IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for the issue of a mandate in the nature of a Writ of Certiorari under Article 140 of the Constitution.

Bojan Koluundzija,
Country Director,
Oxfam Australia,
No. 15, Rohini Road, Colombo 06.

Petitioner

Case No. CA (Writ) 339/2014

Vs.

1. (Mrs.) V. B. P. K. Weerasinghe
   Commissioner General of Labour,
   Department of Labour,
   Narahenpita, Colombo 05.

1A. Mrs. M.D.C. Amarathunge,
Commissioner General of Labour,
Department of Labour,
Narahenpita, Colombo 05.

2. A. D. K. M. Weerakkodi
   Assistant Commissioner of Labour,
   District Labour Office of Colombo – West,
   Department of Labour,
   Narahenpita, Colombo 05.

3. Kumudu Balasooriya
   Senior Labour Officer,
   District Labour Office of Colombo – West,
   Department of Labour,
   Narahenpita, Colombo 05.

4. Lalilth Shantha De Silva
   Senior Labour Officer,
   District Labour Office of Colombo – West,
   Department of Labour,
   Narahenpita, Colombo 05.

5. (Mrs.) G. G. Gamage
   No. 56/8A, Dulapitiya, Borelasgamuwa.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Murshid Maharoof with Shoaib Ahamed for the Petitioner

Nirmalan Wigneswaran SSC for 1A to 4th Respondents

Argued on: 02.07.2019

Written Submissions tendered on:

Petitioner on 15.11.2018 and 16.08.2019

1A to 4th Respondents on 10.01.2019 and 19.08.2019

Decided on: 23.01.2020

Janak De Silva J.

The Petitioner is the Country Director of Oxfam Australia which is a Non-Governmental Organization duly registered under the Voluntary Social Services Organizations (Registration and Supervision) Act No. 31 of 1980 as amended (P1). The Petitioner seeks a writ of certiorari quashing the order/award in the letters dated 07.11.2013 (P15) and 23.05.2014 (P18).

The order P15 is in relation to unpaid Employees Provident Fund (EPF) dues from Oxfam Australia to the 5th Respondent for the period November 2005 to June 2011. The reasons for the said order are contained in P18.

The 5th Respondent worked for Oxfam Australia from November 2005 to June 2012. The Petitioner does not dispute that the 5th Respondent was an employee of it within the meaning of the EPF Act for the period 1st August 2011 to 30th June 2012 in terms of a contract of employment P10.

The dispute is whether the 5th Respondent was an employee of Oxfam Australia within the meaning of the EPF Act for the period 1st November 2005 to 30th June 2011 during which period she was, according to the Petitioner, working in terms of several consultancy agreements marked P3 to P9.

Consequent to a complaint made by the 5th Respondent to the 1st Respondent (P11) that her statutory payments of EPF was not paid for the period 1st November 2005 to 30th June 2011, the 4th Respondent conducted an inquiry after which P15 was issued whereby Oxfam Australia was directed to pay the arrears of EPF for the period 1st November 2005 to 30th June 2011 plus the surcharge amounting in total to Rs. 1,087,692.34. At the request of the Petitioner the reasons for the said decision P18 was given to the Petitioner. The Petitioner seeks to assail these two documents which according to her contains a decision/award.

Rules of Natural Justice

One ground on which the Petitioner seeks to assail P15 and P18 is that they were made in breach of the rules of natural justice. This Court will first address this submission.

The inquiry took the form of affording the parties an opportunity of filing written submissions, which both parties did, as well as an oral hearing although an oral hearing is not standard practice in disputes of this nature according to the Respondents. The oral hearing took place on 19.06.2013 and the inquiry notes were produced to Court marked R4. Thereafter the 4th Respondent submitted a report dated 21.08.2013 (R5) to the 2nd Respondent recommending that action be taken to recover the statutory dues for the relevant period. This report contains reasons for the conclusion that the 5th Respondent was an employee of Oxfam Australia for the period 1st November 2005 to 30th June 2011 within the meaning of the EPF Act.

The above steps in my view satisfies the rules of natural justice and therefore I reject the submission of the Petitioner that P15 and P18 was made in breach of the rules of natural justice.

Employer-Employee Relationship

The Petitioner sought to assail P15 and P18 on the basis that P15 and P18 is unreasonable.

The common law grounds heads of judicial review are illegality, irrationality and procedural impropriety [*Council of Civil Service Union v. Minister for the Civil Service* (1985) AC 374 at 408 (HL)]. There Lord Diplock went on to state:

> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no

sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

The Petitioner contends that P15 and P18 are unreasonable as there was no employer-employee relationship between the 5th Respondent and Oxfam Australia as the 5th Respondent was only an independent contractor during the period 1st November 2005 to 30th June 2011.

The Petitioner placed much emphasis on the fact that the 5th Respondent had in the contracts marked P3 to P9 accepted that she is not an employee of Oxfam Australia and that she will not claim any benefits available to an employee.

In this context it is important to bear in mind the legal principle that the characterisation by the parties of the nature of the contract between them is not determinative of the true legal relationship between them.

