1978 March 31

[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

CLEANTHIS CHRISTOFIDES LTD.,

Appellant,

v.

1. THE FUND FOR REDUNDANT EMPLOYEES,
2. YIANNAKIS FLORIDES,

Respondents.

(*Case Stated No.* 149).

Termination of Employment Law, 1967 (*Law* 24 *of* 1967 *as amended by Law* 17/68)—*Employment as clerk ceasing upon conversion of employer's office into "Agency"—Re-employment as "Agent", upon advertisement for the purpose, under a written contract and on a commission basis—Other officers dismissed as redundant—No "contract of service" or existence of "employee-employer" relation within the meaning of the definition of "employee" by section* 2 *of the Law.*

Master and Servant—Contract of service—Distinction between contract of service and contract for services—Written contract—Declaration of parties—Whether conclusive in determining nature of contract—Section 2 (*definition of "Employee"*) *of the Termination of Employment Law,* 1967 (*Law* 24 *of* 1967 *as amended by Law* 17/68).

Practice—Case Stated—Need that Judges should set out clearly and separately the specific questions on which the opinion of the Supreme Court is sought.

Respondent 2 (applicant in the Court below) was first employed by the appellant company in July 1959 as a clerk in their head office in Nicosia and in April, 1962 he was transferred in the Limassol office. In July 1968, following the reorganization of the company, the Limassol office was converted into an "Agency" and after advertising for the purpose the company appointed him as the Limassol "Agent". By letter dated 22nd July, 1968, he was informed by the appellant company that as

from the 1st August, 1968 he would cease to be their employee and would start work as their "Agent". The other employees of the company in the Limassol office were dismissed as redundant on the 31st July, 1968; and as from 1st August, 1968 respondent 2 worked for the company as their "Agent" under a written contract. This contract was described as "a contract of service", its sub-title read "between Firm and Agent" and the parties thereto were called "the Firm" and "the Agent", respectively. Under this contract he was paid commission, he was not allowed to connect himself with any insurance business, similar to the business of the company; and although he was allowed to engage or be connected with any other business, other than insurance business, it was made a condition that the company's interests should not be adversely affected; also, his right to any additional business was subject to the company's consent.

When he applied to the Redundancy Fund for a redundancy payment under section 16 of the Termination of Employment Law, 1967 (Law 24/67) the Fund refused to pay on the ground that he had never ceased to be "employed" by the appellant company. He then applied to the Arbitration Tribunal which held that he has never ceased to be an employee of the company within the meaning of section 2* of the Termination of Employment Law, 1967 (Law 24/67 as amended by Law 17/68). Hence the present appeal:

The appeal turned on the construction of "employee", as defined by the said section 2 and the question posed for consideration was whether the written contract in this case was "a contract of service" within the first leg of the said definition or whether the contract came within the second leg of the definition namely that respondent 2 was an employee because he was a person who worked for another person "in circumstances from which the existence of a relation of employee and employer may be concluded".

Held, (1) (*After stating the tests and criteria to be applied in determining whether a contract is a contract of service or a con-*

* Section 2 (definition of "Employee") reads as follows: "'Employee' includes any person who works for another person either under a contract of service or in circumstances from which the existence of a relation of employee and employer may be concluded; and the expression 'employer' shall be construed accordingly".

tract for services—vide pp. 216–17 *post*) that the relationship of the parties is determined by the law and not by the label which they choose to put on it; and that on the true construction of the first part of the definition of the word "employee" to be found in section 2 of the Law, the contract in this case, though called a contract of service, it cannot, under any circumstances be considered, in law, as such.

(2) That the employee–employer relationship has always been understood to be one of master and servant and the expression in "circumstances from which the existence of a relation of employee and employer may be concluded" does not change the relationship of employee–employer; in other words it includes cases where there does not exist a contract of service or could not exist as such, and yet, the relationship of employee–employer may be concluded from the surrounding circumstances; and that the purposes of Law 24/67 itself would have been defeated had agents and independent contractors been included within the definition of "employee" in this Law. (See, also, sections 16, 18 and section 2—definition of "wages"—of the Law).

