joining" would amount to disobedience of lawful order.[6]

2. Where the concerned workman in the course of a discussion with his superior officer on a question of sales policy put forward his viewpoint in a raised voice and when the superior officer asked him to "shut up" and "get out", replied that he would not shut up and also refused to get out, his refusal to obey such orders could not be considered wilful disobedience of a lawful and reasonable order of the superior deserving the punishment of dismissal. Such orders could not be considered to be either lawful and reasonable or relating to the duty of the concerned workman.[7]

LLet us consider three other types of misconduct:

1. Go-Slow:

"Go-slow" which is a picturesque description of deliberate delaying of production by workmen pretending to be engaged in the factory is one of the most pernicious practices that discontended or disgruntled workmen sometime resort to. It would not be far wrong to call this dishonest. For, while thus delaying production and thereby reducing the output, the workmen claim to have remained employed and thus to be entitled to full wages. Apart from this also "go-slow" is likely to be much more harmful than total cessation of work by strike. For, while during a strike much of the machinery can be fully turned off, during the "go-slow", the machinery is kept going on a reduced special which is often extremely damaging to machinery parts. For all these reasons "go-slow" has always been considered a serious type of misconduct. [8]

"Go-slow" is a strike on the job, a covert sabotage effected by a conscientious withdrawal of efficiency. It is insidious and cannot be countenanced and no provocation can justify it. It is not a legitimate weapon in the armoury of labour. "Go-slow" is a serious misconduct and merits dismissal of those who adopt it. In rare instances those adopting it may be dismissed en mase. It would be better to charge-sheet individuals or a group of them and hold an enquiry into the charge-sheet. Where a charge-sheet is issued, it must clearly set out on what days the workman had slowed down, what was the norm expected of him and how the workman had falledn short of that norm. The norm may be determined by the actual average of production over a period of one year before the actual slow-down and in the computation of it, production under an incentive scheme should be considered also. The employer is entitled in the last resort, if there be a prolonged "go-slow", to declare of Tribunals and Courts may well be summed up in the words of Chagla, Chief Justice of Bombay: "...both in the case of a piece-rated worker and in the case

of a time-rated worker, during the time the employee has to work, the employer is entitled to expect from him average speed and normal skill." [9]

2. Conduct Subversive of Discipline:

A worker has a right to make a complaint to the police against the management. Such an act by itself is not subversive of discipline. But where the complaint was made without any reasonable justification and knowing it to be false, the worker must suffer the consequences of his wrongful act. An act which brings the superior officer into contempt is undoubtedly subversive of discipline.[10]

3.'Gherao' is a Misconduct:

If a manager is wrongfully restrained or confined with a view to make him concede to the demands of the workmen, it would be the height of insubordination. All that is inconsistent with subordination is insubordination. Demands could be made by workmen consistent with their subordinate position. If demands are made on the manager coupled with the threat that he shall not be allowed to leave the place where the demands are made till he conceded them, it is just a reversal of their respective positions, the workmen assuming to themselves a position of authority and reducing the manager to the position of obedience on pain of being subjected to physical inconvenience. This amounts to an act of gross insubordination.[11]

Misconduct Outside Premises:

The other interesting point one has to consider is whether the employer can proceed against the misconduct of an employee committed outside working hours and outside the premises:

1.A complaint was made on 18th November 1959 that Agnani, a sub-editor of The Tribune had quarrelled and used abusive language against Om Prakash, a shopkeeper in the Tribune Colony, which, in the words of the complainant, constituted "a challenge to the self-respect of those who lived in the Colony". The employer should not attempt to improve the moral or ethical tone of his employees' conduct in relation to strangers not employed in his concern by the use of the coercive process of disciplinary jurisdiction. What Agnani had done was to intervene on behalf of a colleague to ensure release of some items pledged with the shopkeeper by that colleague. Hot words were exchanged, but the whole incident was nothing but a private quarrel.[12]

2. Shobnath worked as an underground Munshi in a colliery. He was staying in the staff quarters built on the colliery land On the night of 5th June 1957, Shobnath, the worse for drink went into the quarters of his fellow-workmen, abusing them, using filthy language, and making a thorough nuisance of himself. His conduct was riotous and disorderly. An enquiry was held and Shobnath dismissed from service. The Tribunal looking into the dispute was of the view that no misconduct had been committed as it was outside the premises and outside working hours that the incident had taken place. The Supreme Court did not agree. The incident had taken place near the coal-bearing area and where the company had provided quarters for its workmen. The persons involved were employees of the colliery or their families.[13]

3. One Raghavan and Mathews, workmen of the Tatapuram factory of Tata Oil Mills Company Ltd., waylaid and assaulted Augustin, chargehand, outside the factory premises whilst the latter was returning home after work. They were charged with "misconduct" under the Standing Orders which included the expression "...fighting...within or without the factory". Found guilty, Raghavan was dismissed. The Tribunal took the view that the assault was a private matter in which the employer was not interested. The Supreme Court did not agree. What the occasion for the assault was and what motive actuated it had been considered by the Enquiry Officer. It arose out of a difference of opinion regarding the introduction of an incentive bonus system. The charge framed explains the motive. The misconduct falls within the scope of the Standing Orders: the assault arose out of a difference of opinion on a matter connected with the work of each of them.[14]

<u>The Enquiry Vitiated</u>

In the light of the observations made by Vidialingam J., adverted to earlier, where the management has held an enquiry, it will stand vitiated if:

1. There is want of good faith;

2. There is victimization or unfair labour practice; and

3. There has been a violation of the principles of natural justice

Let us examine each of these in turn:

1. When There is Want of Good Faith:

This is normally expressed as want of bona fide or on account of mala fide. A good example of want of good faith would be an instance where management have asked one of its officers, who knows about or has been a witness to the particular incident, to be its enquiry officer in a charge arising out of the incident to which he was a witness. There is an old equitable maxim that "he who seeks equity must come with clean hands".

2. When There is Victimization or Unfiar Labour Practice:

(i) Unfair Labour Practice:

What is unfair labour practice was considered at length by the Labour Appellate Tribunal in a case of J.K. Eastern Industries. It expounded three instances where there would be unfair labour practices:

"(1) An order made in bad faith, with an ulterior motive, arbitrarily, or with harshness is an instance of unfair labour practice.

(2) Where there has been an encroachment of any natural, contractual, statutory or legal rights of the employees.

