

WHO IS A WORKMAN? A CRITICAL EVALUATION OF THE TESTS TO DIFFERENTIATE A WORKMAN FROM AN INDEPENDENT CONTRACTOR IN THE LIGHT OF JUDICIAL DECISIONS

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ABSTRACT

A workman is governed by contract of service, and an independent contractor is governed by contract for service. However, the decision as to the nature of the contract to identify whether a person providing services to an organization is a workman under a contract of service or an independent contractor under a contract for service becomes difficult with globalization, changes in employment methods, flexibilities in employments, developments in science and technology and the devices designed by employers to circumvent their obligations. The courts have developed many tests to apply to the facts and decide whether the person who provides his services is a workman or an independent contractor. The tests developed by the courts include control test, integration test, economic reality test and multiple test. There is no hierarchy or any rule to apply these tests to the facts to decide the nature of relationship between parties. When the cases have ambiguous and complicated facts, the courts abandon the single test approach and adopt a combined test approach to produce satisfactory results. In many cases, employers who have power to include clauses favourable to them due to unequal bargaining power between the parties have included designations such as self-employed persons, agents, consultants, free-lancers and sub-contractors to label the workmen as independent contractors with the belief that they could circumvent their statutory obligations. However, the courts have creatively applied the tests to the facts and decided that they were workmen. The decisions made by the Appellate Courts as to the nature of the contracts convince that the tests are still adequate to make decision as to the nature of relationship, and to find who is a workman.

Key words: Contract of service, contract for service, workman, independent contractor

1. INTRODUCTION

Legislature has enacted many legislation to regulate employer – workman relationship, and provide for terms and conditions of employment, social benefits, job security and settlement of industrial disputes. As these legislation are applicable only to employer – workman relationship, it becomes important to differentiate a workman from an independent contractor. The courts have developed many tests to apply to the facts, and decide whether the person concerned is a workman or an independent contractor. The cases with complicated facts pose

challenges to the courts to make decisions as to the nature of contract. Hence, the objective of this paper is to discuss whether the tests developed by the courts are relevant today to differentiate a workman from an independent contractor or if there is a need to develop new tests to differentiate a workman from an independent contractor. To find an answer to these questions, the tests developed by the courts are tested in this paper in the light of decided cases.

1. TESTS DEVELOPED BY THE COURTS

Courts have developed many tests to decide whether the relationship is employer and workman

relationship under a contract of service or hirer and independent contractor relationship under a contract for service. The first test applied by the courts was control test. In *Collins v. Hertfordshire County Council*¹⁴ Hilbery, J. stated: "...in a contract for service the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but direct how it shall be done."¹⁵The degree of control exercised over a person rendering his services is also important to decide the relationship between the parties. In *Simmons v. Heath Laundry Co*,¹⁶ Fletcher-Moulton L.J observed: "...The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be contract of service...."¹⁷Although the degree of control exercised is important to decide the nature of relationship, it is not appropriate when skill workers are employed.¹⁸ In such situations, courts cannot depend only on the degree of control to decide the nature of relationship between the parties.¹⁹

Sri Lankan courts also have explained the control test and its importance to decide the relationship between parties. In *Jamis Appuhamy v. Shanmugam*,²⁰ Sharvanandha, J. stated: "A servant is one who is bound to obey any lawful orders given by the master

as to the manner in which his work shall be done. The master retains the power of controlling him in his work and may direct not only what he shall do but how he shall do it."²¹ However, the Sri Lankan courts are also of the view that the control test is not the sole criterion in deciding the relationship.²²

The inadequacy of the control test led to develop some other tests to decide the nature of relationship between parties. In *Stevenson Jordan and Harrison, Ltd v. MacDonald and Evans*,²³ Lord Denning introduced the integration test and explained: "...under a contract of service, a man is employed as part of the 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."²⁴Integration test is a useful test when services are rendered to the main business of the organization under flexible contracts.

In *U.S v. Silk*,²⁵ the American Supreme Court introduced the economic reality test and Reed, J. stated: "...the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for

¹⁴(1947) 1 All.E.R.633.

