

Need of Legal Recognition for Distance Working in PostCovid19 Sri Lanka: An Empirical Approach

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Abstract— The COVID-19 pandemic immensely affected the employer-employee relationships within the industrial sector leading to drastic issues with regard to labour relations providing room for distance working concept. Though the Home Work Convention, 1996 functions as an international legislation which regulate distant workers, it is pertinent that Sri Lanka has not signed and ratified the convention due to existing controversies such as the absence of a proper procedure of claiming compensation, occupational safety and health for distant workers, mechanism of evaluating the exact hours of work and issues with regard to salaries, social security and gratuity, job security and social problems faced by women employees etc. Therefore, the entire research focuses on the need of an effective legal and regulatory framework which safeguards the rights of distant workers recommending to enact a separate legislation which ensures the rights of distant workers while strengthening its regulatory framework in advance.

Keywords -Legal and regulatory framework, Distant-working concept, Home Work Convention

I. INTRODUCTION

This research paper focuses on the required improvements of Sri Lanka legal framework within Post-Covid19 Sri Lanka. It is obvious that the traditional system which managed employer-employee relationships subjected to a rapid change within the recently experienced pandemic situation.

This led to a lacuna within the legal system paving way for the need of legal and regulatory framework to promote distant working concept with regard to maintenance of labor relations.

The virtual pause of business activities functioned as the basis and resulted in the identification of the decrease of the expected future income. This leads the employers towards harsh and arbitrary decisions on employee management. However, this paper analyses the significance of adhering to the fundamental principles of law prior to arbitrary decisions and further the job security of the employees should be ensured. Therefore, it is necessary to discuss how far is it justifiable to allow pay cuts and employment terminations based on extraordinary circumstance such as Covid-19 pandemic. The entire research paper deals with the lacuna of Sri Lanka law on distant working concept highlighting the issues of direct incorporation of Home Work Convention emphasizing the need of a separate legislation which ensures the rights of distant workers.

II. METHODOLOGY

The required data has been collected using primary and secondary sources. When referring to primary sources, the relevant statutes were used throughout the research together with available case laws and the secondary sources include the journal articles and reports in relation to labour standards. Further moving ahead from blackletter approach the research also

paved the way for gathering empirical data with the objective of addressing the issues in a practical basis via interviews. The interviews were held with the authorities of International Labour Organization, Trade Unions, Employers' Federations as well as leading Academics in the field of Labour Law and these interviewees were selected purposefully in order to accomplish the objective of the research paper via innovative recommendations which preserve the authenticity and credibility of the research.

III. DISCUSSION

With the current wave of Covid-19 Pandemic the conventional model of working subjected to a drastic change leading to the need of specific legal and regulatory framework which regulates the employees who are being subjected to the newly emerged distant-working concept.

When referring to the Sri Lankan context, it is obvious that the government has introduced specific health guidelines in order to ensure the safety of employees within the office environment via the implementation of precautionary mechanisms which regulate the spreading of Corona virus. This situation has provided room for the employers to formulate special regulations in order to regulate the employees resulting them to decide working hours as well as number of employees which can be accommodated. (Epidemiology Unit - Ministry of Health - Sri Lanka, 2020)

However, the absence of a proper legal and regulatory framework within Sri Lanka has worsened the issue leading to the arbitrary decisions of the employers irrespective of hazardous impact of it towards working sector. When referring to international legal framework, it is obvious that the International Labour Organization (ILO) which is a part of United Nations forms the relevant rules and regulations which are essential in case of

regularizing labour relations by resolving disputes among tri-parties namely Employers, Employees and the Government.

The distant-working concept which acquired the attention of post covid-19 Sri Lankan society lead to the discussion of pros and cons of the applicability of *Home Work Convention* (HWC) 1996, (No.177) which was introduced by ILO and classified under the category of conditions of employment referring to specific categories of employees. It has also been identified that this convention has been signed and ratified by ten countries around the world such as Albania, Argentina, Belgium, Bosnia, Bulgaria, Finland, Ireland, Netherlands, North Macedonia and Tajikistan.

However, Sri Lanka hasn't ratified this convention yet due to existing controversies such as the absence of a proper procedure of claiming compensation, occupational safety and health for distant workers, mechanism of evaluating the exact hours of work and issues with regard to salaries, social security and gratuity, job security as well as matters with regard to issues of maternity benefits and social problems faced by women employees and threats against freedom of association which means the absence of an exact procedure of joining trade unions are among the major concerns which need to be addressed within legal framework. Though the inspections are to be carried out in actual workplaces, the process of inspecting the work done at residential levels require a special procedure of inspection in advance.