(3) A presumption as to unfair labour practice may fairly be drawn where an employee is found to have been dispensed with for no reason whatever or for a reason which is patently false or is proved to have been false, the true reason being an indirect or unlerior motive."[15]

(ii) Victimization:

The word "victimization" means:

(a) either punishing an innocent person on account of displeasure, or

(b) punishing a person disproportionately to the offence.[16]

(a) Displeasing employer:

1. It is victimization when the workman concerned is innocent and yet he is being punished because he has in some way displeased the employer, for example, by being an active worker of the Union of the employees which was acting contrary to the employer's interest. [17]

2. The fact that the relations between an employer and the union were not happy and the workmen concerned were office-bearers or active workers of the union would by itself be no evidence to prove victimization, for if that were so, it would mean that the office-bearers and active workers of a union with which the employer is not on good terms would have a carte blanche to commit any misconduct and get away with it on the ground that relations between the employer and the union were not happy. [18]

3. Miss Scott was confidential secretary of Mr. Gowan, Delhi Representative of the Assam Oil Company Ltd. Her services were terminated. One of the main causes for it was the fact she had joined the Union of employees and this was frowned upon by Mr.Gowan, as in her official capacity, she had access to secret information. This action was victimization.[19]

If an employer takes action against a workman on the ground that he joined a trade union, or is actively working for it or participating in its activities, that would no doubt be victimization. So would it be if the punishment were excessive.

(b) Punishment disproportionate to offence:

Hind Construction and Engineering Company Limited carries on business as engineers and contractors in different parts of West Bengal. Eleven permanent and nineteen temporary workmen were the employees it had at Sukchar Storeyard. It was the normal custom of the company to have fourteen holidays a year and whenever a holiday fell on a Sunday, the following Monday was treated as a holiday. 1st January 1961 was a Sunday and the 2nd should have been a holiday in the normal course. Owing to pressure of work the company decided to work on 2nd and give a holiday in lieu on a subsequent day. The permanent workmen did not turn up for work on the 2nd. They were charge-sheeted for being absent on

2nd and after an enquiry, dismissed. The resulting industrial dispute reached the Supreme Court via the Tribunal. Normally, the awarding of punishment for misconduct is for the management to decide. No tribunal can consider the propriety or adequacy of the punishment or whether it is excessive or too severe. But where the punishment is shocking disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice. The Supreme Court held: "...this is one of those cases in which it can plainly be said that the punishment imposed was one which no reasonable employer would have imposed in like circumstances... "The workmen were reinstated.20

3. When There is Violation of the Principles of Natural Justice:

In order to fulfil the requirements of the principles of natural justice:

(1) an employee has to be given a charge-sheet which is clear and unambiguous;

(2) the charge-sheeted employee has to be given the right to cross-examine all witnesses produced in support of the charge;

(3) the charge-sheeted employee has to be told that he may give evidence himself and produce such relevant evidence as may be necessary in his defence;

(4) no documentary evidence shall be considered without the charge-sheeted employee being given an opportunity to explain them, and where the document is the statement of a witness taken down during his absence, such statement had been given to him atleast 48 hours before it was introduced in evidence.

Principles of Natural Justice:

1 (1) "The principles of natural justice require that a charge-sheeted employee should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the employer should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined on behalf of the management, and that no materials should

be relied upon against him without his being given an opportunity of explaining them." If this procedure is followed, the evidence recorded at an enquiry is not open to attack. 21

2. Mani Ram, an employee of Shanker Flour Mills, was charged with negligence, as there was a breakdown in the boiler from 19th to 23rd August 1960. The breakdown was attributed to his negligence. Negligence could be proved only on the basis of the report of an expert. The expert's report was not brought on record. Unless the report forms part of the record and was brought to the notice of the employee, it would not be possible for him to indicate the possible flaws in the report and to show that no negligence could be attributed to him. The non-production of the expert's report is a major lacuna in the evidence.22

3. It is desirable that all witnesses on whose testimonies the management relies on support of its charge against the workman should be examined in his presence. Recording evidence in the presence of the workman concerned serves a very important purpose. The witness knows that he is giving evidence against a particular individual who is present before him; and, therefore, he is cautious in making his statement. "In our opinion, unless there are compelling reasons to do so, the normal procedure should be followed and all evidence should be recorded in the presence of the workman who stands charged with the commission of acts constituting misconduct." - Gajendragadkar J., of the Supreme Court. 23

4. Witnesses were not orally examined before the enquiry officer. Instead the prepared signed statement of the witnesses were read over to them and they were asked whether the statements were correct and they had signed them. These statements were also read over and explained to the workman charged and they were then asked to cross-examine the witnesses. No copies of the statements of the witnesses were supplied to the workman at any time.

Wanchoo J., of the Supreme Court held, "... the purpose of the rules of natural justice is to safeguard the position of the person against whom an enquiry is being conducted so that he is able to meet the charge laid against him properly ...Many of our industrial workers are illiterate and sometimes even the representatives of the labour unions may not be present to defend them....The minimum we shall expect where

witnesses are not examined from the very beginning at the enquiry in the presence of the person charged is that the person charged would be given a copy of the statements made by the witnesses which are to be used in the enquiry well in advance before the enquiry begins and when we say that the copy of statements should be given well in advance we mean it should be given at least two days before the enquiry is to begin."

Part II

The process of holding domestic enquiries in industry

Preliminary investigation

Before a prudent employer launches into a disciplinary enquiry he should carry out a preliminary investigation to find out whether a prima facie case of misconduct is evident. A hypothetical instance of an employee who has overstayed his leave by ten days would illustrate the point. The normal reaction of any employer would be to issue a charge-sheet and initiate disciplinary proceedings. It is quite possible that if the employee concerned had been consulted, the entire proceedings could well have been avoided. For the story he had to tell was that his village was in a remote corner of the country; that there were three bridges and a river to be crossed to get to it; that owing to unseasonal rains, two of the three bridges had been washed away and that the river was in flood; that the telegraph lines between his village and civilization had been cut and he could not communicate with the company.

An enquiry should be the result of a preliminary investigation and should not be resorted to merely as a matter of course. For, let it not be forgotten that to an employee, who is a human being, the mere receipt of a charge-sheet, is in itself a stigma, and is likely to bring him down from the normal pedestal of the social stratification of the group to which he belongs.

If it is found that there is a prima facie case of misconduct, then the manager or officer who has conducted the preliminary investigation, should have a charge-sheet framed and issued to the employee. The charge-sheet will intimate who the enquiry officer is. From the moment the charge-sheet is issued, the drama shifts to the Enquiry Officer's court.