¹⁵ At p. 638.

See also *Yewens v. Noakes*, (1880) 6 Q.B.D. 530 at pp 532-533.

Morren v. Swinton and Pendlebury Borough Council, (1965) 1 W.L.R.576 at p. 581.

¹⁶ (1910) 1 K.B.543.

¹⁷ At pp 549-550.

¹⁸ See *Cassidy v. Ministry of Health*, (1951) 2 K..B.34 at pp. 352-353..

¹⁹ See *Performing Right Society Ltd v. Mitchell and Booker (Palais De Danse) Ltd*, (1924) 1 K.B. 762 at p. 767.

²⁰ (1978) 80 NLR 298.

²¹ At p. 300.

²²*Samarawickrema, J. in Free Lanka Trading Company Ltd v. De Mel, Commissioner of Labour*, 79 NLR 158 at p. 161.

L.H. de Alwis, J. in *Palm Products and Sales Co-operative Society Ltd v. Kandiah*, Sri Kantha Law Report, Vol 3, p. 133.at p. 137.

²³ (1952) 1 The Times.L.R. 101.

²⁴ At p. 111.

See also *Bank Voor Handel En Scheepvaart N.V v. Slatford* (1953) 1 Q.B. 248 at p. 295.

²⁵ (1946) 331 U.S.704.

decision.”²⁶In *Market Investigations, Ltd v. Minister of Social Security*²⁷ Cooke, J. cited the *U.S v. Silk* case²⁸ and stated that according to the American Supreme Court, the test to be applied was “ ‘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.’ The economic reality test leads to make decision as to whether the person is in business on his own account or works for another who takes the ultimate risk of profit and loss.”²⁹

The courts also introduced a test with combined aspects to decide the nature of relationship. In *Short v. Henderson, Ltd*,³⁰ Lord Thankerton recapitulated four indicia of contract of service as: “(a) the master’s power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master’s right to control the method of doing the work, and (d) the master’s right of suspension or dismissal.”³¹ In *Montreal v. Montreal Locomotive Works Ltd*³² Lord Wright opined: “In the more complex condition of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate...(1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss...” This approach developed the multiple test to determine nature of relationship. In *Market Investigations, Ltd v. Minister of Social*

*Security*³³ Cooke, J. stated: “The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor...”³⁴ As the courts cannot depend only on the control test in modern ambiguous and complex cases, they apply the control test and other appropriate tests such as integration test, economic reality test and multiple test to decide the nature of relationship. If such an approach is not adopted, the objectives of many labour legislation would be defeated and vulnerable employees who do not have equal bargaining power would be exploited.

2. EXHAUSTIVE LIST AND STRICT RULES

In modern complex employments, sometimes we may be able to identify the nature of relationship from the facts, but we would find it difficult to suggest the dividing line between contract of service and contract for service. In *Stevenson Jordan and Harrison, Ltd v. MacDonald and Evans*³⁵ Lord Denning stated: “It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies.”³⁶ The nature of relationship depends on facts of the case, and all circumstances of the case should be considered to decide the nature of relationship. In *Simmons v. Heath Laundry Co*³⁷ Fletcher-Moulton L.J observed: “...it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case....”³⁸ The courts are in agreement that neither an exhaustive list could be prepared nor strict rules

²⁶ At p. 716.

See *Ready Mixed Concrete, Ltd v. Minister of Pensions and National Insurance*, (1968) 1 All E.R 433 at p. 443.

²⁷ (1968) 3 All E.R 732 at p. 737.

²⁸ *Op.cit.*

²⁹ *Market Investigations, Ltd v. Minister of Social Security*, *op.cit.*, at p. 737.

³⁰ (1946) 62 The Times L.R. 427.

³¹ At p. 429.

³² (1947) 1 D.L.R. 161 at 169.

³³ *Op.cit.*

³⁴ At p. 738.

³⁵ *Op.cit.*

³⁶ At p.111.

³⁷ (1910) 1 K.B.543.