(3) That the approach of the Tribunal that a person is an employee within the definition of the Law whose living is totally or largely dependent upon the employment continuing, irrespective of what common Law category his employment falls into, is not warranted by the definition, nor do the terms of the contract support the view that the applicant's living was, if not totally, at least largely, dependent upon the employment continuing. Accordingly the relationship created by the contract in this case was not that of an employer–employee within the meaning of section 2 of the Law and the case will be remitted to the Tribunal with this opinion.

Order accordingly.

Observations: Courts and Tribunals when asked to state a case must clearly and separately set out the specific questions for which the opinion of the Court is sought so that the very purpose of stating a case can be achieved.

Cases referred to:

Global Plant Ltd. v. *Secretary of State for Health and Social Security* [1971] 3 All E.R. 385;

Market Investigations Ltd., v. *Minister of Social Security* [1968] 3 All E.R. 732 at p. 737;

Ferguson v. *John Dawson & Partners (Contractors) Ltd.*, [1976] 3 All E.R. 817;

Ready Mixed Concrete (South East) Ltd., v. *Minister of Pensions and National Insurance* [1968] 1 All E.R. 433;

Addiscombe Garden Estates Ltd., v. *Crabbe* [1957] 3 All E.R. 563;

Facchini v. *Bryson* [1952] 1 T.L.R. 1386 at p. 1389.

Case Stated.

Case Stated by the Chairman of the Arbitration Tribunal relative to his decision of the 9th December, 1969, in proceedings, under sections 3 and 16 of the Termination of Employment Law, 1967 (Law No. 24/67 as amended by Law 17 of 1968) instituted by Yiannakis Florides, whereby his claim for compensation, for unjustified dismissal, from his employer (the appellant company) or, alternatively for a redundancy from the Fund of Redundant Employees, was dismissed.

L. Demetriades, for the appellant company.

Cl. Antoniades, Counsel of the Republic, for respondent 1.

R. Michaelides, for respondent 2.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment in this appeal will be delivered by Mr. Justice A. Loizou.

A. LOIZOU J.: This is an appeal by way of case stated from the decision of the Arbitration Tribunal, by which the application of the applicant for compensation for unjustified dismissal from his employer, the appellant company (respondent 1 before the Tribunal) under section 3, or alternatively, redundancy payment from the Fund, respondent 1 (respondent 2 before the Tribunal) under section 16 of the Termination of Employment Law, 1967 (Law 24/67) as amended by Law No. 17/68, was dismissed.

The facts found by the Tribunal were as follows:

" The respondent company are insurance agents who carry on business all over the island. Their branch office in Limassol, which is the locus of this application, dealt with matters arising in Limassol itself and in the Sovereign Base Areas of Episkopi and Akrotiri.

The applicant was first employed by the company on the 8th July, 1959 as a clerk in their head office in Nicosia. In April, 1962 he was transferred in the Limassol office.

In July, 1968 the company decided to reorganize. As part of this the Limassol office was to be converted into an "Agency" as from 1st August, 1968.

After considerable negotiations it was decided that the applicant be appointed as the Limassol "agent." On 22nd July, 1968 the company sent a letter to the applicant stating, amongst other things, that as from 1st August, 1968 he would cease to be their 'employee' and would start work as their 'agent'.

The other employees in the Limassol office were dismissed as redundant on 31st July of the same year.

As from the 1st August the applicant worked for the company as their 'agent' under a written contract. The nature and effect of this contract we will deal with later.

On 12th August, 1968 the applicant applied to the Redundancy Fund for a redundancy payment under section 16 of the Termination of Employment Law, No. 24 of 1967. The Fund refused to pay on the grounds that the applicant had never ceased to be 'employed' by the respondent company."

