De Silva

v.

The Associated Newspapers of Ceylon Ltd.

COURT OF APPEAL.
WIMALARATNE, P. AND TAMBIAH, J.
C.A. (S.C.) 36/77—L.T. KANDY 3/255/74.
MARCH 5, 7, 1979.

Labour Tribunal—Application for relief by District Correspondent of newspaper group on ground of termination of services—Whether independent contractor or 'workman' within meaning of Industrial Disputes Act—Tests applicable—Reinstatement—Whether contract for fixed term entitles applicant to such relief—Gratuity—Can Tribunal make order even if not legally due in terms of contract—Non-renewal of written contract for fixed term—Effect.

The applicant had entered into a written agreement dated 10th March, 1969, with the respondent Company in terms of which he was appointed the District Correspondent of its newspapers for Kandy North. Prior to this he was the Kandy Group Correspondent from February, 1958. In terms of the said written agreement the respondent Company agreed to purchase from the applicant news reports, pictures, information etc. relating to his district which were suitable for publication. Other clauses of the agreement provided for the payment of a sum of Rs. 300 per month to the applicant as a "retainer". For the exclusive purchasing rights over such news, in addition, the respondent Company also agreed to pay the applicant for every news item and picture which it published at rates set out in the schedule. Other clauses of the agreement also provided for the accuracy and veracity of news supplied, the reporting of any special proceedings and/or events etc. This written agreement was renewable by mutual consent and although in the first instance it was for a period of six months it was thereafter renewed from time to time until finally after it expired on 28th February, 1974, the respondent Company did not renew it.

The applicant went to the Labour Tribunal on the ground that his services had been terminated unlawfully by the respondent Company as from 28th February, 1974, and prayed for reinstatement or compensation in lieu thereof and also for a gratuity for his past services. The respondent Company took up the position that the applicant was not a "workman" within the meaning of the Industrial Disputes Act, but was an independent contractor. Accordingly the question that arose for decision by the Labour Tribunal was wheher there was a contract of service between the parties or one for services.

Apart from the series of agreements in writing renewed from time to time as aforesaid there was also other evidence both oral and documentary in regard to the legal relationship between the parties. This evidence revealed that since his appointment as the Group Correspondent in 1958 the applicant had to attend the office of the respondent Company daily; taken instructions from the Chief Reporter or his assistant who was also the Kandy news editor as to the coverage of verious events; that he was paid travelling and subsistence though this was not stipulated in the written agreement; that he sometimes received special instructions from the Head Office in Colombo regarding the coverage of various events and

that communications to him from the Head Office were addressed to the Kandy Office and not to his residence. There was also the evidence of Mr. Wickremanayake who was the Kandy news editor above referred to regarding the assignments given and the work done by these District Correspondents. This witness also spoke to the fact that they had to apply for and get leave and sometimes leave was refused. The applicant had on occasions also acted for Mr. Wickremanayake. Bonuses were paid for good work and these were paid monthly along with the "retainer".

On behalf of the applicant it was submitted that the Court must look at the oral and documentary evidence notwithstanding that there was an agreement in writing. Cases were also cited by Counsel which referred to the "control test" and the "economy reality test" and the "integral test". It was submitted on behalf of the respondent that these two latter tests were not applicable in deciding whether it is a contract of service or of services if there was a written contract.

Held

(1) A correspondent was not doing business on his own account but was employed as a part and parcel of the Company business of newspaper publishers and was an integral part of the company's business. He was therefore employed under a contract of service and was a "workman" within the meaning of the Industrial Disputes Act.

(2) However having been employed under a series of contracts of employment for fixed terms without any guarantee that the contract would be renewed on the expiry of the stipulated period such an employee would have no claim to reinstatement. A fixed term contract was not terminated by the employer but by mutual agreement on the effluxion of time.

(3) The Labour Tribunal nevertheless had jurisdiction to order payment of gratuity to the applicant on the basis that he had been employed as a "workman" from February 1958 up to 28th February, 1974. Even where gratuity is not legally due in terms of the contract a Labour Tribunal may consider whether such an order is just and equitable, and in the case of a fixed term contract not being renewed by the employer for reasons other than misconduct and inefficiency, then a "retiral situation" arises which gives rise to a claim for gratuity.