³⁸ At pp 549-550.

could be laid down to determine the nature of a contract. In *Market Investigations, Ltd v. Minister of Social Security*³⁹ Cooke, J. stated: “...No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases...”⁴⁰ In *Y.G.de Silva v. Associated Newspapers of Ceylon Limited*⁴¹ Sharvanandha, J. also stated that “it is not possible to formulate principles and tests of universal validity to determine the question...”⁴² Hence, in the modern complex employments strict rules cannot be developed, but the facts of the individual cases should be considered to make appropriate decisions.

Employers sometimes label workmen as independent contractors to circumvent their obligations under labour legislation. However, courts do not accept the labels given in the contracts when the facts lead to a different conclusion. In *Y.G.de Silva v. Associated Newspapers of Ceylon Limited*⁴³ Sharvanandha, J. stated: “ A tribunal is not bound by the label used, nor barred from determining the true nature and relationship between the parties by the description given by the parties...”⁴⁴ In *Free Lanka Trading Company Ltd v. De Mel, Commissioner of Labour*,⁴⁵ the agreement between the parties referred the ‘Technical Sales Representatives’ as Independent Agents even though the facts showed that they were workmen. Samerawickrame, J. commented: “ The agreement ...appears to have been entered into so as

³⁹ *Op.cit.* at p. 737.

⁴⁰ At pp 737-738.

⁴¹ (1983) 1 B.L.R. Part III p. 118.

⁴² At p. 121.

⁴³ *Op.cit.*

⁴⁴ At p. 122.

⁴⁵ (1978) 79 NLR 158.

to erect a façade under cover of which the management could seek to avoid performance of obligations cast by Law upon employers towards their employees.”⁴⁶ In many cases, the courts have removed the artificial facades erected by employers to see the true nature of the relationship between the parties.

3. COMPLEX AND AMBIGUOUS FACTS AND JUDICIAL DECISIONS

In this paper, important facts of the decided cases have been extracted and included to illustrate identification and application of appropriate tests to decide the nature of relationship. However, identification and application of the tests to the facts in the cases do not create strict rules as the appropriateness of the tests depends on the facts of each individual case. Sri Lankan Courts are very often guided by the conflicting decisions in *Ready Mixed Concrete Ltd v. Minister of Pensions and National Insurance*⁴⁷ case and *Market Investigations Ltd v. Minister of Social Security*⁴⁸ case to make their decisions.

In *Ready Mixed Concrete Ltd v. Minister of Pensions and National Insurance*⁴⁹ case, a person had a contract with a company for carriage of concrete. He entered into a hire-purchase agreement for a lorry with another associated hire-purchase company. The lorry was painted in Ready Mixed Concrete Company’s colours. He was to make the lorry available at all times to the company, and not to use the lorry for any other purpose. He did not work for set hours and had no fixed meal break. He was entitled to employ

⁴⁶ At p. 161.

⁴⁷ *Op.cit.*

⁴⁸ *Op.cit.*

⁴⁹ *Op.cit.*

competent substitute drivers, but if the company were dissatisfied he had to provide another substitute. He had to wear the company's uniform and carry out all reasonable orders from the company 'as if he were an employee of the company.' He had to maintain the lorry and pay all running costs. He was free to buy fuel and other requirements subject to company's control in the case of major repairs. The company gave no instructions about the method of driving and routes. The company made a payment to him according to a rate per mile for the quantity of his deliveries. The parties could determine the contract by notice and the company had the right to acquire the lorry. The contract had a declaration that he was an independent contractor. In this case, the court had to decide whether the contract was a contract of service or a contract of carriage.

MacKenna, J. stated: "...A contract of service exists if the following 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 a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service..."⁵⁰ In this case, the court applied the control test, integration test, economic reality test and multiple test and gave more importance to the fact that he was entitled to employ another substitute, and decided that the obligations were more consistent with contract of carriage than with contract of service.

⁵⁰ At pp 439-440.