According to the preamble of the HWC (1996) it's evident that there exists many international labor conventions and Recommendations laying down standards of general application concerning working conditions which are applicable for homeworkers such as *Equal Remuneration Convention* 1951 (No.100), *Discrimination*

(Employment and Occupation) Convention 1958 (No.111), Minimum Age Convention 1973 (No.138), Freedom of Association and Protection of the Right to Organize Convention 1948 (No.87) and Right to Organize and Collective Bargaining Convention 1949 (No.98) and these conventions are among the fundamental conventions of ILO.

During an interview conducted on 3rd July 2020 the senior expert in legal and regulatory reforms, Ms. Shyama Salgado stated that the time has ripen up to initiate a social dialogue on the emerging jurisprudence with regard to distant working concept together with the special focus towards the process of digitalization and facilitation ensuring socio-political and economic commitments along with International labour standards prior to the process of incorporation of the home-work convention. She further prided over the fact that any convention cannot be incorporated solely without a comparative analysis on existing jurisprudence.

As per the HWC (1996, art.1), if a person engages in occupation in his or her home or in other premises of his or her choice, other than the workplace of the employer for remuneration which results in a product or service specified by the employer irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions such person is considered to be a homemaker.

When referring to the Sri Lankan context, there exists employees who already in employment based on a contract of employment as well as the employees to be recruited in order to utilize the distance working concept. Since the first category of employees engage in particular

employment based on a contract of employment they should be either directed to partly or occasional distance working concept and according to the HWC (1996, art.1(b)) specifies the fact that persons with employee status do not become homeworkers within the meaning of this convention simply by occasionally performing their work as employees at home, rather than at their usual work places. However, the pandemic situation leads to the turning point within the industrial sector as well as the entire business world leading to the increased recognition of the second category of employees who are to be recruited as distant workers and this will also pave the way for the need of resolution of numerous issues prevailed with regard to employees in case of remuneration, discrimination, freedom of association as well as recognition of their rights though it might take a considerable period for adaption of this newly emerged concept of distance working within the community.

Though the aforesaid HWC (1996) functions as a statute which provides for the legal protection of the rights of distant workers, the Article four of the convention leads to the confusion whether it actually safeguards the rights of distant workers in case of practical application within Sri Lankan context. According to the second limb of Article four of the convention, the equality of treatment is expected to be promoted. Even the reference towards The Constitution of the Democratic, Socialist, Republic of Sri Lanka (1978, art.12) guarantees the Right to Equality. However, though Sri Lankan legal framework specifies the process of safeguarding the rights of employees within the workplace, there isn't any specific legislation which guarantees the rights of distant workers

During an interview conducted on 7th September 2020 with the Assistant Director General of Employer's Federation of Ceylon, Mr. Chamil Perera stated that they being the employers have already formulated a special policy named "Remote Work Policy" within the existing legal framework on labour relations with the objective of managing the employees who work from home. This clearly denotes how Remote work policy has already recognized residential premises as the actual work place of the distant worker. He further stated that the policy specifies two categories of distant workers namely, the employees who work under distance working concept as per the request of the management and the employees who work based on their personal requests. However, the policy framework highlights the fact that the final discretion is upon the company to decide the employees who will be subjected to distance working and how long he or she would render his or her service as per the agreement based on their mutual understanding and consent. He also emphasized the fact that in case of any dispute which arise with regard to distant workers, the Workmen's compensation Act can be applied. However, he also pointed out that the absence of twenty four hours coverage for the employees might negatively impact on the safety of employees during working hours since it's hard to identify the exact working hours within the distance working concept.

When referring to foreign jurisdictions, the manner in which occupational safety and health is assured it's obvious that in a recent case, Michel Carroll was killed by her de facto partner, Steven Hill, while working from their family home in New South Wales (NSW) on June 16, 2010. Carroll and her partner were employed as financial advisers by family company S L Hill &

Associates Pty Ltd. Carroll's workplace was inside the family home and her employment was deemed by the NSW Court of Appeal to be a substantial contributing factor to her being killed. Carroll had two dependent children, a teenage son and a newborn baby, who made claims for death benefits under the *Workers Compensation Act 1987* (NSW). The Workers Compensation Commission determined Carroll died as a result of an injury arising in the course of her employment and payments were ordered for her children. (Hilsop 2020)

This landmark case clearly denotes the significance of a legal framework regarding distant workers and currently Sri Lanka needs such strong legal and regulatory framework for the process of safeguarding the rights of distant workers in advance. Though the existing room for injuries and illnesses within work environment is unavoidable the employers as well as the government is responsible for occupational safety and within the scope of distant working concept the procedure of claiming compensation, occupational safety and health of distant workers should be reassured.