Cases referred to

(1) *Indian Institute of Technology v. Mangat Singh*, (1974) 2 L.L.J. 191 (Delhi).
(2) *The Times of Ceylon Ltd. v. Nidahas Karmika Saha Welanda Sevaka Vurthiya Samithiya*, (1960) 63 N.L.R. 126.
(3) *Carson Cumberbatch & Co. Ltd. v. Nandasena*, (1973) 77 N.L.R. 73.
(4) *Morren v. Swinton and Pendlebury Borough Council*, (1965) 2 All E.R. 349; (1965) 1 W.L.R. 576.
(5) *Stevenson Jordon and Harrison Ltd. v. Mc Donald and Evans*, (1952) 1 T.L.R. 101; (1952) W.N. 7.
(6) *Bank Voor Handel in Scheepvaart v. Statford*, (1952) 2 All E.R. 956; (1953) 1 Q.B. 248; (1952) 2 T.L.R. 861.
(7) *U.S. v. Silk*, (1946) 331 U.S. 704.
(8) *Market Investigations Ltd. v. Minister of Social Security* (1968) 3 All E.R. 732; (1969) 2 W.L.R. 1; (1969) 2 Q.B. 173.
(9) *Beloff v. Pressdram Ltd.* (1973) 1 All E.R. 241.
(10) *The National Union of Workers v. The Scottish Ceylon Tea Co. Ltd.*, (1976) 78 N.L.R. 133.

APPEAL from the Labour Tribunal, Kandy.

A. A. de Silva, with *S. Dassanayake*, for the applicant-appellant.
Mark Fernando, for the respondent-respondent.

Cur. adv. vult.

May 16, 1979.

WIMALARATNE, P.

The applicant-appellant was the Kandy group correspondent of the respondent company (hereinafter referred to as A. N. C. L.) from February, 1958. In response to an advertisement calling for applications for posts of Special correspondents in the same company, the applicant applied by letter R2 dated 12.1.69. After facing an interview by the Board of Editors of A. N. C. L. he was selected as the District correspondent for Kandy North. He entered into the agreement R1 dated 10.3.69, which is termed "a contract for the supply of News intelligence and Reports of events". The preamble recites as follows :

> "Whereas the A. N. C. L. ..... is desirous of procuring news intelligence reports of events, pictures and other material suitable for publication in its newspapers, magazines or other publications ; and whereas Yaseratne Gunapala de Silva represents to the company that he is a fit and proper person to supply such news and material relating to all areas in the District of Kandy North"
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> and whereas the company has agreed to purchase for its use all such news, reports, pictures and information etc. which in its view and judgment is suitable for publication, and the said Y. G. de Silva hereinafter called the vendor, has agreed to supply daily, hourly or at such intervals as would suit the company's requirements such news etc. as the company would require relating to all areas in the Kandy District".

Then follow seven clauses of the agreement. The Company agreed to pay the applicant a monthly "retainer" of Rs. 300 for the exclusive purchasing rights over all news etc. obtained by him. The Company agreed in addition to pay the applicant at rates set out in a schedule for every item of news or information published in the Company's newspapers and for every picture used by the Company. The applicant undertook whenever possible to supply reports of any special proceedings or events which may interest the Company when so requested by the Company. Provision was also made to procure the accuracy and veracity of all news and information supplied, and to vest the copyright of all news used, in the company. The contract was to remain in force until 10.9.69, and was renewable by mutual consent on that date, provided it had not been earlier terminated by each party giving one month's notice to the other.

The contract was renewed on 13 occasions, for periods ranging from one year to three months, by the documents R3 to R10, R12 to R14, R17 and R18. The contents of the contracts remained the same as in R1, except that after 1.8.72 the "retainer" was reduced from Rs. 300 to Rs. 150 per month, and the rates in the schedule were also reduced. The company did not renew the contract R18 which terminated on 28.2.74.