The first question posed by the Tribunal was whether the applicant before it (respondent 2 in this appeal), was ever dismissed and in relation to that, whether he had been an employee of the appellant company throughout the whole of the period under consideration.

The approach of the Tribunal was that under the Termination of Employment Law, 1967, as amended, it had to apply a new concept of employment and observed that "the contract of service is still there, the servant gets the benefit of the law", but that it had to go a little further, namely, that in addition to servants, other classes of employees should get the benefit of the law if, to put it in non-technical terms, the Tribunal thought that it ought to do so, and it asked itself what classes of persons other than servants were to get the benefit of the law, what had the legislator in mind when he defined "employee" thus and it pointed out that it should not lay down a hard

and fast definitive rules, as one of the aims of the Tribunal was flexibility within a reasonably recognisable and foreseeable policy and it gave the following guide-lines:-

"Firstly, this is protective legislation. The law was based on an International Recommendation aimed directly at safeguarding the 'worker' (to use a neutral word for the moment) from having his means of livelihood arbitrarily taken away from him. This, then, must clearly be the first class of persons who get the benefit of the Law; the employee whose living is totally or largely dependent upon the employment continuing; irrespective of what common law category his employment falls into. To hold otherwise would be to go against the very basis and intention of the Law itself.

Secondly, we feel that, on the basis of the definition in the Law, all the 'border-line' cases of which there are so many in the Law Reports must now be decided in favour of the 'worker'. By that we mean that 'employment' will exist. Most of the cases, as we said above, were decided with other policy reasons in mind. All were decided upon technicalities of the law of contract. The Law and the definition that we administer clearly make such policies unsuitable and such technicalities unnecessary. We do not feel we need to go further than this at the moment. These two categories will, we hope, be a sufficient guide to advocates and others concerned with this Law. No doubt we will have to elaborate more on these points in the future and perhaps to consider new ones. We do not propose to do so at present.

In the present case it is clear that under the contract of 1st August, 1968 the applicant was engaged to act as a sole agent in consideration of a commission. But 'agent' and 'servant' are not mutually exclusive concepts. Was the agency contract a contract of service as well?"

After referring to the contract (*Exhibit* 1) and finding that it was a border-line case, the Tribunal concluded that same gave rise to employment within the meaning of the Law, as they so understood the result of the definition of an "employee" by this Law. This view of it was further strengthened, as it stated, from the facts that the applicant's living was totally or largely

dependent upon the employment continuing; he was employed for an indefinite period, he was paid commission in consideration of a service to the company, he was not allowed to connect himself with any insurance business similar to the business of the company and although he was allowed to engage or be connected with any other business other than insurance business it was, nevertheless, made a condition that the company's interests should not be adversely affected; also, the applicant's right to any additional business was subject to the company's consent. Consequently, it held that—"the applicant has never ceased to be an employee of the company within the meaning of section 2 of the Termination of Employment Law No. 24 of 1967, as amended by Law No. 17 of 1968".

The concluding paragraph of the case, as stated, is:-

> "The Supreme Court is respectfully requested to consider and determine the questions raised herein and remit the matter to me with their opinion or make any order they deem fit under the provisions of the Termination of Employment Law, No. 24 of 1967, as amended by Law No. 17 of 1968".

We avail ourselves of this opportunity to point out for the guidance of the Courts and Tribunals that it is absolutely necessary that when asked under the Law to state a case, the specific questions for which the opinion of this Court is sought, must be clearly and separately set out so that the very purpose of stating a case, *i.e.* of having well defined legal issues, can be achieved. Fortunately, however, in this case, the matter was really confined to the interpretation of the terms "employer" and "employee" to be found in section 2 of the Termination of Employment Law, 1967, Law No. 24/67, as amended by Law No. 17/68.