Stages of an Enquiry:

The stages in the conduct of a disciplinary enquiry can be identified as:

1. Issue of a charge-sheet;
2. Recording of evidence:
    (a) oral evidence of management witnesses and introduction of documents;
    (b) cross-examination of management witnesses by the charge-sheeted employee or his representative;
    (c) oral evidence of employee and his witnesses and the introduction of documents; and
    (d) cross-examination of employee and his witnesses;
3. Findings of the Enquiry Officer; and
4. Punishment

After a charge-sheet has been issued and the enquiry convened, management would call witnesses to give evidence orally before the Enquiry Officer. The employee would follow suit with his evidence. On the strength of the record of the proceedings before him the Enquiry Officer makes up his mind on the facts and comes to his conclusion on whether the facts disclosed before him do or do not disclose the commission of misconduct. On the "findings" of the Enquiry Officer, the management decides on whether to punish and also decides the severity of punishment.

Charge-sheet

A disciplinary enquiry is initiated by serving a charge-sheet on the workman who is alleged to have committed misconduct. The employer has to tell an employee in a clear, unambiguous, precise terms what he is charged with. If the employer does so, then, the employee would be in a proper position to refute the charge against him.

1. Gohain, an employee of Powari Tea Estate, was charged as follows:

> "It has been brought to my notice that you have been taking money from labourers at the time of payment of their wages and also from assisted emigrant labourers when they want to sign J forms and also from non-workers in the lines."

The charge-sheet further added that Shri Allison, the Divisional Manager of the Estate, who had issued the charge-sheet, had checked on the information furnished to him against Gohain and that he had been satisfied that Gohain had been guilty of the said misconduct.

The charge is not happily worded and the concluding portion of the charge-sheet seems to indicate that Shri Allison had already made up his mind that Gohain was guilty of the misconduct set out in the charge.

The Supreme Court emphasised "that such incautious and loose language in the charge-sheet is to be avoided, because it is likely to create an apprehension in the mind of the employee charge-sheeted that the person issuing the charge has already decided the case against him." 25

2. "A" and "B" were charge-sheeted for stealing a bag of cement from the managing director's house. They refused to attend the enquiry. The enquiry was held in their absence. As a result of the findings they were dismissed. The tribunal, before whom the dispute came in adjudication, held that the employees had not been given a fair hearing on the ground, that in the charge-sheet the details of the alleged misconduct had not been given fully. The High Court of Allahabad, reversing the award, observed:

"The date and approximate time of theft is mentioned in the charge-sheet. The place of incident is also mentioned. The charge-sheet asked them to explain why steps should not be taken against them for committing a misconduct....It asked them to appear before the manager... It is evident from the charge-sheet that it gives the necessary particulars of the charge of theft. A charge sheet is not expected to be a record of evidence. It cannot be said to be imprecise or lacking in necessary details. The Labour Court wrongly held that the charge-sheet did not contain full details...." 26

If a charge-sheet, which is issued to an employee, is not clear and unambiguous, it would mean that he cannot put forth any defence. How can a man defend himself unless he is aware of what he is charged with?

Multiplicity of charges

There is normally a tendency among management, once they have decided to charge-sheet a particular employee to "throw in the lot". Avoid the tendency to do so.

1. An employee was charged on two occasions with misconduct. On each charge the management concluded that the offence was grave enough to merit dismissal and passed two orders of dismissal. One of the charges was successfully impugned. Even then, in view of the fact that management had found the other charge serious enough to merit dismissal, would mean that the order of dismissal in that case would hold.27

> 2. Kuppuswami, head of the job composing department, was charged with three counts of negligence by the Printing Works, found guilty, and removed from service. It was determined by the tribunal adjudicating on the dispute that on the first charge, the negligence was not attributable to composing, nor did the second charge result from defects in composing. The punishment meted out by the management on Kuppuswami was on the footing that all three charges have been proved. When once it is seen that two of the charges could not be validly sustained against the worker, it would follow that the punishment could not be sustained either.28

Communication of Charge-sheet:

It is not enough if a proper charge-sheet is framed and signed. That charge-sheet has to be communicated to the employee concerned:

> 1. When registered notices containing charge-sheets were returned to the employer unserved, if the Standing Orders provide that charge-sheets may be served by their display on the notice-board that would be sufficient communication to the employee.29

> 2. Where notices sent by registered post to the charge-sheeted workmen come back undelivered, and where the Standing Orders are silent, the employer should publish in some local newspaper in the regional language with a wide circulation a notice containing the names of all the workmen against whom action is proposed to be taken, and the charges framed against them.30

Where the charge-sheets have not been properly served and notice of the day and time of holding of the enquiry not intimated to the workmen, the enquiry is not held properly.

Role of the Enquiry Officer

The Enquiry Officer may be a member of the management or he may be an outsider, the employer's lawyer or a manager of another business. His role is to impartially elicit all information that is necessary for him to come to a conclusion as to whether the misconduct charged has been established or not. He is not the prosecutor. He ought not to behave like an inquisitor.

He should begin the proceedings by asking the charge-sheeted employee whether he has understood the charge and whether he pleads guilty or not guilty.

> The workmen, who are charged with misconduct can refuse to make a statement before the evidence of witnesses against them is recorded. 31

The Enquiry Officer may proceed to hold the enquiry ex parte, i.e., without the charge-sheeted employee participating if he does not turn up at the time and place appointed without valid excuse or if he withdraws from the enquiry. The following three instances illustrate this principle:

> 1. Refusal of an enquiry officer to allow a representative of the union or a lawyer to represent the charge-sheeted workman would not vitiate the enquiry. If the workman refused to participate on such rulings, the findings of guilty in an ex parte enquiry would not be invalid.32

> 2. Charge-sheeted workmen were given the opportunity to be present at the stage of oral examination. They decided to go on an excursion. The intrasigence of the workmen in not availing the opportunity was squarely on them.33

> 3. Workman withdrew from the enquiry at a certain stage. It was the duty of the Enquiry Officer to continue the enquiry ex parte and record evidence. He should have then written his findings. Mere fact of withdrawal does not absolve the Enquiry Officer of these duties.34

Unless the Standing Orders so provide an employee is not entitled to have the assistance of a co-employee, Union leader or any other person at the enquiry:

> The Standing Orders of Dunlop Rubber Company (India) Limited provided that a charge-sheeted workman may be assisted at the enquiry by a representative of a union which was registered under the Indian Trade Union Act and recognised by the Company. There were two rival unions and the charge-sheeted employees refused to participate in the enquiry as the only persons who could assist them belonged to the rival union. The Supreme Court held that the refusal by the Enquiry Officer to allow the charge-sheeted employees assistance of the men of their own union, which was not the recognised union, was neither illegal nor a denial of natural justice.35

Adjournment

Another question which often concerns an enquiry officer is whether he should allow adjournments of the enquiry at the behest of the charge-sheeted employee.