The applicant complained to the Labour Tribunal that the Company unlawfully terminated his services from 28.2.74, and prayed for reinstatement or compensation in lieu of reinstatement, and also for gratuity for past services. The respondent answered that the applicant was not a "workman" employed by the company but that he was an "Independent contractor", and that the Tribunal could not entertain the application. The President has taken the view that there was no contract of employment between the applicant and the Company; and that the written contracts are similar to agreements relating to the sale and purchase of goods. As the applicant was not a "workman" within the meaning of the Industrial Disputes Act, No. 43 of 1950, as amended, the Tribunal has dismissed his application.

The question the Tribunal had to decide was whether the applicant was a servant or an independent contractor. The distinction between contracts of service and contracts for services loomed large at the inquiry. If the applicant was the servant of the respondent, then he was employed under series of *contracts of service.* If the applicant was not a servant, but an independent contractor, then he was employed under a series of *contracts for services.*

In the course of his submissions at the close of the trial learned Counsel for the applicant submitted to the Tribunal that "this agreement is a complete fabrication (false device ?).....This contract does not give the real relationship which existed between the parties. I therefore say that we must go outside this contract". It was therefore incumbent on the Tribunal to have made a fair analysis of the evidence led on behalf of the parties to determine the real relationship that existed between them, for one element of the concept of employer and employee which has undergone considerable change in recent times is the notion that the relationship is a purely contractual one. As stated by the Court in *Indian Institute of Technology v. Mangat Singh* (1) "Employment originally was and still is basically a contract between the employer and the employee. This bilateral relationship is however often found to be superseded partly or wholly by status

which is contrasted with contract. Status is determined extrinsically by law and not by agreement between parties. Status may supersede contract by affecting either of the two parties to it, namely the master or the servant.". (at p. 194).

Learned Counsel for the appellant has argued before us that notwithstanding the written contracts, one must look at the other evidence relating to the nature of the applicant's rights and duties in order to determine the real relationship between the parties. As the President has depended heavily on the words of the written contract and has not given much consideration to the other evidence, oral and documentary, it is necessary to set down in some detail the relevant evidence. From the time he was appointed a group correspondent in 1958 the applicant resided in Kandy. He had to attend the office of the A. N. C. L. daily. That office was situated in the Bank of Ceylon Building. He made use of the office equipment and stationery as well as the telephone installed in that office in the course of his duties. He had to report daily either to the Chief Reporter, Mr. Dissanayake or to his assistant Mr. Cecil Wickremanayake, who was also called the Kandy News Editor. Both of them gave him instructions from time to time as to what news he had to cover. Wickremanayake maintained a diary which contained a list of events which the local editors wanted the correspondents to cover. Although R1 did not define the territorial area of Kandy North, Wickremanayake told him that it included eight electorates, namely, Kandy, Senkadagala, Teldeniya, Minipe, Akurana, Wattegama, Hewaheta and Kundasale. When he had to cover events in distant places like Minipe he was paid his expenses for travelling and subsistence although that was not a condition stipulated in R1. He would sometimes be instructed by the local editor to cover electorates other than the eight mentioned above; and sometimes the head office in Colombo would send him special instructions, either by telephone or by telegram. He produced some of these instructions as contained in letters and telegrams marked A1 to A4. He was asked, inter alia, to give full coverage to all inter school (cricket) matches played in his area, to obtain the reactions of the Mahanayaka and Anunayaka Theras on the abolition of Poya Holidays and the introduction of Sundays as holidays, and to obtain photographs of some politicians who were contestants at the general election, 1970. A5 to A8 are newspaper cuttings of reports sent by him and relate mainly to events outside his area. They include reports of a Rugger Match in Radella between the visiting French Ruggerites and an Up Country XV; an account of proceedings held in the Magistrate's Court of Kuliyapitiya in what was known

as the Deduru Oya headless murder case; and the death by poisoning of five persons in Pussellawa area. A9 to A10 are telegrams requiring his presence at the head office in Colombo. All these communications have been addressed to him to the Kandy office and not to his residence at Watapuluwa.