It was the contention of the appellant that the Arbitration Tribunal was bound in the interpretation of these two terms by the principles of interpretation of the Common Law made part of the Laws of Cyprus under section 29 of the Courts of Justice Law, 1960, and under these principles effect should be given to the terms of the written contract between the parties; moreover, the Tribunal was not entitled to invoke other notions of interpretation.

Under section 2 of the Termination of Employment Law, an "employee" was defined as follows:

" 'employee' means any person who works under a contract of service:

Provided that the Tribunal may, even in the absence of a contract of service, consider a person to be an employee if the relations between the parties are such as to lead the Tribunal to the conclusion that a relation of employer and employee exists"

And "employer" was defined to mean –

" the person with whom the employee has entered into a contract of service and includes persons deemed by the Tribunal to have the status of employer even though a contract of service does not exist. The term includes the Government of the Republic of Cyprus and any body of persons corporate or incorporate and the legal personal representatives of a deceased employer".

By the Termination of Employment (Amendment) Law, 1968, (Law No. 17/68), the aforesaid definitions were amended as follows:

" By the deletion of the definitions of 'employee" and 'employer' and the substitution therefor of the following new definition:

'employee' includes any person who works for another person either under a contract of service or in circumstances from which the existence of a relation of employee and employer may be concluded; and the expression 'employer' shall be construed accordingly".

By the amended section, the two definitions of "employer" and "employee" were merged into one. Under the said definition, as amended, there are two categories of employees that are included in the said term. First, those who work under a contract of service and second, those in circumstances from which the existence of a relation of employee and employer may be concluded.

The question, therefore, that poses for consideration is, what is a contract of service and whether a relation of employee

and employer which may be concluded from "the circumstances", covers a wider spectrum than that of a contract of service. In other words, whether it includes a contract for services or, as in the present case, contract of agency.

In the case of *Global Plant Ltd.*, v. *Secretary of State for Health and Social Security* [1971] 3 All E.R. p. 385 the question arose whether a contract was a contract of service or a contract for services, under the National Insurance Act, 1965 and the law which has to be applied in deciding whether a given situation produces a contract of service or a contract for services was examined.

As it was pointed out by Lord Widgery, C.J. at p. 389,

> " One must next look, at any rate briefly, at the law which has to be applied in deciding whether a given situation produces a contract of service or a contract for services. A great deal has been said on this subject over the years, because in a great many branches of the law the distinction between these two contracts is relevant. I think it is well accepted now that the idea of the degree of control exercised by the employer over the servant being the decisive factor in this question has been very largely modified. It is recognised nowadays that other factors, other, that is, than simply the degree of control exercised by the alleged master, have to be taken into account in separating a contract of service from a contract for services."

He then went on and referred to the test of Cook J. in the case of *Market Investigations Ltd.* v. *Minister of Social Security* [1968] 3 All E.R. p. 732 at p. 737 where it was said:-

> " The observations of Lord Wright, of Denning, L.J., and of the Judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. 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. 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; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

The case of *Ferguson* v. *John Dawson & Partners (Contractors) Ltd.*, [1976] 3 All E.R. 817, may also be referred; it was held therein that although the parties' expressed intention might be a relevant factor in deciding what was the true nature of the contract, yet, it was not a conclusive factor. Regard should be had to the arrangement as a whole and in particular to the rights and obligations of the parties. The terms of the contract whether implied or added by agreement during the plaintiff's employment indicated that the reality of the relationship was employer and employee, *i.e.* a contract of service.

Among other cases referred to was that of the *Ready Mixed Concrete (South East) Ltd.*, v. *Minister of Pensions and National Insurance* [1968] 1 All E.R. 433, because the trial Judge in the *Ferguson* case had applied the tests and criteria suggested therein to the realities of the plaintiff's employment, and Megaw, L.J. at p. 825 said:-

" However, as I have previously indicated, I am content for the purposes of this appeal to accept, in favour of the defendants, the less stringent view which appears hitherto to have found favour in a number of cases, that is that the expression of the parties' intention may be a relevant factor, though certainly not a conclusive factor, in deciding what is the true nature of the contract."

