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

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Consolidated Marine Engineers Limited
No. 101, Kiwi Road, Colombo 02.

Petitioner

Case No. C. A. (Writ) 28/2012

Vs.

1. Asst. Commissioner of Labour (Colombo South)
   Colombo South District Labour Office,
   Colombo 05.

2. Commissioner General of Labour
   Department of Labour,
   Narahenpita, Colombo 05.

3. E. H. M. Chandralatha
   Labour Officer,
   Colombo South District Labour Office,
   Department of Labour,
   Narahenpita, Colombo 05.

4. D. A. K. Pitigala
   No. 58, 1st Lane, Siddamulla, Piliyandala.

5. H. R. Piyasiri
   No. 85/3, Thihariya, Kalotuwawa, Kalagedihena.

6. O. Lambert De Silva
   No. 138/17, Dawatagodawatta, Medawala, Gonigoda, Harispattuwa.

Respondents

Before: Janak De Silva J.

K. Priyantha Fernando J.

Counsel:

Ali Sabry P.C. with Suraj Rajapakse for the Petitioner

Nayomi Kahawita SC for the 1st to 3rd Respondents

Chandana Jayatissa for the 4th to 6th Respondents

Argued On: 18.03.2019

Written Submissions Filed On:

Petitioner on 16.12.2014

1st to 3rd Respondents on 18.12.2014

4th to 6th Respondents on 03.05.2019

Decided On: 29.05.2020

Janak De Silva J.

The 4th to 6th Respondents made a complaint to the Commissioner of Labour that although they were employees of the Petitioner, they were not paid their Employees Provident Fund (EPF) dues.

After inquiry the Petitioner received a letter/certificate directing it to pay a sum of Rs. 717,522.48 as EPF dues under and in terms of the Employees Provident Fund Act (EPF Act). The Petitioner is challenging this decision.

The Petitioner contends that:

(1) The 4th to 6th Respondents is not "employees" of the Petitioner within the meaning of the EPF Act.

(2) The Petitioner was not given a fair hearing in that:

(i) The Petitioner raised a preliminary objection that the 4th to 6th Respondents were not "employees" of the Petitioner but the inquiry was concluded without a hearing on the merits

(ii) The Petitioner was not given an opportunity to cross-examine the witnesses

(ii) The 1st to 3rd Respondents failed to communicate the decision and reasons for it.

Employer-Employee relationship

The Petitioner contends that it obtained the services of a security company and the 4th to 6th Respondents were working as security guards in the premises of the Petitioner under that security company.

Later the 4th to 6th Respondents resigned from that security company and formed a group of their own of which the 4th Respondent was the head and offered to provide the Petitioner security services on contract basis which was accepted by the Petitioner. Thereafter the Petitioner agreed to pay a fixed amount to the 4th Respondent monthly for the services provided on a contract basis as in the case of the contract for security service with their earlier company. The Petitioner denies that the 4th to 6th Respondents were its "employees" within the meaning of the EPF Act which is disputed by the 4th to 6th Respondents.

In this context it is important to bear in mind the legal principle that the characterization 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 W.L.R. 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], [(1978-79) Sri.L.R. 173] 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 issue then 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) 1 All E.R. 433 at 439-40] 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) have 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].

Let me examine the available evidence in this matter.

One important element in a contract of services is the payment of wages or other remuneration between the parties.

The Petitioner did not pay any wages to the 5th and 6th Respondents. The names of the 4th to 6th Respondents do not appear in the pay register of the Petitioner. Instead, the Petitioner paid a monthly sum to the 4th Respondent for the security services supplied and he paid what is due to the 5th and 6th Respondents. All vouchers for the payment of security services was in the name of the 4th Respondent. This is consistent with the position of the Petitioner that the 4th Respondent was the leader of the team that offered their services and accordingly he was paid which he in turn distributed to the other two.

In *Ceylon Mercantile Union v. Ceylon Fertilizer Corporation* [(1985) 1 Sri.L.R. 401] Samarakoon C.J. in his minority decision held that a similar arrangement did not amount to the payment of wage agreed between the parties. However, the learned counsel for the 4th to 6th Respondents contended that the majority concluded that the arrangement was a subterfuge to overcome the application of labour laws. But the reasoning for that conclusion was that the contact between the parties was most tenous and that in truth and in fact the wages were calculated and determined by the Ceylon Fertilizer Corporation. Nonetheless, it cannot be said that the relationship between the 4th, 5th and 6th Respondents were tenous in nature.