In *Market Investigations, Ltd v. Minister of Social Security*⁵¹, a company engaged in market research employed many women as interviewers. A woman involved in this case also had been employed as an interviewer for a short period of time on several occasions. She agreed to provide her skill and service to the company for a fixed remuneration. The company could specify the persons to be interviewed, the questions to be asked, the order in which questions should be asked and recorded, how answers were to be recorded and how she should probe for answers. The company could require her to attend the company's office for instructions. She received a meals allowance and travelling expenses from the company. She was free to work when she wanted, and undertake similar work for other organizations within the period prescribed by the company for the completion of survey. The agreement did not provide for time off, sick pay or holidays. The company did not allow the interviewers to send a substitute without prior permission of the company. When an interviewer was working in the field the company had no means to contact her as the company had no record of where or when she would be working in the field. The court applied the control test, integration test and economic reality test and decided that she was not in business on her own account but she had been employed by the company under a series of contract of service.

4. SRI LANKAN CASES

Sri Lankan appellate courts had creatively applied the tests to decide the nature of relationship in many cases which had ambiguous and complex facts. In *Times of Ceylon Ltd v. Nidahas Karmika Saha*

⁵¹ *Op.cit.*

Velanda Sevaka Vurthiya Samitiya⁵² a person was employed as a temporary monthly paid employee from August 1954 to May 1956 by a newspaper company to deliver newspapers to subscribers. His temporary employment was terminated in May 1956, and he was engaged from that day by the newspaper company to deliver newspapers under the terms of a different contract. The contract between the Company and him provided that he would be paid a commission once a month for every copy delivered, and if he was unable to call for his papers this office must be notified or a substitute sent, and he would collect his papers at the times stipulated by the circulation manager, and failure to call for copies for distribution without due notice or non-delivery of copies taken will result in termination of the contract.

The Court said that in this case the essence of the work was the distribution of newspapers and attendance at the office at a time to be stipulated by the company was merely incidental to the essential part of the contract, and the essential work of distribution of newspapers could have been carried out through agents or substitutes at the option of the person, and this feature is inconsistent with the relationship between master and servant.⁵³ In this case, the court very much depended on the control test to decide that the person was not a workman of the company.

In *Rev. Father Alexis Benedict of Youth Fisheries Training Project v. Denzil Perera and Others*,⁵⁴ a youth development project was established in Beruwela to train youth in deep sea fishing. After three months training, they worked as part of the

crew of the boats, and later some of them became skippers of the boats. The catch was sold and all collections were handed over to the project. The applicants, trained fishermen, were paid an equal share of 50% of the catch at the end of each month. The monthly remuneration to the applicants varied according to the catch. The other 50% was to the project to meet the expenses for maintenance, repairs, renewals, etc. There were no letters of appointment issued to the applicants. An Employees' Provident Fund Scheme and an Insurance Scheme were introduced by the project for the crew. The boats were shifted from Beruwela to Mutuwal and a hostel had been provided for the applicants, other fishermen and trainees of the project. Later, the project and the boats had been shifted to Negombo and the applicants were dismissed. The court applied the control test, integration test and economic reality test and stated that the project exercised control over many aspects of the venture and bore the financial risk of the venture. The court decided that they were integral part of the project and were employees of the appellant as a matter of economic reality.

In *Raj Diamonds (Pvt) Ltd v. Weerakoon*⁵⁵ a company imported rough diamonds from Belgium and handed them over to a franchise owner to cut and polish the diamonds. The franchise owner had subcontracts with several individual diamond cutters who had to return the finished products within a stipulated time to the franchise Owner. The Franchise Owner submitted the bills for the finished products to the Company, and the Company settled the bills submitted by the Franchise Owner, and the Franchise Owner made payments to the subcontractors according to the agreed sum for each stone retaining

⁵² (1960) 63 NLR 126.

⁵³ See also *Ceylon Transport Board v. Perera, S.C.* No. 177/69.

⁵⁴ C.A. 549/82.

⁵⁵ C.A No. 721/93.

his own fees. The Company supplied the machinery, rough diamonds, implements and the place for cutting and polishing the diamonds. The Franchise Owner had to comply with the specific orders given by the Company. The diamonds had to be cut and polished according to the instructions given by the Company. The agreement between the Franchise Owner and the Company provided that the Franchise Owner had to engage persons who had been previously approved by the company as competent and acceptable for such work and service, and the Franchise Owner had to terminate the contract with such persons after obtaining written consent of the Company. According to the agreement, the Franchise Owner had to have bonds with the persons that they will not carry out any similar assignments for any other person or company during the subsistence of the contract, and thereafter for a minimum period of two or three years determined by the Company without prior written approval of the Company.