Wickremanayake was called as a witness by the applicant. He was an officer on the permanent executive staff of A. N. C. L. He testified to the fact that district correspondents were expected to come to his office and to take instructions from him. He gave them assigments which they had to carry out. Sometimes special assignments were given by him which would involve correspondents going to places outside their normal areas. Sometimes when they did not carry out their duties satisfactorily, explanations were called for. Wickremanayake said that he had occasion to call for explanations from the Kandy South District correspondent, one Senaratne, on several occasions, and had even to report him to the local editor and the Chairman of A. N. C. L. The document A11 is a letter by which the chief administrative officer had called for an explanation from D. P. Sirisena, the Kurunegala correspondent.

When correspondents wanted leave they had to apply for leave either to Wickremanayake or to Russel Gunasekera, Manager of the Kandy office. There were several occasions on which leave was refused. A17 and A18 are leave applications made by the Kandy South correspondent. Leave had been recommended by Wickremanayake in each instance. A13 is a circular dated 29.8.72 sent by the editorial administration department to all correspondents. It contains four guide lines for "news suppliers", relating to accuracy of reports, absence from areas etc. The respondent points out that the applicant was not required to obtain leave, but only to inform the local editor of absence from the area in order to enable the paper to make other arrangements. It would appear, however, that prior to the date of that circular leave had to be obtained, because A17 to A18 relate to a period anterior to August, 1972.

There were occasions when the applicant acted for Wickremanayake. There was also the fact that District correspondents could not delegate their duties. This is understandable because accuracy was the essence of good reporting and inaccurate reports could cause incalculable damage to the paper. Good work was rewarded by the payment of bonuses. These were paid monthly, along with the "retainer".

All this evidence stood uncontradicted. They were relevant to support the applicant's relationship to the company as being that of a servant to the master; and to establish that notwithstanding the written contracts, the applicant and District correspondents like him were "workmen" employed by the Company. The President has however, not attached much weight to this volume of evidence. He has preferred to act on the written contracts, and has taken the view that the applicant was an independent contractor.

The Industrial Disputes Act defines "employer" and "workman" as follows:—

Unless the context otherwise requires "employer" means any person who employs or on whose behalf any other person employs any workman; and "workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is express or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract, whether such person is or is not in employment at any particular time.

Decided cases have held that this definition of workman read with the definition of employer covers a person whose relationship with the employer is or has been one of master and servant. An independent contractor is not included in this definition. *The Times of Ceylon Ltd. v. Nidahas Karmika Saha Welanda Sevaka Vurthiya Samithiya* (2). In *Carson Cumberbatch & Co. Ltd. v. Nandasena* (3), Tennekoon, C. J. reached the conclusion that "a common law contract of service must subsist between the employer and workman before two persons can be regarded as employer and workman", at p.84.

Perhaps the best definition of the relationship between master and servant is that of *Salmond*: "A servant may be defined as any person employed by another to work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done", *Law of Torts* (13th Ed.) 112. This is the orthodox test—the right of the employer to control the employee in regard to the manner in which the work is to be done. The test of control, however becomes difficult to apply when the employee exercises professional skill or performs work of a highly technical or scientific nature. "Superintendence and control cannot be the

decisive test when one is dealing with a professional man or a man of some particular skill or experience", per Lord Porter in *Morren v. Swinton and Pendlebury Borough Council* (4) at 351.

The inadequacies of the "*control test*" have led Judges to formulate other tests in the context of modern industrial complexities. One of them, known as the "integration test" was formulated by Lord Denning thus: "under a contract of service a man is employed as a part of a business; and his work is done as an integral part of the business; whereas under a contract for services, his work although done for the business, is not integrated into it, but is only accessory to it". *Stevenson, Jordan and Harrison Ltd. v. McDonald and Evans* (5) at 111, or as stated by the same learned Judge in another case; "The test of being a servant does not nowadays depend on submission to orders. It depends on whether person is part and parcel of the organisation" (6) at 971.

In *U.S. v. Silk* (7), the Supreme Court of the United States has decided that in determining whether certain persons were "employees" within the meaning of a statute the test to be applied is not "power of control, whether exercised or not, over the manner of performing service to the undertaking", but whether the men were employees "as a matter of economic reality". Based on this decision the English courts have recently evolved a test which is really a refinement of the integration test, and it was stated thus by Cooke, J. in *Market Investigations Ltd. v. Minister of Social Security* (8): "The fundamental test to be applied is this: Is the person who has engaged himself to perform these services performing them as a person in business on his own account? If the answer to the question is 'yes' then the contract is a "contract for services". If the answer is 'no' then the contract is a "contract of service" (at page 737.)

