Are you a Workman at your Work Place or an Independent Contractor? An Analysis of the Yardsticks used by the Courts to Differentiate the Contract of Service and Contract for Service

LM De Silva
Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka.

In Sri Lanka one could find several enactments which govern the employer employee relationship. Trade Unions Ordinance No 14 of 1935, Industrial Disputes Act No 43 of 1950, and Termination of employment of workmen (Special Provisions) Act No 45 of 1971 are among them. Since these legislations provide provisions regarding wages, minimum hours of work and other social benefits, one might come to a decision that it is not necessary to have a contract of service between the parties and it is frequently seen that parties enter into contractual relationships without a written contract of service, but it should be mentioned that these legislations apply only where there is a contract of service and not for an independent contractor under the contract for service. Therefore to identify whether a person who provides service is a workman or an independent contractor in the absence of a written contract of service, court has developed several tests. This is mainly to overcome the difficulties arising due to the globalization, novel technologies, freedom granted in employment and tactics used by the employers. This paper aims to discuss whether the different tests introduced by the courts are adequate to differentiate the workman from an independent contractor.

Only the Shop and Office Employees' (Regulation of Employment and Remuneration) Act No 19 of 1954 specifies the need of a written contract of service and it could be argued that this Act has recognized the need of a written contract of service mainly to curb the injustice faced by the employees and also the difficulty to prove the existence of a contract of service by oral evidence. Also though the letter of employment helps to prove the existence of an employer employee relationship it is not a written contract of service. In this scenario court has developed 'control test', 'integration test', 'economic reality test', and 'multiple test' and adopt them according to the circumstances.

The initial test used by the courts was the 'control test'. In the case of *Yewens v Noakes* (1880) 6 QBD 530 the court emphasized "A servant is a person subject to the command of his master as to the manner in which he shall do his work". This suggests the employer's capacity to control. The more he can control, more likely the existence of an employer employee relationship. Court identified certain aspects with regard to the control test such as the employer's power to select the employee, whether the employer paid wages, the employer's right to control the method of doing the work and the employer's right to dismiss from work. The case *Jamis Appuhamy v. Shanmugam* (1978) 80 NLR 298 also demonstrates that Sri Lankan courts also have recognized the control test to differentiate a workman from an independent contractor. However soon the courts recognized the inadequacy of the control test as it was difficult to apply where skilled workers are employed. For an instance hospital authority is unaware of what a surgeon does at the theatre, but it is unreasonable to say there is no employer employee relationship for the very reason that hospital authority doesn't have any control over the surgeon. The same happens with regard to pilots, engine drivers and scientists, but it would best suit for an owner and housemaid relationship. Nevertheless courts later recognized many other tests to fulfill the inadequacies arose out of the control test.

In the case of *Stevenson Jordan and Harrison Ltd v McDonald and Evans* (1952) 1 Times. L.R Lord Denning introduced the 'integration test' and said "...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" In the Sri Lankan case *Y.G de Silva v Associated News Papers Ltd* (1978-1979) 2 Sri LR 173 a person entered into an agreement with a newspaper company as a District Corre-

spondent for six months and it was renewable by mutual consent of the parties. He had to attend daily and take instructions from the company. He used the office equipment, stationary and office telephone. Although it was not stated in the agreement his traveling expenses were paid by the company. Also he was granted leave with the consent of the company. The court held that he did not run a business of his own and considered him as an integral part of the business, but the application of this test was limited to where the service is rendered to the main business of the organization.

In *Market Investigations Ltd v. Minister of Social Security* (1968) 3 ALL ER citing the case of *US v. Silk* (1946) 331 U.S. 704 court held that the test to be applied is not whether power of control is exercised or not but depending on the economic reality. This is known as the 'economic reality test'. Here it is considered whether the person is in business on his own account or works for someone else who gains the profit or loss. In the Sri Lankan case *Jamis Appuhamy v. Shanmugam* (1978) 80 NLR 298 a person was engaged as a taxi driver. He was not paid regularly and was paid one - third of the daily profit. Court applied the economic reality test and said that he did not bear the risk or loss of the business and therefore he is a workman. This acts as one of the most effective tests in differentiating the contract of service and contract for service.

Courts have developed another test covering multiple aspects of the relationship. In *Montreal v. Montreal Locomotive Works Ltd* (1947) 1 D.L.R 161 court introduced a fourfold test which includes 1. control, 2.ownership of the tools, 3. chance of profit, 4.risk or loss. In the modern world of work the control test is not adequate to apply in complex cases therefore courts apply not only the control test, but also the integration test, economic reality test and the multiple test. In *Ceylinco Insurance Co. Ltd v. Commissioner of Labour* C.A No. 398/95 the respondents were insurance agents and they were engaged as independent contractors, but for them it was prohibited to work in any other organization or run their own business. Court decided respondents were an integral part of the company and company had control over the performance of service and therefore considered them as employees of the company.

The above yardsticks used by the courts demonstrates that courts play an active role in identifying the existence of an employer employee relationship. It is frequent that some persons are labeled as independent contractors by the employers, but the courts tend to assess the reality behind the relationship and then consider them as employees according to the circumstances. In Sri Lanka Labour Commissioner is not bound by the contractual relationships between the parties and he is granted power to reach the objectives laid down by the labor laws. Due to the new realties in the world of work, some people engage in work where they can earn money through the internet. Whatever the circumstance it is, and although there is no written contract of service that prevails, it is reasonable to conclude that in applying the tests developed, even today courts can play a creative role to differentiate a workman and an independent contractor.