During an interview conducted on 3rd July 2020, based on the existing procedure of claiming compensation, occupational safety and health of distant workers in Sri Lanka, the Senior Lecturer, Ms. Shyamali Ranaraja who contrasted the difference of procedure of claiming compensation on actual work place and home being a distant worker emphasized the fact of absence of a proper procedure of determining whether the particular employee subjected to injury or illness while he or she is working or not. She further highlighted the fact that Sri Lankan legal system requires improvement and ensure the rights of distant workers.

When considering the mechanism of evaluating the exact hours of work under the distant-working concept, it's hard to calculate the exact hours of work. However, according to Section 3 of the *Shop and Office employees Act No.15 of 1954*, the normal period during which any person may be employed in or about the business of any shop or office, on any one day shall not exceed eight hours and in any one week shall not exceed forty-five hours. Further, any interval allowed for rest or for a meal are excluded from the decided hours of work. Within the distant working concept, since the employee is expected to work from home there exists the difficulty in obtaining the proper calculations of the exact hours of work due to the invisibility of distant works which hinders the inspection process due to impracticality. Either the HWC (1996) nor the Labour department is silent on this matter and there exists the need of incorporation of a proper legal and regulatory mechanism of evaluating the exact hours of distant workers.

The spectrum of social security of employees requires the focus towards the procedures established regarding Employee Provident Fund, Employees Trust Fund and Gratuity. The considerations on Employment Provident Fund highlight that both employer and employees contribute the fund. The Employee Trust Fund is entirely based on employer's contribution and it seems that there exists no issue in case of functioning of these once even under distant working concept. However, when it comes to gratuity the procedure of distant workers being entitled for gratuity benefits is quite problematic. According to Section 5(1) of the *Gratuity Act No.12 of 1983* it is evident that Every employer who employs or has employed fifteen or more workmen on any day during the period of twelve months immediately preceding the

termination of the services of a workman in any industry shall, on termination of the services at any time after the coming into operation of this Act, of a workman who has a period of service of not less than five completed years under that employer, pay to that workman in respect of such services and the issue arises in case of deciding the guaranteed years of employment of distant workers. Though the employees who work under contract of employment have been included in the convention, the distant workers who render their service in a part time basis have been excluded. These pros and cons of the HWC (1996) lead to the need of formulating a separate statutory enactment with the objective enhancing the rights and social security of the distant working community of Sri Lanka.

Furthermore, it is necessary to ensure the equality of treatment in relation to remuneration of the distant workers without any discrimination. As per Section 3 (1) of *National Minimum Wage of Workers Act No. 3 of 2016* the national minimum monthly wage for all workers in any industry or service shall be ten thousand rupees and the national minimum daily wage of a worker shall be four hundred rupees. Further the remuneration increases via the addition of budgetary relief allowance.

Accordingly, the National Minimum Wage is thirteen thousand and five hundred rupees. Comparatively, within the distant working concept employers tend to reduce wages of distant employees based on the ground that they are not serving within their actual workplaces and this can be considered as a treat for the process of ensuring equal treatment.

The recent pandemic situation also resulted in a huge threat on the job security of thousands of employees. According to the District Labour office Gampaha, the pandemic resulted in many issues being a treat for job security of the employees. The officials also

mentioned the fact of arbitrary decisions of the employers such as reducing number of employees and reducing remuneration lead to these issues. However, the interviews with the employers clearly denoted how the employers are in trouble in case of paying remuneration and maintenance of the factories. Further the pandemic situation resulted in a great loss. According to the research carried out, it is obvious that the employers have made use of two specific procedures to reduce the number of employees. They either directly terminated the employees or took steps to terminate employees via Voluntary Retirement Scheme (VRS). When considering the issue emerged at Escual Lanka PVT LTD it has been found three hundred and fifty employees were terminated out of nine hundred and fifty employees and the employers have used VRS procedure to terminate these employees. In Helaclothin PVT LTD it has been found that the employers have taken steps to terminate the employees who are above the age of fifty-five years and the employees whose employment is less than six months. In the situation arose in "Sumithra Hasalaka" it has been found that the employees are being forced to resign by themselves. All most all these issues have arisen as a result of the pandemic and it is pertinent to mention the fact that these employees even deprive the option of moving towards distant working concept due to lack facilities and required knowledge. Therefore, the pandemic functioned as a huge threat for thousands of employees depriving their job security and there isn't any doubt regarding the need of effective rules and regulations which ensure the job security of employees either they work at office or home.