> "It would be unreasonable to suggest that in a domestic enquiry, it is the right of a charge-sheeted employee to ask for as many adjournments as he likes. It is true that by refusing to adjourn the enquiry at the instance of the charge-sheeted workman, the Enquiry Officer failed to give the workman, a reasonable opportunity to lead evidence, that may introduce an element of infirmity in the enquiry."[36]

Bias of the Enquiry Officer

It would be a violation of the principles of natural justice if the Enquiry Officer was a person who was biased against the workman or already knew the facts of the case. This stems from the equitable principle that no man shall be a judge in his own cause.

> 1. Thommy, a sarang of Madura Company was charged with negligence. "A" was to enquire into the charge. While the enquiry was pending, another charge-sheet was issued against Thommy for allegedly making imputations against the honesty of officers including "A". This charge was being enquired into by "B". With the enquiry before him still to be concluded "A" gave evidence in the second enquiry. Thommy was found guilty of both charges. "A" could not be but biased and ought not to have proceeded with the enquiry before him.[37]

> 2. Ten workmen of the Lamba Bari Tea Estate were charged with forcibly and illegally confining the Manager, Assistant Manager and Office Staff between 9.30 A.M. and 8.00 P.M. on 3rd November, 1960 and with shouting slogans and abusing the Manager of the Tea Estate. The enquiry into the charge was held by the Manager himself. The Manager recorded the statements, cross-examined the labourers and made and recorded his own statements of facts and questioned the offending labourers about the truth of his own statements as recorded by himself. The Supreme Court opined that an enquiry should always be entrusted to a person who is not a witness. An enquiry

cannot be said to be held properly when the person holding the enquiry begins to rely on his own statements.[38]

Evidence

1. "A" was employed as a thalasi jamadar of a sugar mill. He was charged with having adopted a threatening attitude and used insulting language to the Chief Engineer of the Mill. An enquiry was held and thereafter "A" was dismissed. The inquiry was successfully challenged on the ground that it was incomplete. The transcript of the proceedings of the enquiry showed that the Enquiry Officer translated the complaint of the Chief Engineer into Punjabi for the benefit of "A" and asked him if he wanted to ask the Chief Engineer anything. "A" declined to question the Chief Engineer. Where a workman is charged with the offence of misbehaviour towards a senior officer of the concern, the officer concerned would be the best person to state what had actually happened. The mere fact that "A" was asked to put questions to the Chief Engineer would not mean that the officer had been examined as a witness. The enquiry was neither fair nor complete as the Chief Engineer was not examined and his evidence recorded by the Enquiry Officer.[39]

2. Patra was charged with having falsified the records, paid wages to a man already dead: all this being done to misappropriate the wages.

In finding Patra guilty of the charges the Enquiry Officer had relied on the reports of the Gram Panchayat. The Tribunal was of the view that as members of the Gram Panchayats were not required by any law to keep any record or register of deaths, their reports were not admissible in evidence and vitiates the enquiry. The Calcutta High Court were of the view that such report could be the basis of findings of the Enquiry Officer. The strict rules of evidence do not apply to disciplinary enquiry situations.

3. Fifty workmen were charged with having struck work illegally and confined some of the officers of Arati Cotton Mills Ltd. In addition, fourteen of these workmen were charged with having abused and attempted to assault the Chairman of the Board of Directors. Separate enquiries were held against each of the workmen. The management's evidence consisted in each case of one witness who was not a common witness. In other words, the same person did not give evidence against all the employees. At the end of the enquiry proceedings in respect of each individual, the charge-sheeted workman was asked to produce his

been informed that he had a right not merely to examine any witness on his behalf, but also to make his own statement in support of the case. 41

4. Raghavan, charged with assaulting a fellow-workman, expressed a desire to examine two witnesses in his defence. He asked the Enquiry Officer to invite the witnesses to give evidence. The Enquiry Officer made it clear that it was no part of his duty to call the witnesses for Raghavan. Raghavan should in fact have had them ready. Nevertheless, the Enquiry Officer sent out two letters calling on the persons to come and give evidence before him. One of them refused to give evidence. The Enquiry Officer received an unsigned communication purportedly from the other witness asking for four days' time. The Enquiry Officer ignored this epistle, concluded the enquiry, and returned to Bombay the same day as scheduled. Gajendragadkar, C.J., held: "In a domestic enquiry, the officer holding the enquiry can take no valid or effective steps to compel the attendance of any witness, just as the company produced its witnesses before the Enquiry Officer, Raghavan should have taken steps to produce his witnesses." 42

5. When the Chief Reporter of Anand Bazar Patrika went away for a while, he asked "A" to act on his stead. "B" a reporter refused to do the work assigned to him by "A", provided his own work assignments and refused to recognise "A"'s authority. A charge-sheet was inevitable and the enquiry was entrusted to the editor of another newspaper. The Hindustan Standard. The Enquiry Officer found "B" guilty and in view of the seriousness of the misconduct, recommended dismissal. But in view of the fact that "B" had a long service to his credit he was discharged. The tribunal adjudicating the resulting dispute impugned the enquiry on the ground that the Enquiry Officer did not permit "B" to examine a single witness on his behalf and disallowed relevant questions put by "B" in cross-examination. The Supreme Court criticised this award. It found that "B" had only wanted to examine a single witness, his editor, who, in the view of the Enquiry Officer would have been able to give no assistance to him at the enquiry nor contributed anything relevant to the charge. "There can be no doubt that at the domestic enquiry it is competent to the Enquiry Officer to refuse to examine a witness if he bona fide comes to the conclusion that the said witness would be irrelevant or immaterial. If the refusal to examine such a witness, or to allow other evidence to be led, appears to be the result of the desire on the part of the enquiry officer to deprive the person charged of an opportunity to establish his

> innocence, that of course, would be a very serious matter". In this case the Enquiry Officer thought honestly that the evidence of the editor would be neither material nor relevant and in doing so, he neither acted capriciously nor mala fide. "B" had been permitted to cross-examine the management witnesses at length. Some of the questions put by "B" were not only irrelevant but were very unfair and it was the Enquiry Officer had dis-allowed certain questions a tribunal can only go behind that decision, even if some of the questions were relevant, if it can be shown that the Enquiry Officer was acting mala fide. That was not the case here.43

An Enquiry Officer, who, at the end of the evidence led before him, still feels that some material is necessary for him to come to a proper conclusion or findings, may call such persons or evidence as may be necessary, in his opinion, for him to come to a proper conclusion on the charge-sheet.