The facts of that case were briefly these: A company engaged in market research employed several persons as interviewers for short periods of time. Mrs. I was so engaged on several occasions on agreements whereby she undertook in consideration for a fixed remuneration, to provide her own work and skill. The company was entitled to specify the persons to be interviewed, the questions to be asked, the order in which they were to be asked and recorded and how they were to be recorded, and how she should probe for answers. She could be required to attend the company's office for instructions or might receive them from a supervisor. During the period of each agreement she could work when she wanted, could undertake similar work for other organisations, and could not be moved from the area which she agreed to work. There

was no provision for holidays, time off or sick pay. The company's position was that Mrs. I was employed on a series of contracts for services. On the question whether whilst working under the agreements with the company Mrs. I was included in the class of "employed persons" (i.e., persons employed under a contract of service for the purposes of the National Insurance Act of 1965) ; and whether she was employed in ' insurable employment " within the meaning of the National Insurance (Industrial Injuries) Act, 1965, the Court held that Mrs. I had been employed under a series of contracts of service (and not on a series of contracts for services) because (i) the extent and degree of control exercised by the company were consistent with her being employed under a contract of service, and (ii) in particular, not having been shown that Mrs. I was in business on her own account, the nature and provisions of the contracts as a whole were consistent, rather than inconsistent, with there being contracts of service.

Dealing with the company's argument that Mrs. I's work was performed under a series of contracts, each for a particular and specific survey, and that the relationship of master and servant is normally conceived of as a continuous relationship and the fact that there is a series of contracts is more consistent with these contracts being contracts for services, Cooke, J. observed, "For my part, I doubt whether this factor can be considered in isolation. It must, I think, be considered in connection with the more general question whether Mrs. I could be said to be business on her own account as an interviewer" (at p. 740).

In *Beloff v. Pressdram Ltd.* (9), one of the important questions for decision was whether the political and lobby correspondent of the Observer newspaper, who had no written contract of employment with the company, was employed under a contract of service within section 4(4) of the Copyright Act, 1956. Holding that on the facts of the case the plaintiff was employed under a contract of service, Ungoed Thomas, J. said, "The test which emerges from the authorities seems to me, as Denning, L.J. said, whether on the one hand the employee is employed as part of the business and his work is an integral part of the business, or whether his work is not integrated into the business but is only accessory to it ; or as Cooke, J. expressed it, the work is done by him in business on his own account" (at p. 250).

Learned Counsel for the respondent submits that the integral test and the economic reality test are not applicable where services are performed in terms of written contracts, as in this case. He also posed the question as to whether a person who habitually

sells all the vegetables to a particular hotel, or an insurer who insures all the hiring cars of a travel firm should be considered as an integral part of the business of the hotel or the travel firm and thus be treated as employees of the latter. Further, if all the international news of the company is obtained exclusively through Reuters for 25 years, do Reuters become its employees ? Even if one were to apply the test of control, in his submission, the company did not instruct the applicant as to the means of doing his work. Although it is legitimate and necessary to instruct an independent contractor as to *what* work he should do, the company did not even instruct him as to what he should do. Whatever test is applied, Counsel contends, the facts of this case do not show that the applicant was a servant or workman employed by the company.

Let us first apply the control test. There was a stipulation as to the salary, although it was called by another name. Whether a monthly payment made to another is termed a salary or retainer does not alter the legal position. Even if no news was supplied by him, the applicant was entitled to this payment. The applicant had to reside in the Kandy District. He had to attend the company's office and obtain instructions from the local editor. Special assignments were sometimes made by the head office. For carrying out these items of work he was paid according to a schedule of rates. At least prior to 1972 leave had to be applied for and obtained. Bonus payments were given for good work done—hardly consistent with the treatment meted out to an independent contractor. These are all features which are prominent in contracts of service, and inconsistent with contracts for services.

A point was made of the fact that employer and employee did not contribute to the Employees' Provident Fund. But it has to be remembered that constributions to that Fund depended on whether a particular employment was a " covered employment ". Even in the case of a covered employment, the failure to contribute to the Fund would certainly not be a circumstance from which the relationship of the parties could be gathered.