The Company argued that the sub-contractors (Diamond Cutters) were independent contractors and they never had regular hours of work and were not regular in their attendance. The Company also argued that it had no direct dealings or legal nexus with the sub-contractors. A counter argument has been made that having the Franchise Owner was a ruse adopted by the Company to evade legal obligations. The court applied mainly the control test to the facts that the Company had control, and the Franchise Owner had to perform his work according to the supervision and specifications of the Company,

and decided that the Company was the employer of the sub-contractors.⁵⁶

In *Ceylinco Insurance Co Ltd v. Commissioner of Labour*,⁵⁷ the Company argued that the respondents were insurance agents/sales representatives to canvass insurance policies, and they were engaged as independent contractors strictly on a commission basis, and therefore they were not the employees of the Company. The court held that it is crystal clear and is manifest that the respondents were precluded from engaging in any other venture and from performing services in a business of their own. The court applied the control test, integration test and economic reality test and held that the respondents were part and parcel of the organization owned and managed by the Company, and the Company had control and overriding supervision as to the mode and manner of the performance of services of the respondents, and decided that the Respondents were employees of the Company.

In *Palm Products and Sales Co-operative Society Ltd v. Kandiah*⁵⁸ the Appellant, Palm Products and Co-operatives Society Ltd, Kilinochchi set out its objectives in its by-laws which included “improvement of the economic and social welfare of the members...” Toddy tappers in the district of Kilinochchi were entitled to membership in the society. The society undertook tapping of palm trees and sale of the produce. The Respondent was a member of the society and fifteen trees were assigned to him for tapping. He had no fixed hours of work and he was paid at the rate of sixty cents for each

⁵⁶ See also *Ceylon Mercantile Union v. Ceylon Fertilizer Corporation*, (1985) 1 Sri LR 401 for a similar decision.

⁵⁷ C.A No. 398/95.

⁵⁸ *Op.cit.*

bottle of toddy. In 1977, he fell from a tree and became incapable to continue the work. The question arose whether he was a workman covered by the Workmen's Compensation Ordinance. The court was of the view that the control test is not the sole decisive factor, and applied mainly the integration test and economic reality test to decide that the Respondent was an integral part of the business of the society, and he was not performing the business on his own account, but a workman within the meaning of the Workmen's Compensation Ordinance.

In *Perera v. Marikar Bawa*⁵⁹ the applicant was a head cutter of a tailoring company. The company provided a cubicle to him, and he hired tailors to his work and used his own equipments such as scissors, measuring equipments, thread etc. The cuttings, fittings and alterations had to be attended under his personal supervision and guidance. The company collected tailoring orders from the customers and passed them to the applicant. The company received tailoring charges from the customers, and paid a commission to the applicant every month from the collection. The applicant had to cease any private work during the continuance of employment with the company and the hours of attendance and work was the normal working hours in the company. The applicant did not sign the attendance register, and he was not entitled to a bonus which had been paid to the other regular employees. The company did not make any contribution to the Employees' Provident Fund for him. The court stated that the control test is not an appropriate test as the applicant possessed special skill and experience. It applied mainly the integration test and decided that the applicant's work was an integral part of the business and part and partial of the

⁵⁹(1989) 1 Sri LR 347.

organization, and he did not carry on his business of head cutter as a business belonging to him, but done by him for the company as a workman.

In *Hatton National Bank Ltd v. Commissioner of Labour*,⁶⁰ the Kandy Branch of the Bank entered into a service agreement with a person in 2002. The agreement was to provide electrical maintenance during the day from 8.00 a.m. to 5.00 p.m. for a consideration of 6,500/= payable by the Bank at the end of each month. The Bank thereafter entered into a revised agreement in 2005 with 'Susantha Electricals' represented by the same person to render the said services. The court had to decide whether the person was an employee of the Bank until 2005. The Bank heavily relied on the term 'providing electrical maintenance' in the agreement, and contended that the agreement between the parties was not a letter of appointment but a service contract for providing electrical maintenance. Justice Sriskandarajah, J. stated: "...one cannot interpret a document by the use of one word but the entire document has to be taken into consideration in construing the meaning of a document in the given circumstances. The intention of the parties also plays a key role in the interpretation of the said document."

