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

Sri Lanka Telecom PLC.,
Lotus Road,
P.O. Box 503,
Colombo 1.
Petitioner

CA CASE NO: CA/WRIT/232/2015

Vs.

The Commissioner General of Labour,
Labour Secretariat,
Narahenpita,
Colombo 5.
And 28 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Sanjeeva Jayawardena, P.C., with Chandimal Mendis and Rajeev Amarasuriya for the Petitioner.
Manohara Jayasinghe, S.S.C., for the 1st-4th Respondents.
Lakshan Dias for the 10th Respondent.
Parakrama Agalawatta with Sanjeewa Ranaweera for the other Respondents.

Decided on: 22.11.2019

Mahinda Samayawardhena, J.

The petitioner company (Sri Lanka Telecom PLC) filed this application seeking to quash, by way of writ of certiorari, the documents marked P9 and P11, whereby the Commissioner of Labour decided that the respondent debt collectors of the petitioner company are employees of the petitioner (as opposed to independent contractors) for the purpose of payment of Employment Provident Fund contributions.

Notwithstanding a number of tests, such as, the control test, the integration test, the economic reality test, mutuality of obligation test, dominant impression test, have been formulated in order to decide whether a person is an employee or an independent contractor, there is no conclusive test which could answer that question; and therefore, that question shall ultimately be answered on a case by case basis taking into consideration the unique facts and circumstances of each individual case.[1]

In this process, the labels given or terminology used are not binding. They are, more often than not, misleading. For instance, a clause in the appointment letter expressly stating that the appointment shall never be considered as creating an employer-employee relationship with the establishment which issued the letter, and accepting the appointment by the employee subject to that condition is not decisive. To give another example, the label given for the payment for the work executed, as "allowance", "commission", "incentive",

[1] This has been admitted by the petitioner in paragraph 15 at page 13 of the written submissions tendered to this Court. Vide also pages 10-13 of the same written submissions for various tests.

"compensation" etc. instead of "salary", is not crucial.[2] The employee is the weaker party who has no bargaining power. He has to succumb to the conditions of the employer. That may be why, as the petitioner laments, "overly rigorous application of labour laws of this country"[3] or anywhere in the world.

In the facts and circumstances of this case, in my view, there is an employer-employee relationship between the petitioner company and the debt collectors of the petitioner company. In other words, the relationship between the petitioner and the 5th-29th respondents is one of a contract of services (workmen) and not contract for services (independent contractors).

Let me now give reasons for the said conclusion.

1. The petitioner advertised in newspapers for the "Post of Debt Recovery Officer" whose job is to "visit the telephone subscribers' premises and collect dues from them" for a payment of "commission of 2% out of collection" with reimbursement of "travelling expenses".[4]

   Their job in short was to recover debts from defaulting customers of the Sri Lanka Telecom whose services have been disconnected.

   In the Agreements later entered, which I will refer to later, this commission has been increased/amended in the following manner: 6.5% commission, if collected within

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[2] The petitioner in paragraph 11 of the counter affidavit has admitted that "there are circumstances in which commissions are included for computation of EPF".
[3] Vide page 4 of the written submissions of the petitioner.
[4] Vide 6R1.

two months from the date of the job assigned; 5%, if collected within four months; and no percentage beyond four months.

2. They have been selected for the said post after an interview.[5]

3. They have been issued with Company Identity Cards.[6]

4. However, they were not given a "Letter of Appointment" for "the Post of Debt Recovery Officer" as advertised, in the conventional sense, but given a "letter of assignment of job wise basis" upon being "nominated" as a Debt Collector.[7] Vide the "Agreement for Collection of Debt" marked 1R8, P2(1)-(y). It appears that the petitioner had been very careful in selecting words to be used in this "Agreement".

   I must mention that, as I stated at the outset, the terminology—"Agreement", "Appointment" etc. is beside the point. The point is whether or not they are workmen under the petitioner in the eyes of the Labour Law.

5. In paragraph 10 of this Agreement, it is expressly stated that "This agreement should not be interpreted at any time as a contract of employment." In my view, the inclusion of such a clause, shows the guilty mind on the

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[5] Vide 6R1(a), 1R15.
[6] Vide 6R2, 1R7.
[7] However, I find that the 10th respondent has *inter alia* filed an Appointment Letter marked 6R1 with the amended petition and affidavit both dated 16.10.2017, as I understand, without notice to the petitioner. Therefore I refrain from using it against the petitioner.

part of the employer. Such clauses are misleading and not binding.

6. In my view, this Agreement has most of the characteristics/attributes of a Letter of Appointment, which establishes employer-employee relationship. It has *inter alia*:

(i) A commencing date and ending date of the job. That is, the job is for a period of six months, one year or two years. That means, there is a fixed period of employment.

(ii) It says the payment method or how the employee is remunerated for the job. The petitioner states that "In the case of a workman there is a guaranteed payment monthly."[8] Although there is no fixed monthly amount payable, there is a fixed method of calculation of the amount payable by the employer to the employee on monthly basis or otherwise. There was an ascertainable salary/wage.

(iii) It contains directions on how he shall perform the job.[9]

[8] Vide paragraph 56 at page 20 of the written submissions of the petitioner.
[9] Vide clauses 5 and 6.

(iv) The appointees shall make an initial refundable deposit as security albeit it is a negligible amount.[10]

(v) Either party can terminate the Agreement by giving one month's notice.[11]

(vi) However, if the employee does not discharge his duties to the satisfaction of the employer, the employer has the authority to terminate the services forthwith without one month's notice.[12]

If this is a "job by job wise assignment", why termination clauses?