Recording of Evidence

Legally speaking, all that the Enquiry Officer has to do is to record the evidence in his own words, the recordbeing a summary of what transpired. However, it is quite often the practice of charge-sheeted employees to challenge the recording of evidence. Some companies have the habit of recording verbatim the evidence. Some have gone a stage further. They normally have the typescript of the recording read back and agreed to by all persons who were present when they were recorded. After typing, each page of the record is initialled by all those who were present during that stage of the proceedings. This ensures that there would be no improper challenge of the record of the proceedings of the enquiry.

Findings

The Enquiry Officer having sat through the enquiry, recorded the proceedings, has still a final role and task to fulfil. He has now to apply his mind to all the facts that have emerged before him and from that mass of details, record his findings. In other words, he will, in writing, state, giving due regard to all the evidence whether he finds the employee guilty of the charge or not. In doing so the Enquiry Officer is really appreciating the evidence before him. The Enquiry Officer may or may not recommend the punishment.

1. The whole object of holding an enquiry is to enable the Enquiry Officer to decide upon the merits of the charges before him. The employer cannot pass an order of dismissal once the evidence is recorded. Findings have to be made despite the fact that the Enquiry Officer himself was competent to dismiss the employee concerned.[44]

2. The Welfare Officer of TISCO held as follows in the enquiry he conducted against three workmen charged with theft of coal:

> "From the evidence on record I am inclined to feel that the accused have failed to prove their innocence with regard to the charge brought against them."

The burden of proving innocence does not rest with the charge-sheeted employees. It is for the Management to prove its case.[45]

3. The Industrial Tribunal observed that five sets of facts were adverted to by the Enquiry Officer in his findings:

> "(1) that the cycle sheds were in existence for a number of years;
>
> (2) that there were provisions for 2000 cycles or so;
>
> (3) that the practice of keeping cycles in these sheds existed since the sheds came into existence;
>
> (4) that a number of employees were found making

parts for their cycles from company's materials and using their cycles for surreptiously removing materials from the workshop, and

(5) that a concerted effort was made by the dissident group to invite defiance of the Company's order by a rigorous propoganda accompanied by shouting and gesticulating and that such propoganda was carried on from 25 May to 6 June 1964",

were not borne out by the evidence adduced before the Enquiry Officer.

Shelat J., of the Supreme Court held, "strictly speaking the Enquiry Officer was not entitled to bring in facts in his report which did not form part of the evidence....it is clear that these observations were made incidentally and none of them was relied on by him for holding any of the workmen against them..Understandably if any one of these observations had been relied on by him, the enquiry and report would have been vitiated on the ground that it did not form part of the evidence..."46

Punishment

When the findings of the Enquiry Officer are placed before the Management it then becomes the Management's task to decide on whether to punish, the severity of the punishment.

The punishments that are normally available to management are as under:

Factory	Office
1. Warning	1. Warning
2. Suspension (as provided in the Standing Orders, normally four days)	2. Fine
3. Discharge	3. Stoppage of Increment
4. Dismissal	4. Discharge
	5. Dismissal

Depending on service rules and the Standing Orders the lists may be wider.

Fine

Before the imposition of a fine or the stoppage of an increment a specialised procedure is to be followed. In the case of a fine the maximum amount that can be levied is only 1/32 of the earnings of the employee for the month. After an enquiry, the punishment of a fine within limits can only be inflicted after the permission of the State Government has been obtained. Needless to say, this punishment is academic.

Stoppage of increment

In the case of a stoppage of increment, after the enquiry has been completed and the findings accepted, the management must serve a letter on the charge-sheeted employee enclosing the findings and asking him to show cause why his increment ought not to be withheld. This punishment can only be inflicted after hearing him and giving due weight to his representations.

In arriving at the quantum of punishment the management has the right to take into account the past record of the employee. It is preferable, however, that such past record was introduced as part of the management's evidence in the enquiry.

Illegal Strike

Management ought to bear in mind that the Supreme Court had laid down that mere participation in an illegal strike would not necessarily justify dismissal:

> "Mere participation in an illegal strike would not necessarily justify dismissal. Where the charge that the concerned workmen were guilty of fomenting the strike and inducing the other workmen to take part in the strike by threats was not proved, concerned workmen would not be dismissed unless the Standing Orders so provide." 47

