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

Hotel Development (Lanka) PLC.,
Hilton Colombo,
No.2, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 2.
Petitioner

CASE NO: CA/WRIT/318/2015

Vs.

Chandani Amarathunga,
Commissioner General of Labour,
Labour Department,
Colombo 5.
And two Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Romesh De Silva, P.C., with Shanaka Cooray for the Petitioner.
Anusha Fernando, D.S.G., for the 1st and 2nd Respondents.
(No written submissions have been filed on behalf of the 1st and 2nd Respondents.)
Rohan Sahabandu, P.C., with Surekha Withanage for the 3rd Respondent Employee.

Decided on: 06.06.2019

Mahinda Samayawardhena, J.

The petitioner (Hilton International Colombo) filed this application seeking to quash by way of certiorari the order of the 1st respondent (Commissioner General of Labour) dated 10.03.2015 marked P9 whereby the petitioner was ordered to pay a sum of Rs.978,900/= to the 3rd respondent (Medical Doctor) as gratuity on the basis that the 3rd respondent was an employee (as opposed to an independent contractor) of the petitioner from 01.06.1987-01.03.2012 (nearly 25 years).

It is the position of the petitioner that the 3rd respondent was not an employee but an independent contractor and therefore the petitioner is not obliged in law to pay gratuity to the 3rd respondent.

So much has been written and so many theories/tests have been evolved on how to distinguish an employee from an independent contractor. However, whether a person is an employee or an independent contractor is purely a question of fact to be decided on unique facts and circumstances of each individual case. In this process, labels, designations, particular terms used by the employer in Agreements entered into between the two parties etc. are, more often than not, misleading and not binding.

The petitioner has advertised for the post of Medical Officer of Hilton International Colombo. In response, the 3rd respondent has applied for the said post by application dated 22.11.1986.[1] By the letter dated 27.05.1987, the General Manger of the petitioner has *inter alia* informed the 3rd respondent that "*we decided to obtain your services as the Medical Officer of the Hotel*

[1] Page 48 of the Petition.

effective 1st June 1987 subject to the terms discussed with you."[2] By letter dated 11.03.1996, the Director Personnel of the petitioner has written to a third party "*This is to certify Dr. L.P.V.E. Jayaweera (the 3rd respondent) was employed from 1987 July to date as our Chief Medical Officer. He is being paid a monthly remuneration for the services rendered.*"[3] By letter dated 15.03.1989, the Resident Manager of the petitioner has been informed that "*As decided by the Management, Dr. L.P.V. Jayaweera-the Hotel Medical Officer is to be extended 50% discount on Food & Beverage excluding Banquets as in the case of other Department heads. He is also to be extended with the facility of using the Hotel Sports & Fitness Centre.*"[4] The 3rd respondent has used hotel letterheads with the Heading "*Hilton Colombo Medical Clinic*" when writing prescriptions and internal memos.[5] Even in 1999, by letter dated 09.07.1999, the Management has recognized the 3rd respondent as the "*In-house Doctor Hilton Colombo"/"Hotel Doctor*".[6] In 2003, by letter dated 23.05.2003, the General Manager of the petitioner has addressed the 3rd respondent as the "*House Doctor Hilton Colombo*".[7]

However in this letter dated 23.05.2003 the General Manager of the petitioner has suggested to the 3rd respondent some terms to be included in a formal Agreement to be entered into between the two parties "*to provide professional medical services as a service provider for an initial period of two years to be renewed on an annual basis thereafter.*"[8]

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[2] Page 49.
[3] Page 53.
[4] Page 54.
[5] Pages 158, 216, 217.
[6] Page 196.
[7] Page 197.
[8] Page 159.

This letter has been replied by the 3rd respondent by letter dated 10.06.2003.[9] In that letter, the 3rd respondent, whilst emphasizing that he has been functioning as the Medical Officer in charge of Colombo Hilton from the inception of the hotel for well over 17 years at that time and being "*on call for 24 hours every day of the year*", has stated that if he signs the Agreement in the way it has been suggested in that letter, *status quo* will change and he wants same *status quo* to remain.