The court said if the agreement was for providing service then there was no need to sign an attendance register by him or to be personally present to provide the service, but he could have assigned or appointed some other person to attend the work. The court also said that the Bank has not shown at least one instance where the said service was provided by some other person. The Bank contended that the Respondent was not employed as an integral part of the business as its business was banking but not electrical maintenance

⁶⁰C.A 2029/2005.

and therefore he was an independent contractor. The court pointed out that the Bank had a Department called Premises and Engineering Department and the staff of the Department were employees and the respondent was appointed in place of an employee who was an electrician in the Kandy Branch and retired in 2000. The court also said that the Respondent had to sign the attendance register and that he had specific working hours show that he was not a person in business on his own. The court applied mainly the integration test and economic reality test and also considered the control test and agreed with the decision made by the Commissioner of Labour that the Respondent was a workman under contract of service.

In appeal⁶¹ the Supreme Court also referred to the agreement between the parties which provided “the provision of electrical maintenance during the day between 8.00 a.m. to 5 p.m. to the Kandy Branch of the Hatton National Bank.” However, the court stated: “The manner of work, its nature, its detailed description, its specifications, being some basics which reflect control, is not reflected in this contract adverted to above...Indeed on the terms of the agreement, especially in the absence of any detailed control over the work, which has been minimal in terms of the contract, it has to be determined to be a contract for services and not a contract of service.” In this case, the Supreme Court applied the control test to make the decision.

It is submitted that although the agreement between the parties is relevant in determining the nature of the contract, the wordings in the agreement and degree of actual control could become insignificant if the nature of work and crucial facts lead to a different

conclusion. Hence, the wording ‘providing electrical maintenance’ in the agreement become insignificant when the person was expected to provide the service from 8.00 a.m. to 5.00 p.m. for a consideration paid at the end of each month and the person was personally present in the work place to provide the service.

In *Jamis Appuhamy v. Shanmugam*,⁶² the Appellant was running a taxi service and had a fleet of five taxicabs and he engaged the Respondent as a taxi driver from 1966 to 1973. The Respondent was not paid any regular salary or wages. He was paid only a one-third share of the day's profit from the taxi driven by him after the deduction of expenses for petrol and oil. The expenses for repairs and maintenance of the taxi were borne by the Appellant. The Respondent had to pay fines for traffic offences committed by him. The Appellant argued that he exercised no control over the Respondent and the Respondent had freedom to go when and where he pleased and therefore he was an independent contractor. The court extracted a relevant fact that the Respondent had an obligation to report for work daily, at least during school sessions. The court said that the Respondent neither owned the assets nor bore the risk of loss on the investment. When the court commenting on the mode of payment said it was a device to provide an incentive to earn as much money as possible for the mutual benefit of the master and the servant. The court mainly applied the integration test and economic reality test and concluded that the Respondent's work was an integral part of the Appellant's business and the Respondent was part and parcel of the Appellant's organization and therefore a workman.

⁶¹S.C. No. 87/2007.

⁶² (1978) 80 NLR 298.

In *De Silva v. Associated Newspapers Ltd*⁶³ the Applicant entered into an agreement with a Newspaper Company in 1969 and the Company appointed him as the District Correspondent for Kandy North. The Company agreed to purchase news reports, pictures, information, etc. from him. The Company paid a sum of Rs. 300/= per month to him as a 'retainer' for exclusive purchasing rights, and for every news item and picture at rates set out in the schedule. The agreement was for a period of six months and renewable by mutual consent of the parties. The agreement was renewed by the Company many times until 1974. He had to live in Kandy and attend the office of the Company daily and take instructions. He used the office equipments, stationeries and telephone during the course of his duties. When he had to cover events in distant places, he was paid his expenses for traveling and subsistence, although it was not stipulated in the agreement. He had to apply for leave and sometimes leave was refused. Bonuses were paid for his good work monthly with the 'retainer' payment. The court applied the control test, integration test and economic reality test and held that the Applicant was not doing business on his own account, but was employed as part and parcel of the Company and was an integral part of the Company's business.