The distant workers also face numerous issues in case of claiming maternity

benefits. When considering women who are being employed, it's obvious that they have to serve both at office and home and the distant-working concept provide a sought of relief for them to manage their day-today responsibilities. However, the issue arises with regard to the process of determining the exact hours of work of a mother or a pregnant lady under maternity leave and the absence of such a mechanism is among the lacunas of the legal and regulatory framework for distant workers. Though Section 3(1) of the *Maternity Benefits Ordinance No. 32 of 1939* specifies the period in which any woman is entitled to the payment of maternity benefit, there is not any provision to safeguard the entitlement of distant women employees for maternity benefit.

During an interview conducted on 2nd July 2020 based on the rights of distant women workers, the Sri Lankan programming officer of International Labour Organization, Ms. Pramodini Weerasekara stated that the distant working concept would function as a kind of blessing for most of the women employees who render their duties both in work place and their homes. She further mentioned that the flexible working hours embedded within this distant working concept would indirectly facilitate these women employees for the process of fulfilling their duties. However, she also highlighted on the necessity of a strong legal framework which safeguard their rights specially in case of the matters regarding maternity benefits without leading to arbitrary decisions of the employers.

Apart from the issues regarding the treats towards their job security and maternity benefits the sudden shift towards the distant working concept also led women employees to numerous social problems. During an interview conducted on 8th of July 2020 the Joint Secretary, Free Trade

Zones and General Services Employees' Union, Mr. Anton Marcus stated that the rural women who were employed at cities lost their jobs due the pandemic situation and they no longer able to continue their service via distant working concept. Moreover, though they go back to their villages it's hard for them to get accustomed with their previous lifestyles and ultimately have to bear the brunt of numerous social issues. This opinion clearly denotes the discrepancies which need to be addressed within the legal system when incorporating distant working concept. This further leads to the realization of the need of an effective legal framework which safeguards the rights of each employee through special considerations on their socio-economic backgrounds.

The distant workers' right to join trade unions is among the core issues within the scope of rights of distant workers. When referring to International standards it's obvious that, as per the *Freedom of Association and Protection of the Right to Organize Convention* (1948, art.2) Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. Further, *Right to Organize and Collective Bargaining Convention* (1949, art.1(1)) highlights that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment and Article 2(1) of it provides that the Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration. Moreover, though the homework too ensures that the equal treatment should be provided to both categories of employees, which means both

distant workers and employees who work under a contract of employment. However, the issues arise with regard to the right of distant workers to join existing trade unions leading to the doubt about the practicality of equal treatment for distant workers and this leads to the necessity of a specific legal protection for distant workers.

Therefore, it is necessary to address the aforesaid issues of the legal system and it is evident that here exists the difficulty of direct incorporation of the HWC(1996) due to the above discussed issues within the convention and the dualistic approach maintained by the Sri Lankan Legal framework right after the judgement issued in *Nallaratnam Singharasa v. Attorney General (2013) 1 SRI L. R.* where the court held that the international conventions do not become a part of the domestic law until the specific legislations are enacted.

Therefore, instead of signing and ratifying the Home work convention it is better to enact a specific legislation in order to safeguard the rights of distant workers addressing all of the above discussed issues and within the pandemic such a legislation consists an extreme timely significance in advance.

IV. RECOMMENDATIONS

As per the aforementioned analysis, it is obvious that the time has ripened to introduce a separate legislation for the regulation of distant workers while ensuring the relationship among tri-parties. Therefore, it is important to focus on the conflicting issues within the concept of distance working in comparison with the approaches of foreign jurisdictions such as Home Work Convention (HWC) 1996, (No.177) in order to draft an effective statutory enactment which safeguard the rights of distant workers while paying a special attention towards both kinds of employees, either the employees under a contract of

service or the newly recruited distant workers. Furthermore, it is necessary to strengthen the regulatory framework of the distant workers via the legal recognition of the policies such as Remote Work policy which has been introduced through the Employers' Federation of Ceylon and this might lead to an on-going social dialog which would result in the formation of a strong legal and regulatory framework for distant workers in advance.

V. CONCLUSION

The research proved that there exists a need of a legal and regulatory framework which ensures the rights of distant workers. However, it is obvious that numerous issues hinder the direct incorporation of HWC (1996) to the Sri Lankan legal system. Further, it was revealed that minimal attention has been given by the government towards the newly emerged distant working concept and the drastic change caused through the use of this concept will indirectly contribute the National Growth of the country in the long run.

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