Counsel for the respondent says that the fact that the contract makes no provision for leave suggests that it is not a contract of service. I cannot accept that this is a test of much assistance when contracts of service are entered into for fixed short periods, with no provision for leave, off time, etc. The fact that the applicant was free to work for others is also not inconsistent with the existence of a contract of service. It is by no means a necessary incident of a contract of service that the servant is prohibited from serving any other employer.

There are certain features which go to show that the control which the Company had the right to exercise was, however, limited in various ways. But that control appears to have been very extensive in this case. It was so extensive as to be entirely consistent with the applicant being employed under a contract of service on each occasion on which he engaged himself to supply news to the Company by providing his own work and skill in the performance of a service to the Company. The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service.

The answers to the questions posed by learned Counsel for the respondent are apparent when one applies the tests of integration and economic reality. Reuters is a business establishment doing business on its own account. So is the vegetable vendor who supplies all the vegetables required by a particular hotel. But the correspondents of this group of newspapers were certainly not doing business on their own account. They were employed as part and parcel of the company's business of newspaper publishers; they were an integral part of the company's business, and not merely accessory to it. They were therefore employed under contracts of service by the company, and were "workmen" within the meaning of the Industrial Disputes Act.

But the applicant was employed under a series of contracts of employment for fixed terms. A 'fixed term' contract is one under which a person is employed for a fixed term without any guarantee that the contract would be renewed on the expiry of the stipulated period, the contract coming to an end by consensual termination at the end of the agreed period. Where a contract for a fixed term is not renewed, the employee would have no claim to reinstatement before a Labour Tribunal; because a claim for reinstatement can be made before a Labour Tribunal under section 31B (1) (*a*) of the Act only if his services are *terminated by the employer*. But a fixed term contract is terminated not by the employer, but by mutual agreement, on the effluxion of time.

The position would have been different had the question of the non-employment of the applicant and of other District correspondents gone before an Industrial Court or an Arbitrator. Section 48 of the Act defines an 'Industrial dispute' as meaning any dispute between an employer and a workman .....connected with the employment *or non-employment* .....of any person. These words appear to be wide enough

to cover the case of non-renewal of a series of contracts of employment for fixed periods, if they have given rise to an implied promise or understanding that the employer would renew the contract in the absence of misconduct or inefficiency.

The reliefs of reinstatement or compensation in lieu thereof were therefore reliefs which the Labour Tribunal had no jurisdiction to grant. But the Tribunal had the jurisdiction to order payment of gratuity on the basis that the applicant had been employed as a " workman " by the company from February 1958 up to 28.2.74—a period of 16 years.

The contracts of employment in the present case have no provision for the payment of gratuity. In that sense gratuity is not " legally due ". Even where a gratuity is not legally due a labour tribunal may consider whether it is just and equitable to grant a gratuity. But since the decision in *The National Union of Workers v. The Scottish Ceylon Tea Co., Ltd.* (10), a tribunal's jurisdiction to award gratuity is limited to cases where an employee's services have come to an end in circumstances which amount to " a retiral situation ". I am of the view that when a fixed term contract of employment is not renewed by the employer for reasons other than misconduct or inefficiency on the part of the employee, then a retiral situation arises, which gives rise to a claim for gratuity.

The applicant, in concluding his evidence in chief, stated that he left " the question of gratuity and compensation to the Tribunal ". Just after that he said that his salary was about Rs. 700 per month. That would include the retainer, payments for news items supplied at the schedule rates, special payments for feature articles and bonuses. This evidence has not been contradicted by the company. It seems, therefore, that having regard to the good work put in by the applicant, as testified to by Wickremanayake. Rs. 700 per month would be a safe guide for the computation of gratuity on the basis of an unbroken period of 16 years service. Whilst dismissing the applicant's claim for reinstatement and compensation, I would allow him claim for gratuity, and award him a sum of Rs. 11,200. To that extent this appeal is allowed, with costs fixed at Rs. 500 payable by the respondent.

TAMBIAH, J.—I agree.

Appeal allowed and gratuity awarded.