Communication of Order of Dismissal

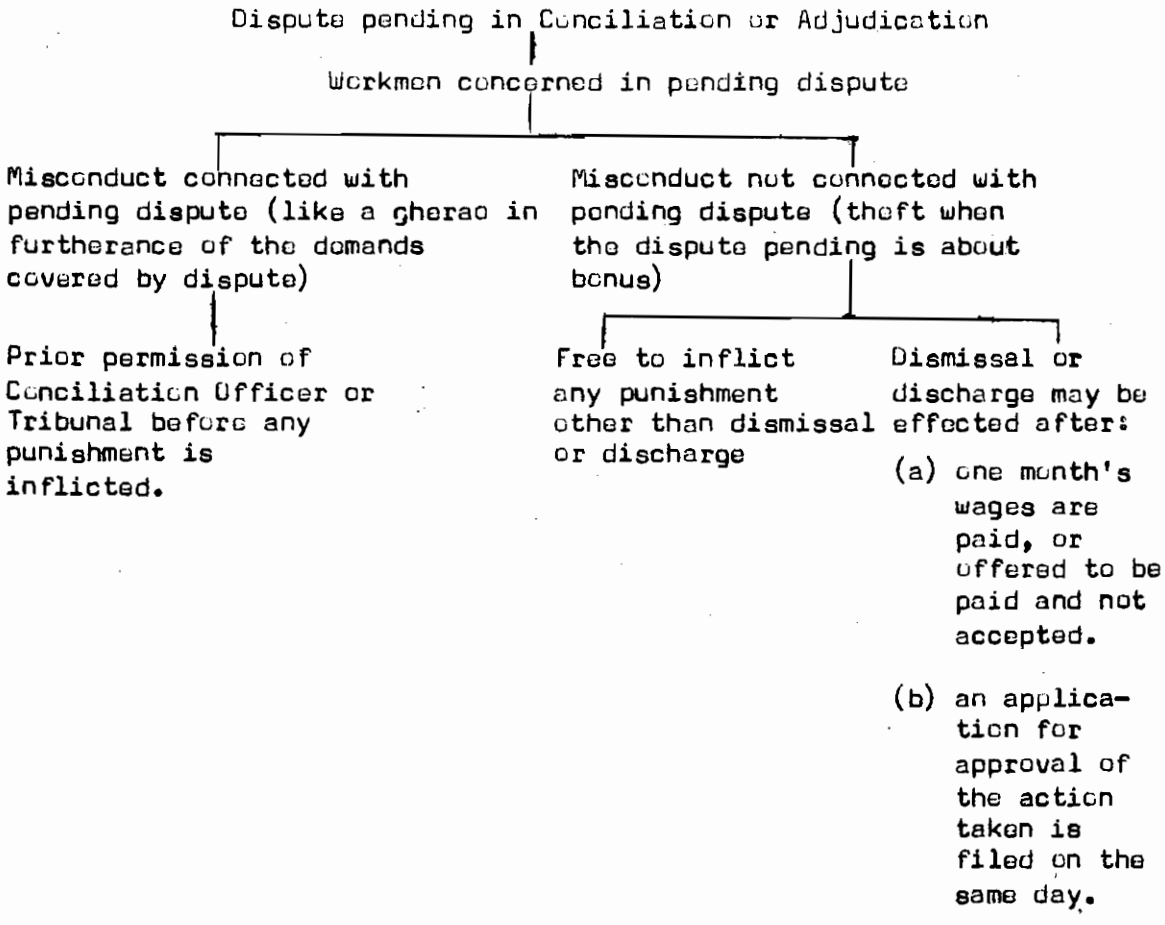
It is open to the employer to act on the findings and dismiss or discharge the charge-sheeted employee. But if it does so it must communicate such order to the employee.

> The manager of Ritz Theatre, Delhi passed on the order of dismissal of an employee after an enquiry, to the assistant manager, who in turn passed it on to a clerk for handing it over to the charge-sheeted employee. It was doubtful whether it reached the person concerned and bang he came back.48

Maintenance of Status Quo

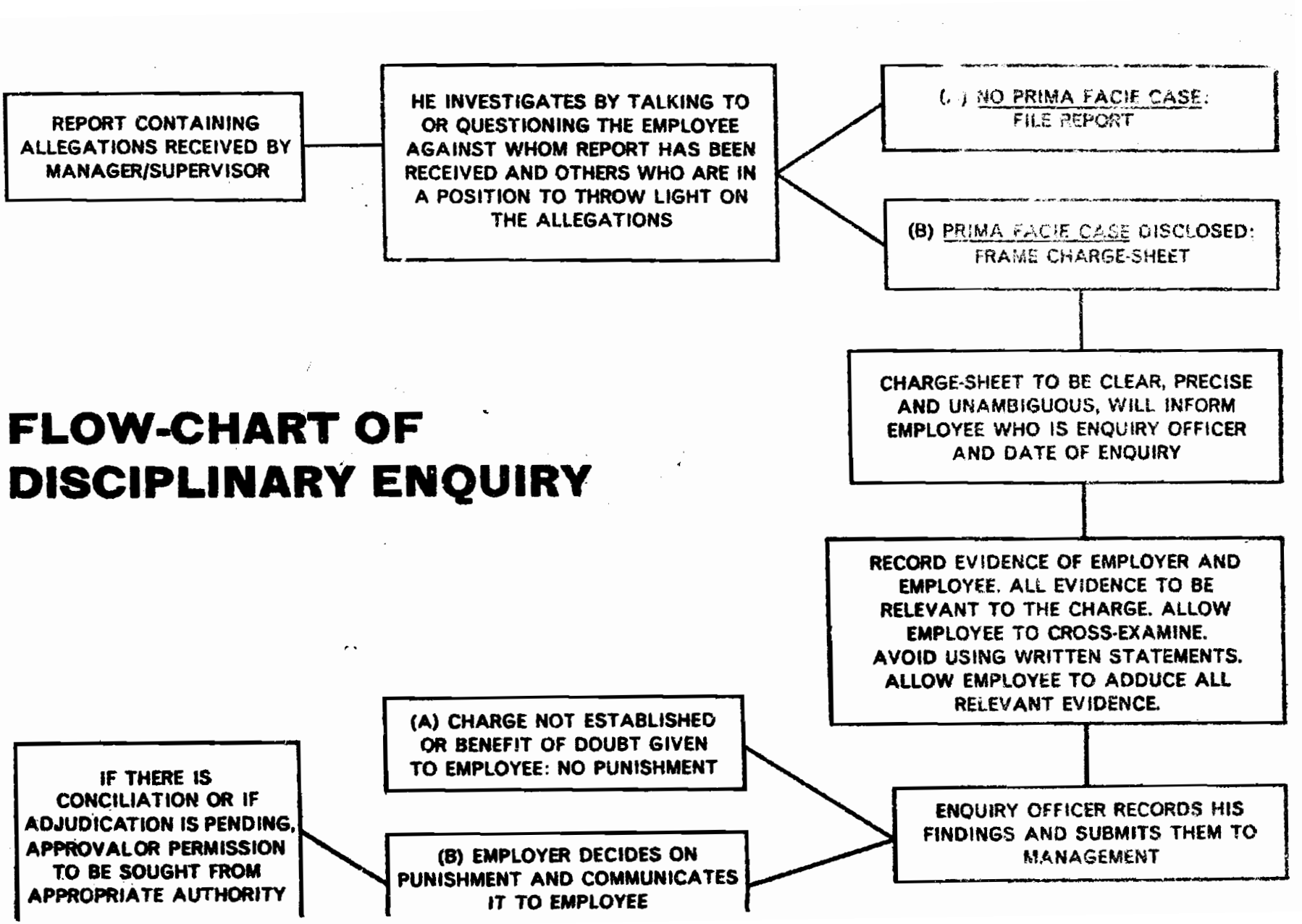
The right of management to punish its workmen is restricted when a dispute is pending either in conciliation or in adjudication. This is to safeguard a worker from being punished because he was party to the dispute. It also ensures that the status quo is maintained.

The diagram below will be useful in understanding the provisions of Section 33 of the Industrial Disputes Act:



A flow-chart of disciplinary enquiry represents the process of conduct of domestic enquiries in industry.