This has been replied by the General Manager by letter 01.07.2003 and stated therein that the only relationship the hotel had with the 3rd respondent was "*for you (the 3rd respondent) to provide your professional services for a fee*" and further stated that failure to respond to that letter before 28.07.2003 will result in retaining the services of another Doctor.[10]

It is clear that one of the main purposes of insisting on entering into a formal Agreement was the desire of the petitioner to manifest that the 3rd respondent was not an employee of the petitioner.

The first Agreement for 01.09.2003-31.08.2005 has been signed on 01.09.2003.[11] In this Agreement the 3rd respondent has been identified not as the Hotel Doctor of Hilton Colombo but as "*the service provider*", and clause 12 particularly states that "*It is hereby expressly agreed by and between the Hotel and the Service Provider that this is a contract for services and that nothing in the 'agreement' shall be construed to mean and create a relationship as Employer/Employee between parties*." This

[9] Page 161.
[10] Pages 162-163.
[11] Pages 3-4.

clause is, as I have already stated, not decisive and the Court is free to disregard it if the other circumstances point to the fact that there was a relationship of employer and employee.

When it is up to the Court to decide whether there was a relationship of employer and employee between the parties on the totality of the evidence, the inclusion of such a clause into the Agreement by the employer, in my view, shows *mala fides* on part of the employer to cover the true relationship.

In this Agreement instead of the words "*monthly salary of Rs.40,000/=*" "*a fee of Rs.40,000 per month*" have been used.

According to the Agreement the 3rd respondent shall *inter alia* conduct two medical clinics per day on weekdays at 8.30 am-9.30 am and 3.30 pm-4.30 pm and the 3rd respondent shall personally conduct the clinic at least three days a week. The 3rd respondent shall be available on call for 24 hours on all days himself or doctors assisting him. Thereafter, periodically, Agreements have been entered into up to 31.08.2012.[12]

The main contention of the learned President's Counsel for the petitioner is that the fact that the 3rd respondent could delegate his work to another militates against having an employer-employee relationship between the parties. The learned Counsel cites *The Times of Ceylon Ltd v. Nidahas Karmika Saha Velanda Sevaka Samitiya (1960) 50 NLR 126* in support. The facts are clearly distinguishable. In the Times of Ceylon Ltd case the alleged employee was a delivery peon who distributed newspapers on subscribers on payment of a monthly commission, which could be done by himself or through somebody. But in the instant case, the 3rd respondent medical

[12] Pages 5-19.

doctor who got a fixed monthly salary had to conduct medical clinics in the hotel 3 days out of 5 weekdays and his assistant doctors who could do the other 2 days shall be doctors acceptable to the hotel. On call duty for 24 hours on all days shall be done by himself or doctors assisting him acceptable to the hotel.

The next submission of the learned President's Counsel for the petitioner is that the 3rd respondent's service is not integrated into the hospitality services provided by the Hilton Hotel and therefore the 3rd respondent fails in the integration test. The learned counsel cites clauses 5 and 6 of the Agreements whereby the petitioner agreed to pay a fee of Rs.200/= per head for certification of the medical fitness of prospective employees and payment of consultation fee by the hotel guests. These are extra earnings in addition to his monthly fee (salary) of Rs.40,000/= which increased up to Rs.62,750/= by the time of signing the last Agreement. Extra earnings shall be separated from the fixed salary.

The belated complaint of the petitioner that no proper inquiry was conducted as no oral evidence was permitted is unacceptable. The petitioner has been fully represented by a leading law firm and the petitioner has been given a fair hearing.

I am not inclined to disturb the finding of the Commissioner of Labour. Application is dismissed with costs.

Judge of the Court of Appeal