This case is also useful, because the parties in our case described the contract (*Exhibit* 1) as a contract of service. Megaw, L.J. at p. 824 expressed the view that -

" ..... a declaration by the parties even if it be incorporated in the contract, that the workman is to be, or is

> to be deemed to be, self-employed, an independent contractor, ought to be wholly disregarded—not merely treated as not being conclusive—if the remainder of the contractual terms, governing the realities of the relationship, of employer and employee".

And in that respect applied the principle laid down by Jenkins L.J. in *Addiscombe Garden Estates Ltd.* v. *Crabbe* [1957] 3 All E.R. 563 and referred to the passage of Jenkins L.J. who quoted from the judgment of Denning, L.J. in *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386 at p. 1389 as follows:

> " The occupation has all the features of service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it ..... It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven—I will not in these days say a coach and four—but an articulated vehicle".

And as Jenkins, L.J. put it, and we ourselves may, similarly and mutatis mutandis, say that "the present case, has nothing to do with the Rent Acts, but the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties".

In the present case respondent 2 was a person who worked for the appellant under a contract of service until the 31st July, 1968. Thereafter their relationship was changed.

The Branch office of the appellants closed down, their employees, including respondent 2 were dismissed as redundant and after advertising for that purpose respondent 2 was re-engaged on the terms of this contract which though described as a contract of service, it had as a sub-title, "Between Firm and Agent"

and the parties to it, appellant and respondent were called "the Firm" and "the Agent" respectively.

The Tribunal having found as a fact that respondent 2 was engaged to act as a sole agent in consideration of a commission, asked itself whether the agency contract was a contract of service as well and gave the answers to which we have already referred.

On the true construction of the first part of the definition of the word "employee" to be found in section 2 of the Law, as amended, and applying the tests and criteria to be found in the authorities already referred to as to what a contract of service is, the contract (*Exhibit* 1), though called as a contract of service, it cannot, under any circumstances be considered, in law, as such.

It remains now to consider whether it comes withing the second leg of the definition, namely, that respondent 2 was an employee because he is a person who works for another person "in circumstances from which the existence of a relation of employee and employer may be concluded", that is, a definition that comes into play when there is no contract of service. The employee–employer relationship has always been understood to be one of master and servant and the expression in circumstances from which its existence may be concluded, does not change the nature of the relationship of employee–employer; in other words, it includes cases where there does not exist a contract of service or could not exist as such, and yet, the relationship of employee–employer may be concluded from the surrounding circumstances. The purposes of the law itself would have been defeated were we to include agents and independent contractors within the definition of an "employee" in this Law; a glance at the remaining provisions of the Law, bear out this interpretation; they are section 16 (5) regarding the dismissal not giving right to compensation and sections 16 and 18 in particular as to when an employee is redundant, as well as the definition also of "wages" may be helpful in this respect; in section 2 of the Law there is a proviso saying, "provided further that commissions and *ex gratsia* payments would not be deemed to be wages for the purposes of this Law".

The approach of the Tribunal that a person is an employee within the definition of the Law whose living is totally or largely

dependent upon the employment continuing, irrespective of what Common Law category his employment falls into, is not warranted by the definition, nor do the terms of the contract (*Exhibit* 1), as summed up by the Tribunal support the view that the applicant's living was, if not totally, at least largely dependent upon the employment continuing. Whatever that may mean, here we have a person whose services were terminated, upon the advertisement for an agent, he was preferred, obviously because of his past experience in that type of work and employed on specified terms and at the same time be free to do any other work, except of a nature that would compete with that of the appellants.

For all the above reasons we are of the opinion that the relationship created by *Exhibit* 1 as from the 1st August, 1968 was not that of an employer–employee, we remit the case with this opinion to the Tribunal, within the meaning of section 2 of the Law.

In the circumstances, however, we make no order as to costs.

Order accordingly.