The inclusion of a clause that the payments over Rs.50,000/= are after the deductions of 5% for withholding tax will not negate the presence of an employer-employee relationship.[13] The decision to deduct in the form of "withholding tax" or "PAYE tax" is on the employer and not the employee. Broadly speaking, PAYE tax is also a withholding tax on income payments to employees.

[10] Vide clause 7.
[11] Vide clause 8.
[12] Vide clause 9.
[13] Vide clause 4.

7. Letter marked 6R5 sent to the 14th respondent debt collector is revealing. It *inter alia* reads as follows:

> *It has been noticed that you have not performed your duties up to the satisfactory level. Especially success rate of the defaulted files and monthly collections from the defaulted customers are far below from the given targets.*
>
> *Hence hereby strictly advice you to improve your performance up to the expected levels immediately.*
>
> *If you are not in a position to achieve said performance level, your contract will be terminated according to the terms and conditions of the contract without further notice.*

If the debt collectors are independent contractors, who are paid "job by job basis", how can the petitioner send this type of a warning letter reprimanding termination of contract?

This goes to suggest that the work performed is integral to the employer's business.

8. The petitioner has taken disciplinary actions against the debt collectors who were found to have acted negligently in the discharge of their services. Vide 6R5(a) sent to the 8th respondent whereby the 8th respondent has been asked by the petitioner to show cause in writing before a given date why "disciplinary action" shall not be taken against him.

No disciplinary actions can be taken against independent contractors.

This also goes to show that they work under the control and direction of the employer and not independently.

9. They have been given detailed instructions on how to recover debts on installment basis.[14]

10. They have also been given training on how to perform their duties.[15] Only employees receive training for performing services in a particular manner. Conversely, independent contractors bring specialized expertise or skills to the employer.

11. Dress code for the casual day, being every Friday, has been made applicable to debt collectors as the other employees. T-shirts with company logo issued to the employees of the plaintiff company, have been issued to these debt collectors.[16]

12. The debt collectors have been authorized to represent the petitioner company before statutory bodies such as Mediation Boards set up under the Mediation Boards Act.

Vide 6R8 where the 16th respondent has been authorized to attend the Mediation Board in relation to recovery of

[14] Vide 1R13.
[15] Vide 1R16.
[16] Vide 6R7 containing 4 pages.

some dues "on behalf of Sri Lanka Telecom PLC", which is the petitioner.

As seen from 1R11, the 19th respondent has been authorized "to take decisions on our (Sri Lanka Telecom PLC) default cases to the Mediation Board."

As seen from page 2 of 1R11, the 19th respondent has signed the Certificate of Settlement on behalf of Sri Lanka Telecom PLC.

An independent contractor will not be authorized to represent Sri Lanka Telecom PLC.

13. The debt collectors have been assigned specific days in the week to be present at the petitioner company in a roster.[17]

That is akin to Fiscal officers (process servers) working in Courts reporting for duty on specific days in a roster due to the nature of their job.

14. As seen from 1R10, the petitioner has maintained an Attendance Register for the debt collectors. The argument that "1R10 has been kept at the Metro Office as a record of the Debt Collectors visiting that particular office, for security purposes only" is unacceptable because there appears to be no such requirement for other visitors (such as customers/defaulters).

[17] Vide 1R9.

15. The debt collectors have been given a travel allowance and a phone allowance.[18]

16. The debt collectors have participated in annual events and activities of the welfare association of the petitioner company.[19]

17. Their services have been appreciated and awards have been presented at official award ceremonies held in Five Star Hotels in Colombo.[20] This shows the continuity of relationship with the employer.

18. Service Certificates have been issued to them by the administrative officer of the petitioner company stating that they have been "employed" in the petitioner company on commission basis.[21]

The petitioner has tendered P8(a)-(k) to say that some of the debt collectors who initially complained to the Commissioner of Labour for failure to pay EPF contributions have later given letters to the petitioner to say that they are not employees of the petitioner. In reply, they have filed affidavits to say that they were coerced into giving those letters, and they obliged to it in fear of losing the employment.[22] This shows *mala fide* intention of the employer.

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[18] Vide paragraph 12 of the counter affidavit.
[19] Vide 1R17, 6R4, 6R4(a), 6R4(b).
[20] Vide 6R3-6R3(c).
[21] Vide 6R3(d).
[22] Vide 6R9-6R9(d), 1R20-1R23.

The petitioner complains that there was no fair hearing before reaching the impugned decision, in that no proper inquiry where parties could lead evidence and cross-examine the witnesses of the opposite party was held before the Labour Commissioner.

As seen from P3, P4, 1R3-1R6, an inquiry with the participation of both parties has been held by the Labour Commissioner wherein, on behalf of the petitioner company, as seen from page 2 of 1R6, four very senior officers of the petitioner company with another two lawyers (the first of whom is an amiable and able senior counsel) have participated. According to page 1 of 1R6, senior counsel for the petitioner has invited the inquiring officer to dispose of the inquiry by way of written submissions together with documents if any, as the question to be decided was whether the debt collectors are employees or independent contractors under the petitioner company. As seen from P6, written submissions together with documents have been tendered to the Labour Commissioner on behalf of the petitioner. There had not been a legal representation for the debt collectors and they had been undefended. Hence no inquiry was held and therefore the impugned decision was taken without giving a fair hearing is unacceptable. I totally reject the argument of the petitioner that the written submissions were tendered with the expectation that the petitioner would later be permitted to present its case fully.[23]

[23] Vide page 4 of the written submissions of the petitioner. Cf. page 1 of 1R6.

The ages of the debt collectors when they were recruited, whether they were full-time employees or part-time employees etc. are irrelevant for the purpose of payment of EPF contributions.

I dismiss the application of the petitioner but without costs.

Judge of the Court of Appeal