The 4th to 6th Respondents did not produce any contract of employment with the Petitioner showing the right of suspension or dismissal. Of course that is not decisive as there can be an implied contract of employment. Yet, there was no evidence led to show of any particular instance where the Petitioner sought to exercise such a right during the seven year period when the security services were supplied. In *Short v. J. & W. Henderson Ltd.* [(1945-1946) 62 T.A. 427, 429] the House of Lords held that the master's right of suspension or dismissal is one of the indicia of a contract of service.

The 4th to 6th Respondents did not sign the attendance book maintained by the Petitioner in relation to the other employees. They maintained their own book and got it signed by the Accountant of the Petitioner.

In my view. these factors negate any conclusion that there was a contract of service between the Petitioner and the 4th to 6th Respondents by applying the control test. As MacKenna J. held in *Ready Mixed Concrete Ltd. (South East) v. Minister of Pensions* (supra page 440-1):

> "If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant."

Applying the integration test, there is no evidence to show that the work done by the 4th to 6th Respondents were an integral part of the business of the Petitioner or that they are part and parcel of the Petitioner.

Neither is there evidence that the 4th to 6th Respondents were employees of the Petitioner as a matter of economic reality.

It is true that the 4th to 6th Respondents were issued identity cards by the Petitioner. But the evidence taken as a whole negates any relationship of employer-employee between the parties.

Therefore, I hold that the 4th to 6th Respondents have failed to prove that they were employees of the Petitioner within the meaning of the EPF Act. Hence the conclusion of the Respondents that there is a contract of services between the Petitioner and the 4th to 6th Respondents is not supported by the evidence led at the inquiry.

Generally, courts exercising judicial review do not review errors of fact made by administrative bodies/officials, unless those errors of fact are linked to the assumption of the administrative body's jurisdiction i.e. jurisdictional errors of facts. [*R v. Fulham, Hammersmith and Kensington Rent Tribunal* (1951) 2 K. B. 1 at 6; *Walter Leo v. Land Commissioner* 57 N.L.R. 178].One exception to this general principle is the 'no evidence rule'. Wade and Forsythe, *Administrative Law*, 7th Edition at page 312 observes as follows:

> *"**'no evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding, or where, in other words, no tribunal could reasonably reach that conclusion on that evidence"**..... "It seems clear that this ground of judicial review ought now to be regarded as established on a general basis", and forecasts that 'no evidence' seems destined to take its place as yet a further branch of the principle of ultra vires, so that **Acts giving powers of determination will be taken to imply that the determination must be based on some acceptable evidence. If it is not, it will be treated as 'arbitrary, capricious and obviously unauthorised'.**"* (Emphasis added)

The observations made by the text writers about this ground of judicial review have been adopted and endorsed by the Supreme Court in *Kiriwanthe v Navaratne* [(1990) 2 Sri.L.R. 393 at 409] and in *Nalini Ellegala* v *Poddalagoda* [(1999) 1 Sri.L.R. 46 at 52].In *Nicholas* v *Markan Markar* [(1985) 1 Sri.L.R. 130, pp. 140 – 141] the Court of Appeal cited with approval the following dictum about the 'no evidence rule' in the leading English case of *Edwards v. Bairstow* [1956] A.C. 14:

> *"..it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that*

there has been some misconception of the law, and that this has been responsible for the determination..... ***I do not think that it matters much whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination".*** (Emphasis added)

In effect, the no evidence rule has opened up a very narrow path for courts to review non-jurisdictional errors of facts. In the UK, a finding by an administrative body that has been made in ignorance of established and relevant evidence has been held to be amenable to judicial review. [*Regina v. Criminal Injuries Compensation Board Ex Parte A (A.P.)* [1999] 2 AC 330; *Secretary of State for Education and Science v Tameside MBC* [1976] UKHL 6].

In *Hasseen v Gunasekara and others* [CA Application No. 128/86 C.A.M. 02.10.1995] this Court considered an order of the Rent Board of Review, affirming an order of the Rent Board which had been "arrived at without an adequate evaluation of the evidence and by failing to take into consideration relevant items of evidence which could have influenced the finding" and held the Rent Board as well as the Board of Review had "erred in law by failing to take into account relevant items of evidence in arriving at the finding" and therefore quashed the orders of the Rent Board as well as of the Board of Review

Accordingly, the determination made by the 1st to 3rd Respondents that the Petitioner was the employer of the 4th to 6th Respondents is liable to be quashed on this basis.

Preliminary Objection

The contention of the Petitioner is that at the inquiry, it raised a preliminary objection and the inquiry was concluded without giving it an opportunity of making representations on the merits and as such it was denied a fair hearing.