FLOW-CHART OF DISCIPLINARY ENQUIRY



Part III Decision-making in domestic enquiries

There is yet another aspect of the law that impinges on decision-making in awarding punishment after the due process of conducting a fair and proper domestic enquiry. It concerns the jurisdiction of the Tribunal to award a lesser punishment than what management has meted out.

The Tribunal can:

1. Concur with the decision of management, or
2. disagree and substitute
   a) reinstatement with full back wages; or
   b) reinstatement with part wages; or
   c) reinstatement without wages or with suspension within or beyond the pale of standing orders or withholding of increment or any other punishment other than the extreme one of termination of service; or
3. award compensation in lieu of reinstatement on the ground that the employer has lost confidence in the charge-sheeted employee.

The law to determine what constitutes "loss of confidence" sufficient for the Tribunal to award compensation in lieu of reinstatement still remains in the grey area of uncertainty.

Reinstatement?

1. Mitter J., of the Supreme Court in Binny's case observed: "It has become almost a settled principle that reinstatement should not be awarded where management justifiably alleges that they have ceased to have confidence in the dismissed employee. In other cases the Tribunal must consider carefully the circumstances of the case to come to a finding that justice and fairplay require that reinstatement should be awarded." [49]

2. Ramprasad Rao J., of the Madras High Court had this to say: "It is only in cases where reinstatement of a worker whose services have been terminated would result in explosive industrial relations between the management and the terminated workers that it would be necessary for an Industrial Court to consider whether the alternative remedy of awarding compensation would be adequate.[50]

The confusion is still further confounded when we contrast the situation of a confidential secretary reinstated by the Supreme Court[51], and the special pedestal on which a driver has been placed by the Kerala High Court:

> " .... the post of a driver is different from the post of a worker in a factory or some other employee who it may be said is ordinarily remotely controlled by the employer. Such an employee in the factory does not come into daily contact with the employer and his every action would not have the same repercussions on the employer, as is the case of a manager sitting in a car driven by a driver. We must also say that an employer may bona fide lose confidence on a driver for reasons or grounds which another may not consider reasonable or just. In such cases the subjective satisfaction if honestly arrived at for the employer to say that he has lost confidence in his driver." : obiter dicta of Govindan Nair C.J.[52]

The legal aspects of the process of domestic enquiry in industry and punishment as a consequence of establishment of guilt has to further examined and understood in the context of an evolving system of industrial jurisprudence best explained through a contrast of pronouncements of three eminent jurists of the country:

1. "Employers must realise that their employees, however humble their status and however poor their earnings may be, are entitled to be treated as human beings and must be treated with due respect to human dignity." : Gajendragadkar C.J., Supreme Court.[53]

2. "This approach on the part of the industrial employer is in accordance with the egalitarian and progressive trend of our industrial jurisprudence, which strives to treat capital and labour as co-sharers to break away from the tradition of labour's subservience to capital." Dua J., of the Supreme Court. [54]

3. "Processual law is neither petrified nor purblind but has a simple mission - the promotion of justice. The Court cannot content itself with playing umpire in a technical game of legal skills but must be activist in the cause of deciding the real issues between the parties .... A shift on the emphasis, away from technical legalistics, is overdue if the judicature is not to aid its grave diggers." : Krishna Iyer J., Supreme Court.[55]

The parameters of decision-making

We will illustrate the problems involved in decision-making through a hypothetical example. Let us assume that a supervisor has been assaulted and beaten up by three workmen on the factory floor following an altercation of words between one of the workers, who is a union leader and the supervisor. The incident is a misconduct under the standing orders.

The supervisors as a group and the individual supervisor involved in the incident in particular are highly incensed and are demanding immediate action of issue of charge-sheet and suspension of the workmen pending enquiry. They would like to see the workmen dismissed.

Proposition 1 : Levels of hierarchy closest to the incident constituting misconduct advocate firm and immediate action.

The manufacturing Manager opines that the supervisor involved in the incident is prone to use abusive language and has a bad record of human relations and would not be surprised if the assault had been preceded by one of the supervisor's known predilictions to tantrums.

Proposition 2: Levels of the hierarchy removed from the immediate supervisory relationship will tend to take a more objective view of the situation.

The Personnel Manager reports that the incident cannot be ignored. There has been violence on the factory floor. But he assesses that when it comes to the stage of recording evidence two polarisations will take place. Some supervisors and an odd officer would give evidence of the actual assault and beating up. But there would be conflicting and contradictory evidence from the workmen that no such incident took place. One of the workmen involved had not signed the muster roll and an effective alibi would be built around him. The odd supervisor may turn hostile under pressure of the workmen.

Proposition 3: Management will find that the establishment of the case is not always clear cut and there will be more than one side to the story.

The Personnel Manager also assesses that since a Union leader is involved, there would be some reaction to the issue of a charge-sheet and suspension of the workmen. The severity of the reaction

is assessed differently by people whom he has consulted. They were:

"We'll have a bit of shouting and tamasha."

"There will be an immediate cessation of work and the strike can last 1. 3 to 5 days

2. 2 to 4 weeks

3. Indefinite."

"The chaps will go slow and reduce output

1. to 60%

2. to 40%

3. to 20%."

The Economic impact of union militancy

The economic dimension of a path of militancy adopted by the workers is an important one. Let us study this using a set of figures.

	in Rs lakhs
The daily output of the factory is	1.00
Variable cost per day is	.50
Contribution after variables	.50
Wages per day	.20
Other fixed costs	.25
Total	.45
Profit before tax per day	.05

The factory works for 300 days per annum and the annual profit before tax is Rs 150 lakhs.

The impact of a strike per week, assuming no strike wages are payable works out to

non-recovery of other fixed cost	.25
+ profit not made	.05
per day	.30
per week of 6 working days	1.80 lakhs loss.

The impact of go-slow at various levels are :

	Go slow at		
	60%	40%	20%
daily output	.60	.40	.20
variable cost	.30	.20	.10
contribution after variables	.30	.20	.10
wages	.20	.20	.20
Contribution after variables & wages	.10	.00	(.10)

In this instance it is clear that any output below 40% will not recover wages. At outputs below that level it is not economically viable to operate the factory.

Proposition 4: When the operations are no longer viable on account of go-slow, management will retaliate by locking-out.

If the militancy adopted by the Union leads to further violence and the life and limbs of management staff are endangered or property is in jeopardy, management once again will have no choice but to lock-out.

Assuming that lock-out wages need not be paid, the economic impact of such action is loss of Rs 20,000 per day - the same as in the case of strike.