In *Celltel Lanka Ltd v. Commissioner of Labour*⁶⁴ the Company engaged the Respondent as a 'Consultant' in matters relating to taxation, industrial relations and labour law upon an oral agreement from June 1991 to March 1996 and thereafter upon a written agreement referred as a 'consultancy agreement' until December 1996. The contract between the Company and the Respondent provided that he would be paid a

⁶³ (1978-1979) 2 Sri LR 173.

⁶⁴ C.A. No. 1342/98.

monthly retainer of Rs. 24,000/= and he may use the facilities available in the office of the Company to provide his services and he may determine the time and dates that he should attend office. The Company argued that the contract was totally irreconcilable with a contract of service and is consistent only with a contract for service. The Respondent submitted many documents including service certificate, internal memos and letter to Navaloka Hospitals stating that the Respondent was an employee. The Court said that the documents make it clear that the services of the Respondent were not confined to areas covered by the 'consultancy agreement' and the Respondent was a workman of the Company. The court did not expressly refer to any test, but it has been influenced by the control test, integration test and economic reality test to make the decision.

In *Sri Lanka Insurance Corporation v. Commissioner of Labour*,⁶⁵ the Corporation included the Respondent in the panel of Motor Car Assessors in 1964. He was required to undertake inspections, assessments, investigations and other work of similar nature connected with insurance claims, in any part of the country and thereafter submit a report with least possible delay. The report had to reach the Motor Claims Department within three days of the examination of the vehicle. He had to be available at short notice to receive his work assignments. The letter of appointment did not show that he had right to delegate to someone else the work assigned to him. He was paid on piece rate basis a fixed remuneration for each report submitted, and traveling and subsistence payments as well. He was also expected to safeguard the interests of the Corporation. The court said that the Respondent had a long standing

⁶⁵ C.A. No. 52/2006.

and stable relationship with the Corporation until his retirement in 2002, and he was under a duty to act according to the instructions given by the Corporation and the conditions in the relevant document. The court applied the control test and held that the Respondent was not performing services on his own account and he was selected to perform services to the Corporation and as such he was a workman under a contract of service.

The cases discussed above do not create strict rules, but flexible guidelines to identify important facts and appropriate tests, and apply the tests to the facts to determine the nature of relationship between parties. However, it is important to bear in mind that it is not important to count the number of relevant facts, but to identify the crucial facts that would be the determining factors.

In Sri Lanka, the labour courts are not fettered by the clauses in the contracts when they make just and equitable decisions. The Commissioner of Labour who has been empowered to enforce many labour legislation is also not fettered by the clauses in the contracts which defeat the objectives of the legislation. Hence, the decided cases guide the labour courts and the Commissioner to consider the facts and make decisions as to the true nature of relationship between the parties.

5. CONCLUSION

The question arises whether the tests that the courts had developed during the period in which mostly unskilled workmen were employed as manual workers under regular contracts in plantations and factories are relevant during the period in which mostly skilled workmen are employed under atypical and flexible employment contracts driven by

development in science and technology. The tests developed by the courts during the period when workmen had to go to their workplace, are to be applied during the period when science and technology carry work to the workmen. In future, the courts will have challenging cases because of the increasing trend of employment of home-workers, on-call workers, on-line workers and off-shore workers. The author suggests that a new type of workers called e-workers would emerge with the terms and conditions of employment hitherto not experienced. However, the decisions given by the Appellate Courts in the cases with complex and ambiguous facts show that the tests developed by the courts are relevant even today, and the tests could be creatively applied to make decisions as to the true nature of contracts and achieve the objectives of labour legislation. Hence, a need to develop new tests has not arisen yet, but a need to contextual application of the tests has arisen to find who is a workman.

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