I am unable to accede to this position. The inquiry officer made a finding overruling the preliminary objection of the Petitioner and thereafter held that there exist merits worthy of summoning the parties for further inquiry. The parties were summoned again on 25.05.2011 for further inquiry on which date the Petitioner was represented by counsel.

However, it appears that further evidence from the 4th to 6th Respondents have been taken in the absence of the Petitioner. Although the Respondents contest this position, the record shows that such evidence was taken in the absence of the Petitioner.

Where evidence is taken without the knowledge of a party and without giving it an opportunity of responding to it, there is no fair hearing [*Taylor v. National Union of Seaman* (1967) 1 W.L.R. 532, *Errington v. Minister of Health* (1935) 1 K.B. 249].

Cross-Examination

The learned President's Counsel for the Petitioner contended that no cross-examination of the witnesses was permitted by the Department of Labour and as such there was no fair hearing. The proceedings marked R2 to R6 does not reflect any cross-examination having taken place. The question then is whether this deprives the parties of a fair hearing.

In my view it is not imperative to provide for cross-examination in all instances for there to be a fair hearing. Whether cross-examination must be allowed depends on the circumstances of each case.

In *R. v. Commissioner for Racial Equality, ex parte Cottrel and Rothon* [(1980) 1 W.L.R. 1580 at 1587-1588] Lord Lane CJ held:

> "It seems to me that there are degrees of judicial hearing, and those degrees run from the borders of pure administration to the borders of the full hearing of a criminal cause or matter in the Crown Court. It does not profit one to try to pigeon-hole the particular set of circumstances either into the administrative pigeon-hole or into the judicial pigeon-hole. Each case will inevitably differ, and one must ask oneself what is the basic nature of the proceeding which was going on there. It seems to me that, basically, this

was an investigation carried being carried out by the commission. It is true that in the course of the investigation the commission may form a view, but it does not seem to me that that is a proceeding which requires, in the name of fairness, any right in the firm in this case to be able to cross-examine witnesses whom the commission have seen and from whom they have taken statements."

A similar approach was taken by the Supreme Court in *Chulasubadra De Silva v. The University of Colombo and Others* [(1986) 2 Sr.L.R. 288] where it held that a tribunal like the Examination Committee exercising quasi-judicial functions is not a Court and therefore is not bound to follow the procedure prescribed for actions in courts nor is it bound by strict rules of evidence. It was further held that it can unlike a Court obtain all information material for the issues under inquiry from all sources and through all channels without being fettered by rules of procedure and that where its procedure is not regulated by statute, it is free to adopt a procedure of its own, so long as it conforms to principles of natural justice.

In this case, the complaint of the Petitioner stems from steps taken by the Commissioner General of Labour to recover EPF dues owed to the 4th to 6th Respondents by the Petitioner. Prior to doing so, an inquiry had been conducted by the Department of Labour as reflected by R2 to R6.

The learned State Counsel contended that there is no legal necessity to hold a formal inquiry. It is true that the EPF Act does not specifically provide for any formal inquiry into a complaint made by an employee in relation to his outstanding EPF dues. Nonetheless I am unable to accede to this position as the Commissioner General has been given wide powers in terms of the EPF Act to regulate and monitor the several statutory provisions therein. It provides effective different procedures by which the outstanding EPF dues can be recovered from a defaulting employer. In order for the Commissioner General of Labour to exercise his powers under and in terms of the EPF Act in a fair manner, the employer must be given a fair hearing to respond to any complaint made by an employee. Although the EPF Act is a piece of social legislation, it does not mean that employers are deprived of basic and fundamental safeguards

in law. An inquiry where the employer is given a fair hearing is in my view an indispensable requirement.

However, there is no requirement for such an inquiry to provide for an opportunity of cross-examination. The Commissioner General of Labour is not exercising any judicial power in the strict sense in such an inquiry. At the conclusion of the inquiry, the Commissioner General of Labour can, inter alia, make an application to the Magistrates Court in terms of section 38(2) of the EPF Act. Whilst it is true that the scope of such proceedings have been made narrow by the EPF Act and judicial pronouncement, that in my view is insufficient to impose a requirement of cross-examination into such an inquiry.

For all the foregoing reasons, I issue a writ of certiorari quashing the document P6. There is no need for the quashing of P7 as it does not contain any decision, and P8 as it is only a follow up of the decision embodied in P6.

The application of the Petitioner is allowed without costs.

Judge of the Court of Appeal

K. Priyantha Fernando J.

I agree.

Judge of the Court of Appeal