Proposition 5: Management would strive to the extent possible to keep output at a level that ensures it has to take no action, workers will attempt to force management into taking offensive action.

A quantitative approach to decision-making

The economic impact of reaction to either initiating the process of domestic enquiry through a charge sheet or by dismissing the workman found guilty of misconduct having been clearly determined, the next question to be considered is whether there are any mathematical aids "to reduce complexity to simplicity?" [56]

Game theory is one source of inspiration. John Mc Donald's description on Von Newmann is apt:

> "On one occasion, for example, he distinguished sharply between the observable world, the observing instrument, and the peculiarity of the human observer, and then took apart the paradox that if you assigned all of the observing instruments - including the human eye, brain and whole body - to the universe, you still had to postulate the observer without whom all meaning was lost. He saw in the tradition of mathematics a bias stemming from its empirical origins in mechanics, and he looked for human foundations in games."

Would the players, the management and the workers find themselves in the throes of an "attrition game"[58], or in a "win-draw-lose" [59] wrestling bout?

The second tool that can aid management is the use of a decision tree which allows him to plot the course of action his alternative decisions are likely to follow. It will aid him to visualize the future despite the lack of sufficient tangible information available to him at present and determine the outcome of uncertain events.

> "Using the decision tree, management can consider various courses of action with greater ease and clarity. The interactions between present decision alternatives, uncertain events and future choices and their results become more visible." [60]

The key decision points and chance events that may influence the course of disciplinary enquiry can be built into a decision tree. When relevant financial data and the probabilities of each alternative are built into the decision tree, rolled back, the branches pruned, a very valuable and incisive tool to aid decision-making on whether to charge-sheet or award the ultimate punishment is readily available to management.

> "Proposition 6 : Mathematical and statistical aids to decision-making are useful to management in arriving at how to react to indiscipline and initiate a disciplinary enquiry and punish the recalcitrant employee."

Expediency in Decision-making

There is an element of expediency in all such decision-making. Let us introduce a further complication to our hypothetical case. It would suit the management to keep the Union leader out of the factory for some time at this juncture. Should they do so?

In the same breadth the question raises yet another dimension, the short-run and long-term implications of action taken under disciplinary proceedings.

> Proposition 7: Where the short-run implications far out-weigh the long-term consequences of the action proposed, managements will tend to take the route that provides greatest short-run satisfaction.

We envisage one major exception to the proposition we have just made. Managements will tend to take a longer term view of their market position and the impact of non-supply of goods for any length of time. The reactions of monopolistic producers will differ very radically from others and a close assessment of competitive strategies and thrusts and exploitation of the market situation by them will weigh very heavily in the minds of decision-makers.

Proposition 8: The maintenance of discipline is a means and not an end and top management will compromise to satisfice both short-run and long-term interests of the concern.

The dimension of collective bargaining:

We had in our introduction to this paper postulated that the enactment of S. 11 A had shifted the emphasis from the earlier accent of holding a proper enquiry to the realms of decision-making. We make a further proposition :

Proposition 9: Punishment of an employee found guilty of misconduct has moved into the sphere of collective bargaining.

The Tribunal is now endowed with the right to review and reassess the evidence adduced in the domestic enquiry proceedings. Where the enquiry conducted was not faultlessly done, or where no enquiry has been held, the decision vests with the Tribunal, anyway.

A casual glance at any volume of Law Reports before the introduction of S. 11 A and after will show that the pronouncements by the High Courts and the Supreme Court on the subject of domestic enquiries has dwindled from a deluge to a trickle. This is understandable as no

appeal lies from the decision of Tribunals which are based on facts to the higher courts. The Tribunal's decision is final unless a substantive issue of law is involved and the writ jurisdiction of the High Courts and the Supreme Court can be invoked.

Against that backdrop of reduced litigation and the uncertainty that must prevail on the final outcome of the reference before an Industrial Court, increasing resort will need to be made to achieve compromise in bilateral negotiations or tripartite bargaining under the aegis of the conciliation machinery of the State.

Unions and workmen have recognised that even in matters of punishment for misconduct they have an increasing say. They are on occasion willing to bargain the quantum of compensation in lieu of reinstatement. We have been a party to resolving this ticklish issue across the bargaining table by paying monetary compensation in lieu of reinstatement and also in awarding punishment beyond the pale of the Standing Orders.

We believe this trend will increase. In the game of punishment of misconduct WIN and LOSE will be substituted by COMPROMISE. The glove fits the changing shape of the fingers of justice, equity, management, labour and industrial peace that together forms the hand of industrial relations.

Conclusion :

We have expounded the liturgy as evolved by the high priests of the law, the litany will continue in the day to day decision-making of managers.

...

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27. Workmen of R.P.David & Co. 1965 I L.L.J. 88 (Madras).
28. Royal Printing Works 1963 II L.L.J. 60 (Madras).
29. Bata Shoe Company Private Ltd. 1961 I L.L.J. 303 (S.C.)
30. G. Mckenzie & Co. A.I.R. 1959 S.C. 389
31. Anglo-American Direct Tea Trading Co. Pvt. Ltd. 1961 II L.L.J. 625 (S.C).
32. Brooke Bond India (Pvt) Ltd. 1961 II L.L.J. 417 (S.C.)
33. Sarada Industries, Ambattur 1973 I L.L.J. 248 (Madras).
34. Imperial Tobacco Company of India Ltd. 1961 II L.L.J. 414 (S.C.)
35. Dunlop Rubber Co. India Ltd. 1965 I L.L.J. 426 (S.C.)
36. Tata Iron & Steel Co. Ltd. 1966 II L.L.J. 749 (Patna).
37. Workmen of Madura Co. Ltd., Cochin 1966 I L.L.J. 498 (Kerala).
38. Workmen of Lambe Bari Tea Estate 1966 II L.L.J. 315 (S.C.)
39. Malwa Sugar Mills Co Ltd. XXV F.J.R. 209 (Punjab).
40. Fort William Jute Mills Co Ltd. 1963 I L.L.J. 734 (Calcutta).
41. Arati Cotton Mills Ltd. 1965 I L.L.J. 616 (Calcutta).
42. Tata Oil Mills Co. Ltd. 1964 II L.L.J. 113 (S.C.)
43. Ananda Bazaar Patrika (Pvt) Ltd. 1963 II L.L.J. 429 (S.C.)
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50. Dhanpal Bus Service (P) Ltd. 1976 I L.L.J. 15 (Madras).

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