Lord Denning in *Facchini v. Bryson* [(1952) 1 Times Law Reports 1386 at 1389] held:

> "The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. **Their relationship is determined by the law and not by the label which they choose to put upon it.**" (emphasis added)

This decision was cited with approval in *Ferguson v. John Dawson and Partners (Contractors) Ltd.* [(1976) EWCA Civ 7, (1976) 1 WLR 1213] where it was held:

> **"[A] declaration by the parties, even if it be incorporated in the contract, that the workman is to be, or is to be deemed to be, self-employed, an independent contractor, ought to be wholly disregarded – not merely treated as not being conclusive – if the remainder of the contractual terms, governing the realities of the relationship, show the relationship of employer and employee.** The Roman soldier would not have been a self-employed labour-only sub-contractor because of any verbal exchange between him and the centurion when he enlisted. I find difficulty in accepting that the parties, by a mere expression of intention as to what the legal relationship should be, can in any way influence the conclusion of law as to what the relationship is." (emphasis added)

Sharvananda J. (as he was then) adopted this principle in *Y.G. de Silva v. The Associated Newspapers* [BALJR (1983) Vol. 1 Part III p. 118] when he held that it is irrelevant that the parties have declared their relationship to be something else. The rationale is that due to the difference in bargaining power between the parties the employer can force the employees to declare in the contract that they are not employees when as a matter of law for the application of the relevant statutory rules they are in law employees of the employer.

The question then is what is the true relationship between the parties as a matter of law. Courts have adopted different tests to be applied in determining this issue.

The control test articulated by MacKenna J. in *Ready Mixed Concrete Ltd. (South East) v. Minister of Pensions* [(1968) 2 QB 497 at 515] is as follows:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

The integration test adopted in *Y.G. de Silva v. The Associated Newspapers* (supra) has two components. Firstly, it considers whether the work done is an integral part of the business and Secondly, whether the person is part and parcel of the organisation.

The economic reality test which closely resembles the integration test poses the question whether the persons were employees as a matter of economic reality which test was cited with approval in *Free Lanka Trading Co. Ltd. v. W.L.P. de Mel, Commissioner of Labour* [79 (II) N.L.R. 158].

The following facts are relevant in determining whether the decision in P15 is unreasonable.

(i) The 5th Respondent was reporting to the Operations Manager which meets the control test requirements.

(ii) The 5th Respondent was required to submit monthly work plans and work closely and in consultation with regional programme Co-ordinators and the work carried out by the 5th Respondent appears to be a core area of the Petitioner. An independent contractor is unlikely to provide the core function of the Petitioner. This fact is important in satisfying the integration test.

(iii) While the 5th Respondent appears to have prepared her work methods, it was in terms of the "terms of Reference". This shows that the 5th Respondent was working under supervision and hence the elements necessary for control test are present.

(iv) The 5th Respondent had been provided with an office as well as a desk, chair and computer and a permanent seat. In *Y.G. de Silva v. The Associated Newspapers* (supra) it was held that where the services are to be performed in the employer's premises, this may be some indication that the contract is a contract of service.

(v) Although in *Y.G. de Silva v. The Associated Newspapers* (supra) it was held that the fact that delegation is not allowed carries no implication that the contract is a "contract for service", it was also held that if the worker can delegate the performance of the work to another, this will be conclusive against the contract being a "contract of service". There is provision in agreements P2 to P5 which specifically prohibit the 5th Respondent from delegating any part of her work without prior approval in writing.

(vi) The 5th Respondent was provided insurance cover for medical and personal accident in P5 to P9 while P2 to P4 provide for reimbursement of medical expenditure. These factors support the position that the 5th Respondent was an integral part of the business of Oxfam Australia.

The above factors in my view show that the true relationship between Oxfam Australia and the 5th Respondent was one of employer-employee within the meaning of the EPF Act.

The Petitioner referred to section 114 of the Inland Revenue Act which deals with PAYEE tax and section 153 of the Withholding Tax Act and submitted that PAYEE tax is deducted by an employer from an employee and Withholding tax is deducted by a specified person when paying fees to another for independent professional

services. It was further submitted that during the period the 5th Respondent worked as a consultant Withholding tax was deducted and paid by Oxfam Australia while during the time the 5th Respondent worked as an employee PAYEE tax was deducted from her salary. Hence it was submitted the 5th Respondent was a consultant acting as an independent contractor for the relevant period.

As the learned Senior State Counsel submitted this is but a consequential application of the label that parties agreed to attach to their relationship and cannot be used to be determinative of the true nature of the legal relationship between parties.

In considering whether the decisions assailed in these proceedings are unreasonable, this Court will not seek to substitute its decision for the decision of the Commissioner of Labour. As Lord Ackner held in *R. v Secretary of State for the Home Department, ex parte Brind* [(1991) 1 AC 696]:

> "But it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to be supervisory, as opposed to an appellate jurisdiction. Where Parliament has given to a Minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable Minister properly directing himself would have reached the impugned decision, the Minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role, will quash that decision. Such a decision is correctly, though unattractively, described as a "perverse" decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the Mininster has made,

is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision – that is, to invite an abuse of power by the judiciary."

I hold that the decision in P15 and the reasons in P18 are not unreasonable. They have been made after consideration of relevant facts.

For the foregoing reasons, the application is dismissed with costs fixed at Rs. 75,000/= payable by the Petitioner to the 5th Respondent.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal