THE EMPLOYERS' FEDERATION OF CEYLON

THE CONTRACT OF EMPLOYMENT

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by

S. R. DE SILVA

Monograph No. 4

– Revised Edition 1998 –

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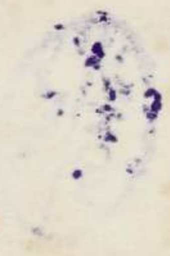

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TABLE OF CONTENTS

	Page No.
PREFACE	1
INTRODUCTION TO THE FIRST EDITION	3
TABLE OF CASES	5

	Paragraphs
A. Origins of the Law Relating to the Contract of Employment	1-3
B. The Philosophy of the Common Law and its Impact on the Contract of Employment	4 -7
C. Significance and Relevance of the Contract of Employment	8 - 21
D. Right to Work	22 - 27
E. What is a Contract of Employment ?	28 - 107
Introduction	28 - 30
Servant and Independent Contractor	31 - 36
Origins and Limitations of the Control Test	37 - 42
Wages Boards Ordinance	43 - 44
Shop & Office Employees' Act	45 - 46
Employees Provident Fund Act	47
Payment of Gratuity Act	48
Workmen's Compensation Ordinance	49
Industrial Disputes Act	50 - 74
Dual Capacity – Directors and Contracts of Employment	75 - 80
Present Legal Tendencies	81 - 107
F. The Political and Social Acceptability of the Legal Basis of the Contract of Employment	108 - 113
G. Some General Principles Applicable to Contracts of Employment	114 - 178
Parties to Contracts	116 - 118
Contracts which are Illegal or Contrary to Public Policy	119 - 139
Are Written Contracts Necessary ?	140
Effect of Collective Agreements, Court Orders and Statutes on Contracts	141 - 149
The Theory of Implied Terms	150 - 155
Variation of Contract and Effect of Custom and Usage	156 - 173
Unilateral Variation of Contract	174 - 178

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Paragraphs

H. Types of Contracts of Employment 179 - 260
Monthly Contracts of Employment 180
Fixed Term Contracts 181 - 191
Probation 192 - 193
Probation Defined 194
The Right of the Employer to Terminate the Services of the Probationer 195 - 202
Re-employment on Probation 203
Casual Employment 204 - 218
Temporary Contracts of Employment 219 - 222
Seasonal Contracts of Employment 223 - 224
Apprenticeship and Training 225 - 252
Legal Status of Non-Permanent Employees 253 - 260

I. Scope of Termination of Contract 261 - 262

J. Resignation 263 - 271

K. Doctrine on Constructive Termination 272 - 295
Repudiation of Contract 282 - 295

L. Frustration of Contract and Impossibility of Performance 296 - 320

M. Vacation of Employment 321 - 346
Absence of the Employee beyond the Contractual Period 322 - 328
Intention to Desert or Abandon Employment 329 - 332
Emergency Regulations and Vacation of Employment 333 - 337
Section 2(II) of the Essential Services Order 338 - 346

N. Non-disciplinary Terminations – Termination of Employment Of Workmen Act 347 - 384
Introduction 347 - 349
Nature of Prohibition on Termination and Exceptions to the Operation of the Act 350
Definition of Scheduled Employment 351 - 352
Definition of Termination 353
Non-Disciplinary Termination 354 - 359
Termination and Non-Employment by the Employer 360 - 365
Non-Employment as a Consequence of Closure 366 - 368
What is the Prior Consent in writing of a Workman ? 369 - 370
Consequences of Terminations in Breach of Act and Commissioners Powers 371 - 372
Effect of an Application made under the Act 373 - 377
Conclusions 378 - 384

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PREFACE

The Monograph entitled "The Contract of Employment" was brought out by Mr. S. R. de Silva in February 1983. This publication was hailed as one of the most valuable contributions made by Mr. de Silva to the legal and industrial relations literature of Sri Lanka. There have been many cases decided by the Courts based on the interpretation to contracts of employment provided by Mr. de Silva in this Monograph which, as he has stated in the introduction to the First Edition, covers a subject of fundamental importance in labour law and industrial relations.

Mr. de Silva himself was very keen that the Secretariat should undertake a revision of his Monograph based on changes which have taken place as a result of judicial interpretations since the original work was published.

The revised edition was compiled by Mrs. Shyamali Ranaraja with the able assistance of Ms. Champika Jayasinghe, who together researched the subject with a view to incorporating decisions given by Courts after 1983. The text has more or less remained in its original form, except where changes were required to fall in line with recent judicial pronouncements.

E. F. G. Amerasinghe
Director-General

Colombo,
March 1998.

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INTRODUCTION TO THE FIRST EDITION

This is the Fourth in the series of Monographs on a subject which has been covered at Seminars as part of our Training Programme. The subject is, for many reasons, of fundamental importance in labour law and industrial relations and to all people who are involved, whether as businessmen, Unions, Lawyers, other professionals or academicians.

First, the contract of employment is the basis or foundation of the relationship which is the subject-matter of the whole field of labour law and industrial relations. It is the contract of employment which not only creates the relationship of employer and employee but also, in the course of that relationship, gives rise to many problems of interpretation and variation, the latter through practice, negotiation, Collective Agreements, legal rules or even Trade Union action.

Second, there is a common misconception that the contract of employment refers only to a written document that is given to and signed by an employee. This misconception overlooks the fact that the contract of employment includes a variety of other matters which are not in the written document and are reflected in implied terms, customary practices, laws, Court Orders and Collective Agreements.

Third, many problems in industrial relations require examination by first making reference to the contract of employment and, indeed, it is sometimes necessary to inquire as to whether there is a contract of employment at all. There are so many assumptions among persons who have, or do not have, a contract of employment as to when such a relationship exists, or does not exist. For instance, it is often assumed that there is no employment relationship between two persons when in fact and in law there is, and it is erroneously assumed that the label which the parties have attached to a relationship is the most important factor in determining the nature of the relationship. It is overlooked that in many cases the law steps in and places its own label on the relationship, whatever the parties might think about it.

Fourth, the contract of employment provides answers to many problems, but at the same time provides no answers to others. For instance, it is relevant in determining whether the employer has a right to transfer the employee, but it does not help in deciding whether that right has been exercised mala fide.

Fifth, the basic rights and obligations of the parties are to be found in the contract of employment, express or implied, modified by collective bargaining, Court Orders, customary practices and so on as the case may be.

Sixth, it is sometimes vital in relation to the application of certain labour laws to know whether a contract of employment exists at all, and to know that certain types of contracts which are not contracts of employment at all have been brought within the ambit of certain statutes.

Seventh, unless we understand the precise nature of the contract of employment, what it entails and the place it occupies in the social policy thinking of our society it is not possible to have a proper appreciation of the powers of our Courts in relation to the contract of employment or an appreciation as to why

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these Courts in some instances act on the contract of employment and in other instances do not.

This Monograph, which is perhaps more in the nature of a book on the subject having regard to its length and contents, is intended to appeal to a wider reading public than the previous Monographs. It is hoped that it would be of use to the professional practitioner in the field of labour law and industrial relations as well as to academicians and students because it attempts to analyse many of the legal concepts involved in or relevant to the contract of employment. It also seeks to reach people in employment who are directly concerned with the employment relationship. Some of the subjects such as "Some General Principles Applicable to the Contract of Employment" and "Types of Contracts of Employment" cover issues of a practical nature in that they often arise in the daily workings of business institutions.

In the field of labour law and relations there is, more than in any other, a disparity between the legal theory and the practice. This has been underlined, wherever relevant, and is of particular importance to people who have to make decisions affecting the employment relationship because decisions based on the theory would be of little avail if the practice is different. For instance, the fact that an employer is entitled to state in the contract of employment that the services of an employee may be terminated on specific grounds does not oust the powers of Labour Courts to deny the employer the right to so terminate the contract in exercise of their just and equitable jurisdiction. Therefore, an employer who erroneously assumes that a Court will necessarily give effect to the contract may well make a decision which cannot be sustained. Subjects such as casual and temporary employment are not only of practical concern to those involved in the employment relationship but are some of the most difficult concepts and disputed areas relating to the contract of employment.

I wish to express my appreciation of the assistance given to me by Mr. E. F. G. Amerasinghe, Deputy Secretary of this Federation, but any mistakes or omissions are entirely mine. It needs to be emphasized that no final answers can be given to many of the subjects covered and only guidelines are possible. On several matters the answers contained herein are the result of the author's own perception based on his experience in this field. I am well aware that many other answers are possible to the several issues that arise in connection with the contract of employment. What is important to remember is that in a social science such as ours, unlike in the exact or physical sciences, it is often impossible to furnish "right" or "correct" answers and it is only possible to provide a view or answer which may, in the circumstances, be better than another one.

S. R. DE SILVA
Secretary
Employers' Federation of Ceylon

Colombo,
February, 1983.

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TABLE OF CASES

	Paragraph No.
A	
Abdu Salam v State of Kerala (1973) Lab. I.C. 1584 (Ker.)	264
Abewickrema v Pathirana (1986) 1 SLR 120	271
Abraham Rehen v Karachi Municipality AIR. 1929 Sind 69	270
Agra Electric Supply Co. v Alladin (1970) 37 F.J.R. 416 (S.C.)	202
Ahmedabad Savangpur Mills Co. v Industrial Courts 1965 (1) L.L.J. 155 (Guj.)	14
Air Ceylon Ltd. v Rasanayagam (1969) 71 N.L.R. 271	50
Allawdeen v Holland Colombo Trading Society Ltd. (1952) 56 N.L.R. 289.	286
All Ceylon Commercial & Industrial Workers' Union v Hentley (Garments) Ltd. I.D. 239 C.G.G. 12,797, 8.12.61	198
All Ceylon Commercial & Industrial Workers' Union v Fernando & Sons Ltd. I.D. 168 C.G.G. 12,087, 18.3.60	209
All Ceylon Commercial & Industrial Workers' Union v Pieris I.D. 44 & 58 C.G.G. 11,471, 8.8.58	207, 218
Ambagamuwa Korale Multi-Purpose Co-operative Societies Union v The All Ceylon Co-operative Employees' Union S.C. 147/67, S.C.M. 19.12.68 (unrep.)	263
Amul Roy v The Chief Commissioner of Tripura 1970 Lab. I.C. 1326 (Tripura)	197
Anderson v James Sutherland (Peter Read) Ltd. 1941 Scottish cases	77
Andiris v Punchihamy 24 N.L.R. 203	137
Argent v Minister of Social Security (1968) 3 All E.R. 208	33
Arnolda v Gopalan (1963) 64 N.L.R. 153	61
Arumugam v Nagammal A.I.R. 1949 Madras 462	210
Assam Oil Co. v Its Workmen (1960) (1) L.L.J. 587 (S.C.)	14
Ayodha Prasad Singh v Registrar Co-operative Societies 1970 Lab. I.C. 1395 (Oriss)	197

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Paragraph No.

B

Babynona v Arthur Silva 54 NLR 166 49

S.W.R.D. Bandaranayake National Memorial Foundation v M.P.C. Perera - 1988 2 CALR 166 193

Bank Voor Handel en Scheepvaart N.V. v Slatford (1952) 2 All E.R. 956 90

Barnett v Coral Leisure Group Ltd. 131

Beeton & Co. (1913) (2) Ch. 279 77

Bell v Dillo (1882) Wendt Reports 102 329

Beloff v Pressdram Ltd. (1973) 1 All E.R. 241 95

Beretta v Rhodesia Railways (1947) (2) S.A.L.R. 1075 298

Bettini v Gye (1876) 1 W.B.D. 183 315

Bhattacharyya v The Secretary-General United Nations (1971) L.L.J. 588 187

Bodiyabaduge Indrani Fernando v Andrews Travel Services SC No.2/94, SCM 7.7.94 (unrep.) 49

Bombay Labour Union v International Franchises (Pvt.) Ltd., 1966 (1) L.L.J. 417 (S.C.) 14

Boston Deep Sea Fishing & Ice Co. Ltd. v Ansell (1888) 39 Ch. D. 399 30

Boyd Moss v George Steuart & Co. S.C. 119/74, S.C.M. 24.3.76 (unrep.) 71

British Broadcasting Corporation v Ioanou (1975) All E.R. 999 (C.A.) and 1975 I.C.R. 267 189

Building Material Corporation v Jathika Sevaka Sangamaya 1993 (2) S.L.L.R. 316 331

Bulsand Sugar Co. Ltd. v Dargan (1952) L.A.C. 181 200

Burn & Co. v Their Employees A.I.R. 1957 S.C. 38 311

(G.O.) Buyser v Harrison & Crosfield Ltd. (I.D. 328) C.G.G. 14,800, 3.3.68 185

C

Caledonian (Ceylon) Tea & Rubber Estates Ltd. v Hillman 79 N.L.R. (1) 421 112

Caltex (India) Ltd. v Second Tribunal 1963 (1) L.L.J. 156 195

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	Paragraph No.
Canners Brothers Ltd. v Canners 1940 (4) All E.R. 179	124
Carson Cumberbatch & Co. v Nandasena (1974) 77 N.L.R. 73	54, 58, 66, 71, 88
Cassidy v Ministry of Health (1951) All E.R. 574	33
Ceylon Bank Employees' Union v Yatawara (1963) 64 N.L.R. 49	50
Ceylon Bank Employees' Union v The Bank of Ceylon (1979) 79 N.L.R. 133	122
Ceylon Bank Employees' Union v The Hongkong & Shanghai Banking Corporation C.G.G. 12,679, 21.6.63	175
Ceylon Brake & Clutch Linings (Pvt.) Ltd. v de Mel S. C. Application 184/75, S.C.M. 27.3.78.	80
Ceylon Cold Stores v Industrial & General Workers' Union S.C. 117/71, S.C.M. 19.2.74	309
Ceylon Cement Corp. v Fernando 1990 (1) SLR 361	194, 195
Ceylon Ceramics Corporation v Weerasinghe S. C. 24-25/76, S.C.M. 25.7.78 (unrep.)	213, 218
Ceylon Electricity Board v de Abrew (1976) 78 N.L.R. 79	80
Ceylon Insurance Company v Commissioner of Labour et al C. A. 398/95 C. A. M. 10.4.96	41
Ceylon Mercantile Union v Bartleet & Co. Ltd. C.G.G. 15,002, 17.3.72	173
Ceylon Mercantile Union v Ceylon Fertilizer Corporation (1985) 1 SLR 40	33, 34
Ceylon Mercantile Union v Donald & Co. C.G.G. 12,061, 12.2.60	329
Ceylon Mercantile Union v de Mel (1974) 76 N.L.R. 390	345, 346, 364
Ceylon Mercantile Union v Heath & Co. Gazette of Sri Lanka 100, 22.2.74	334
Ceylon Mercantile Union v James Finlay & Co. Ltd. C.G.G. 15,003, 24.3.72	172
Ceylon Tobacco Co. Ltd. v Illangasinghe (1986) 1 SLR 1	373
Ceylon Trading Company Ltd v United Tea, Rubber & Local Produce Workers' Union (1986) (2) Colombo Appellate Court Report p.62	195

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Paragraph No.

CTB v Perera S.C. 177/69, S.C.M. 18.7.71 — 66

CWC v Aislaby Estates C.G.G. 14,901, 10.4.70 — 73

CWC v JEDB (1987) 2 SRI L.R. 73 — 281

Coconut Research Bd v Subramaniam (1970) 72 NLR 422 — 50

Collettes Ltd v Commissioner of Labour et al (1989) 2 SLR 6 — 48, 77

Colombo Apothecaries Co. v Wijesooriya (1968) 70 N.L.R. 481 — 52, 54, 61, 66, 70

Colombo Manning Market Labour Society Ltd. v Alexander S.C. 181/70, S.C.M. 18.10.73 — 75

Colombo Paints Ltd. v de Mel (1973) 76 N.L.R. 409 (C.A.) 76 N.L.R. 381 (S.C.) — 59

Collier v Sunday Referee Publishing Co (1940) 2 KB. 647 — 24

Collins v Hertfordshire Country Council (1947) K.B. 598 — 31

Condor v The Barron Knights (1966) 1 W.L.R. 87 — 320

Construction Industry Trading Board v Labour Force Ltd. (1970) 3 All E.R. 220 — 33

Construction Liaison v Fernando (1988) I1 CALR 122 — 373

Coomarasu v Leechman & Co S.C. 307/72, SCM 20.12.73 — 53

Coppage v Kansas (1915) U.S. 1 — 7

D

De Silva v ANCL Ltd., S.C. 30/79, S.C.M. 13.6.80 — 28, 97

De Silva v De Silva (1942) 42 N.L.R. 531 — 263

Decro-Wall International S.A v Practitioners in Marketing Ltd. (1971) 1 W. L. R. 361 (C.A.) (1971) 2 All E.R. 216 — 265, 287

Denham v Midland Employers Mutual Assurance Ltd. (1955) 2 All E.R. 561 — 38

Denmark Production v Boscobel Ltd. (1968) 3 All ER 513 — 287

Devonald v Rosser & Sons (1906) 2 K.B. 729 — 25

Dharangadhra Chemical Works v State of Saurashtra 1957 (1) L.L.J. 477 (S.C.) — 68

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Paragraph No.

Dharmadasa v Perera (1975) 77 N.L.R. 285 — 132

Dias v Rajaratnam S.C. 197/70, S.C.M. 26.5.72 — 60

Distington Hematite Iron Co v Possehl & Co 115 L.T. 412 — 308

Dunk v George Waller & Son Ltd. (1970) 3 All E.R. 30 — 227

E

Egg Stores Ltd. v Leibovici (1977) I.C.R. 260 — 317

Eksath Engineeru Ha Samanya Kamkaru Samithiya v Samson Perera, C.G.G. 14,297 of 22.1.65 — 209, 218

Emerald Construction Co. Ltd. v Lowthian (1966) 1 All E.R. 1013 (1966) 2 All E.R. 702 — 33

Express Newspapers v Labour Court 1964 (1)L.L.J 9(SC) — 197, 202

F

Fall (Inspector of Taxes) v Hitchen (1973) 1 All E.R. 368 — 95

Ferguson v John Dawson & Partners (Contractors) Ltd. (1976) 3 All E.R. 817 — 28

Fernandez (Clement) v Giovanola Binny Co. Ltd. (1971) 39 F.J.R. 357 (Ker.) 1971 (2) L.L.J. 174 — 195

Francis v Kuala Lumpur Councillors (1962) 1 W.L.R. 1411 — 294

Free Lanka Trading Co. v de Mel (1980) 79 (2) N.L.R. 158 — 100, 28

G

Gaffoor v Almeida (1971) 74 N.L.R. 164 — 51

Gajamudi Estate v Arumainayagam 1957 (1) L.L.J. 412 — 197

Gannon v Firth (1976) I.R.L.R. 415 — 293

Gardner Ltd. v Beresford (1978) I.R.L.R. 63 — 277

Giovanola Binny Ltd. v Industrial Tribunal 1969 Lab. I.C. 1473 (Ker.) — 197, 202

Girija Singh v Calcutta Transport Corporation 1966 (2) L.L.J. 542 (Cal.) — 197

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Paragraph No.

Global Plant Ltd. v Secretary for Health & Social Security (1971) 3 W.L.R. 269 — 93

Gomez v Sri Lanka State Trading Corp (1983) 2 SLLR 260 — 177

Goonewardena v Goonewardena (1973) 76 N.L.R. 57 — 75

Guest Keen Williams (Pvt) Ltd v Sterling (1959) 2 L.L.J. 405 (S.C.) — 175

Gunadasa v Commissioner of Labour, C.A. 418/91, C.A.M. 15.12.93 (unrep.) — 372

Gunaratne v de Zylva S.C. 463/67, S.C.M. 17.9.68 — 51

Gunton v Richmond-upon-Thames London Borough Council (1980) 3 W.L.R. 714 — 289

H

Hare v Murphy Brothers Ltd. 1973 I.C.R. 331 1974 I.C.R. 603 (CA) — 285, 288, 293 307, 310, 318

Harischandra Gupta v State of Madya Pradesh (1972) (2 L.L.J. 369) (Mad. Prad.) — 264

Harman v Flexible Lamps Ltd. (1980) I.R.L.R. 418 — 317

Harold Holdsworth & Co. Ltd. v Caddies (1955) 1 All E.R. 725 (H.L.) — 77

Harris & Russel v Slingsby (1973) I.C.R. 454 (N.I.R.C.) — 265

Hart v A. R. Marshall Ltd. (1977) I.R.L.R. 51 — 318

Herbert Clayton & Jack Waller Ltd. v Oliver (1930) A. C. 209 — 25

Herbert Morris Ltd. v Saxelby (1916) (1) A.C. 688 — 123

Hettiarachchi v The Vidyalankara University 76 N.L.R. 47 — 198

Hewitt v Bonvin (1940) 1 K.B. 188 — 31

Hill v Begg (1909) 2 K.B. 802 — 210, 216

Hill v Beckett (1915) 1 K.B. 578 — 33

Hill v C. A. Parsons & Co. Ltd. (1972) Ch. 305 — 285, 294

Hindustan Steel Ltd. v Rourkela Mazdoor Sabha 1970 (2) L.L.J. 533 (Oriss) — 183

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Paragraph No.

Hindustan Steel Ltd. v Rourkela Mazdoor Sabha 1969 (2) L.L.J. 202 (Oriss) 197

Hire Purchase Co. Ltd. v Fernando (1980) 79 N.L.R (2) 15 64, 65

Hirasingh v The Union of India 1970 Lab. I.C. 593 (Del.) 197

Horan v Hayhoe (1904) 1 K.B. 288 67, 226

Hotel Galaxy (Pvt) Ltd v Mercantile Hotels Management Ltd (1987) 1 SLR 5 294

Howard v Pickford Tool Co. Ltd. (1951) 1 K.B. 417 286

Hughes C.W. A. L. Ltd. (1966) 2 All E.R. 702 33

Hunter & Company Ltd v The Ceylon Mercantile Industrial & General Workers' Union (CMU) (1997) 1 SLR 337 145

Hutton v West Cork Ry. Co. 23 Ch. D. 672 76

I

Indian Institute of Technology v Mangat Singh 1974 2 L.L.J. 191 (Del.) 20, 85

Indian Iron & Steel Co. v Their Workmen A.I.R.. 1958 (SC) 130 312

Industrial & General Workers Union v Ceylon Tobacco Co. Ltd. C.G.G. 14,930 of 30.10.70 223

M.S. Isadeen v Fernando H.C.L.T. Appeal 123/91 (unrep.) 358

J

Jairam v Union of India A.I.R. 1954 S.C. 584 263

James Appuhamy v Shanmugan S.C. 69/76, S.C.M. 8.3.78 103

Jawala Prasad v State of U.P. 1954 (2) L.L.J. 698 (All) 263

Jayawardena v Associated Newspapers of Ceylon Ltd C. A. No.562/87 C. A. M. 9.9.93 330

Jayaweera v Simon (1915) 17 N.L.R. 9 33

Jeewanal Ltd. v Their Workmen 1961 (1) L.L.J. 517 (S.C.) 329

J. K. Cotton Manufacturers Ltd. v U.P. Govt. A.I.R. 1960 Allahabad 734 14

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Paragraph No.

K

Kailash Chandra Sethia v Rajasthan State Electricity Board 1974 Lab. I.C. 103 : 1974 (2) L.L.J. 318 (Rajas.) 197

Kandimalla Ramamurthy & Co. v Labour Court (1970) 37 F.J.R. 160 224

Karunadasa v Unique Gemstones Ltd S.C. 27/96 S. C. M. 5.12.96 371, 384

Kedar Nath Bahl v State of Punjab (1972) 41 F.J.R. 577 (S.C.) 197

Knight v Bucknill (1913) 6 B.W.C.C. 160 214

Knowles v Scott (1891) 1 C.H. 717 376

Kotmale Valley Estates Co. of Ceylon Ltd. v Drieberg S.C. Application 336/72, S.C.M. 16.7.74 352

L

Lanka Estate Workers' Union v Superintendent, Pussella Group S.C. 195/68, S.C.M. 6.3.71 307

Lanka Estate Workers' Union v Superintendent, Hewagama Estates S.C. 7-9/69, S.C.M. 2.9.70 300

Lanka Salu Sala Ltd v Wickremanayake SC 47/75, SCM 9.4.76 176, 178

Latiff v Fernando (1980) 79 N.L.R. (2) 89 64

Lee v Lee's Air Farming Ltd. (1960) 3 All E.R. 420 (P.C.) 77, 78, 79

Lee Behrens & Co. Ltd. (1932) 2 Ch. 46 76

Lister v Romford Ice & Cold Storage Co. (1957) A.C. 555 153

Liyanagamage v Road Construction & Development Co. (Pvt.) Ltd. (1994) 2 SRI L.R. 225 203

Luck (1940) 3 All E. R. 307 15

Luckshmi Theatre Ltd. v The Ceylon Cinema & Film Studio Employees' Union S.C. 84/71 decided on 29th June 1972 (unrep.) 62

M

Mamoojee v Akoo 1947 S.A.L.R. 733 134

Management of Consolidated Coffee Estates Ltd. v The Workmen 1970 (2) L.L.J. 576 (S.C.) 14

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Paragraph No.

Manager Ury Group v The Democratic Workers' Congress (1969) 71 N.L.R. 47 — 50

Marbe v George Edwards (Daly's Theatre) Ltd. (1928) 1 K.B. 269 — 25

Market Investigations Ltd. v Minister of Social Security (1968) 3 All E.R. 732 — 33, 89, 90, 91, 95

Marshall v Harland & Wolff Ltd. 1972 I.C.R. 101 (N.I.C.R.) — 314, 316

Massey v Crown Life Insurance Co. (1978) I.C.R. 590 — 102

Matara Wallaboda Pattu Bahukariya Sevaka Samithiya v Matara Wallaboda Pattu Multi-Purpose Co-operative Society S.C. 182/68, S.C.M. 17.11.69 — 63

McLelland v N. Ireland General Health Services Board (1957) 2 All E.R. — 294

Mendis v Ceylon Luxury Hotels Ltd., C.A. 960/77, C.A.M. 26.11.82 — 352

Mendis v RVDB (1971) 80 CLW 49 — 373

Merril J. Fernando & Company v Deimon Singho (1988) 1 S.L.R. 242 — 218

Mersey Docks & Harbour Board v Coggins & Griffiths (1947) A.C. 1 (H.C.) — 33, 37, 40

Meyyan v Alagamma (1889) 9 S.C.C. 156 — 322, 324

Mohammadu Marikkar v Ibrahim Naina 13 N.L.R. at 191 — 136

Montreal Locomotive Works Ltd. v Montreal & A.G. for Canada (1947) 1 D.L.R. 161 — 33, 90, 95

Moosajees Ltd. v Eksath Engineeru Saha Samanya Kamkaru Samithiya S.C. 945/74, S.C.M. 26.2.76 — 105

Moosajees Ltd. v Rasiah (1986) 1 SRI L.R. 365 — 194, 195, 202

Morgan v Fry (1968) 2 Q.B. 710 — 293

Morgan v Manser 1948 (1) K.B. 184 — 302

Morner v Rymer (unrep.) — 126

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Paragraph No.

Morren v Swinton & Pendlebury Borough Council (1965) 3 All E.R. 349 — 33

Municipal Commissioner v Dattatraya Sadashev A.I.R. 1946 Nagpur 347 — 311

N

Nagalingam v de Mel S.C. Appl. 650/74, S.C.M. 10.12.75 — 371

National Union of Workers' v Wanarajah Tea Co. of Ceylon S.C 59/76, S.C.M 16.10.68, (1969) 20 C.L.G. 243 — 326

New Bhopal Textiles Ltd. v Ramdutt Chaturvedi 1961 (2) L.L.J. 580 (Mad. Prad.) — 311

Niboyet v Niboyet (1878) 4 P.D. (C.A.) 1 — 15

Nidahas Karmika Saha Velanda Sevaka Vurthiya Samithiya v Adamjee Lukmanjee & Sons Ltd. - I.D. 202 C.G.G. 12,125 of 6.5.90 — 210

Noorbhai v Karuppan Chetty (1925) 27 N.L.R. 325 (P.C.) — 286

Normandy v Ind. Coope & Co. (1908) 1 Ch. 84 — 76

Norris v Southampton City Council (1982) I.R.L.R. 141 — 318

O

Odiris Appuhamy v Umbichy (1964) 64 C.L.W. 66 — 61

Omer v Cherubim S.C. Appl. 413/75, S.C.M. 17.12.75 — 371

P

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Palm Products & Sales Co-operative Society Ltd. v Kandiah III Sris L.R. 133 — 49

Pauley v Kenaldo Ltd. (1953) 1 All E.R. 226 — 33

Parameshwara Ayyar v Mysore Machinery Manufacturers Ltd. 1967 (2) L.L.J. 169 (Mys.) — 202

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Patnaik S. B. v State of Orissa 1973 Lab. I.C. 1360 (Oris) — 264

Perera v Dharmadasa (1978-79) 2 S.L.L.R 287 — 133

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Peterson v Jajbhay 1940 T.P.D. 19 — 135, 138

Pfizer Ltd. v Rasanayagam (1991) SLR 290 — 332

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Police Court case 24356 Matale 2 Beling 83 (Cey. S.C. 1865) — 329

Ponnamma v Beer Hogg & Sevier Trust S.C. 40/69, S.C.M. 22.2.71 — 66

Poussard v Spiers (1976) 1 Q.B.D. 410 — 315, 320

Premajam v University of Kerala 1965 (1) L.L.J. 77 (Ker.) — 197

R

Radha Raman Bajpai v L.A.T. 1957 (2) L.L.J. 15 (All) — 14

Rai v Patna Electric Supply Co. 1955 L.A.C. 545 — 226

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Ral v Excise Commissioner 1967 (1) L.L.J. 97 (Mad. Prad.) — 197

Rambhau Jairam Dhammange v Vinkur Co-operative Society Ltd. 1966 (1) L.L.J. 90 (Bomb.) — 14

Ranaweera v Jayatilleke S.C. 173/71, S.C.M. 6.7.72 — 53

Ratnasabapathy v Asilin Nona (1960) 61 N.L.R. 548 — 209

Rayala Corpn. Ltd. v The Facit Asia and Rayala Corpn. Employees Union 1972 (2) L.L.J. 389 (Mad.) — 186

Ready Mixed Concrete (South East) Ltd. v Minister of Pensions & National Insurance (1968) 2 Q.B. 497 — 28, 34

Ready Mixed Concrete v Minister of Pensions (1968) 1 All E.R. 433 — 33

Reckitt & Colman (Ceylon) Ltd. v Pieris S.C. 151/76 S.C.M. 16.1.78 — 150

Richard Pieris & Co. v Jayatunge CA 404/80, CAM 9.9.82 — 194, 200, 202

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Paragraph No.

River Valleys Development Board v United
Engineering Workers' Union S.C. 56/71, S.C.M. 27.3.73 — 21, 211, 218

Rohtas Industries Ltd. v Brijaandan Pandey 1956 (2) L.L.J. 444 S.C. — 14

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Horatio Crowther & Co. Ltd. (1948) 1 K.B. 424 — 12

S

Saloman v Saloman & Co. 1897 A.C. 22 — 78

Salvessen v Administrator of Austrian Property (1927) A.C. 641 (H.L.) — 19

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v Proprietor, Dhawalagiri Bakery, C.G.G. 12,102 of 8th April 1960 — 329

Sanders v Ernest A. Neale Ltd. 1974 I.C.R. 565 — 285, 286, 290, 294

M. Satchithanandan v Samuel Ghanam C.A. 476/86 (unrep) — 320, 367

S. B. Patnaik v State of Orissa (1973) Lab. I.C. 1360 (Oriss.) — 264

Schelengemann v Mayer Bridgens & Company (1920) C.P.D. 494 — 308

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Union of Workers S.C. 244 49/70, S.C.M. 5.6.73 — 173

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Shirlaw v Southern Foundries Ltd. 1939 2 K.B. 206 — 152

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	Paragraph No.
Y.G. de Silva v Associated Newspapers of Ceylon Ltd. (1978-79) 2 SLLR 173	191
Simmons v Hoover (1976) I.R.L.R. 266	293
Sinnathamby v Ratnaweera (1966) 67 N.L.R. 518	208
Siyaguna v Nelu's Advertising Services (Pvt.) Ltd. H.C.L. No. 9 168 191 decided on 30.3.92	195
Sri Lanka Samanya Kamkaru Samithiya v Wilfred & Co. Ltd. H.C. Appeal 70/91 (unrep.)	355
Sri Lanka State Plantations Corporation & Another v The National Union of Workers (1992) 1 SRI L.R. 171	275
St. Anthony's Hardware Stores v Kumar C.A. Application 1461/78, C.A.M. 23.7.79	354
State Distilleries Corporation v Rupasinghe S.C 91/93, S.C.M. 2.3.94	192, 196, 198 199, 200
State of Punjab v Dharam Singh (1968) 34 F.J.R. 408 (S.C.)	197
State of Punjab v Dharam Singh (1970) 37 F.J.R. 219 (S.C.)	197
State of Uttar Pradesh v Akbar Ali Khan 1967 (1) L.L.J. 708 (S.C.)	197
Stephenson Jordan & Harrison Ltd. v Macdonald & Evans (1952) 1 T.L.R. at 101, 111	33, 95
Stephenson v London Joint Stock Bank Ltd. (1903) 20 T.L.R. 8	270
Sukhbans Singh v State of Punjab (1963) (1) L.L.J. 671 (S.C.)	197
Superintendent, Abbotsleigh Group & Others v Estate Services Union (1991) 1 SLR 380, 385	280
Superintendent Deeside Estate v Illankai Thozhilar Kazhakam (1968) 70 N.L.R. 279	50
Superintendent Faithfield Estate v Lanka Jathika Estate Workers' Union S.C. 40/65, S.C.M. 23.7.67	50
Superintendent Nakiyadeniya Group v Cornelishamy (1969) 71 N.L.R. 142	50
S. C. Application 359/75 S. C. M. 18.5.76	212, 350

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Paragraph No.

Superintendent Hattanagalla Estate Ltd. v Ceylon Estates Staffs Union S.C. 231/72, S.C.M. 8.11.74 — 334

Superintendent Marigold Estate v Ceylon Estates Staffs Union S.C. 278/73, S.C.M. 9.12.74 — 334

T

Thaksala Weavers Ltd. v Perera S.C. Spl.L.A. 90/93 — 279

Tea, Rubber, Coconut & General Produce Workers' Union v Henderson & Co. Ltd. I.D. 99 C.G.G. 11,670 of 20th February 1959 — 210

Tea, Rubber, Coconut & General Produce Workers' Union v Intercom C.G.G. 14,917 of 3rd July 1970 — 197

Teheran-Europe Co. Ltd., v S.T. Belton (Tractors) Ltd., (1968) All E.R. 886 (C.A.) — 56

Thirunavukarasu v United Workers' Union C.A. 206/78, C.A.M. 21.1.80 — 147

Thomas Marshall (Exports) Ltd. v Guinle (1978) I.C.R. 905 — 290

Thomas v John Drake & Co. Ltd. (1971) 6 I.T.R. 146 — 316

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U

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United Engineering Workers' Union v Devanayagam (1967) 69 N.L.R. 289 — 6, 16, 70, 132, 373

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Paragraph No.

U.S. v Silk (1946) 331 U.S. 704 — 90

Utkal Machinery Ltd. v Shanthi Patnaik 1966 (1) L.L.J. 398 (S.C.) — 195

V

Varma v Mettur Industries Ltd. 1961 (1) L.L.J. 456 (Mad.) — 14

Venkatacharya v Mysore Sugar Co. (1956) 1 L.L.J. 41 (Mys.) — 194, 202

Vine v National Dock Labour Board (1956) 1 Q.B. 658 (1956) 3 All E.R. 939 (H.L.) — 285, 286

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W

Walker Sons & Company (U. K.) Ltd v W. P. Gunathilake S. C. Application No.365/76 — 80

Warburton v Co-operative Wholesale Society Ltd. (1971) 1 K.B. 663 — 313

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Whittaker v Minister of Pensions & National Insurance (1966) 3 All E.R. 531 — 33

White & Carter (Councils) Ltd. v Mcgregor (1961) 3 All E.R. 1178 (H.L.) — 287

Willard v Whiteley (1938) 3 All E.R. 779 — 33

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Workmen of Kettlewell Bullen & Co. v Kettlewell Bullen & Co. Ltd. (1964) 2 L.L.J. 146 (S.C.) — 175

Y

Young & Woods Ltd. v West (1980) I.R.L.R. 201 (C.A.) 28 — 28

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A. ORIGINS OF THE LAW RELATING TO THE CONTRACT OF EMPLOYMENT

1. Prior to the Industrial Revolution the law of master and servant or, what is today more appropriately called 'employment law', occupied an insignificant place in most legal systems. It is only with industrialization and the consequently growing importance of labour or services as an input in this process that employment law became the object of development largely through legislative activity and the pronouncements of courts. Even so, the developments effected through the judicial process were hardly developments as we understand them today because, to a large extent, they were designated to secure the position of, or to protect, the employer rather than the employee. The phrase 'the law of master and servant' commonly in vogue in earlier times in itself reflected the superior position occupied by the employer and the position of servility occupied by the employee. This connotation still continues today in the area of domestic service where the employee is referred to as a "servant".

2. This contract of employment prior to the era of legislative activity, trade unionism and collective bargaining consisted of the terms which the employer decided on and what the common law implied into the contract in the absence of any express exclusion. Since what the courts implied into the contract were more in the nature of duties and obligations placed on employees and the corresponding rights of employers, while the duties of employers were relatively minimal the individual contract of employment was hardly ever one which resulted from an equality in the bargaining position of the parties.

3. The three significant and major developments which contributed towards a change in the nature of the contract of employment were firstly the rise of trade unions and the consequent collective bargaining, secondly the legislative activity designed to protect employees who, at one time or another, came to exercise the franchise and thus have an influence on the composition of the legislature, and thirdly, the establishment of a special system of labour courts invested with an equitable jurisdiction to vary the terms of a contract of employment. Today, in systems where trade unionism is a decisive factor, the employer no longer has the same power he had to determine the fundamental terms of employment. Where trade unions are less strong, legislative activity has to some extent filled the lacuna created by the absence of collective bargaining which often decides the fundamental content of the contract of employment. Labour courts of the type that exist in Sri Lanka are of recent origin and have had as we shall see, a tremendous impact on the contract of employment.

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B. THE PHILOSOPHY OF THE COMMON LAW AND ITS IMPACT ON THE CONTRACT OF EMPLOYMENT

4. The common law of employer and employee relations developed in an era of laissez-faire. Hence the law proceeded on the basis that it would give effect to what the employer and employee have agreed upon unless their agreement was illegal or contrary to public policy. There was a time when the common law regarded an employer as having a proprietary right in his servant with criminal sanctions attaching to breaches of contract by employees. It is this concept that made a stranger wrongly injuring a servant liable not only to the servant but also to the master. Even though the common law has come a long way since that time, in the modern common law the contract of employment is still considered more or less conclusive in determining the rights of the parties, and it implies rights and duties only in the absence of contractual terms. This attitude is based on the fundamental misconception of the common law that the contract of employment is a voluntary agreement entered into between parties of equal bargaining strength. The common law looks upon employment as a mere contractual relationship between two parties terminable at the will of either party, subject to the condition of notice in certain cases.

5. The two important developments which helped to correct this imbalance was, firstly, collective bargaining consequent upon the rise of trade unionism. Collective bargaining had the effect, on the one hand, of enhancing the bargaining position of employees through the industrial and political strength of their bargaining agent and, on the other hand, of pre-determining various important terms and conditions in contracts of employment which could not contain terms which were contrary to what had been agreed upon in the course of collective bargaining. The second factor was the replacement of the laissez-faire state with the modern welfare State with its emphasis on intervention in the social and economic affairs of the community. As it has been aptly said –

> "To attempt a return to pure laissez-faire, to reduce the state to its old minimum functions of tax-gatherer, policeman and panoplied protector is really a rejection of the whole trend of modern civilization".[1]

Through law the State came to lay down minimum terms and conditions of employment, particularly in regard to wages, hours of work, working

[1] See C. K. Allen Law And Orders (1945) at p.279

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conditions and such like. In some countries, such as our own, the establishment of a special system of courts as are found under the Industrial Disputes Act constitutes one of the most important vehicles through which the old common law has been changed and modified in keeping with modern concepts of social justice. That is why, for instance, the Industrial Disputes Act expressly provides that a labour tribunal may grant relief to an employee "notwithstanding anything to the contrary in any contract of service between him and his employer". It is the laws enacted by the State, the decisions of labour and higher courts and practices and terms established by collective bargaining that constitute the body of labour law, as distinct from the common law.

6. While the common law attached a sanctity to the contract of employment, labour law does not. That is why the Privy Council was prompted to say –

> "The common law of master and servant has fallen into disuse".[2]

It is the aloofness and indifference of the common law and lawyers to fundamental social and economic problems and, indeed, their claim that such factors are irrelevant in deciding issues, that led to the modern tendency to take legal issues out of the hands of the traditional judicial system and to submit them to semi judicial or administrative tribunals such as labour courts.

7. There are a few judges who, as early as the end of the last century, saw that free competition in the economic system meant the freedom to combine to have a competitive chance and that to say that an employee has the freedom to abstain from entering into an employment relationship is really no freedom at all. Hence Justice Holmes' famous statement that-

> "A man is hardly free in his abstaining (from making a contract) unless he can state the terms or conditions upon which he intends to abstain".[3]

Justice Holmes was one of the earliest within the judicial system to realize that it is only by belonging to a Union that an employee can (at that time at any rate) secure a fair contract of employment and that this should be given effect to by the law "in order to establish the equality of position between the parties in which liberty of contract begins ...."[4]

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[2]Lord Devlin in ***United Engineering Workers' Union v Devanayagam*** (1967) 69 NLR 289 at 303

[3](1894) 8 *Harvard Law Review* 8.

[4]***Coppage v Kansas*** (1915) US 1.

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C. SIGNIFICANCE AND RELEVANCE OF THE CONTRACT OF EMPLOYMENT

8. If, as we have seen, labour law has modified the common law to the extent that it has, the question arises as to the extent to which the contract of employment is relevant in the determination of the rights and duties of parties.

9. Lord Devlin's statement quoted earlier that the common law of master and servant has fallen into disuse is an exaggeration because, as we shall see, the contract of employment and the common law are still relevant in many respects, the difference really being in the sanctity and importance attached to it. In other words, the difference lies mainly in the degree of importance and the new powers given to a special system of Courts to vary and modify the terms of a contract of employment.

10. The common law still almost completely governs the question whether a relationship of employer and employee exists between two persons. Here, too, certain modifications have been introduced by statutes which have imposed on persons who are not strictly employers in the common law sense the duties of an employer for certain limited purposes.[5] Although labour courts are entitled to give relief contrary to the terms of a contract and to create new contracts for the parties, the terms of the individual contract of employment are a factor which weighs with a court in its determinations. The common law duties owed by an employee to an employer, though modified by the industrial law, are not wholly irrelevant and are sometimes reflected in the industrial law even in the area of termination of employment. Industrial law has thus supplemented and modified the common law.

11. The modifications of the common law have been in two important respects. Firstly, the common law gave effect to the contract unless it was illegal or contrary to public policy. With industrialization numerous problems connected with safety and health in factories, hours of work, holidays and remuneration arose and, in the context of the modern welfare state, it was no longer possible to leave such matters solely to the free will of the employer and individual employees. Hence the necessity for legislative activity in the sphere of employment and regulation of such matters as minimum terms and conditions of employment including wages,[6] safety

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[5]See Wages Boards Ordinance (1941) s. 45 and s. 59A, Industrial Disputes Act (1950) s. 43B.

[6]Wages Boards Ordinance, op. cit. Shop & Office (Regulation of Employment and Remuneration) Act (1954).

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and health in factories,[7] maternity benefits,[8] superannuation,[9] and the employment of women and children.[10] These legislative provisions govern the content of the contract of employment by writing into it terms and conditions which the parties cannot contract out of.[11] While the common law generally affords only a civil remedy in the form of damages for breach of common law duties, criminal liability attaches to the breach of these statutory obligations. Further with the emergence of trade unions from the position of illegal combinations to legally recognized bodies enjoying special privileges and immunities under the law, collective bargaining has become an important method of negotiating terms and conditions of employment and, in Sri Lanka the terms of a collective agreement become implied terms in the contracts of employment between the employers and employees bound by the agreement.[12] It must also be noted that terms and conditions in the contract of employment are modified and added to by arbitrators and industrial courts under the Industrial Disputes Act. Parties, therefore, are no longer free, as under the common law, to contract on whatever terms they wish.

12. Secondly, the impact of labour law on termination of employment is a good illustration of the extent to which the contract of employment has been modified by labour law. In the common law either party was entitled to terminate the contract of employment in accordance with its provisions without consequences. Where the termination is in breach of contract the aggrieved party was entitled to damages represented by the period of notice that should have been given, but an employee is not entitled to reinstatement as the common law courts do not decree specific performance of a contract of service, either directly by ordering reinstatement or indirectly by granting an injunction against the employer. As stated by Lord Goddard[13] reinstatement is –

> "a remedy which no court of law or equity has ever considered it had power to grant. If an employer breaks his contract of service with his employees...... the workmen's remedy is for damages only. A court of equity has never granted an injunction compelling an employer to continue a workman in his employment or to oblige a workman to work for an employer."

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[7] Factories Ordinance (1942).

[8] Maternity Benefits Ordinance (1939).

[9] The Employees' Provident Fund Act No. 15 (1958).

[10] Employment of Women, Young Persons & Children Act No.47 (1956).

[11] Cf. Wages Boards Ordinance, op. cit., s. 62.

[12] Industrial Disputes Act, op. cit, s. 8(1).

[13] ***R. v. National Arbitration Tribunal, ex parte Horatio Crowther & Co. Ltd*** (1948) 1 KB 424, 431.

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Common law courts have also refused to grant the remedy of a declaration, which is a remedy merely declaring the rights of the parties without any order of the court requiring their fulfilment. Nor were concepts of justice, wrongfulness and unfairness in terminating a contract part of the common law. The only question was whether the termination was legal in the sense that it was in terms of the contract. The common law in this respect has been altered in Sri Lanka by the creation of industrial courts, arbitrators and labour tribunals with special powers to award reinstatement or compensation to an employee unfairly dismissed even though the termination was in accordance with the contract. The common law recognized the right to terminate employment in terms of the contract even without reason, but industrial law requires the employer to justify a termination on grounds apart from contractual rights. Employees have therefore been vested with greater rights than those enjoyed by them under the common law.

13. Nowhere does the law in Sri Lanka stipulate in express terms the grounds on which an employee's services may be terminated. These grounds have, by and large, to be spelt out from the decisions of labour courts. The law relating to termination of employment in Sri Lanka may be said to consist of the following :-

(a) The decisions of labour tribunals, arbitrators and industrial courts.

(b) The common law, which is the Roman-Dutch law, according to which employment may be terminated in terms of the contract or on grounds recognized by the common law. This aspect of the law relating to termination has to a large extent been superseded by (a).

(c) The Service Contracts Ordinance[14] in terms of which the services of a workman may be terminated with one month's notice, or summarily in cases of misconduct.

(d) Certain statutes which prohibit the termination of the services of a workman in certain circumstances. Thus, under the Industrial Disputes Act it is an offence for an employer to dismiss a workman for the reason that such workman intends to give or has given evidence in any proceedings under the Act.[15] It is an offence for an employer to terminate, without good cause, the services of a workman for the reason that such workman has become entitled to the benefit of any collective agreement, or any settlement or award of an industrial court or arbitrator or an order of a labour tribunal

[14] (1865).

[15] S. 40 (1) (j).

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under the Act.[16] It is also an offence for an employer, after an industrial dispute has been referred for settlement to an industrial court, arbitrator or labour tribunal but before an award in respect of such dispute has been made, to terminate without the approval of the court the services of any workman concerned in such dispute for any act or omission connected with, arising from, or constituting or included in such dispute.[17] Under the Wages Boards Ordinance[18] it is an offence for an employer to dismiss a workman from his employment by reason only of the fact that such workman is or becomes a member of a Wages Board, or has given information to any authority with regard to matters under the Ordinance or has, after giving reasonable notice to his employer of his intention, absented himself from work through being engaged in duties as a member of a Wages Board or is entitled to any benefit under any decision of a Wages Board. Similarly the Shop & Office Employees (Regulation of Employment and Remuneration) Act[19] renders it an offence for an employer to terminate the services of an employee employed by him on or about the business of any shop or office for the reason that such person has given information to any authority with regard to matters under the Act, or is entitled to any benefits by or under the Act. Further, the Shop & Office Employees' Act[20] renders it an offence for an employer to terminate the employment of a female covered by it on the ground of her pregnancy or confinement or any illness consequent upon her pregnancy or confinement. The Section further prohibits an employer from giving notice of dismissal during the period that a female employee is absent on maternity leave or from giving notice of dismissal in such a manner that the notice expires during her period of absence. An identical provision exists in the Maternity Benefits Ordinance in relation to females covered by it. The Army Act, Air Force Act, Navy Act and Police Ordinance require an employer to give all proper facilities to enable any employee to become or to be a member of the Reserve Forces in question and to enable an employee who is already a member of such Reserve Force to undergo such training and service as he may be required to undergo. Any employer who fails in this duty or dismisses an employee or reduces his wages or penalises him in any other way for undergoing or rendering any training or service as aforementioned is guilty of an offence.

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[16] S. 40 (1) (k).

[17] S.40 (1) (p).

[18] S. 49.

[19] S. 57.

[20] S. 18.

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14. The common law and the law of contract, it is submitted, are not totally out of place in a system of industrial law as it obtains in Sri Lanka; however, their relevancy has undoubtedly been diminished. In India, where the Industrial Disputes Act has established courts not unlike ours, it has long been recognized that these courts are unfettered by considerations based on contractual rights as between employer and employee and are not bound by the common law of master and servant.[21] In ***Radha Raman Bajpai v L.A.T.***[22] the Court pointed out that the Industrial Disputes Act in India contains only a part of the law governing master and servant, and that the Contract Act must govern these relations insofar as that Act has not been modified by the Industrial Disputes Act, the object of which was not to provide for a different law of contract to govern employer-employee relations, but to establish machinery better suited to settle industrial disputes. The Court observed –

> "An ordinary court of law will not reinstate the dismissed employee but adjudication....(is) not governed by the same strict law of master and servant. Once it is found that dismissal of an employee is wrongful, the relief that a tribunal can grant may differ from the relief that can be granted by a court of law, but it does not follow that the law that a court of law would apply, when deciding whether the dismissal of an employee is wrongful or not, need not be applied by a Tribunal when deciding the question."[23]

In ***J. K. Cotton Manufacturers Ltd. v U.P. Government***[24] the Company employed a clerk on a contract of temporary service for a definite period after the expiry of which his services were terminated. The matter was referred for adjudication and the clerk was awarded reinstatement. The High Court held that it was not open to the Tribunal to go behind the agreement between the parties, and quoted with approval the observation of the Supreme Court of India in ***Rohtas Industries Ltd. v Brijnandan Pandey:***[25]

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[21] See ***Varma v Mettur Industries Ltd.*** 1961 (1) LLJ 456 at 461-2 (Mad.) ***Assam Oil Co. v Its Workmen*** 1960 (1) LLJ 587 (SC), ***Rambhau Jairam Dhammange v Vinkur Cooperative Society Ltd.*** 1966 (1) LLJ 90 at 99-100 (Bomb.), ***Ahmedabad Sarangpur Mills Co. Ltd. v Industrial Court*** 1965 (1) LLJ 155 at 167 (Guj), ***Bombay Labour Union v International Franchises (Private) Ltd.*** 1966 (1) LLJ 417 at 419 (SC).

[22] 1957 (2) LLJ 15 (All.).

[23] Ibid, at 19.

[24] AIR 1960 Allahabad 734.

[25] 1956 (2) LLJ 444 (SC).

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"But an industrial tribunal cannot ignore altogether an existing agreement and their existing obligations without any rhyme or reason whatsoever."

and observed –

"........ it may be that in certain circumstances, for good and substantial reasons a certain agreement may be modified by industrial tribunals, which probably ordinarily they would not be entitled to do ; but if there are no reasons given, a solemn agreement entered into between the parties will stand."

Further, while an industrial dispute can arise in spite of the existence of a binding contract between the employer and employee and a court is not precluded from granting relief which is inconsistent with the contract, it does not follow that "if the employees themselves rely on a contract for their claim .... the Tribunal has the power to modify or discard the terms of contract which would govern the claim".[26]

15. All these developments have not only reduced the importance of the common law and the contract of employment but has, as a result, diminished the freedom of the individual (whether of the employer or the individual workman) in regard to the content of the contract of employment as well as other aspects of the contract such as its termination. In industry the individual is no longer able to negotiate his own terms, particularly where the 'closed shop' principle operates. It is an era of standardized contracts and of collective bargaining where the individual's freedom is little. The growth of trade unions has replaced individual bargaining with collective bargaining which imposes restrictions on both employers and employees. The growing tendency of State intervention is designed to remedy the worst results of freedom of contract. Just as much as freedom of property has come to be restricted in the social interest so also the freedom of contract has come to be restricted since industrial conditions make abstract freedom of contract defeat rather than promote full individual life. Today the law constantly interferes in economic matters to protect the interests of the weaker elements of society. The relationship between employer and employee is today more than a mere contractual one because in terms of modern ideas of social justice the continuance of the relationship approaches more the position of a status in the sense that courts are entitled to restore the relationship even against the will of the

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[26] ***Management of Consolidated Coffee Estate Ltd. v The Workmen*** 1970 (2) LLJ 576 at 581 (SC).

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employer. We can no longer view a contract of service with the same icy impartiality with which we may view an ordinary commercial contract. As R. H. Graveson[27] says –

> "The aim of law throughout the greater part of the nineteenth century was to secure individual rights of property and to give effect to the freest expression of the will in contractual undertakings. The law stood by as umpire of referee, to state the rules of the game of civilized life, to see that the game was played according to those rules and, when disputes arose, to intervene neither on one side nor the other. This century has seen the early growth of a different conception of law; a conception in which law is gradually, and in England slowly, changing its purpose from the upholding of an abstract autonomy of the will and a concrete securing of gains and acquisitions to an active social and public concern in the protection from exploitation of the economically weaker members of society, the regulation of terms and conditions of contracts of employment, the imposition on the community as a whole of the responsibility of caring for its less fortunate members, stricken by old age, ill health or unemployment, the securing of reasonable remuneration to producers in farming and agriculture, and .... the introduction of compensation by employers to workmen for accidents arising out of and in the course of their employment."

It is therefore true to say that social legislation imposing minimum standards impose extra-contractual obligations enforceable by criminal and civil sanctions and have, thereby, narrowed the area of contractual freedom.

16. The power given to labour tribunals to override a contract of employment is nothing new or startling. It is merely a recognition of the simple fact that there is inequality of bargaining power between an employer and individual employee. An analogous rule is to be found in the law of contract allowing courts to declare void contracts in restraint of trade which

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[27] ***Status In The Common Law*** at p. 45. It is interesting to compare the status of employment with that of marriage. In both cases, while contract is the occasion for the granting of the status, in neither case is the status created by contract since status is 'in every case the creature of substantive law' – *per* Scott L.J. *Re Luck* (1940) 3 ALLER 307 at 327. As stated by Brett L.J. in ***Niboyet v Niboyet*** (1878) 4 PD (CA) 1 at 11 that relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed by contract or agreement but by law. In the case of marriage the relationship cannot be dissolved without State intervention. In the case of employment, while an employee may do so of his own accord, an employer who does so on his contractual rights *simpliciter,* runs the risk in Sri Lanka of being required by a labour tribunal to renew the relationship.

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are unreasonable, unreasonableness being measured by the interests of the contracting parties as well as the interests of the public. The courts do not encourage restrictions on an employee's labour and skill which is his only capital. These rules are a recognition of the lack of freedom and the actual inequality caused by enormous differences in economic bargaining power and of the fact that 'equality is equity'. Thus Lord Devlin,[28] referring to s. 31B (4) of the Industrial Disputes Act empowering a tribunal to grant relief contrary to the terms of a contract of service, said-

> "It is not contrary to modern ideas of justice. The idea that freely negotiated contracts should be conclusively presumed to contain just and equitable provisions began to die with the end of the 19th century. Long before then equity had refused to give effect to provisions in a contract which is considered to be harsh and unconscionable. From the beginning of the 20th century legislatures all over the Commonwealth have been writing terms into contracts and taking them out, whatever the parties may think about them. No doubt it is taking the process a step further to leave it to the discretion of the court to say for itself what terms of the contract it will enforce, but there is nothing in this that is contrary to principle. Indeed in this sub-section the statute is doing no more than accepting and recognizing the well-known fact that the relations between an employer and his workman are no longer completely governed by the contract of service."

17. In Sri Lanka examples of social legislation which have curbed the freedom of contract in regard to terms and conditions of employment are many. The Wages Boards Ordinance[29] and the Shop & Office (Regulation of Employment and Remuneration) Act[30] render invalid contracts which are contrary to their provisions. Minimum wage legislation is another example. Such legislation is of two types. The first type makes it obligatory for the contracting parties to negotiate wages in conformity with recognized standards, commonly referred to as "fair wages" standards. Contracting parties are thus required to adopt minimum terms determined by reference to standards outside their control. This type of legislation is not found in Sri Lanka. The second type imposes statutory minimum standards in particular trades and industries. Wages Boards set up under the Wages Boards Ordinance for the purpose of fixing wages and other terms and conditions of employment in respect of specified trades and industries in Sri Lanka is an example of this second type.

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[28] ***The United Engineering Workers' Union v Devanayagam*** (1967) 69 NLR 289 at 311.

[29] op. cit., s. 56.

[30] op. cit., s. 70 (3).

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18. The relevance and significance of the contract in the modern law of employment may be summarized thus-

(a) The common law and the terms of the contract largely determine whether a relationship of employer and employee exists. This is subject to the statutory provisions which have been enacted from time to time imposing on persons the duties and obligations of an employer in relation to others who in common law are strictly not employees.

(b) The contract of employment, again subject to statutory and judicial modifications, determines the terms and conditions of employment between the parties. In this area the contract can be of vital significance; for instance, the rights and obligations relative to the transfer of an employee may often be determined by the terms of the contract. In fact, the general scope of employment may largely be determined by the contract.

(c) In the area of termination the contract is relevant though not conclusive. It would determine the period of notice which either party is required to give to terminate the contract, it may determine the period of probation and the rights of the parties during this period and it may even prohibit certain types of conduct which may otherwise be deemed to be permissible. The question whether there has been a termination of the contract and, if so, by whom (all of which are material to the exercise of the jurisdiction of labour courts and the operation of several statutory provisions) is still determined by reference to the common law. The fact that labour courts can grant relief contrary to the terms of the individual contract and may modify existing contracts or create new ones does not necessarily imply that a court will in all cases exercise such powers. Whether it does so or not depends entirely on what is equitable in the circumstances and the exercise of an equitable jurisdiction by a court requires that it would normally give effect to a contract unless its terms are found to be unfair or inequitable in a given set of circumstances.

19. The modifications of the common law which we have so far noted and its consequent impact on the individual contract of employment leads to the conclusion that the relationship of employer and employee is today governed by status as much as by contract. The contract was the legal instrument which enabled men and goods to move freely in a developing industrial society.[31] It permitted, for example, an individual to change his employment. From the employer's point of view this meant the right to hire and fire and the right to hire an employee on any terms agreed upon between the parties. In the field of comparative jurisprudence Sir Henry

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[31] W. Friedmann *Law in a Changing Society* (1964 abridged ed.) at p. 89.

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Maine put forward the idea that progressive societies are characterized by the increasing legal freedom of the individual and this development he summed up in his famous aphorism –

> "........the movement of the progressive societies has hitherto been a movement from Status to Contract."[32]

The principle which this celebrated generalization expressed was the emergence of the self-determining, separate individual from the network of family and group ties-the movement from group to individual. His generalization referred, as pointed out by Maine himself, to those personal conditions described by him but which were not the result of agreement. It was intended to convey the idea that the individual's rights, duties, capacities and incapacities were no longer fixed by law as a result of his belonging to a particular class, but arise in consequence of contract. Maine thought of status "as the sum total of the powers and disabilities, the rights and obligations, which society confers or imposes upon individuals irrespective of their own volition."[33] To this extent, the 'status' of an employee referred to here is different because the occasion for granting such status is contract-unlike the ancient family and group ties, slavery, guardianship and other personal conditions referred to by Maine. The Roman family, the slave, caste, the medieval guild and serfdom are examples of what Maine called status. The slave was born into his status and could not contract himself out of it, but this gradually gave way to more freedom of movement and will. The slave was given a limited right of contract and finally he was emancipated, while the medieval serf could become free by escaping into the town. Slavery and serfdom were finally abolished, and they were replaced by a free contractual relation between employer and employee. Bearing in mind, then, that Maine's status was used in a different sense, status in the present context is used to refer to "a legal relation based on agreement but regulated by law, in the sense that its existence and its termination depended on volition of the parties, but its substance was determined by legal norms withdrawn from the parties' contractual freedom".[34] In other words, status is here used not in the sense

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[32] Sir Henry Maine *Ancient Law.*

[33] O. Kahn-Freund "A Note On Status And Contract In British Labour Law" in (1967) Vol. 30 *Modern Law Review* 635 at 636.

[34] O. Kahn-Freund, ibid. at 640. In Roman Law the term 'status' was used in a technical sense to refer to the entire position of an individual regarded as a legal person, and its function was to devide the legal system into the law of persons, things and actions. It was the normal citizen who has a 'status' under Roman Law. In English common law 'status' referred not to the normal but to the abnormal person, or to those who in Roman law had suffered *capitis deminitio* See *R. H. Graveson Status In The Common Law* at pp. 4-5. A married woman's status viz-a-viz society has been a movement towards increasing individual freedom.

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of the sum total of the rights and obligations of individuals as an incident of birth as understood by Maine, but as a compulsory personal condition as opposed to a conventional one, that is, the rights and obligations imposed on an individual by law and not by freely negotiated contracts.[35] But in modern times the movement is the very reverse of the one described by Maine. The restriction on the individual's ability to negotiate his own terms as a result of the operation of the 'closed shop' or standardized contracts or collective bargaining, together with state intervention which has prescribed the minimum content of many contracts of employment, suggest a tendency to return to status as governing the employment relationship. Perhaps the best reflection of this tendency is in the power given to courts to restore the employment relationship even against the wishes of the employer.

20. The fact that the term "status" in employment is often used in different senses is illustrated by ***Indian Institute of Technology v Mangat Singh***[36] where the Court stated :

> "Employment is originally and still basically a contract between the employer and the employee. This bilateral relationship is, however, often found to be superseded partly or wholly by status which is contrasted with contract. Status is determined extrinsically by law and not by agreement between parties. Status may supersede contract by affecting either of the two parties to it, namely, the master or the servant."[37]

The Court concluded that employment in a particular case would remain contractual if the volition of the parties is left unfettered but would be governed by status if the volition of parties has been taken away by statutory provision. This test, it is submitted, is inadequate because the extrinsic factors are not exclusively related to statutory provisions and include other factors such as union pressure in collective bargaining.

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[35] Cf. R. H. Graveson, op.cit. at p.48: "A characteristic feature of status is its legally imposed condition which cannot be got rid of at the mere will of the parties without the interposition of some organ of the State administrative, legislative or judicial". He says (at p. 59), on the authority of Salvessen v Administrator of Austrian Property (1927) AC 641 (HL) that (a) status is a condition imposed by law and not by the act of parties, though it may be predicated in certain cases on some private act such as the contract of marriage. It is more than a mere contractual relation between the parties. (b) Whether the status will be imposed in consequence of private contract depends on the public interest in the relation created by the contract. (c) If status is so conferred, its effect is to impose on the party acquiring its rights and obligations towards the community at large.

[36] 1974 (2) LLJ 191 (Del).

[37] Ibid at p. 194

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However, it is time that in modern society many aspects of the contract of employment are outside the volition of the parties in the sense that many terms such as minimum wages, hours of work, leave, etc., which are fundamental to a contract of service are governed by statutory provisions. The Court's test then leads to the conclusion that many aspects of employment are governed by status since important areas of the contract of service have ceased to be within the volition of the parties.

21. In ***River Valleys Development Board v United Engineering Workers' Union***[38] the question arose as to whether certain employees were casual workmen. The Supreme Court held that although the workmen were termed "casual", their employment had assumed a regular character which was openly recognized by the employer by the mode of payment which was fortnightly and not daily, and also by the climate created by the employer who, throughout, held out to them that they were not casual but were employed on a regular footing, despite the artificial breaks which were periodically imposed on their employment. Therefore, these employees were entitled to the benefit of certain disciplinary rules which were operative in the employer's establishment, though these rules would not apply to employees who were actually engaged on a casual basis. This decision comes somewhat close to the notion that regular employment of a person may, result in his acquiring a status of employment entitling an employee to the benefits enjoyed by permanent employees.

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[38] SC 56/71 S. C. M. 27.3.73 (Unrep.)

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D. RIGHT TO WORK

22. The question considered here is whether a contract of employment obliges an employer to provide an employee with work thus creating in an employee a right to work. The answer depends on a determination of the basic obligations in a contract of employment.

23. It has been rightly said that :

> "The legal basis of the employment relationship is usually the exchange of a promise to work in return for a promise to pay wages."[39]

An employer's basic obligation in a contract of employment is to pay remuneration, while the employee's basic obligation is to perform services. As such, an employer who pays remuneration while at the same time refusing the service cannot be said to be in breach or to have effected a termination of the contract. The only exception to this is the very limited category of employees who exercise such a high or sophisticated degree of skill or talent or enjoy such a high degree of public acclaim that they would lose the skill or talent or cease to enjoy their reputation in the eyes of the public if they do not regularly exercise their skill or talent or perform in the public eye. It is only in such cases that the employer can be required not only to pay remuneration but also to provide work. The classic example in the old common law is the opera singer whose reputation would be lost by non performance before public audiences. This issue sometimes becomes relevant in a situation where an employer makes an application to the Commissioner of Labour under the Termination of Employment of Workmen (Special Provisions) Act 1971 for approval to terminate on the ground of redundancy and, pending the disposal of the application, the employer requires the employees concerned not to report for work but with the guarantee of payment of remuneration. This is a procedure which an employer is entitled to adopt and, in many cases, must necessarily adopt where he has no work to offer. There is no obligation on the employer in such circumstances to re-distribute the existing work in such a manner as to provide the redundant persons with work. Such a requirement would imply under employment of all the staff. The absurdity of requiring an employer to provide work in addition to paying remuneration in all cases is illustrated by the following example. A cook can be told that he need not cook any meals for the rest of the week because the employer will be away

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[39] B. A. Hepple & Paul O' Higgins *Employment Law* (2nd Edition) p.42.

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or else be consuming his meals elsewhere. The cook is not entitled to say that the employer is obliged to allow the cook to prepare the meals and then throw them away on the ground that the employer must provide him with work despite the circumstances and the payment of remuneration for the period.

24. The principles of law applicable to the question of provision of work by an employer, as distinct from the payment of remuneration, may be stated thus. The general rule is that so long as the employer continues to pay wages he has no obligation to provide work.[40] As stated by Asquith, J., in ***Collier v Sunday Referee Publishing Co. Ltd.***[41]:

> "It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided that I pay my cook her wages regularly, she cannot complain if I take any or all of my meals out. In some exceptional circumstances there is an obligation to provide work – where, for instance, the servant is remunerated by commission or where, (as in the case of an actor or singer), the servant bargains, among other things for publicity, and the master, by withholding work, also withholds the stipulated publicity ...... Such cases are, however, anomalous .... The Employer was not bound to provide work to enable the employee to 'keep his hand in', and avoid the reproach of idleness, or even make a profit out of travelling allowances."

25. Whether the contract of employment obliges the employer to provide work in addition to the payment of wages depends on the nature or kind of contract involved. The exceptional situations where the courts would imply a duty to provide work as having been within the contemplation of the parties are as follows:-

    (a) Contracts with theatrical performers such as singers and actors in which the consideration is not only the payment of remuneration but also the provision of work so as to enable the performer to remain in the public eye which is essential to his continued ability to earn.[42]

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[40] ***Turner v Sawdon*** (1901) 2 K.B. 653, ***Collier v Sunday Referee Publishing Co. Ltd.*** (1940) 2 K.B. 647 at 650. In ***Mendis v Ceylon Luxury Hotels Ltd.*** CA 960/77,C. A. M. 26.11.82, the Court of Appeal in Sri Lanka accepted the principle that so long as the salary is paid, it "is a privilege available to an employer to keep an employee in his payroll and give him no work."

[41] op. cit.

[42] ***Herbert Clayton and Jack Waller Ltd v Oliver*** (1930) A.C. 209 *Marbe v George Edwards (Daly's Theatre) Ltd* (1928) 1 K.B. 269.

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(b) In the case of employees employed on a commission or piece-rate basis, there may be held to be an implied condition to provide a reasonable amount of work because such provision would be material to the employees' earnings.[43] However, the duty to provide work may not arise if it is impossible for the employer to do so, such impossibility not being the result of the employer's fault.

(c) In the case of highly skilled employees a court may imply a condition to provide a reasonable amount of work to enable the employee to maintain or develop his skills.

In these exceptional cases failure to provide work would entitle the employee to treat such failure as a repudiation of the contract amounting to a termination by the employer. Thus J.B. Cronin and R.P. Grime[44] conclude :-

> "The servant's main duty is to serve, and the master's to pay for the service. Neither is entitled positively to prevent that service taking place. The Courts have shown themselves ready to imply terms relieving the master of any obligation to pay for service that produces no work; certainly the use of sick-pay schemes and piece work systems will have that effect. They have been less eager to find terms obliging the master to provide work, except in the case of that established exception, the theatre. But it may be that the tide has turned. Piece workers, salesmen on commission, in fact any servant whose pay depends upon the actual completion of work, may have the right to be given that work. But even if he has no such right, he still serves."

26. Labour Law has not developed any contrary theory, so that by and large the common law position holds good. However there are grounds on which it may be urged that the principle requires modification. In modern times the increase of specialized jobs with technically or specially qualified persons would suggest a greater need to give work in addition to payment of remuneration. An employee such as a surgeon may justifiably claim that he would lose his skill and ability if he were required to remain at home and receive his salary for a long period of time, quite apart from the loss to his reputation. Failure to work over a long period of time may even reduce an

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[43] ***Devonald v Rosser & Sons*** (1906) 2 K.B. 729.

[44] *Labour Law* (1970) p. 49.

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employee's opportunity to obtain alternative or better employment elsewhere. Non performance of work may, if viewed from a social and economic standpoint, lead to a reduction of productivity and would not, therefore, be in the social or national interest.

27. For these reasons the general rule in the future may well be that a contract of service obliges the master to provide work with non-offer of work being the exception. The exceptions could include persons who exercise no skill (such as unskilled manual workmen or clerks), so that the failure to provide them with work would cause them no prejudice. Other exceptions could include domestic service. Alternatively, the categories of exceptions to the general common law rule could be extended and should not be regarded as 'closed'. From a practical point of view the problem is unlikely to be of major importance since, generally speaking, an employer would not wish to pay wages for work which is not performed. In the event of the common law rules being modified, it would be reasonable to provide that an employer who in fact has no work to provide would not be under an obligation to do so (e.g. where there is redundancy) as otherwise the obligation would be impossible of fulfilment.

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E. WHAT IS A CONTRACT OF EMPLOYMENT?

Introduction

28. In this section we will analyse the basic elements of a contract of service or employment and attempt to arrive at the tests to identify a contract of employment and to distinguish it from a contract for services, the latter referring to an independent contractor. In so doing, it is important to bear in mind-since there is a common misconception in this regard-that the two parties cannot attach a label to a contract in such a way that the law would deem the contract to be what the parties have described it irrespective of other considerations. The fact of the matter is that the parties cannot change the nature of a contract by the mere use of words, though the description of the contract by the parties may be a relevant factor but by no means conclusive. The reason, as stated by the Supreme Court in ***de Silva v The Associated Newspapers of Ceylon Ltd.,***[45] is that the question whether a contract is one of service or for services is a question of law, and to over-emphasize the description given by the parties "would be to concede to the parties the right to decide what is in effect a question of law". As aptly stated in ***Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance***[46].

> "It may be stated here that whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention."

The point was also well made in ***Ferguson v John Dawson and Partners (Contractors) Ltd.***[47]

> "My own view would have been that a declaration by the parties, even if it were incorporated in the contract, that the workman was to be, or was to be deemed to be, self-employed, an independent

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[45] S.C. 30/79, S. C. M. 13.6.80 (Unrep). See also ***Free Lanka Trading Co., Ltd. v de Mel*** (1980) 79 (ii) NLR 158 at 162.

[46] (1968) 2 QB 497 at 512-13.

[47] (1976) 3 All E.R. 817.

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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, showed the relationship of employer and employee. The Roman soldier would not have been a self-employed labour only sub contractor because of any verbal exchange between him and the centurion when he enlisted. I find difficulty in accepting that the parties, by a mere expression of intention as to what the legal relationship should be, can in any way influence the conclusion of law as to what the relationship is. I think that it would be contrary to the public interest if that were so, for it would mean that the parties, by their own whim, by the use of a verbal formula, unrelated to the reality of the relationship, could influence the decision on whom the responsibility for the safety of workmen, as imposed by statutory regulations, should rest."

In ***Young and Woods Ltd. v West***[48] where the parties agreed that Mr. West was self-employed, Mr. West subsequently claimed, on dismissal that he was an employee and this position was accepted by the Court. The Court saw its duty as one of seeing whether the label attached by the parties to their contract correctly represents the true legal relationship, and it took the view that a party or parties can later seek to take up a position different to that which they or he took up earlier in the matter of the true nature of the relationship. In other words, the description of a relationship by a party does not act as an estoppel against his later taking up a different position on the matter.

29. In this Section we will also examine certain statutory definitions of employer and employee which have, in many respects, modified the common law. The interesting, and sometimes important, questions as to whether and in what circumstances a director has a contract of employment will also be covered. Thereafter, we will seek to ascertain the direction in which the law appears to be moving in the area of the identification of a contract of service.

30. The traditional concept of the employer-employee relationship is the common law relationship of master and servant founded upon the existence of a contract of service as distinct from a contract for service. The distinction is between a 'workman' and an 'independent contractor'. The concept of master and servant has evolved over centuries, but in more recent times social and economic pressures and changes have led either to a transformation of the concept itself or to the challenging of the traditional concept. It is however, useful and necessary to first examine the common

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[48] (1980) I.R.L.R. 201 (C.A.)

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law concept and to distinguish between the master and servant relationship and other relationships to appreciate recent changes. For instance, duties that are implied into a contract of service are not so implied in a contract for services, while several modern statutes (e.g. relating to wages and hours of work) apply only to persons who have a master and servant relationship. The distinction still remains important for purposes of vicarious liability. As succinctly stated by G. H. L. Fridman.[49]

> "The most important illustration of the distinction between servants and others (particularly independent contractors), which is still important today, is provided by the law relating to vicarious liability. For the purposes of such liability it was, and still is, important to determine whether someone on loan from the person with whom he has a contract of service is the servant of the employer to whom his services have been loaned. And it is also important, for the same reason, to determine whether the wrong-doer's employer was an independent contractor or a servant of the person sought to be made liable for the wrong doing in question. Moreover, the status of the person causing injury to a third party is important because of the differences between the vicarious liability of an employer for the acts of servants, agents and independent contractors."

Servant and Independent Contractor

31. Since the common law definition or concept of a 'workman' covers a person whose relationship with the employer is or has been one of master and servant and does not cover an independent contractor, it is necessary to distinguish between a servant and an independent contractor. 'Master' and 'servant' are the terms used by the common law to describe that relationship which exists between one person, called the servant, who

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[49] The Modern Law of Employment (Stevens, London, 1963) at pp. 29-30. It is also necessary to distinguish a workman from an agent. There are several points of similarity between an agent and a workman. A servant may often be an agent of the master, but all agents are not workmen who have a contract of service with the principal. Just as much as an agent is required to account for money and property received by him in the course of his agency, a servant is also required to do so See ***Bostan Deep Sea Fishing & Ice Co. Ltd v Ansell*** (1888) 39 Ch. D.399. The duty cast on an agent and workman to indemnify the principal or master for loss caused in the course of service by the agent or workman, as the case may be, is similar. Despite these similarities the differences are substantial. The principal's liability to indemnify an agent for loss or liability incurred in performing his contract has no equivalent in the master and servant relationship. While an agent usually has the discretion as to how he is to perform his contract, the servant is subject to the master's control in this regard. An agent has a greater degree of freedom in regard to the performance of his obligations. Further, an agent's mandate is in relation to a defined class of transactions while the servant is employed to carry out the master's orders.

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agrees to serve another person called the master. It was this relationship which replaced the status of slavery and serfdom. The following definition enunciated by J. W. Salmond[50] has sometimes been considered the classic definition from a common law point of view :

> "A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done."

A master not only prescribes to the workman the end of his work, but also directs, or at any moment may direct, the means also, or retains the power to control his work. An independent contractor, on the other hand, is one employed to do certain work but he has a right to exercise his own discretion as to the time and manner of doing the work; he is bound by the terms of his contract and not by the orders of his employer. Thus the test for determining whether a person is a servant or an independent contractor is the right of the employer to control the employee in regard to the manner in which the work is to be done. The test is not actual control but the right of control. The distinction may be said to be between a contract to serve another for a wage (contract of service) and a contract to produce a thing or result for an agreed price (contract for services).

32. Numerous tests have been suggested and adopted by the courts to decide whether a particular relationship is one of master and servant or one of employer and independent contractor. According to Mac Cardie, J.,[51]:

> "The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under which payment of the reward may be withheld, all these questions bear on the solution of the question. It seems, however, reasonably clear that the final test if there be a final test, and certainly the test to be generally applied lies in the nature and degree of the detailed control over the person alleged to be a servant."

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[50] Law of Torts (Sweet & Maxwell, London, 13th ed.) at p. 112. According to Mackinon L.J. in ***Hewitt v Bonvin*** (1940) 1 K.B. 188 at 191 this definition can "hardly be bettered". As stated by Mac Cardie J. in ***Performing Right Society v Mitchell & Booker Ltd.*** (1924) 1 K.B. 762 at 768: "A servant is a person subject to the command of his master as to the manner in which he shall do the work. An independent contractor is one who undertakes to produce a given result, but in the actual execution of the work he is not under the order or control of the person for whom he does it and may use his own discretion in things not specified beforehand". See also ***Collins v Hertfordshire Country Council*** (1947) K.B. 598 at 615.

[51] ***Performing Right Society v Mitchell & Booker Ltd.,*** op. cit. at 767.

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33. The following are some of the criteria which have been adopted :

(1) Selection : The master's power to select his servant has been regarded as an indicia of a contract of service.

(2) The obligation to follow orders : A servant is under an obligation to obey the orders of his master, provided they are lawful and do not involve the servant in personal danger.

(3) Control : The most crucial test to determine whether a master and servant relationship exists has been said to be the employer's right not only to prescribe to the employee the end of his work but also to determine the manner in which the work is to be performed. As stated by Lord Porter[52] 'the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work is to be done'. The distinction between actual control and the right of control is particularly important since in modern industry actual control is often exercised by a supervisor who is himself a servant. The test of control among others, has been used to arrive at the conclusion that where building contractors employ labour-only sub-contractors to perform work, there is no relationship between the main contractor and the labour employed in the gangs or the gang leader.[53] The test of control becomes difficult to apply where the employee exercises professional skill or performs work of a highly technical nature. According to the majority in ***Cassidy v Ministry of Health***[54] visiting or consulting surgeons of a hospital are not employed under a contract of service and are therefore, not servants of the hospital and the hospital authorities cannot direct them as to 'what to do or how to do it'. Nor, according to this view, are nurses the servants of the hospital when they are under the direction of a consulting surgeon in the hospital theatre, but Denning, L.J., thought that "nurses are employed by the hospital authorities, paid by them, and liable to be dismissed by them, the consulting surgeon has not that entire and absolute control over them which is necessary to make them his servants even temporarily".[55] Somervell, L.J.,[56] pointed out that the

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[52] ***Mersey Dock & Harbour Board v Coggins*** (1947) A.C. 1 at 17 (HL).

[53] ***Emerald Construction Co., Ltd. v Lowthian*** (1966) 1 All E.R. 1013 Re. C. W. & A. L. Hughes Ltd (1966) 2 All E.R. 702, ***Construction Industry Training Board v Labour Force Ltd.*** (1970) 3 All E.R. 220.

[54] (1951) 1 All E.R. 574 See also ***Whittaker v Minister of Pensions & National Insurance*** (1966) 3 All E.R. at 536-7.

[55] ***Cassidy v Ministry of Health,*** op. cit.

[56] Ibid

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control test defies universal application because, for instance, the certified master of a ship is a servant of the owner who can tell him where to go but not how to navigate. Thus "clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience."[57] In ***The Trustees of Frazer Nursing Home v Olney***[58] a child of about six years of age was given X-ray treatment as a result of which she was seriously burnt due to the negligence of the nurse. The nurse was held to be the servant of the nursing home though the work she was employed to do was of a skilled character as to the method of performing of which the employer himself was ignorant. Thus it is clear "from the more recent cases that persons possessed of a high degree of professional skill and expertise, such as surgeons and civil engineers, may nevertheless be employed as servants under contracts of service, notwithstanding that their employers can, in the nature of things exercise extremely little, if any, control over the way in which such skill is used. The test of control is, therefore, not as determinative as used to be thought to be the case, though no doubt it is still of value in that the greater the degree of control exercisable by the employer the more likely it is that the contract is one of service".[59] The inadequacies of the control test have led judges to look into other tests, and one which commends itself in the context of the modern industrial complex is the 'integration' test of Lord Denning.[60] One feature which seems to run through the instances is

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[57] Lord Porter in ***Morren v Swinton & Pendlebury Borough Council*** (1965) 3 All E. R. 349 at 351.

[58] (1944) 45 N.L.R. 73.

[59] ***Whittaker v Minister of Pensions & National Insurance,*** op. cit., at 537 See the following statement of Lord Wright in ***Montreal Locomotive Works Ltd v Montreal & A. G. for Canada*** (1947) 1 D.L.R. 161 at 169, cited in ***Ready Mixed Concrete v Minister of Pensions*** (1968) 1 All E. R. 433 at 443; "In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant .... In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a four fold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of tools; (3) chance of profits; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior." See also ***Argent v Minister of Social Security*** (1968) 3 All E. R. 208, ***Market Investigations Ltd. v Minister of Social Security*** (1968) 3 All E. R. 732.

[60] ***Stevenson Jordan & Harrison Ltd v Macdonald & Evans*** (1952) 1 T.L.R. 101 at 111. For an excellent discussion of the common law concepts of master and servant applied to modern welfare legislation see K.W. Wedderburn. *The Worker And the Law* (Penguin, Harmondsworth 1965) at pp. 33-40. The 'integration test' of Denning, L.J., quoted in the text is favoured by J.B. Cronin & R.P. Grime *Labour Law* (Butter worths, London, 1970) pp. 10-11.

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that 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. This test would have a limited application since it presupposes the existence of organization or business and this is not the only situation in which it becomes necessary to identify a contract of employment, though the more difficult cases arise in a business or organisational situation. In ***Ceylon Mercantile Union v Ceylon Fertilizer Corporation,***[61] the Respondent denied that it was the employer of the 502 workmen on whose behalf the Union application was made. The Respondent contended that they were workers supplied by a "labour contractor" – an independent contractor, and as such they were employees of such contractor. The Court (Samarakoon, C.J., dissenting) held that the workers had only the most tenuous contract with the "contractor" and it was the Respondent who determined wages and advances to the workmen, the "contractor" acted merely as a conduit for the transfer of payments. The Corporation was deemed to be the employer.

(4) Power to dismiss : The power of dismissal is a factor to be taken into consideration in determining whether a person is a master. It is also regarded as an indication of the control exercised by the master over his servant.[62]

(5) Payment : Payment by the master for services rendered by the servant has been regarded as evidence of control,[63] but the question of remuneration is by no means conclusive since no remuneration need be paid to a servant and the remuneration may consist of 'tips' from persons other than the employer.[64]

34. According to ***Ready Mixed Concrete v Minister of Pensions:***[65]

"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

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[61] (1985) 1 SLR 40.

[62] ***Willard v Whiteley*** (1938) 3 All E.R. 779 at 780.

[63] ***Hill v Beckett*** (1915) 1 K.B. 578 of ***Jayaweera v Simon*** (1915) 17 NLR 9 at 11.

[64] ***Pauley v Kenaldo Ltd.*** (1953) 1 All E.R. 226 at 228. As pointed out by J.B. Cronin & R.P. Grime *Labour Law* (Butterworths, London, 1970) at p. 9 f.n. 18 what is required to sustain a contract of service is not remuneration but consideration.

[65] (1968) 1 All E.R. 433 at 439-40.

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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 it being a contract of service .... As to (i) There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands, or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be ......"[66]

Having given examples of provision consistent and inconsistent with a contract of service, the court said:[67]

"An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant."

In ***Ceylon Mercantile Union v Ceylon Fertilizer Corporation,***[68] the majority decision held that an existing contract was not a pre-condition for the application of the control test, as the definition of "workmen" leaves it open for a contract to be implied from the circumstances of a case.

35. The four indicia of a contract of service have generally been thought to be[69] (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. Referring to these indicia Mackenna J.[70] said :

"It seems to me that (a) and (d) are chiefly relevant in determining whether there is a contract of any kind between the supposed master and servant, and that they are of little use in determining whether the contract is one of service. The same is true of (b), unless one distinguishes between different methods of payment, payment by results tending to prove independence and payment by time the relation of master and servant."

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[66] For an explanation of the second and third conditions see ibid. at 440. Examples of provisions under (iii) inconsistent with a contract of service may be an agreement to build and to carry another's goods.

[67] ibid. at 440-1.

[68] op. cit.

[69] See ***Short v Henderson Ltd.*** (1946) 174 Law Times 417 at 421.

[70] ***Ready Mixed Concrete v Minister of Pensions,*** op. cit., at 445.

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36. Sometimes an intermediary may not be an independent contractor but an agent of the management, in which event workmen engaged by the intermediary may be workmen of the management.[71]

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Origins and Limitations of the Control Test

37. The common law regarded the control test as the most important or crucial test in identifying a contract of employment and in distinguishing such a contract from one for services. The test, having regard to the time and circumstances in which it was developed, has an equitable origin and basis and was closely linked to the principle of vicarious liability. It was only equitable that if a master was to be held liable for the acts of his servant on the basis of vicarious liability, the master should have the right to control the manner in which the workman is to perform his duties. Conversely, it would have been inequitable to hold a master liable in respect of acts of a workman over which he had no control. Hence the control test which, if satisfied, identified the contract as one of service thus giving rise to vicarious liability on the part of the master.[72]

38. The relationship between the control test and vicarious liability is illustrated by ***Denham v Midland Employers Mutual Assurance Ltd***[73] where a workman was loaned by his employer Eastwoods to Le Grand without obtaining the workman's consent. The workman was killed whilst working for Le Grand due to the negligence of one of Le Grand's servants. Le Grand had two insurance policies, one covering persons who had contracts of service with him and the second covering persons with whom he had contracts other than contracts of service. The question was which of the insurers was liable to indemnify Le Grand. On the basis of earlier authorities the Court of Appeal held that the deceased was not employed under a contract of service with Le Grand for the purposes of the first policy, but observed (*obiter*) that the deceased was employed by Le Grand for the purpose of vicarious liability. Denning, L.J.,[74] said :

> "I have myself no-doubt that, if a third person had been injured by the negligence of Mr. Clegg in the course of his work, then Le Grand

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[71] ***United Beedi Workers' Union v S. Ahamed Hussain & Sons*** 1964 (1) L.L.J. 285 (Mad.). See further the text after f.n. 135 for the latest developments of the common law concept of a contract of service. See also ***Ceylon Mercantile Union v Ceylon Fertilizer Corporation*** op. cit.

[72] It is by reference to the control test that the person vicariously liable was identified in the leading case of ***Mersey Docks & Habour Board v Coggins*** 1947 A.C. 1. (HL).

[73] (1955) 2 All E.R. 561.

[74] ibid. at 564-5. Similarly Romer L.J. at 566.

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would be liable to the third person and not Eastwoods. So also, when Mr. Clegg himself was killed, Le Grand are liable to his widow on the same footing as if they were his masters and not merely as invitors. These results are achieved in law by holding that Mr. Clegg became for the time being the temporary servant of Le Grand. There is no harm in thus describing him, so long as it is remembered that it is a device designed to cast liability on the temporary employer. The real basis of the liability, however, is simply this: If a temporary employer has the right to control the manner in which a labourer does his work, so as to be able to tell him the right way or the wrong way to do it, then he should be responsible when he does it in the wrong way as well as in the right way. The right of control carries with it the burden of responsibility. So, also, if a temporary employer sets a labourer to work alongside his own skilled men, he should take just as much care to see that the plant and material are safe for the labourer as for the skilled men. The labourer should not be defeated by knowledge of the danger any more than skilled men."

He held, however, that the deceased was not employed under a contract of service with Le Grand on the wording of the employer's liability policy because :

> "His contract of service was with Eastwoods and Eastwoods alone. They selected him. They paid him. They alone could suspend or dismiss him. They kept his insurance cards and paid for his insurance stamps. He was never asked to consent to a transfer of the contract of service and he never did so. If he was not paid his wages, or if he was wrongfully dismissed from the work, he could sue Eastwoods for breach of contract and no one else. If he failed to turn up for work Eastwoods alone could sue him. I see no trace of a contract of service with Le Grand, except the artificial transfer raised by the law so as to make Le Grand liable to others for his faults or liable to him for their own faults; and I do not think the artificial transfer so raised is a 'contract of service' within this policy of assurance."

39. Among other things, this case illustrates the fact that the control test is an equitable test to determine the question of vicarious liability. It also indicates the misleading nature of inquiries as to whether a person is "employed" in the abstract, the proper question being whether he is "employed" for a particular purpose, since the term "employment" can cover a variety of relationships such as independent contractor and principal and agent and is not confined to the master and servant relationship under a contract of service.

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40. The background to the control test and the reasons for its inadequacy in the context of Modern working relationships has perhaps been best stated by O. Kahn-Freund[75]-

> "The traditional test (of a contract of service) was that a person working for another was regarded as a servant if he was 'subject to the command of the master as to the manner in which he shall do his work' but if the so called 'master' was only in a position to determine the 'what' and not the 'how' of the services, the substance of the obligation but not the manner of its performance, then the person doing the work was said to be not a servant, but an independent contractor, and his contract one for work and labour and not of employment. This distinction was based upon the social conditions of an earlier age: it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanization), a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled 'hand'. It reflects a state of society in which the ownership of the means of production coincided with the possession of technical knowledge and skill and in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer i.e., what to modern eyes appears as an imperfect division of labour. The technical and economic developments of all industrial societies have nullified these assumptions. The rule respondent superior (and, one may add, the whole body of principles governing the contract of employment) 'applies even though the work which the servant is employed to do is of a skillful or technical character, as to the method of performing which the employer himself is ignorant'. To say of the captain of a ship, the pilot of an aeroplane, the driver of a railway engine, of a motor vehicle, or of a crane, that the employer 'controls' the performance of his work is unrealistic and almost grotesque. But one need not think of situations in which the employee is physically

[75] (1951) 14 Modern Law Review 504.

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removed from his employer's premises: a skilled engineer or toolmaker, draftsman or accountant may as often as not have been engaged just because he possesses that technical knowledge which the employer lacks. If in such a case the employee relied on the employer's instructions 'how to do his work' he would be breaking his contract and possibly be liable to summary dismissal for having misrepresented his skill. No wonder that the Courts found it increasingly difficult to cope with the cases before them by using a legal rule which, as legal rules so often do had survived the social conditions from which it had been an abstraction. The judgements in ***Mersey Docks and Harbour Board v Coggins & Griffiths,*** show plainly enough the control test had to be transformed if it was to remain a working rule and to be more than a mere verbal incantation."

The control test worked adequately in the simple relationships of domestic and menial service that existed at the time it was formulated and in an age which was free of rapid and sophisticated technological developments. The test assumes, among other things, the master's ability to control the servant in regard to the manner in which he performs his work by virtue of his superior knowledge and skill, whether technical or otherwise. But with modern technological innovations it has become inappropriate to apply the control test in situations where, quite clearly, the servant's technical knowledge and skill far surpasses that of his master. In fact, there could be situations in which a servant would be in breach of his contract of employment if he were to submit to his employer's control. The case of an aeroplane pilot, an engine driver, scientist or a doctor are illustrative of such situations. The examples can be multiplied. That is why courts, in order to keep abreast of modern developments, were compelled to formulate new tests or modify existing ones as in the case of Lord Denning's "integration test"[76] or a mixed test.[77] But none of these tests to identify a contract of employment are sufficiently helpful when dealing with situations of self employment and labour only sub contracts. Further, in the vast majority of relationships in the modern industrial sector the master and servant relationship exists between the servant as an individual and a master who is not an individual but a corporate legal entity which only exercises control through its agents in the remotest sense. Thus it could be said that modern technology and business arrangements have constituted the first challenge to the adequacy of the control test to identify a contract of employment.

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[76] See the text at f.n. 12 ante.

[77] See f.n. 10 and the text at f.n. 16 ante.

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41. The second factor which has shown up the inadequacy of the traditional concept of master and servant is that its strict application has sometimes led to inequitable results at a time when issues in the field of industrial relations are being more and more settled by reference to equitable, rather than strict legal, principles. Modern labour legislation has sometimes been found to exclude certain categories of individuals if the control test is the main determining factor, although social policy demands that such persons also be brought within the ambit of such legislation. If the control test originated for equitable reasons, in the context of modern welfare legislation it could lead to inequitable results by excluding persons from the protection of such welfare legislation. ***Ceylon Insurance Company v Commissioner of Labour and Others.***[78]

42. These developments have led, as we shall see, to statutory extensions of the meaning of "workman" and to the "deeming" of a person (who would not be a workman in common law) as a workman for all or certain purposes. It is, therefore, useful and necessary to examine the various statutory definitions of "employer" and "employee" in Sri Lanka and see whether or not they fit into the equivalent common law concepts.

Wages Boards Ordinance

43. The Wages Boards Ordinance,[79] which regulates the wages and other emoluments of persons employed in trades and provides for the establishment and constitution of wages boards and other connected or incidental matters, defines a 'worker' as "any person employed to perform any work in any trade".[80] If one has regard to some of the other provisions of the Ordinance, *prima facie* it would appear that the Ordinance was intended to cover a person who has a contract of service with another. The definition of 'employer' in s.64 (which will be referred to again later) suggests an employer in the common law sense. Further, the provisions of Part I of the Ordinance relating to the payment of wages *prima facie* apply to workmen and employers in the common law sense, while Wages Boards set up under Part II also appear to apply to workmen with contracts of service. However, for the purposes of the statute, certain persons who may not be workmen are brought within the ambit of the statute by deeming them to be workmen. Thus s. 38 (1) states :

> "Any person who, by way of trade or for any commercial purpose, makes any arrangement express or implied with any other person in

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[78] C.A. No. 398/95 C. A. M. 10.4.96

[79] 1941, Cap. 136 (1956) as amended.

[80] ibid. s. 64.

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pursuance of which such other person performs any work to which a minimum-rate of wages is applicable, shall be deemed, for the purposes of this Ordinance, to be the employer of such other person in respect of that work, and the nett remuneration obtainable by such other person in respect of the work, after allowing for his necessary expenditure in connection with the work shall be deemed to be wages."

In view of this provision, the performance by a person of work for which a minimum rate of wages is applicable[81] renders the person for whom such work is performed, the employer. The section applies only where the arrangement for the performance of such work in question is by way of trade or for any commercial purpose, where a minimum rate of wages has been prescribed for such work and the deeming of the relationship as being one of employer and employee is not for all purposes but for the purposes of this Ordinance. Where these conditions are satisfied it is not open to the employer to plead, for instance, that the "workman" is in reality an independent contractor. In this way the Wages Boards Ordinance has cut across the traditional concept of master and servant by conferring its benefits on persons who do not have contracts of service. It may even be argued with justification that when the Ordinance defines a worker as "any person employed to perform any work" it does not, having regard to the social policy behind the Ordinance, have in mind only a person who has a contract of service with another. Section 38(1) puts the matter beyond doubt.

44. The Ordinance further provides a departure from the common law concept of master and servant in a situation where the immediate employer is himself in the employment of another

> "Where the immediate employer of any worker is himself in the employment of some other person, and that worker is employed to do any work in the course of and for the purpose of the trade of that other person, that other person shall, for the purposes of this Ordinance, be deemed to be the employer of that worker jointly with the immediate employer."[82]

The operation of this provision is dependent on, first, the immediate employer being employed by some other person and secondly, on the

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[81] This would apply to work covered by the decisions of a wages board established under the Ordinance.

[82] s. 45.

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immediate employer's workman being employed to do work in the course of and for the purpose of such other person's trade. In that event, a relationship of master and servant is deemed to exist between such other person and the true employer's workman for the purposes of this Ordinance only. The terms "employment" and "employed" in the section refer, in the absence of contrary indications in the section, to employment under a contract of service. The section does not, therefore, apply to a situation where A enters into a contract for services with B who employs workmen to perform work for the purposes of A's trade because B is not "in the employment" of A. The section covers, for instance, the Superintendent of an estate and the labour force employed by him on the estate as the Superintendent is employed by the owner of the estate. The section is not intended to apply in situations where the immediate 'employer' is an agent who engages a person for the purposes of his principal, but the principal in such a case would be covered by the definition of 'employer' in the Ordinance as including a person "on whose behalf any other person employs". These conclusions derive support from the definition of an 'employer' in the Ordinance as meaning –

> "any person who on his own behalf employs, or on whose behalf any other person employs, any worker in any trade, and includes any person who on behalf of any other person employs any worker in any trade."[83]

which is substantially the same as in the Industrial Disputes Act.[84] The definition, as we shall see when considering the Industrial Disputes Act and its interpretation in ***Carson Cumberbatch & Co. Ltd v Nandasena,***[85] has been held to apply to a person who has a contract of service with another. The need for ss.45 and 38(1) of the Wages Boards Ordinance, flowing from reasons of social policy, arises from the fact that the definition of 'employer' would not cover the situations contemplated by ss.38 and 45. The case of the agent who employs for the purposes of the principal would not himself come within the definition of 'employer,'[86] but could come within the ambit of s.45 only if "employment" therein is given the meaning of employment in any capacity and not under a contract of service. This latter hardly seems to have been the intention because the purpose of the section is not to hold the immediate employer liable but his

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[83] s. 64.

[84] (1950) as amended.

[85] (1974) 77 N.L.R. 73.

[86] "An agent who engages a man for the purposes of his principal cannot himself be said to 'employ' or utilize the services of that man" – ***Carson Cumberbatch & Company Ltd v Nandasena,*** op. cit. at 81.

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employer and if so, in the case of an agent, s.45 is superfluous as the principal would in any event come within the ambit of the definition of an "employer" in s.64.

Shop & Office Employees' Act

45. The Shop & Office Employees (Regulation of Employment and Remuneration) Act[87] is perhaps an even better illustration of an example of the legislative abandonment of the common law concept of employer and employee for the purpose of achieving certain specific objectives of social policy. The Act states that an employer –

"(a) in relation to any shop, means the owner of the business of that shop, and includes any person having the charge of the general management and control of that shop, and

(b) in relation to any office, means the person carrying on, or for the time being responsible for the management of, the business for the purposes of which the office is maintained."[88]

The Act contains no definition of employee or workman, but it provides that[89] :

> "For the purposes of this Act, a person shall be deemed to be employed in or about the business of a shop or office if he is wholly or mainly employed –

(a) in a shop in connection with the serving of customers or the receipt of orders or the dispatch or delivery of goods, or as the case may be, in an office in connection with the business for the purposes of the transaction of which the office is maintained: or

(b) in the service of the employer upon any work, whether in the shop or office or outside it, which is ancillary to the business carried out in that shop or office, and notwithstanding that he receives no reward for his labour.."

46. The Act does not define an employer by reference to the common law concept of the term and quite clearly includes a person who does not have

[87] (1954) Cap. 129 L.E.C. (1956) as amended.

[88] s.68(1).

[89] s.68(2).

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a contract of service with the employee, e.g. a person having the charge or general management and control of a shop.[90] This latter phrase would include a managing director, general manager or manager, while an owner may be a company, a partnership or a single individual. Any contract of service an employee has would be with the owner as defined and not with a director or manager though the latter have been brought within the concept of an employer for the purposes of the Act. However, when we come to consider who is an 'employee' for the purposes of the Act it is necessary to determine the meaning of "employed" in s.68(2).[91] A person so employed is a person who has a contract of service. Any other meaning would lead to absurd consequences, e.g., in the matter of weekly holidays (s.5) annual holidays and leave (s.6) public, holidays and employment of persons on such holidays (s.7), intervals (s.9) and so on. In short, therefore, while the term "employer" has been given an extended meaning and includes a person who has no contract of service with anyone, an employee contemplated by the Act, though not defined, is one who has a contract of service with an employer in the common law sense. Finally, the Act provides in s.58[92] for the creation of an employer-employee relationship between persons who would not in common law be deemed to have such a relationship, in the same way as the Wages Boards Ordinance does in s.45.[93]

Employees Provident Fund Act/Employment of Women, Young Persons and Children Act

47. The Employees' Provident Fund Act[94] defines an employer as

> "any person who on his own behalf employs, or any person on whose behalf any other person employs, or any person who on behalf of any other person employs, any person in a covered employment."[95]

It does not define an employee except to the extent of prescribing that an employee includes any apprentice or learner who is paid a remuneration.[96]

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[90] It should be noted that in terms of the definition there is a difference between an 'employer' in relation to a shop and an 'employer' in relation to an office.

[91] The term appears in several sections throughout the Act.

[92] "Where in a shop or office the immediate employer of any person employed in or about the business of that shop or office is himself in the employment of some other person, and the first mentioned person is employed to do any employment in the course of and for the purpose of the business of that other person, that other person shall, for the purposes of this Act, be deemed to be the employer of the first mentioned person jointly with the immediate employer."

[93] See ante.

[94] 1958, as amended.

[95] s. 47.

[96] ibid.

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The Act applies to an employer and a workman who have a contract of service. Here again the same provision as in the Wages Boards Ordinance and the Shop and Office Employees (Regulation of Employment and Remuneration) Act in terms of which the immediate employer is himself in the employment of another person is to be found.[97] The definition of 'employer' in the Employment of Women, Young Persons and Children Act[98] is the same as in the Wages Boards Ordinance.

Payment of Gratuity Act

48. In the Payment of Gratuity Act "workman" is defined as follows :

> "Workman means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is express or implied, oral or in writing and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any workman whose services have been terminated."

In ***Collettes Ltd. v Commissioner of Labour and Others***[99] it was held that a Managing Director has a dual capacity of being an employee of the Company and at the same time, taking part in the management of the Company. The fact that as Managing Director or as Group Managing Director he takes part in the management of the affairs of the Company does not deprive him of his other capacity as an employee of the said Company. Therefore the Managing Director was held to fall within the definition of a "workman" set out in the Gratuity Act.

Workmen's Compensation Ordinance

49. The definition of workman in this Act is similar to, but wider than, that in the Industrial Disputes Act, and as amended by Act No.15 of 1990 reads as follows –

> ".... any person who has entered into or works under a contract with an employer for the purpose of his trade or business in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship or a contract personally to execute any work or labour, and whether the

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[97] s.9.

[98] Act No.47 of 1956 s.34.

[99] (1989) 2 SRI L.R. 6

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remuneration payable thereunder is calculated by time, or by work done or otherwise, and whether such contract was made before or after the coming into force of this definition...."

In ***Fernando v Andrews Travel Services***[100] the wife of a tour guide who drowned while conducting a tour for the Respondent Company applied for compensation to the Commissioner of Workmen's Compensation. The dispute was whether the deceased was a 'workman' within the meaning of the Ordinance. The Supreme Court rejected the argument that a 'workman' for the purposes of the Ordinance was restricted to persons over whose work the employer had full control, and held the fact of the deceased workman's permanent employment with another person to be irrelevant. The Court held that he was a 'workman' in as much as he had a contract, howsoever arising, and as his employment was for the purpose of the employer's trade or business.

Industrial Disputes Act

50. In the field of labour law in Sri Lanka, concepts of employer and workman in the Industrial Disputes Act have given rise to many problems and many of the decided cases relating to these concepts have centred round its provisions. The Act states that unless the context otherwise requires, 'employer'

"means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and *any person who on behalf of any other person* employs any workman.[101]

The Act further provides that unless the context otherwise requires, 'workman'

"means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed

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[100] SC Appeal No.2/94, S. C. M. 7.7.94 (unrep.). Also See ***Palm Products & Sales Co-operative Seciety Ltd v Kandiah*** III Srisk L.R.133. ***Babynona v Arthur Silva*** 54 NLR 166.

[101] s.48 However, the Act has no application to the Government in its capacity as employer, or to or in relation to a workman in the employment of the Government: s.49. A corporation is an employer within the meaning of the Act and does not come within s.49 – ***Air Ceylon Ltd. v Rasanayagam*** (1969) 71 N.L.R. 271. Employees of the Bank of Ceylon – ***The Ceylon Bank Employees' Union v Yatawara*** (1963) 64 N.L.R. 49 at 58-60 and of the Coconut Research Board which is a corporation – ***The Coconut Research Board v Subramaniam*** (1970) 72 N.L.R. 422 are covered by the Act.

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or implied, oral or in writing, and whether it is a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated."[102]

Section 51 states :

"(1) Where the employer of any workman employed on any estate is a person who is called or known as the 'superintendent' or the 'manager' it shall be sufficient, for the purposes of any application made under section 31B or any reference under section 3 or section 4 of this Act, to designate such person in such application or such, reference as the 'superintendent' of that estate, or the 'manager' of that estate, as the case may be, without the addition of the name or any further description of such superintendent, or manager, as the case may be.

(2) No application or reference referred to in subsection (1) of this section, and no order or award made on such application or reference, shall be invalid for the reason only that the employer has been designated in accordance with the provisions of that subsection."

Section 51 was enacted in 1968 due to conflicting decisions of the Supreme Court[103] on the question whether an action against the superintendent of an estate is maintainable or whether he should be named, so as to render it unnecessary to name the superintendent or manager.

51. A body of employers or a trade union of employers comes within the definition of an employer.[104] Partnership as an employer, the effect of the introduction of a new partner as well as the joint liability of partners were considered in ***Gaffoor v Almeida.***[105] Here the workman joined as superintendent of an estate in 1946 on the footing that his employers were running the estate as partners. The appellant became a shareholder of the

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[102] s.48.

[103] See ***The Superintendent, Deeside Estate v Illankai Thozhilar Kazhakam*** (1968) 70 N.L.R. 279, ***The Superintendent, Nakiadeniya Group v Cornelishamy*** (1969) 71 N.L.R. 142, ***The Manager Ury Group v The Democratic Workers Congress*** (1969) 71 N.L.R. 47, ***The Superintendent, Faithfield Estate v Lanka Jathika Estate Workers' Union*** S.C.40/65, S. C. M. 23.7.67 (unrep.). See further S.R.de Silva *The Legal Framework of Industrial Relations in Ceylon* (H.W. Cave & Co., Colombo, 1973) at pp. 298/99.

[104] ***The Ceylon Bank Employees' Union v Yatawara*** op. cit. at 53-6.

[105] (1971) 74 N.L.R. 164.

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business in 1960 and informed the workman that he had taken over the management of the estate and would be directly responsible to the other shareholders. He assured the workman that he would ensure that his interests as superintendent were conserved "fairly and squarely" and called upon him to follow his directions on all matters. The appellant terminated the workman's services in 1962, whereupon the workman made an application to the labour tribunal against the appellant claiming certain sums as compensation, gratuity and provident fund benefits. Objection was taken by the appellant to the application on the ground that he is only a co-owner of a fractional share, that the proceedings cannot be maintained against him alone and that, in any event, no order can be made against him in respect of the workman's services prior to 1960. It was held that where acting expressly or impliedly on behalf of the other co-owners or partners, one of them employs a workman, he comes within the definition of an employer which includes "any person who on behalf of any other person employs any workman." Hence, though the appellant owned only a fractional share of the business, the workman was entitled to look to the appellant alone as the employer. Further, under the rule of joint liability of partners, the workman was entitled to choose the appellant alone against whom to enforce his claim.[106] It was also held that in the circumstances, the appellant was liable even in respect of the period of service prior to 1960. As stated by Weeramantry, J.,[107]:

> "It has been urged again that where there is a partnership and there is a change in the composition of the partnership by the introduction of a new member, the old partnership comes to an end and a new partnership arises in law. It has been submitted on behalf of the appellant that his new partnership would not be responsible for the liabilities of the old partnership unless such liabilities have been taken over. Such taking over of liabilities may however be express or implied and the circumstances of the present case, having regard to the continuance of the services of the respondent without termination of his services under the old partnership and without payment of any retirement benefits at such time, would appear to be suggestive of an implied assumption by the new partnership of the liability of the old partnership towards the respondent in regard to his earlier period of service. Moreover the appellant's letter A1 wherein he undertakes responsibility for conserving the respondent's rights would appear to

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[106] Weeramantry, J., pointed out (at 168) *obiter* that had the owners been co-owners and not partners, there may have been substance in the appallent's claim that he would be liable only *pro rata* and that one co-owner cannot be sued in respect of the entirety.

[107] ibid at 167.

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be an express assumption of liability in respect of obligations already incurred towards the respondent."[108]

The fundamental question is whether the definitions of employer and workman cover only persons between whom the relationship is that of master and servant, or whether they are sufficiently wide to include other relationships. It would be convenient to first analyze the definition of an employer.

52. A person who employs on behalf of another (e.g. the superintendent of an estate) may in certain circumstances be as much an employer as the person on whose behalf he employs (e.g. the owner of the estate). "Any person who on behalf of any other person employs any workman" is an employer within the meaning of the definition only where there is a contractual relationship of master and servant between him and the workman. This construction appears logical when one bears in mind the definition of 'workman'. According to Tennekoon, J., in ***Colombo Apothecaries Co. Ltd. v Wijesooriya***[109] the term 'employer'

> "is defined by reference to 'workman'; the verb 'employs' occurring repeatedly in the definition is in the present tense; the grammatical 'object' of that verb is 'any workman' (in the singular) and not 'any workmen' (in the plural); if the plural was used it would have suggested a continuum of activity as the test for identifying an 'employer'. But the contrary is the implication here. It seems to me that a person is an 'employer' within the meaning of this definition only in relation to another or others (i.e. a workman or workmen) with whom there is a subsisting contract of service."

53. The decision of the Supreme Court in ***Ranaweera v Jayathilake***[110] that the term 'employer' in the Industrial Disputes Act covers both a principal and an agent must be understood subject to two important decisions one of the Supreme Court[111] and the other of the Court of Appeal.[112] In ***Coomasaru v Leechman & Co. Ltd.***[113] the workman was employed as superintendent of

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[108] For a case where a partner made an application to a labour tribunal in respect of the alleged termination of his employment as manager by some of the other partners, see ***Gunaratne v de Zylva*** S.C.463/67 S. C. M. 17.9.68 (unrep.) where the Supreme Court doubted (obiter) whether a partner could be a "workman" within the meaning of the Act.

[109] (1968) 70 N.L.R. 481 at 504.

[110] S.C. 173/71 S. C. M. 6.7.92 (unrep.).

[111] ***Coomasaru v Leechman & Co. Ltd.,*** S.C. Application 307/72 S. C. M. 20.12.73 (unrep.).

[112] ***Carson Cumberbatch & Co. Ltd v Nandasena*** (1974) 77 N.L.R. 73.

[113] op. cit.

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9670

Rangalle Consolidated Ltd. The local agents of this Company were Leechman & Co. Ltd., who purported to transfer the workman to another group on altered conditions of service which he refused to accept, whereupon Leechman & Co. Ltd., acting on behalf of Rangalle Consolidated Ltd terminated his services. The material letters addressed to the workman were on the letter heads of Rangalle Consolidated Ltd., and the letter terminating his services was signed by Leechman & Co. Ltd., for Rangalle Consolidated Ltd. The workman applied to the labour tribunal against Leechman & Co. Ltd., and the tribunal, on a preliminary objection by that Company, made order that Leechman & Co. Ltd., were the workman's employers and must meet any relief awarded to the workman. In holding that Leechman & Co. Ltd., were not the workman's employers, the Supreme Court held that this Company had always acted on the instructions of the principals (Rangalle Consolidated Ltd.,) and that Leechman & Co. Ltd., had not entered into a contract of service with the workman so as to make them personally liable. In considering the definition of 'employer' in the Act the Supreme Court thought that the word 'employs' in the definition refers to employment created through a contract of employment and that this common law position had not been altered by the Act. Referring to the term "employs" in the Act, Their Lordships observed :

"(i) the definition in no way alters the Common Law Rule so as to make an agent liable on a contract which he has entered into strictly as agent without in any way making himself personally liable.

(ii) Section 48 of the Industrial Disputes Act extends that Common Law Rule by making a principal also liable on a contract made by an agent where the agent has contracted personally and is liable on such a contract personally. The intention is to ensure that the owner of a business or an estate continues to be liable under the Industrial Disputes Act and cannot evade his liability by entrusting the running of such business or estates to the manager or a superintendent."

The term "employer" in the Act refers only to a person who employs a workman under a contract of service. Thus in terms of this decision the mere fact that a person is an agent does not render him an 'employer' of a person he has employed on behalf of the principal, unless he has himself entered into a contract of employment with the workman. The common law in this respect has been extended by the Act only to the extent that where the agent himself enters into a contract of employment in circumstances where in common law the agent alone is liable, the principal is also liable on the contract.

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54. These principles were affirmed by the Court of Appeal in ***Carson Cumberbatch & Co. Ltd v Nandasena***[114]. In this case Carson Cumberbatch & Co. Ltd., (Carsons) together with others, floated a company called Farms and Retail Markets Ltd. (Farms). The directors of Farms appointed Carsons as managers and secretaries of Farms. The workman was appointed assistant manager, and later manager, of a farm belonging to Farms. Both appointments were made by Carsons "for and on behalf of" Farms. On termination of his services by Carsons, again "for and on behalf of" Farms, the workman applied to the labour tribunal claiming relief against both Carsons and Farms. Before the Labour Tribunal, Farms admitted to being the employer while Carsons denied that they employed the workman. The tribunal ruled that both Carsons and Farms were the employers of the workman. The Supreme Court held, *inter alia,* that the tribunal's order was correct in that the definition of 'employer' in the Act rendered the principal (Farms) and its agent (Carsons) both employers of the workman.[115] On appeal the Court of Appeal reversed the judgement of the Supreme Court. In his lucid analysis Tennekoon, J., pointed out[116] that the definition of 'employer' consists of the following three limbs :

1. Any person who employs any workman.

2. Any person on whose behalf any other person employs any workman.

3. Any person who, on behalf of any other person, employs any workman.[117]

The term "employs" in all three limbs refers not to a relationship but to an existence of a contract of employment between two persons.[118]

> "The first limb of the definition in so far as it gives a meaning to the term 'employer' by applying it to a 'person who employs' is unhelpful in that it says no more than that the term 'employer' is a substantial derivative of the verb 'to employ'; but the definition is significant in that it defines 'employer' as a person who employs

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[114] (1974) 77 N.L.R. 73.

[115] It is a matter of irony that Walgampaya J., one of the judges of the Supreme Court in this case, reached the opposite conclusion in ***Coomasaru v Leechman & Co. Ltd.,*** op. cit.

[116] (1974) 77 N.L.R. 73 at 81.

[117] The argument on behalf of the workman in this case was that Carsons came within the third limb of the definition.

[118] (1974) 77 N.L.R. at 81/82. Tennekoon J., had taken the same view in his dissenting judgment in ***Colombo Apothecaries Co. Ltd., v Wijesooriya*** (1968) 70 N.L.R. 481 at 504 (7 judges).

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another who is a workman. The act of 'employing' an inanimate object does not bring two persons into relationship with each other. In such a context 'employs' means only to 'use as a means or instrument or as material'. On the other hand the act of one person employing another brings two persons or legal entities into relationship with each other; here 'employ' means 'use the service of'; a person cannot be employed by another in the way in which a chattel or an animal is 'employed' by a human being; slavery was abolished in this country over a century ago by the Abolition of Slavery Ordinance (Cap.75). A person has first to agree to be employed and also to the terms, however bald or fragmentary, of the employment. The relationship that arises thus gives rise to rights and obligations on the part of the employer and the employee. An agent who engages a man for the purposes of his principal cannot himself be said to 'employ' or utilize the services of that man. The conclusion then that the concept of the person 'employing' another involves within it the existence of a contract between the person employing and the person employed is irresistible. We are accordingly of the opinion that when the first part of the definition of the term 'employer' speaks of 'a person who employs a workman' it contemplates a person who employs another under a contract of service, express or implied, to which the person employing and the person employed are the parties."

"The verb 'employs' is used in a similar way in the second and third parts of the definition and can bear only the same meaning as it has in the first limb; we cannot think of any sufficient reason to construe the second and third 'employs' in the definition to have been used by the legislature in a sense different from the first; and, in any event, we find it difficult to contemplate any other sense in which the word can, in its context, be construed. Counsel for the second respondent suggested that 'employs' may be used in the sense of 'utilize the services of'; we have no doubt that this is the sense in which it is used; but the attribution of this meaning to the word does not help to dispense with the resultant contractual nexus which is the inevitable outcome of one person utilizing the services of another. Having regard to the factual context in which the question of who is or are the employers of the 2nd respondent arises in this case, it must be noted that the definition of the word '*employer*' contains no reference to control or supervision or management exercised by one person over another, so that it certainly does not have the effect of including cases in which a person not the contractual employer, may by reason of the control, supervision or management exercised over a workman give only the *appearance* of being the employer."

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55. It was argued on behalf of the workman that in the field of labour law the term 'employer' has received an extended meaning. For instance, in the Workmen's Compensation Ordinance, the Shop and office Employees' Act, the Maternity Benefits Ordinance, the Indian Immigrant Labour Ordinance and Estate Labour (Indian) Ordinance the term 'employer" has been defined to include managing agents and similar persons. Their Lordships took the view[119] that these statutory extensions only mean that the legislature in those cases decided to enlarge the common law concept of an employer and that the absence of such an extension in the Industrial Disputes Act indicates that no such extension was intended as far as the Act is concerned. They thought[120] that the Act itself contains many provisions which support the view that an employer, whether he be principal or agent, must have a contract of employment with the workman. For instance, the definition of 'workman' refers to a person who has entered into or works under a contract with an employer.[121] Sections 8, 14, 19 and 21(D) relating to collective agreements, settlement by conciliation, arbitration and adjudication prescribes that their terms shall be implied terms in the *contract of employment* between the employer and the workman. Section 33(4) prescribes that for the purposes of s.33(3) any reference to the employer shall be deemed to be a reference to the person who is responsible for the general management of the business of the Company. This provision implies that a person who is responsible for the general management of a company's business would not ordinarily be an employer for the purposes of the other provisions of the Act. In these circumstances :

> "The person referred to as a person *employing* a workman in each of the three limbs of the definition is intended to refer to a person who is under contractual obligation to the workman. Thus the first limb of the definition will catch up a person who himself engages a workman and also one who engages a workman through an agent who is known to the latter to be acting as agent; the second limb will apply to a *principal* on whose behalf an agent, without disclosing the existence or identity of his principal engages the services of a workman, in such a case the workman on discovering the existence and identity of the principal can hold him to the contract; the third limb would include the type of agent who is referred to under the

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[119] (1974) N.L.R. at 83.

[120] ibid. at 83-4.

[121] But *quaere* whether "under a contract" necessarily implies a contract of service and may include a contract for services, especially since the words used are "under a contract in any capacity." It is submitted not because "in any capacity" refers not to the nature of the relationship but to the capacity in the sense of manual, clerical, etc.

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second limb, because in such a case the agent is at common law regarded as having contracted personally."[122]

On the facts of this case Farms was held to come within the first limb only of the definition and Carsons was held to fall outside all three limbs of the definition. The only contract of employment, express or implied, into which the workman had entered was with Farms.

56. The combined effect of these two decisions is to clarify the somewhat vexed question as to whether institutions such as Agency Houses[123] who employ persons on behalf of their principals are also employers, together with their principal, of persons so employed. The answer is that as long as they are acting as agents only there is no contract of employment between them and the workmen and therefore, no employer and employee relationship exists between them. To be liable, such agents must themselves personally enter into a contract of employment. This common law position has been extended by the Act to bind the principal also even in cases where the agent has made himself personally liable on a contract of employment with the workman where the principal also has a contract of service with the workman. The liability of an agent in the circumstances that arose in these cases would often depend on each factual situation. For instance, it would be a question of fact in each case whether the agent himself contracted to be bound. It should be noted that the case of foreign principals probably stands on a different footing as, in such cases, less evidence may be required to establish that the agent has personally bound himself.[124] Halsbury[125] states the principle in such cases as follows :-

> "Where a contract is made by an agent on behalf of a foreign principal there is no presumption, as was formerly considered the case, that the agent necessarily incurs personal liability and has no authority to establish privity of contract between the principal and the third party. Where the intention of the parties is not clear or the terms of the contract are in dispute, the fact that the principal is a foreigner is a factor to be taken into account in determining whether in the circumstances the contract is enforceable by or against the foreign principal or whether the agent is personally liable."

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[122] (1974) 77 N.L.R. at 84-5 per Tennekoon, J.

[123] This is the term that was used to describe those institutions in the private sector which managed the plantations on behalf of their principals prior to the nationalization of the plantation.

[124] See ***Teheran-Europe Co. Ltd., v S. T. Belton (Tractors) Ltd*** (1968) All E.R. 886-(CA).

[125] Laws of England 4th ed. vol. 1 para 825.

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57. An equally important consequence of these two decisions is the insistence of Their Lordships that the crucial test is whether there is a contract of service, express or implied, between the workman and the agent. The decisions therefore support the view expressed in ***The Legal Framework of Industrial Relations in Ceylon***[126] that the common law almost completely governs the question whether the relationship of employer and employee exists between two persons. The extent to which status rather than contract governs the question of employment is relevant largely at the point of time when a contract of employment is terminated and in those exceptional situations where the legislature has created a relationship of master and servant between persons who have in common law no contract of service. Other than in the aforementioned exceptional situations, our courts have rejected the notion that a status of employment could be created otherwise than by a contract of employment, express or implied.

58. The argument on behalf of the workman in ***Carson Cumberbatch & Co. Ltd., v Nandasena***[127] was that the definition of 'employer' covers an agent who employs a workman on behalf of another. This argument receives support from the third limb of the definition referred to by Tennekoon J., which would otherwise be superfluous. If an agent has made himself personally liable by himself entering into a contract of service with a workman, the first limb of the definition is wide enough to make him an employer even if the third limb was absent from the definition. Further, the type of agent in the two cases under consideration may often satisfy the test of control and supervision. It must be appreciated however, that this argument could lead to improbable consequences. For instance, on this construction the manager of a business or a department of a business undertaking may be held to be as much an employer for the purposes of industrial disputes as the ultimate authority who controls the workman, even though there is no contract of service between the manager and the workman and the manager is powerless in relation to such industrial disputes. The necessity or otherwise for there to be a contract of service between the employer and another person to come within the ambit of the definition will be considered again when analyzing the definition of a 'workman'.

59. In ***Colombo Paints Ltd. v de Mel***[128] the term "employer" in the Termination of Employment of Workmen (Special Provisions) Act, (1971), which is the same as the definition in the Industrial Disputes Act, arose for

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[126] op. cit. at p. 607.

[127] (1974) 77 N.L.R. 73 (CA).

[128] (1973) 76 N.L.R. 381.

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interpretation. In this case when a branch of the company was closed down a workman employed in that branch continued to be employed on the same terms and conditions in a new company. His services were not terminated by the old company and both companies operated under the same centralized administration with regard to personnel management, accounting and salaries. When the new company terminated the workman's services the Commissioner of Labour ordered the original company to reinstate the workman. The Supreme Court held that the Commissioner's order was correct as the original company came within the definition of 'employer". The new company was held to have employed the workman on behalf of the original company. This decision was affirmed by the Court of Appeal.[129]

60. Certain other aspects of the concept of an employer in the Industrial Disputes Act remain to be considered. In ***Dias v Rajaratnam***[130] an order made by a labour tribunal against "M. C. Dias, Managing Director, The Dias Mechanical Engineering Works Ltd." was quashed by the Supreme Court on the ground that the order would have the effect of making M.C. Dias personally liable though he was not the employer.

61. The Act provides[131] that notwithstanding that any person has ceased to be an employer –

(a) an application to a labour tribunal for relief or redress from such person may be made in respect of any period during which the workman was employed by such person, and proceedings thereon taken by a labour tribunal;

(b) if such application was made while such person was such employer, proceedings thereon may be commenced or continued and concluded by the labour tribunal, and

(c) the tribunal may order such person to pay to that workman any sum as wages in respect of any period during which that workman was employed by such employer, or as compensation as an alternative to reinstatement of that workman or as a gratuity and such order can be enforced against such person as if he were the employer.

[129] op. cit. at p. 409.

[130] S.C. 197/70, S. C. M. 26.5.72 (unrep.).

[131] s. 31B (6).

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These provisions do not entitle a tribunal to make an order against an employer who has died before the proceedings have commenced[132] or, for that matter, who has died before an order has been made.

62. A mere change in the legal personality of an employer does not always affect the rights of the workman. In ***Luckshimi Theatre Ltd. v The Ceylon Cinema & Film Studio Employees' Union***[133] the employees served under a partnership and thereafter under a limited liability company. The Supreme Court held that the tribunal was entitled to take into account the service of the employees under the partnership in calculating gratuity payable by the limited liability company in the circumstances of this case. The same partners continued as shareholders of the company and the workmen continued in employment on the same terms without any notice that the employers were now a new legal entity. As stated by Rajaratnam, J., :

> "Although in law the employers had a separate legal personality from the partnership, in fact they were presenting themselves as the same employers to the workmen".

63. Where a business is taken over by another employer, the transferee does not, in the absence of an arrangement to the contrary, become the employer of the transferor's employees.[134]

64. The question whether a liquidator stands in the position of an employer in relation to proceedings under the Industrial Disputes Act has arisen in more than one case in ***Hire Purchase Co. Ltd., v Fernando***[135] the Company was in liquidation and the workman made an application to the Labour Tribunal against the employer and liquidator claiming gratuity and other terminal benefits. The Supreme Court held that although he was not the employer the liquidator "has been made a party for the reason that he now represents the Company in all matters and so becomes a necessary party particularly when it comes to the question of the enforcement of any award made by a Labour Tribunal". This decision, it is submitted is incorrect since only an employer as defined in the Act can be made a party to a proceeding before

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[132] ***Arnolda v Gopalan*** (1963) 64 N.L.R. 153. ***Odiris Appuhamy v Umbichy*** (1964) 65 C.L.W. 66 for the corresponding provision in relation to industrial courts and arbitration see s. 47 and ***The Colombo Apothecaries Co. Ltd., v Wijesooriya*** (1968) 70 N.L.R. 481 at 511-12 where Tennekoon, J., pointed out that the section applied where "the dispute under contemplation had arisen prior to the cessation of that relationship".

[133] S.C. 84/71 S. C. M. 29.6.72 (unrep.).

[134] ***Matara Wallaboda Pattu Bahukariya Sewaka Samithiya v Matara Wallaboda Pattu Multi-Purpose Co-operative Society*** S.C.182/68, S. C. M. 17.11.69 (unrep.).

[135] (1980) 79 (ii) N.L.R. 15.

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a Labour Tribunal and the consideration which prompted the Supreme Court to hold that the liquidator could be made a party was irrelevant to the purely legal and jurisdictional issue before it. The correct decision, it is submitted, was reached by the Supreme Court in ***Latiff v Fernando.***[136] An industrial dispute between a union on behalf of its members on the one hand and the Company and its liquidator on the other hand was referred for settlement by arbitration. The Supreme Court held that the liquidator of a company which is being wound up cannot be personally liable for the obligations of the Company and no award under the Industrial Disputes Act can be made against him. An industrial dispute can arise only between an employer on the one hand and his workmen on the other and, since a liquidator is not an employer, he cannot be made a party to a reference of an industrial dispute.

65. Both the above cases also decided, quite correctly, that proceedings under the Industrial Disputes Act can be continued and an order made in relation to a Company which is in liquidation since legal personality continues until it is dissolved. As stated by the Supreme Court in ***Hire Purchase Co. Ltd., v Fernando***[137]:

> "As is well known a company comes into existence as a legal personality on its incorporation and ceases to exist as such on its dissolution. Winding up or liquidation is the process whereby the management of the company's affairs is taken out of its directors' hands. A liquidator is appointed to administer the property of the company. He must apply the assets to the payment of the creditors in their proper order. The point to be remembered is that throughout this process of winding up the company does not cease to exist as a legal entity."

66. It next remains to consider the extent to which the definition of 'workman'[138] in the Industrial Disputes Act enlarges or narrows the common law concept of a workman. The definition of 'workman' in the Act falls into three parts[139]:-

    (1) Any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or

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[136] (1980) 79 (ii) N.L.R. 89.

[137] op. cit. at p.17.

[138] See the text at f.n. 48 ante.

[139] See Tennekoon, J., in ***Colombo Apothecaries Co. Ltd. v Wijesooriya*** (1968) 70 N.L.R. 481, 504.

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labour. Under this part a person need not have actually worked under the employer and it is sufficient if he has entered into a contract of service. But according to Tennekoon, J.,[140] it "postulates a subsisting contract of service".

(2) Any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time. According to Tennekoon J. this part "partially overlaps the first. It deals with persons who belong to a particular class i.e. persons who are ordinarily workers whether or not they are under contracts of service at any particular given time. This part in so far as it catches up a person who has at any given time a contract of service is tautologous, as such a person is already a workman under the first part of the definition. The importance of this part however lies in the fact that it brings within the meaning of the term 'workman' persons who are 'ordinarily' employed under contracts of service but who at any given time are not employed under such contracts of service. Thus we have the word 'workman' catching up within its meaning a person who at any particular time has no contract of service *and no employer.*"[141] The term 'workman' in various parts of the Act is sometimes used in the sense of 'workman' in the first part and the second part has no application at all.

(3) For the purposes of any proceedings under the Act in relation to any industrial dispute, any person whose services have been terminated.[142] According to Tennekoon, J.,[143] this part does not import any new meaning into the definition and merely makes explicit what was before implicit. "The amendment to my mind merely, *ex abundanti cautela,* removed a terminological anomaly of referring to a person no longer in service as a workman in numerous provisions of the Act dealing with proceedings and powers of various authorities and tribunals in relation to an industrial dispute. If the amendment has done anything it has finally closed the door to any suggestion or contention that a person whose contract of service has been terminated is still a workman for the purpose of deciding the question whether an industrial dispute connected with the termination of services exists between an employer and a 'workman'."[144]

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[140] ibid at 505.

[141] ibid at 505.

[142] This was introduced by amending Act No.62 of 1957.

[143] ***Colombo Apothecaries Co. Ltd v Wijesooriya,*** op. cit. at 510.

[144] ibid at 511.

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Decided cases have taken the view that the definition of a 'workman' read together with the definition of 'employer' in the Industrial Disputes Act covers a person whose relationship with the employer is or has been one of master and servant.[145] Thus the definition does not, according to ***The Times of Ceylon Ltd v The Nidahas Karmika Saha Velanda Sevaka Vurthiya Samithiya,***[146] cover an independent contractor. But both counsel appearing in this case conceded that an independent contractor falls outside the definition,[147] so that the Supreme Court's inquiry was confined to determining whether or not the individual in this case was an independent contractor. In ***The Ceylon Transport Board v Perera***[148] the Supreme Court held that a person employed on a monthly allowance as a caretaker of an omnibus stand was not a workman within the meaning of that term in the Act as he had a contract for services and not a contract of service with the employer. In reaching this conclusion the court took into account the fact that the 'employee' was entitled to fulfil his obligations under the contract either himself or through a third party and hence, applying the control test, it could hardly be maintained that the employer had any kind of control over the work performed by him. However, the court, as in the previous case, proceeded on the footing that the Act excludes an independent contractor and the inquiry was confined to the issue whether he was one or not. In ***Carson Cumberbatch & Co. Ltd v Nandasena***[149] Tennekoon, J., reached the conclusion that "a common law contract of service must subsist between the employer and the workman before the two persons can be regarded as employer and workman"[150] after an analysis of the definitions of employer and workman and other provisions of the Act.

In ***Perera v Marikkar Bawa Ltd,***[151] the appellant was the Head Cutter of the Respondent Company. He was provided with a cubicle but employed his own workmen and used his own tools. The Company passed on tailoring orders to him and on execution he was paid a commission from the collections for each month. The Company collected the payments from

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[145] ***Colombo Apothecaries Co. Ltd v Wijesooriya,*** op.cit. per Tennekoon J. C.f. also ***Coomasaru v Leechman & Co. Ltd*** S.C. Application 307/72 S. C. M. 20.12.73 (unrep.). ***Carson Cumberbatch & Co. Ltd v Nandasena*** (1974) 77 N.L.R. 73 (CA) The definitions of 'employee' and 'labourer' in other labour statutes were held in ***Ponnamma v Beer Hogg & Sevier Trust*** S.C. 40/69 S. C. M. 22.2.71 (unrep.) to be of little assistance in the interpretation of the term 'workman' in the Industrial Disputes Act.

[146] (1962) 63 N.L.R. 126.

[147] ibid at 128.

[148] S.C. 177/69 S. C. M. 18.7.71 (unrep.).

[149] (1974) 77 N.L.R. 73.

[150] ibid at 84.

[151] (1989) 1 SLR 342

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customers and kept the accounts. The appellant did not sign the attendance register and was not entitled to a bonus like other employees. The Court of Appeal held that the Applicant's work was an integral part of the Respondent's business and he was part and parcel of the organization and he was a workman and an employee within the meaning of the Industrial Disputes Act.

67. In considering the answer to this issue, it is the first limb of the definition of a workman that is relevant i.e. the phrase "any person who has entered into or works under a contract with an employer in any capacity.... whether it is a contract of service or an apprenticeship, or a contract personally to execute any work or labour." It is clear that this definition does not cover only a contract of service, which is expressly referred to in the definition, because it also expressly covers a contract of apprenticeship. Such a contract is not one of service, but is one in terms of which the apprentice agrees to learn a trade or calling.[152] The specific inclusion of a contract of apprenticeship does not imply that, even in the absence of express mention, all other types of 'employment' come within the definition. The case of the apprentice represents a statutory extension of the common law concept of a workman.

68. In support of the view that the definition of a workman in the Act covers contracts other than those of service or apprenticeship are the following features of the definition:

   (1) The phrase "any person who has entered into or works under a contract" could, prima facie, suggest that such contract need not be one of service. But such contract, according to the definition itself, must be with an "employer" as defined and such a person is, as we have seen, a person who has a contract of service with another. Such a contract, according to the definition of an employer, is one in terms of which a person is 'employed'. Hence the phrase "contract" would appear to mean, other than in the case of an apprenticeship contract, one of service.

   (2) The words "in any capacity" would prima facie appear to suggest that such capacity may include, for instance, an agent or contractor. The word "capacity", however, it is submitted, refers to capacity in the sense of manual, clerical, supervisory and executive, and is not descriptive of the nature of the legal relationship which exists between the two persons.

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[152] See ***Parish of Clapham v Pancras*** (1960) 29 L.S.M.C. 141 at 143-4 ***Horan v Hayhoe*** (1904) 1 K.B. 288.

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(3) The word "a contract personally to execute any work or labour" suggests a type of contract other than one of service, and it may well be contended that if it means a contract of service the phrase is superfluous since a contract of service is expressly mentioned in the definition. K. W. Wedderburn,[153] referring to the definition of 'employee' in the Industrial Courts Acts 1919 as a person under a contract with an employer "whether it be a contract of service or apprenticeship or a contract personally to execute any work or labour", thinks that "it appears to include independent contractors". However, the phrase "a contract personally to execute any work or labour" in the English Truck Acts has been interpreted differently and the judicial interpretations of the term are stated by G. H. L. Fridman[154] as follows :

"He must perform such labour under a contract of service or under a contract personally to execute the labour. Hence a person who contracts to get work done and employs others to do the work, is not himself within the Truck Acts, even if he does some of the work himself. The distinction seems to be between a contract for labour and a contract for the results or effect of labour. In this respect it is important to point out that the Truck Acts apply to the payment of wages and wages are the price of labour, not the price of a contract. Hence the Acts will not apply to persons who contract for payment for the result or effect of labour rather than for labour itself. The person who contracts to do work for an employer must be a person absolutely bound by the terms of the contract to work with his own hands in the performance of it. The fact that he may work or will probably work with his own hands in the performance of the contract is insufficient. He will not come within the Acts unless the employer, by the contract of hiring, has a right to require his personal work and labour in return for wages. However, as long as he does contract for labour in return for wages, he will still come within the Acts even if he has assistance from others who work for him."[155] The fact that the phrase requires the work or labour to be executed *personally* precludes the accommodating of, for instance, an independent contractor in the concept. This is not to imply that where a person obtains the assistance of other persons in the performance of his work it ceases to make him a workman. "The broad distinction between a

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[153] *The Worker And the Law* (Penguin, Harmondsworth, 1965) at p.391.

[154] *The Modern Law of Employment* (Stevens, London, 1963) at p. 37.

[155] The fact that the Truck Acts apply to the payment of wages is probably a factor which influenced the interpretation of the phrase.

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workman and an independent contractor lies in this that while the former agrees himself, to work, the latter agrees to get other persons to work. Now a person who agrees himself to work and does so work and is therefore a workman does not cease to be such by reason merely of the fact that he gets other persons to work along with him and that those persons are controlled by him. What determines whether a person is a workman or an independent contractor is whether he has agreed to work personally or not. If he has, then he is a workman and the fact that he takes assistance from other persons would not affect his status."[156] Thus a contract *personally* to execute work or labour is a contract of service.

69. It seems therefore, that the definition of a workman presupposes a contract of service between him and his employer, the only exception being a contract of apprenticeship for the reason that it is expressly included in the definition. To say that social policy dictates that the Act should be so interpreted as to include persons other than workmen in the common law sense may well be met by the argument that, in that event the legislature could well have included other types of service in the definition and the inclusion of a contract of apprenticeship in the definition was superfluous. The Act may then well have stated "whether it is a contract of service or otherwise", instead of "whether it is a contract of service or of apprenticeship."

70. Even if the Industrial Disputes Act defines a 'workman' and 'employer' substantially in the common law sense, there could be an industrial dispute between an employer and a workman in relation to a person who is not a workman.[157] An industrial dispute is defined in the Act[158] as –

> "Any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, *of any person,* and for the purposes of this definition workmen includes a trade union consisting of workmen."

So long as there is a dispute or difference between persons who come within the description of employer and workmen, it may relate to matters

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[156] ***Dharangadhra Chemical Works Ltd. v State of Saurashtra*** 1957 (1) L.L.J. 477 at 483-4 (SC).

[157] *The Legal Framework of Industrial Relations in Ceylon* op. cit. at p. 243-57, especially p.254-57.

[158] s.48.

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connected with the employment or non-employment, etc., of *any person,* who need not be a 'workman' as defined in the Act. The ends of social policy or social justice would, in the opinion of the legislature, be sufficiently met by enabling a dispute over a person who is not a workman to be raised, provided the dispute is between a workman or workmen and an employer or employers. Since the object of the Act is the maintenance and promotion of industrial peace,[159] it is reasonable to assume that disputes which threaten industrial peace would hardly be between persons who do not have or have never had an employer-employee relationship, but would be between persons who have such a relationship, even though the dispute may be in relation to one who is not a workman. It is only in this limited way that the Act covers non-workmen in the common law sense.

71. It is equally clear that we have not heard the last of the controversy as to who precisely is covered by the Act under the definitions of 'employer' and 'workman'. It is clear that the problem area lies not so much in the definition of a workman but in the definition of an employer. The phrase "any person who on behalf of any other person employs any workman" may well be held, in the future, to cover agents, notwithstanding ***Carson Cumberbatch & Co. Ltd., v Nandasena,***[160] even though there is no contract of service in the common law sense between the agent and the workman. In many instances agents in fact exercise control over the workmen, though they purport to do so on behalf of their principals, and it may well be considered equitable that such persons should be deemed to be employers as well, together with their principals, irrespective of the absence or presence of a contract of service between the agent and the workman. In ***Boyd Moss v George Steuart & Co. Ltd.***[161] the workman was a planter on various estates from 1948 to 1972 when he resigned. In an application to a Labour Tribunal for gratuity against three respondents, George Steuart & Co. Ltd., were held by the Tribunal not to be the employer of the workman, but the second and third respondents were held liable only from 1964 to 1972. In an appeal by the workman to the Supreme Court it was held that George Steuart & Co. Ltd., were only managing agents and not employers as all their dealings with the workman had been on behalf of the owners of the estates, conveying decisions of the owners and not of George Steuart & Co. Ltd. In his application for membership in the provident fund the workman had named the employer as the companies which owned the estates and George Steuart & Co. Ltd., was described by him as agents.

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[159] ***Colombo Apothecaries Co. Ltd v Wijesooriya*** (1968) 70 N.L.R. 481 at 507. ***The United Engineering Workers' Union v Devanayagam*** (1967) 69 N.L.R. 289 (PC).

[160] (1974) 77 N.L.R. 73.

[161] S.C. 119/74 S. C. M. 24. 3.76 (unrep.).

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However, referring to ***Carson Cumberbatch & Co. Ltd., v Nandasena***[162] Their Lordships observed :

> "That case however did not decide that in every case an agent is to be regarded as not being the employer simply because he is an agent. There may be cases in which the agent himself appoints, transfers and deals with the employees without reference to the principal. In such a case he would be the employer within the meaning of the term as used in the Industrial Disputes Act."[163]

72. Similarly, a person "on whose behalf any other person employs any workman" may, in appropriate circumstances, be deemed to include a person who employs a contractor who in turn employs labour for the performance of the contract. Much would depend on the facts of each case. For instance, where a person enters into a contract with another to construct a building and that other (the contractor) employs labour for the purpose, it may not be difficult to establish that the contractor could hardly be described as a person who has employed the workman on behalf of the 'principal' since the employment of the workmen by the contractor is on his own behalf and not on behalf of the person with whom the contractor has contracted to build. But, on the other hand, one may have situations where a contractor regularly brings labour to the employer's workplace to perform work which the employer's admitted workmen perform and the employer directs or may direct, through the contractor, how the work is to be performed and even call upon the contractor not to employ particular persons from among the workmen. In such cases the relationship of 'employer' and independent contractor may well be a 'fiction', the contractor occupying a position similar to that of a foreman or manager through whom the employer exercises control, so that the 'employer' may be held to fall within the description of a person "on whose behalf any other person employs". In that event contracts of service may be held to exist between the principal and the contractor's workmen. In such situations it may well be contended that a dispute between the employer and the contractors' workmen constitutes a threat to industrial peace and it would be within the objects contemplated by the Industrial Disputes Act to treat such workmen as workmen of the principal, without the necessity for the employer's admitted workmen to espouse their cause.

73. Some of the problems surrounding the scope of the Act in relation to employers and workmen arose in ***Ceylon Workers' Congress v Aislaby***

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[162] op.cit

[163] ***Boyd Moss v George Steuart & Co. Ltd.*** op.cit.

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Estates Ltd.[164] In this case the weeding of the estate had been performed by the workmen on check roll account as well as by workmen entering into weeding contracts with the estate in respect of which they were paid a separate amount per acre. The weeding contractors were not required to perform the weeding themselves and they were at liberty to employ any other persons, such as members of their family, for the purpose, which they did. The estate terminated the weeding contracts and resolved to have the weeding performed by the workmen on check roll account, which would have involved a considerable saving to the estate. On a reference of the dispute to arbitration on the issue whether the company's action was justified, the company contended that the weeding contractors were independent contractors and therefore not workmen within the meaning of that term in the Industrial Disputes Act. In support of this claim the company relied on the absence of control by the estate in regard to the manner in which the work was to be performed.

The union argued that there being a dispute or difference between an employer and a trade union of workmen, it was sufficient that the dispute was connected with the employment or non-employment, or with the terms of employment, or with the conditions of labour of any person and not of any workman. Since the termination of the weeding contracts and the non-employment of the weeding contractors involved the non-employment of "any person", it was an industrial dispute. Further, since the admitted workmen on the estate would not be called upon to perform the work of the weeding contractors the dispute is connected with the "employment" of the admitted workmen on the estate. While not conceding that the term "workman" in the Act excludes an independent contractor, in any event for the purposes of an industrial dispute the case of such a contractor falls within the ambit of an industrial dispute if the parties to the dispute are an employer and a trade union on behalf of workmen who have a real and substantial interest in the dispute. The Union further argued that in any event weeding contractors come within the definition of a "workman" in certain other legislative enactments such as the Wages Boards Ordinance.

The arbitrator held that the weeding contractors were not independent contractors but were workmen within the meaning of that term in the Industrial Disputes Act. No reasons were given by the arbitrator for these conclusions. He also held that an industrial dispute within the meaning of the Act existed in the present case. The award does not really assist in determining whether an independent contractor comes within the definition of a workman in the Industrial Disputes Act for the reason that the

[164] C.G.G. 14,901 of 10th April 1970.

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arbitrator concluded that weeding contractors were not independent contractors but workmen.

74. Finally, there are two instances in the Industrial Disputes Act where the term 'employer' has been given an extended meaning *for a certain defined purpose,* implying thereby that such meaning would not otherwise attach to the term as defined in s.48. The first example is s.43B which states :

> "Where the immediate employer of any workman is himself in the employment of some other person, and that workman is employed to do any work in the course of and for the purpose of the trade, business, occupation or undertaking of that other person, that other person shall, for the purposes of sub-section (1) of section 40, be deemed to be the employer of that workman jointly with his immediate employer."

Section 40 deals with the various offences under the Act. Section 43B is in terms similar to s.45 of the Wages Boards Ordinance,[165] but operates only for the purposes of the offences in s.40 of the Industrial Disputes Act. The second example is s.33 of the Industrial Disputes Act. Section 33(1) prescribes the matters that may be contained in the award of an arbitrator or industrial court or order of a labour tribunal. In the case of a personal secretary, personal clerk, personal attendant or chauffeur to the employer, or of a domestic servant, s. 33(3) requires the award or order to contain a decision as to the payment of compensation as an alternative to reinstatement. Section 33(4) states that for the purposes of s.33(3) where the employer is a company, the references in the sub-section to the employer "shall be deemed to be references to the person (however designated) who is responsible for the general management of the business of the Company." Here again the term 'employ' has been given a meaning for a limited purpose which it would not otherwise have borne.

Dual Capacity – Directors and Contracts of Employment

75. A person may in one capacity be a workman and in another not be a workman. Thus a co-owner of land may be a workman within the meaning of that term in the Industrial Disputes Act where the other co-owners employ him to look after the common property.[166] The principle that a person may have a dual capacity – one as a workman and another as a member of, in this instance, the employer society – has been accepted in Sri Lanka.[167]

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[165] See the text at f.n. 81.

[166] ***Gunawardena v Gunawardene*** (1973) 76 N.L.R. 57.

[167] ***The Colombo Manning Market Co-operative Labour Society Ltd. v Alexander*** S.C. 181/70 S. C. M. 18.9.73 (unrep.).

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76. The classic case in point is a director of a company who, in addition to being a director, may have a contract of service with the Company as an executive. The relationship between a company and its director is not one of master and servant. Thus Palmer[168] says :

> "Directors are not, as such, employees of the Company or employed by the Company; nor are they servants of the Company, or members of its 'staff'.. A director can, however, hold a salaried employment or an office in addition to that of his directorship which may, for these purposes, make him an employee or servant, and in such a case he would enjoy any rights given to employees, as such: but his directorship and his rights through that directorship are quite separate from his rights as employee......"

Similarly Charlesworth says :[169]

> "As a company has no physical but only a legal existence, the management of its affairs must be entrusted to human instruments who are called 'directors'. The exact position of directors with regard to the company is rather hard to define. They are not servants of the company, but are rather in the position of managers or 'managing partners'. In some respects they may be said to be (1) trustees, and (2) agents on behalf of the company."

It is clear, therefore, that a director is not, *qua* director, a workman within the meaning of, for instance, the Industrial Disputes Act, so that a dispute between a company and its director which relates to his capacity as a director cannot be an industrial dispute nor can such person make an application to a labour tribunal in respect of a matter affecting his capacity as a director only.

77. It is equally well settled law that a person can have two distinct, separate and divisible capacities, one as a director and the other as a servant, of the Company. Such a person would enjoy one set of rights and duties in relation to and by virtue of one capacity and another set of rights and duties in relation to and by virtue of the other. This principle has been recognized

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[168] *Company Law* (21st ed. Stevens, London, 1968) at pp.521-2. See also ***Anderson v James Sutherland (Peter Read) Ltd*** 1941 Scottish Cases (HL) per Lord Carmont. In ***Re Lee Behrens & Co. Ltd.*** (1932) 2 Ch.46 at 53: "A director is not a servant of the Company: per Bowen L.J. in ***Hutton v West Cork Ry. Co.*** 23 Ch. D. 672; nor is any managing or other director a person in the employment of the Company: ***Normandy v Ind. Coope & Co.*** (1908) 1 Ch. 84.

[169] Company Law (7th ed. Stevens, London, 1960) at pp. 159-60. At f.n. 34 on page 159 he says : "A director may hold some other position with the Company e.g. he may also be the Secretary, in which case he will be a servant of the Company as regards that other position."

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in several cases.[170] In ***Anderson v James Sutherland (Peter Read) Ltd.***[171] the question for decision was whether a managing director was employed by the company in any capacity. He claimed that he was not employed by the company and that his position was an office or function of a director i.e. that he was an ordinary director entrusted with some special powers. Lord Normand stated :

> "In my opinion, therefore, the managing director has two functions and two capacities. *Qua* managing director he is a party to a contract with the company, and this contract is a contract of employment; more specifically I am of opinion that it is a contract of service and not a contract for services. There is nothing anomalous in this, indeed it is a common place of law that the same individual may have two or more capacities, each including special rights and duties in relation to the same thing or matter or in relation to the same persons."

Lord Carmont stated :

> "...... a director can be regarded as having not only the *persona* of director but also the *persona* of employee is plain from the case of ***Re Beeton & Co.*** (1913) (2) Ch.279....... in that case Neville J. said (p. 285): 'It has been argued with some force that *qua* director she certainly cannot be a servant of the Company. Authority to that effect has been cited, and it is a conclusion which is fairly obvious. But it seems to me that in the present case the constitution of the Company allows of the employment of directors for special purposes and the fact that she is a director does not prevent her also being a servant within the meaning of the Act'."

Palmer[172] comments :

> "It follows from this case that in modern company practice a managing director, in the great majority of cases, combines the position of director and of employee and that ...... the validity of his appointment and the scope of his duties have to be gathered from the provisions of the articles and the terms of his contract with the company."

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[170] See *Palmer Company Law,* op.cit ***Anderson v James Sutherland (Peter Read) Ltd.*** op.cit. ***Harold Holdsworth & Co. Ltd v Caddies*** (1955) 1 All E.R. 725 (HL). ***Lee v Lee's Air Farming Ltd.*** (1960) 3 All E.R. 420 (PC).

[171] op.cit.

[172] Company Law, op. cit. at p. 559.

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In ***Harold Holdsworth & Co. Ltd. v Caddies***[173] Viscount Kilmuir said :

> "I cite with approval the summary in 6 Halsbury's Laws of England (3rd Ed.) p. 297 para 601, where it is stated :
>
> > "A managing director may either be merely a director with additional functions and additional remuneration or else he may be a person holding two distinct positions, that of a director and that of a manager."

78. The distinction is nowhere better illustrated than in the decision of the Privy Council in ***Lee v Lee's Air Farming Ltd.***[174] In this case the deceased was sole governing director and principal shareholder of a company. He entered into a contract with the Company as its sole pilot and died while flying an aeroplane. The question was whether he was a workman within the meaning of the new Zealand Workers' Compensation Act which defined a worker as "any person who has entered into or works under a contract of service ...... with an employer, whether by way of manual labour, clerical work or otherwise, and whether remunerated by wages, salary or otherwise." It was considered material[175] to determine whether at the time of death the deceased was acting in his capacity as a servant (i.e. as pilot) or as sole governing director. It was held that he was acting as a servant and was thus a workman for the purposes of the Act. Lord Morris stated[176] :

> "It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company."

79. Where a person enjoys such dual capacity, a dispute between him and the company would be an industrial dispute only if it relates to his capacity as a workman. An industrial dispute must be connected with the employment, non-employment, terms of employment or conditions of labour of any person and it follows that the connection with the terms of employment can only be with the terms of a contract of service. The terms of an award become implied terms in the contracts of employment between the employers and workmen bound by the award and an award on a dispute

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[173] op. cit. at 729. See also ***Collettes Ltd v Commissioner of Labour and Others*** (1989) 2 SRI L.R.6.

[174] op. cit.

[175] See op. cit. at 426.

[176] op. cit. 425. "In their Lordships' view, it is a logical consequence of the decision in ***Saloman v Salomon & Co.*** 1897 A.C. 22 that one person may function in dual capacities."

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relating to that capacity of a person which does not come within the definition of a workman cannot logically be incorporated in the contract of service. In relation to an application to a labour tribunal under s.31B(1) of the Industrial Disputes Act, it is clear that the words "termination of services" can only refer to that capacity of a person which brings him within the definition of a servant. That a statute can cover one aspect only of a person's capacity is clear from a careful analysis of the judgement of their Lordships in ***Lee v Lee's Air Farming Ltd.***[177] In that case the decision would have been different if the deceased had flown the aeroplane as sole governing director; otherwise there was no necessity at all to consider whether he flew the aeroplane as sole governing director or as an employee who had a contract of service with the Company. Thus a person who is a workman in one capacity or for some purposes is not a workman within the meaning of the Act unless he is a workman for the purposes of the dispute.

80. The fact that a Director enjoys a dual capacity – one qua Director and another qua executive – thus bringing him within the meaning of a workman who has a contract of service was recognized in Sri Lanka in ***The Ceylon Electricity Board v de Abrew***[178] and ***Ceylon Brake & Clutch Linnings (Private) Ltd v de Mel.***[179]

Present Legal Tendencies

81. The common law concept of master and servant is still of substantial importance. For instance, it is still the common law tests that are, by and large, applied to determine the existence or otherwise of an employer-employee relationship. For reasons we have examined those tests have proved inadequate, but no self-sufficient alternative has yet been formulated, so that we are compelled to resort to a combination of common law tests to determine the issue. But since these tests were formulated in a context which has undergone some change, the legislature has, for specific purposes and in its task of dispensing social justice, extended the concepts of employer and employee to include persons who in strict common law would have no relationship of master and servant. Therefore, there is a need to be cautious in assuming that when the legislature uses such terms an 'employer', 'workman' and 'employed', it always does so in a strictly common law sense.

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[177] op. cit.

[178] (1976) 78 N.L.R. 79 at 102-104.

[179] S.C. Application 184/75 S. C. M. 27.3.78 (unrep.). Also ***Brakes and Clutch Linnings (Pvt) Ltd. v W. L. P. de Mel and two Others*** S.C. Application No. 184/85 – S. C. M. 27.7.78. ***Walker Sons & Co. (U.K.) Ltd v W. P. Gunathilake*** S.C. Application No.365/76.

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82. The common law concepts are also important in distinguishing the employer and employee relationship from other relationships, unless the legislature has in specific instances removed such distinctions. The reason for the need to distinguish the employer-employee relationship from other relationships such as agency, independent contractors and partners are many. First, certain rights and duties are implied into a contract of service but not into other contracts e.g. the employer's duty of care to a servant is not owed to an agent or independent contractor. Secondly, there is much social legislation which covers the master and servant relationship, such as wages and hours of work, but does not touch other relationships such as agency. Thirdly, relationships other than that of master and servant are governed by different legal principles.

83. The concept of employer and employee includes, among other things, the reciprocal rights and duties as well as the important question of the termination of the relationship. The common law concept, though helpful on the question of termination, is by no means determinative. For instance, the common law grounds on which an employer may terminate a workman's services, though still relevant have been tempered by considerations of social justice. Special tribunals have been created with the power given to them of awarding the reinstatement of a workman, thus cutting across the common law concept of no reinstatement because the contract is one for personal service. The 'personal' element, though relevant at a time when relationships were largely domestic, is less relevant today when the contract is often with an 'impersonal' body like a company. But the Industrial Disputes Act[180] does preserve the spirit of the common law in those areas where the service is purely personal by requiring a court to make an order as to the payment of compensation as an alternative to reinstatement where the employment is in the capacity of personal secretary, personal clerk, personal attendant or chauffeur to the employer or of a domestic servant. Other elements of the concept such as the right to wages as opposed to the right to work may in the future undergo some change.

84. One element of the concept of employer and employee which has undergone considerable change is the notion that the relationship is a purely contractual one – that is, that the relationship of master and servant is created by contract, its content is governed by the terms of the contract (as well as by implied terms) and it may be terminated in terms of the contract. As regards the terms and conditions of the contract, it is commonplace that they are more often than not superimposed on the

[180] s.33 (3).

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contract by legislative provisions such as those which prescribe minimum wages and hours of work. In the area of the termination of the contract, reliance on the contractual provisions alone is today hardly sufficient and in Sri Lanka at least, a termination must be justified as being just and equitable. Elsewhere, as in Britain, statutes have introduced the concept of an unfair dismissal. Hence to a large extent employment today is governed by status rather than by contract.[181] In using such jurisprudential terms such as status one must be careful not to misapply them.[182] Thus it has been pointed out[183] :

> "The second criticism is based on the apparent conflict between the insistence on agreement as the legal basis of the obligations to work and to pay wages, and the growing number of statutes which lay duties on the parties (usually designed to protect the worker) which cannot validly be set aside by agreement. This led Dicey in a statement often repeated today, to say that 'the rights of workmen ..... have become a matter not of contract but of status'. There is a difference between Dicey and the modern proponents of the concept of status. He deduced that the statutory rights conferred on workmen were, legally speaking, a regression, since in Maine's famous words, 'the movement of the progressive societies has hitherto been a movement from status to contract.' The modern advocates of status deduce from this concept a means to enforce extended rights for the worker in his job and to develop new remedies such as reinstatement. Both deductions rest upon a misuse of the term 'status' by which Maine meant 'the sum total of the powers and disabilities which society confers or imposes on individuals irrespective of their own volition'. Apart from minority and mental disorder, the only important modern example of status of this kind is 'non-partiality'. Special restrictions are imposed on the freedom of movement and of work of those United Kingdom and Commonwealth citizens and aliens who do not have the right of abode in the United Kingdom. This is quite different from the kind of restrictions on freedom of contract imposed by other statutes which are said to confer 'status' on certain workers. These statutes regulate the legal relationship between the parties, but the existence and the termination of that relationship still depends, in the last resort, on the volition of the

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[181] Since this idea has been developed in detail in *The Legal Framework of Industrial Relation in Ceylon* op. cit., at ch.37, it will not be discussed here.

[182] See O. Kahn-Freund "A note on Status and Contract in British Labour Law" in (1967) vol. 30 M.L.R. 635, *The Legal Framework of Industrial Relations in Ceylon*, op.cit. at p. 613-14.

[183] Encyclopaedia of Labour Relations Law ed. by B. A. Hepple & Paul O' Higgins (Sweet & Maxwell, London, 1972) vol. 1 para 1-010.

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parties. So even a dock worker who, by registering under a statutory scheme, loses his freedom to contract or not contract (in the sense that he must accept an offer of employment by a registered employer) still retains the ultimate freedom whether to register or not. In this sense his 'status' which the courts will protect, derives not from a characteristic imposed on him by law but from his own volition in registering."

85. In ***Indian Institute of Technology v Mangat Singh***[184] the court said :

> "Employment is originally and still basically a contract between the employer and the employee. This bilateral relationship is, however, often found to be superseded partly or wholly by status which is contrasted with contract. Status is determined extrinsically by law and not by agreement between parties. Status may supersede contract by affecting either of the two parties to it, namely, the master or the servant."[185]

The court concluded that employment in a particular case would remain contractual if the volition of the parties is left unfettered but would be governed by status if the volition of the parties has been taken away by statutory provision.

86. To say that even the termination of a contract of employment today still depends on the volition of the parties is misleading. It is true that normally either party to a contract may terminate it of his own free will. But this is not always so. The Termination of Employment of Workmen (Special Provisions) Act 1971 renders a non-disciplinary termination without the employee's prior written consent or the prior written approval of the Commissioner of Labour, illegal and null and void. Such terminations are, therefore, no longer within the volition of the master. Even in the area of dismissals for misconduct it is unrealistic to claim that termination depends on the volition of the parties merely because the employer has a *legal* right to dismiss, since such a dismissal will be reversed by a third party with power to do so unless it can be justified on grounds other than the legal (contractual) right to do so. In essence, the difference between wrongful dismissal as known to the common law and unfair or unjustified dismissal as developed by labour law is that the law of unfair dismissal "in effect confers on the employee a quasi-property in his employment, whereas at common law, provided proper notice is given, an employee has no right to

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[184] 1974 (2) L.L.J. 191 (Del.).

[185] ibid. at p. 194.

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retain his employment or to be compensated if he is dismissed."[186] When using the term 'status' in relation to employment it does not bear the meaning Maine attributed to it and indeed, there is no reason why that should be the only meaning the term is capable of bearing.

87. In the final analysis it is difficult, if not impossible, to prescribe any objective tests by reference to which a master and servant relationship can be distinguished from other relationships. We are not dealing today purely with the common law concept of that relationship since statutes have brought within the meaning of 'employer' and 'employee' persons who in common law would not be master and servant. Therefore, any attempt to prescribe objective criteria is bound to fail and the traditional notions should be used as guides rather than fetters where statutory definitions are involved.

88. If, however, the present state of the law does not enable us to devise a satisfactory test by reference to which we could identify an 'employer' and 'employee' relationship, it is possible that sometime in the future labour law, moved by considerations of social and other developments, may come to regard any person who sells his services to be an employee and any person who buys such services to be an employer. To put it in another way, if the law as it stands today does not enable us to say that particular features distinguish an employer and employee from others, conceptually the only valid test seems to be that any person who in fact lends his services or labour for reward is an employee. The case of a person who purchases another's services or labour, must, however be distinguished from that of a person who purchases an article, the production of which may involve labour. In the latter case the contract is for the purchase of the article and not for the purchase of labour or services and cannot conceptually fall within the ambit of the notion of 'employment'. If the law should develop in this fashion, then for the purposes of coming within the meaning of an employee in labour law it would matter little whether the person selling his services would in common law have been described as an independent contractor or agent etc., thus removing the distinction between a contract of service and a contract for services. On this view that notions such as 'employed' and 'employment' simply mean a buying and selling of services or labour and do not involve the element of 'control'[187] the courts in such cases as ***Carson Cumberbatch & Co. Ltd v Nandasena***[188] would have reached the opposite conclusion and the definitions of 'employer' and

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[186] ***Treganowan v Robert Knee & Co. Ltd.,*** (1975) I.C.R. 405 at 411B.

[187] The control test being unrealistic in an age where a workman's skill often precludes the possibility of control.

[188] (1974) 77 N.L.R. 73.

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'workman' in the Industrial Disputes Act, would cover independent contractors and agents on the one hand and their principals on the other so long as the arrangement is for the selling of labour or services and not for the sale of goods. Conceptually, at least, there is no other explanation for the notion of employment because all the tests we have so far examined fail when applied to the various arrangements or relationships which exist in modern society where personal service is the exception rather than the rule. Statutory extensions of the common law meaning of 'employment' suggest developments far beyond what the common law is capable of accommodating.

89. Even the English common law is gradually moving away from the emphasis of the earlier common law theories which seek to identify a contract of employment by reference to control and appears to be recognizing the realities of the employment relationship. New theories, or at least refinements of pre-existing ones, appear to be emerging. These trends are evident from ***Market Investigations Ltd., v Minister of Social Security***[189] which deserves close analysis for this reason alone. In this case a company engaged in market research employed several persons as interviewers for short periods of time. Mrs. I. was so engaged on several occasions on an agreement whereby she undertook, in consideration for a fixed remuneration, to provide her own work and skill. The company was entitled to 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. She could be required to attend the company's office for instructions or might receive them from a supervisor. During the period specified for completion of the survey she could work when she wanted, could undertake similar work for other organisations and could not be moved from the area in which she had agreed to work. There was no provision for holidays, time off or sick pay. It was held that while working under the several agreements with the Company Mrs. I. was employed under a series of contracts of service and was, therefore, in the class of "employed persons" and was employed in "insurable employment" within the meaning of the National Insurance Act (1965) and National Insurance (Industrial Injuries) Act (1965). The court thought that the extent and degree of control exercised by the company were consistent with a contract of service. Since it was not shown that Mrs. I. was in business on her own account, the nature and provisions of the contracts as a whole were consistent, rather than inconsistent, with their being contracts of service. The company's position was that Mrs. I. was employed on a series of contracts for services.

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[189] (1968) 3 All E.R. 732.

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90. Having referred to the developments consequent upon the inadequacies of the control test to identify a contract of service, Cooke, J., referred[190] to the American case of ***U.S. v Silk***[191] where, in determining whether certain employees were 'employees' within the meaning of a statute, the Supreme Court decided that the test to be applied was not "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". Cooke, J.,[192] suggested, on the basis of the American case and certain English authorities,[193] 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 the question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service."

91. No exhaustive list, he said, of the considerations relevant in determining this question can be given. He thought, however, that the following are some of the factors to be considered in arriving at a determination as to whether or not a person is in business on his own account :

> "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 application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."[194]

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[190] At 737.

[191] (1946) 331 U.S. 704.

[192] (1968) 3 All E. R. at 737. ***Market Investigations Ltd v Minister of Social Security*** op. cit., at p. 737.

[193] Lord Wright in ***Montreal Locomotive Works Ltd v Montreal & A.G. for Canada*** (1947) 1 D.L.R. at 169 (Denning L.J. in ***Bank voor Handel en Scheepvaart N.V. v Slatford*** (1952) 2 All E.R. 956 at 971.

[194] ***Market Investigations Ltd. v Minister of Social Security,*** op. cit., at p. 738.

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92. In considering whether Mrs. I. could be said to be in business on her own account, Cooke, J., concluded in the negative despite the fact that she was free to work as an interviewer for others and she was required to utilize her own skill and personality within the limits of her instructions.[195] These factors were thought to be not inconsistent with a contract of service. "Mrs. I. did not provide her own tools or risk her own capital, nor did her opportunity of profit depend in any significant degree on the way she managed her work."[196]

93. Cooke, J.'s decision was applied in ***Global Plant Ltd v Secretary of State for Health & Social Security***[197] to drivers employed by a company for earth moving machines hired out by the company to contractors. The drivers reported to the contractor's site and the latter's foreman or agent gave the necessary instructions to the drivers. Subsequently, the drivers informed the Company that they preferred to be self employed as sub-contractors. This was agreed to by the company under a written agreement, some features of which were consistent with a contract of service and others with a contract for services. Under the new arrangement there was no obligation on the drivers to work at all; there was only an agreement that if and when they work they will be remunerated on a certain basis.[198] Referring to the factors enumerated by Cooke J., the court pointed out that the drivers, far from providing their own equipment, were at all times using the company's machinery.[199] The degree of financial risk and of responsibility for investment and management was nil. As regards Cooke, J.'s factor of financial risk, Lord Widgery, C. J., said:[200]

> "What I think Cooke, J., and other judges who have applied the same kind of test in the past had in mind was that if a man agrees to perform an operation for a fixed sum and thus stands to lose if the work is delayed, and to profit if it is done quickly, that is the man who on the face of it appears to be an independent contractor working under a contract for services."

94. Cooke, J.'s test is an extension of the tests enumerated by Lord Wright and Lord Denning.[201] It may even be said that the test is no more than a

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[195] ibid at 740.

[196] ibid.

[197] (1971) 3 W.L.R. 269.

[198] The fact that control was exercised by the contractor's foreman and not by the Company was held to be immaterial – per Lord Widgery, C.J. at 279.

[199] At 279.

[200] ibid.

[201] See cases cited in f.n. 59.

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refinement of Lord Denning's integration test. In fact, the central idea in Cooke, J.'s test is traceable directly to Lord Wright's observation that "it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."[202]

95. The principles enunciated by Cooke, J., in ***Market Investigations Ltd v Minister of Social Security***[203] were also applied in ***Beloff v Pressdram Ltd.,***[204] where the court observed :

> "It thus appears, and rightly in my respectful view, that, the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service. Control is just one of many factors whose influence varies according to circumstances. The test which emerges from the authorities seems to me, as Denning, L.J., said,[205] whether on the one hand the employee is employed as part of the business and his work is an integral part of the business, or whether his work is not integrated in the business but is only accessory to it, or as Cooke, J., expressed it, the work is done by him in business on his own account."[206]

96. The test enunciated by Cooke, J., namely whether a person is in business on his own account or not, does not wholly exclude the element of control. In determining whether a person is in business on his own account the questions to be asked are: what is the degree of control? Does he have an opportunity of making a profit? Does he utilize his own tools and resources? The greater the degree of control, the greater the opportunity of making a profit and the greater the utilization of his own resources, the less likely is the contract one of service. Thus control is one of many factors, but in Cooke, J.'s test there is no over-emphasis on the element of control. His test is clearly based on economic reality and therefore may be said to be appropriate to employment situations in the modern business context,

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[202] ***Montreal Locomotive Works Ltd v Montreal A. G. for Canada*** (1947) 1 D.L.R. 161 at 169.

[203] (1968) 3 All E. R. 732.

[204] (1973) 1 All E.R. 241 at 250. They were also applied in ***Fall (Inspector of Taxes) v. Hitchen*** (1973) 1 All E. R. 368 at 373.

[205] The reference is to the integration test enunciated by him in ***Stevenson Jordan & Harrison Ltd. v Macdonald & Evans*** (1952) 1 T.L.R. at 111.

[206] (1973) 1 All E.R. at 250. It would be noted that the court appears to equate Denning, L.J.'s integration test with Cooke's principle. More probably Cooke, J's analysis is a slight extension of the integration test.

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unlike the control test which is more appropriate to domestic and menial relationships. Cooke, J.'s test constitutes a more realistic distinction between a contract under which a person merely sells his labour and one under which the prime subject of exchange is not labour but, for example, his own business resources. On this basis many arrangements which under the older common law would have been described as contracts for services assume the character of contracts of service.

97. The recent movement of the common law in identifying a contract of service has been recognized by our Supreme Court in several cases. In ***de Silva v The Associated Newspapers of Ceylon Ltd.***[207] the 'employee' was employed as a Group Correspondent in Kandy from 1958 and as a District Correspondent from 1969 to 1974. In an application by him to the Labour Tribunal claiming relief in respect of an alleged wrongful termination of his services the Company claimed that he was paid at certain rates for news and newspictures supplied by him, that from 1969 he was on a series of contracts for varying periods and that on the expiry of the last one it was not renewed. Their position was that he was an independent contractor and not a workman and, hence, the Tribunal had no jurisdiction to entertain his application. The Tribunal accepted this position and dismissed the application. In appeal the Court of Appeal held that the employee was a workman, and in an appeal by the Company from the judgement of the Court of Appeal, the Supreme Court dismissed the appeal and held that the employee was a workman and not an independent contractor.

98. Having outlined the traditional control test to distinguish between a contract of service and a contract for services and the other traditional indicia of a contract of service such as the power of selection, payment, suspension and dismissal, the Supreme Court stated that control or superintendence is not the determining test and thought that tests of universal validity to identify a contract of service were not possible, the true position being the combined effect of all the relevant factors. The Supreme Court stated one essential feature of a contract of service in the following terms :

> "An essential feature of a 'contract of service' is the performance of the work by the servant himself. If, therefore, the person in question can delegate the performance of the work to another, this will be conclusive against the contract being a 'contract of service'. A servant contracts to render personal service. If, however, illness or other lawful excuse prevents his rendering personal service, he commits no breach of contract by his absence. An independent

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[207] SC. 30/79 S. C. M. 13.6.80 (unrep.).

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contractor may sometimes himself be required to do the work under the terms of the contract by which he is engaged and may not be entitled to delegate his performance to another. The fact that delegation is not allowed therefore carries no implication that the contract is a 'contract for service'."

The Court proceeded to point out that though the non-engagement of a person's full time service is not inconsistent with a contract of service, yet the employer's right to exclusive service is material and can sometimes be decisive. Referring to the place of performance as an indicia of a contract of service or for services, as the case may be, the Court observed :

> "The place where the services are to be rendered has also been considered as a relevant factor in a number of cases. Where the services are to be performed in the employer's premises, this may be some indication that the contract is a 'contract of service', while if the services are rendered by the person in question at his own house or elsewhere, this may be some slight indication that he is an independent contractor. It is possible that this is merely another facet of control of the incidental features of the employment."

A third indicia, namely, the label used by the parties to describe their relationship was considered relevant but by no means conclusive as the question is essentially one of law. The fourth indicia, namely, the need for a person under a contract of service to be part and parcel of the organisational structure, was stated by the Court in the following terms :

> "An employee or workman is usually a regular unit in the complex or organisation of a business. He is an integral part of a business – not a casual or temporary person engaged only for the purpose of completing a specific task which is necessary to the main business."

The fifth indicia referred to, namely the payment of remuneration, suggests only that an employee is one who is usually, but not always, paid for the time worked, payment by the job only pointing to the status of an independent contractor. The sixth – an important test was formulated by the Court in the following terms :

> "The independent contractor frequently carries on an independent business, while under a contract of service a man sells his labour and service to the enterprise of another."

99. Applying these tests to the facts of the case, the Supreme Court said that the written contract between the parties did not reflect the true relationship between them and the post for which the workman in fact applied. The

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monthly retainer paid to him was held to be in fact his salary, while he was required to report daily to the News Editor who instructed him as to what news he had to cover and what he had to do. Despite the written contract, his work was not confined to a particular geographical area, he was paid subsistence and travelling and received orders even from Colombo which he had no option but to obey. He received instructions about leave and was even refused leave on occasions. The Supreme Court concluded that the 'employee' had a contract of service with the Company for the following reasons :

> "The evidence discloses that the Company exerted a very considerable degree of control over the work done by the Applicant. It gave instructions as to the events to be covered and reported. The Applicant was left with very little discretion and with very little initiative as to what he was to report.
>
> As the Company was publishing several newspapers, it was essential for the efficient operating of its business that it should have events of news-value reported. Hence it was imperative for the conduct and operation of its business that the Company should have in its regular service a cadre of Reporters or Correspondents to cover incidents and events occurring in the several parts of Sri Lanka. A 'Correspondent' is part and parcel of a newspaper organisation – a cog in its wheel. His work is part of the regular business of the Company. He is a regular unit in the complex organisation of the Company's business and is an integral part of the Company and not a casual or temporary person engaged only for the purpose of completing a specific task which is necessary to the main business. The work done by the Applicant as Group or District Correspondent was done as an integral part of the Company's business. It was done for the Company's business and was integrated into it. The applicant did not on his own have an independent business of news-reporting. He was, in fact, engaged in the business of reporting news not on his account but on account of the Company. Though according to the written agreement R1 etc., it would appear that the Applicant contracted to sell news and reports, what, in fact, was bargained was the sale of his labour as service to the Company. The Applicant identified himself with the Company and became part and parcel of it. Though there was nothing to prevent the Applicant from doing any other work, the work under the Company absorbed all the Applicant's time and he could not, and did not, in fact, engage himself in any other work. He was on a full-time job. The Applicant's engagement as 'Correspondent' cannot be equated to that of an occasional contributor who is not on the Company's staff.

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On an application of the 'integration test' suggested by Lord Denning, or the test 'whether the Applicant was carrying on the business of District Correspondent for himself or for the employer' proposed by Lord Wright, it would appear that the Applicant was an essential unit of the Company's 'organisation', employed as part of its business. The applicant did not do business on his own account. These features stamp the Applicant's contract with the Company as a 'contract of service' and not as a 'contract for service."

100. In ***Free Lanka Trading Co. Ltd., v de Mel***[208] the question was whether the employees were workmen within the meaning of that term in the Termination of Employment of Workmen (Special Provisions) Act 1971. For all practical purposes the definition of a 'workman' in this Act is the same as in the Industrial Disputes Act and the essential question in this case was whether the employees had contracts of service with the employer.

101. The written agreement between the employees and the Company was on the basis that the employees were Technical Sales Representatives who would determine for themselves their hours and days of work, they would submit to the Company only such reports as they deemed necessary and that they were independent agents who had obtained legal advice to the effect that they were not workmen within the meaning of that term in several specified statutes including the Industrial Disputes Act. However contrary to this agreement, the Representatives were required by an official of the Company to furnish various information including their work schedule for the following week. They were in fact required to report for work at a specified time, sign an attendance register, be controlled by a Manager, obtain leave etc. The Supreme Court held that the relations between the Representatives and the Company were not determined by the written agreement but in a manner which subjected them to the employer's control. The fact that they were paid a commission or a salary was held not to be decisive on the question whether they were employees or independent contractors. Applying Cooke, J.'s test as to whether the Representatives were in business on their own account or not, the Supreme Court held that they were quite clearly employees. The Supreme Court further held that the description of their relationship in the written agreement was not relevant to the determination of the status of the parties as it was clearly not intended to be, and was in fact not acted upon in the present instance.

102. The principle that the parties cannot be allowed to determine the question of law as to the legal nature of their relationship by attaching to it a label is one which is too broad as a proposition because exceptions to it have

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[208] (1980) 79 (ii) N.L.R. 158.

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been recognized. For instance, the general proposition assumes greater validity where there is no written contract, or where the written contract is inadequate to determine the question. Of course, even where the written agreement is comprehensive, it is not always conclusive, and one must recognize the social or economic reality that the employee does not necessarily have much option in determining the nature of the relationship. However, the greater weightage would be attached to the label describing the relationship where, for instance, the employee himself has opted, due to advantages accruing to him, for an agreement which describes his relationship as one other than that of an employee, e.g. self employed. The reason for attaching greater weightage to the label in such an instance is that the employee cannot be allowed to have the best of both worlds, i.e. to insist on the benefits of some other relationship and later claim to be an employee when he finds the earlier description of the relationship inconvenient as when the relationship is terminated and he wishes to claim on the basis of an unfair dismissal. That is one reason why the Court of Appeal in ***Massey v Crown Life Insurance Co.***[209] regarded the claimant as self employed. In that case the claimant was treated as an employee until he requested a change in his status to one of self employment, to which the employer agreed, because he was advised to do so by his Accountant. When his services were dispensed with it became convenient for him to claim that he was an employee. The Court of Appeal rejected the claim, and Lord Denning aptly stated :-

> "Having made his bed as being self-employed, he must lie on it."

103. In ***James Appuhamy v Shanmugam***[210] the claimant made an application to the Labour Tribunal on the basis that he was employed as a taxi driver by the owner of the taxi, who denied that there was a contract of service. The workman received no salary but was paid one third of the profits from the daily earnings. Applying the test as to whose business it was, the Supreme Court held that the taxi driver was an employee who had a contract of service and stated :-

> "The ownership of the taxi and the incidence of the financial risk (the chance of profit or the risk of loss on the total investment) are all factors relevant to determine the true relationship between the appellant and the applicant. The applicant neither owns the assets nor bears the risk of loss on the investment. On the other hand, the appellant owns the equipment. The importance of the provision of

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[209] (1978) I.C.R. 590.

[210] S.C. 69/76 S. C. M. 8.3.78 (unrep.).

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> the taxi-cab by the appellant lies in the simple fact that in most circumstances where a person hires out a piece of work to an independent contractor, he expects the contractor to provide all the necessary tools and equipment; whereas if he employs a servant, he provides them himself .... In the instant case, the applicant does not supply the equipment; he supplies his skill and services to operate the appellant's taxi-cab."

It was also argued on behalf of the owner of the taxi, based on certain English decisions, that a taxi driver who drives a taxi owned by another on the terms that he is to account for a proportion of the takings is an individual contractor and not an employee. These cases were distinguished on the footing that they were not ones in which the services of the driver were hired, but rather cases where the drivers, plying their own trade, hired out taxis from the cab proprietors on the terms of a share of the profits. In those cases the driver himself was providing a taxi service with a hired vehicle, the hire being represented by a share of the day's profits. The driver was carrying on a business on his own behalf and for his own benefit only, whereas in the present case the workman had not hired the taxi for the purpose of his own business but, on the contrary, the owner of the taxi hired the driver to operate his taxi. In short, the workman did not carry on a business of his own. As observed by the Supreme Court:-

> "On the facts in the present appeal, it would appear that the person who was carrying on the taxi business was not the applicant but the appellant. The taxi service was provided by the appellant, and for the functioning of the services he engaged the applicant and other drivers. The applicant's work as a taxi driver was done as an integral part of the appellant's business. For the purpose of that business, the appellant engaged the services of the applicant, who thus became part and parcel of the appellant's organisation."

104. Sometimes employers enter into arrangements for some other person to provide them with labour. In such cases the question arises as to whether the labour so provided are employees of the contractor or of the remote employer. Many of the tests already noted would be relevant in determining this question. For instance, the status of the middle man would be relevant. If he is an individual who is not in business on his own account, then the tendency would be for the labour to be deemed to be employees of the remote employer. The purpose for which the labour is required may also be relevant, i.e., whether it is for the purpose of performing part of the employer's normal business and work incidental thereto. The question whether the remote employer is purchasing labour or something else may also be relevant. In any event, the remote employer can

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be held liable under certain statutes such as the Wages Boards Ordinance and the Employees' Provident Fund Act for the limited purposes of such legislation. That is to say, if the contractor fails to pay the minimum wages or provident fund, the remote employer could be held liable on those accounts in certain circumstances.

105. But the crucial question in such arrangements is whether the workmen of the Contractor can have claim against the remote employer under the Industrial Disputes Act, where for instance, the remote employer terminates his contract with the Contractor so that the latter can no longer provide work to his employees, or whether the Contractor terminates the services of his workmen. In such situations, the employees may well file applications before a Labour Tribunal against the Contractor as well as the remote employer. In that event, the issue will not be decided on the label the remote employer and contractor have attached to their relationship. Thus in ***Moosajees Ltd v Eksath Engineru Saha Samanya Kamkaru Samithiya***[211] an arrangement between the Company and an individual that the latter would provide the former, the services of workmen for unloading, baling and loading coconut fibre for export was held not to preclude, on the facts, the Company from being held to be the employer of the workmen, and the arrangement was described by the Supreme Court as "a device adopted by the (Company) to escape the liabilities of an employer."

106. In arrangements of the type described in the preceding paragraphs it is also open to a Union to raise an industrial dispute to the effect that the contractor, and/or his workmen should be employed by the employer as his workmen. Such a demand would be an industrial dispute and referable for settlement by arbitration under the Industrial Disputes Act. In the event of such a reference what the Arbitrator has to decide is whether it is just and equitable that the employer should employ the contractor and his workmen as his own employees, and there is nothing to preclude the Arbitrator from arriving at an affirmative answer on the merits. The Arbitrator may well conclude that operations like sweeping of the premises are necessary in any workplace and that it is only equitable that the employer should be the employer of those who perform this task. As a matter of fact, an Arbitrator may, in an appropriate case, conclude that there already exists an employer-employee relationship between the 'employer' on the one hand and the contractor and his workmen on the other. On the other hand, where such arrangements are entered into by the employer with others in relation to jobs which are not part and parcel of the employer's business or incidental thereto, or where the work is of a purely temporary or non-recurring nature, the equities would be in the employer's favour.

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[211] S.C. Application 945/74 S. C. M. 26.5.76 (unrep.).

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107. Employers who enter into arrangements of this nature should also bear in mind the operation of Section 59A of the Wages Boards Ordinance which, in 1966, introduced certain special provisions applicable where persons are employed to do work under an arrangement made by way of trade or for any commercial purpose. Section 59A(1) provides that where a person, by way of trade or for any commercial purpose, makes an express or implied arrangement with another person for the execution by such other person of any work for which purpose such other person employs workers, the Commissioner of Labour can, after inquiry –

(a) With the Minister's approval, direct the person who has entered into an arrangement to refrain from having such work executed under such arrangements; or

(b) Direct the first mentioned person in writing to furnish to him a certified copy of the arrangement together with certain other information, where the arrangement is in writing and, where the arrangement is not in writing, to furnish such information that the Commissioner may require in this connection.

This statutory provision, however, has a limited application in the sense that the powers vested in the labour administration authorities can be exercised only in respect of an arrangement for the execution of work, the latter term meaning the provision of labour or service. It has no application to an arrangement for the provision of goods which may be the ultimate result of the work. By way of example, if a Company which manufactures soft drinks contracts with another for the provision of bottles, such a contract is one for the provision of goods and not for the execution of work and, therefore, does not fall within the ambit of Section 59A. On the other hand, an arrangement which relates to the performance of labour such as sorting of boxes, packing etc., would be work contemplated by Section 59A.

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F. THE POLITICAL AND SOCIAL ACCEPTABILITY OF THE LEGAL BASIS OF THE CONTRACT OF EMPLOYMENT

108. We have seen that the contract of employment was founded on legal principles based on the recognition of the superiority of the employer and the inferiority of the employee so that, as Sidney & Beatrice Webb remarked :[212]

> "The capitalist is very fond of declaring that labour is a commodity, and the wage contract a bargain of purchase and sale like any other. But he instinctively expects his wage-earners to render him, not only obedience, but also personal deference."

Though the law has moved away from the idea of subordination and servility primarily through the modifications introduced by courts exercising a just and equitable jurisdiction which have considerably changed the respective rights and duties of the parties to the contract, the idea of obedience, as reflected in many of the duties of an employee implied by the law, is still a central element of the contract of employment. This idea is aptly summed up in O. Kahn Freund's statement :[213]

> "There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the 'contract of employment'. But even the element of obedience has moved away, at least in just and equitable jurisdictions, from an almost inflexible duty of obedience. This movement is reflected in the fact that it is more important to consider, for example, in our industrial relations system, whether an order is reasonable rather than lawful because the duty to obey springs today not from the lawfulness of the order but from its reasonableness."

109. Some of these attitudes, it has been said[214] are reflected in many modern common law decisions such as ***Secretary of State v S. A. L. E. F.*** (No.2)[215] where the Court of Appeal in England, in dealing with the question whether a work to rule was a breach of contract, answered the question in

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[212] *Industrial Democracy* (1902) p. 842.

[213] *Labour And The Law* (2nd ed.,) p.7.

[214] Humphrey Forrest "Political values in Individual Employment Law", in *Modern Law Review,* (1980) Vol. 43, p. 361.

[215] (1972) 2 Q.B. 455.

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the affirmative, though the reasons of the Judges differed. Lord Denning based the decision on the intention of the employee when he said :[216]

> "It is no answer .... to say 'I am only obeying the rule book', or 'I am not bound to do more than a 40 hour week'. That would be all very well if done in good faith without any willful disruption of services, but what makes it wrong is that object with which it is done."

According to Buckley, L. J.,[217] however, the work to rule results in –

> "breaches of an implied term to serve the employer faithfully within the requirements of the contract. It does not mean that the employer could require a man to do anything which lay outside his obligations under the contract, such as to work excess hours of work ...... but it does mean that within the terms of the contract the employee must serve the employer faithfully with a view to promoting those commercial interests for which he is employed."

One writer[218] has remarked that Lord Denning's rationale "deprives the employee of what little protection his precise contractual bargain had given him", while Buckley, L. J., "assumes that the contract is for the benefit of British Rail. The bilateral nature of the contract, which would allow the employee to argue that he had entered the contract to further his own interests is ignored." Roskill, L. J., based his decision on an invocation of the officious bystander test. He referred to –[219]

> "an officious bystander watching an interview between a responsible official of the board about to engage a highly articulate driver or guard ....I have imagined a copy of the rule book being handed over the table and the onlooker asking the former why he had not said to the latter 'You do understand, don't you, that you must not operate these instructions so as to disrupt the entire running of the railway system of the country?' "

and concluded that the answer will be in the affirmative. Humphrey Forrest's criticism that the driver may well act on the interpretation of his colleagues who support the union's call to industrial action[220] is weak, because, surely, the driver knows that the union's interpretation is designed

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[216] Ibid at p.492.

[217] Ibid at p. 498.

[218] Humphrey Forrest, op. cit. at p. 365.

[219] op. cit. at p. 508.

[220] op. cit. at p. 366.

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to promote industrial action and has no relevance to the true issue, which is whether it is a reasonable interpretation. If it were, it remains unanswered as to why the driver did not act on that interpretation at other times. The rationale of Lord Denning and Roskill, L. J.'s conclusions amount to little more than a reasonable interpretation of the contract. A criticism based on the view, whether acceptable or not, that the law should recognize work to rule as justifiable industrial action, would have been more to the point.

110. The common law concept of a contract of employment was a unitary one which sought to protect the interests of the employer. The change to a pluralist attitude towards the contract of employment which, in essence, means holding an even balance between the competing interests of the two parties, is best reflected in our industrial relations system in the creation and functioning of labour courts, vested with an equitable jurisdiction and with the power to give relief contrary to the provisions of a contract of employment and even with the power to vary and create new contracts for them[221] pluralism proceeds on the footing that conflicts between the two interests groups are resolved through bargaining and compromise, for which purpose pressure groups must be given room to operate and act as checks against the abuse of power. Hence collective bargaining and trade unions and the inevitability of conflicts (and even the desirability of conflicts). Some of the criticisms of pluralism have been admirably summed up by Humphrey Forrest :[222]

> "The radical critique of pluralism starts from the position that resources of both power and wealth are unequally distributed within our society, and that this inequality is carried over into, and conditions, the structures of control within industry, where the majority of employees are closely controlled by the few. Thus, to whatever lengths the employees carry their industrial strength, through the development of collective bargaining, the demands they are able to make of management are essentially limited by external constraints, arising from the unequal distribution of resources within society as a whole. A wide range of influences combine to ensure that management's right to manage can only be challenged at the

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[221] For further reading on the unitary and pluralist approaches to industrial relations see Alan Fox "Industrial Sociology And Industrial Relations" (1966) *Royal Commission On Trade Unions And Employers Associations (Research Paper 3), H. Clegg in (1975) 13 British Journal of Industrial Relations* 309. Alan Fox *Beyond Contract : Work. Power and Trust Relations* (1974). Alan Fox "Industrial Relations : A Social Critique of Pluralist Ideology in *Man And Organisation* (ed. J. Chile, (1980) Vol.43 *Modern Law Review* 361.

[222] op. cit. at p. 368-69.

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margins; and even there, in personnel areas which directly affect employees, managers have often only grudgingly shared their authority. Employees can bargain about bonuses, but not about the business they're in; about pensions but not products; about the distribution of profits, but not the validity of the profit motive itself........ From this radical perspective the attractions of a pluralist ideology for management can be seen; if calls to serve the common interests (adopting a unitary perspective) no longer sound convincing, then managerial goals can be served almost as well by an ideology which accepts the existence of a conflict of interest, but channels it into marginal action on marginal issues, and which asserts the existence of a common interest not in the outcome of any particular issue, but in the maintenance of underlying structures. The irony of the situation is that even this limited step from a unitary to a pluralist perspective has only partially been accepted. In Flander's famous words, 'The paradox, whose truth managements have found it so difficult to accept, is that they can only regain control by sharing it.' That, its radical critics assert, is precisely the point of pluralism: it is a device for ensuring the preservation of managerial control; such 'sharing' as it involves is essentially peripheral."

111. To what extent are these different concepts of the contract of employment acceptable politically and socially. The unitary concept of individual employment law, leading as it does to a degree of employee subordination amounting almost to servility, would be found by many to be socially repugnant and politically unwise. But that is not to say that one can banish from the law the element of obedience, which must not be confused with servility, from the notion of the contract of employment. Whether it be the State or any organisation within it, some of the old notions of the contract such as obedience are inevitable because social organisation is not possible, or the exercise of political power for that matter, without a hierarchical structure in which some people must necessarily have a limited right to give orders and others be subject to a limited duty to obey. Even *within* trade unions such a situation exists as exemplified by the duty of union members to submit to limited orders from their union on pain of expulsion in the event of breach, coupled with loss of employment and deprivation of the 'right to work' in situations where the 'closed shop' operates. Nor would the existing societies which so misleadingly claim to be 'classless' or to have recognized 'equality' tolerate a proposition which excludes the need for obedience and compliance. Some element of subordination is inherent in contracts of employment in any known system, and to object to the law using tests to identify a contract of service based on notions such as sale of labour as distinct from the sale of a person's

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organisational skill, is to run counter to the reality which underlines the employment relationship. The writer sees nothing wrong in the basic aim of pluralism which, according to H. Clegg,[223] "is to combine social stability with adaptability and freedom." If the freedom that the pluralist concept allows is illusory, the degree of freedom in a pluralist system is certainly more than in systems where there is a concentration of power, whether of the left or the right. In any event, what is more to the point is that it is the search for total freedom that is illusory, and any system which purports to grant it must lead to anarchy and to the absence of any social and political organisation.

112. Even if the legal basis of the individual employment relationship is still unsatisfactory in other jurisdictions such as England,[224] our system reflects a reasonable legal acceptance of the pluralist view of the individual employment relationship. Some examples of this acceptance are :-

(a) The removal of the sanctity of contract in individual employment law through a special system of labour courts.

(b) The recognition of an employee's right to reinstatement in his job if unfairly, and not merely unlawfully dismissed.

(c) The statutory obligation to obtain the prior approval or consent of the Commissioner of Labour or the workmen to effect a non-disciplinary termination such as a termination consequent upon redundancy.

(d) The concept that compensation for termination of the individual contract may be payable even where the employer is not culpable or is not at 'fault'.[225]

(e) Tripartite fixation of minimum wages by Wages Boards for certain categories of employees in certain trades.

113. From these trends in our labour law it may fairly be concluded that in the sphere of individual employment law the jurisprudence is based not on the idea of 'agreement' that is reflected by the contract in classical theory but on the necessity for 'fairness' or 'equity'. Therefore, in modern labour law the concept of offer and acceptance – central to the classical theory of

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[223] (1975) 13, *British Journal of Industrial Relations, op. cit.*

[224] See Humphrey Forrest, op. cit. p. 371 et eq.

[225] See ***The Caledonian (Ceylon) Tea & Rubber Estates Ltd. v Hillman*** S.C. 250/72 S. C. M. 20.9.79 N.L.R. (1) 421.

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contract – is less irrelevant. If that be the case, little objection can be taken on political or social grounds to the legal basis of the contract of employment as we now know it. The movement from a unitary to a pluralist conception of individual employment law in our industrial relations system has saved contract from much of the embarrassment it has suffered. The author submits, however, that if fairness and equity have enabled employees to make claims contrary to their contracts, even employers should in certain circumstances be entitled to claim the right to vary the contract on the same ground. It is common in industrial relations to find employees claiming that their contracts of employment have been varied by customary practices, or that they should be varied to their benefit in the course of collective bargaining or otherwise. Customary practices do not, as we shall see, really constitute a unilateral variation because there is some element of agreement or acquiescence by the employer. The point is that when an employee, or a Union, on his behalf, insists upon a variation of existing terms the fundamental test is the reasonableness of the claim. There is no justifiable ground for denying a similar right to an employer who is in a position to establish that his request for a change in the terms is a reasonable one. Of course, in either event the change ultimately takes place as a result of mutual agreement, even if the agreement of one party is unwillingly given.

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G. SOME GENERAL PRINCIPLES APPLICABLE TO CONTRACTS OF EMPLOYMENT

114. In this Section we will analyse some requirements of a valid contract of employment, some of the practical problems which arise in connection with contracts of employment, the question of variation of contracts, the effect of custom and collective agreements on contracts etc.

115. One of the requirements of a valid contract of employment is that the contract must be between parties who in law are capable of entering into a contract and the contract itself must not be illegal or contrary to public policy.

Parties to Contracts

116. It is not intended in this Monograph to cover the principles applicable to parties to a contract of employment. It would suffice to note that our statutory law prohibits the employment of persons below a particular age and that a contract of employment with a person below such a minimum age is an illegal contract. Further, there are restrictions on the employment of certain categories in certain types of employment or during certain hours. For instance, a person below the age of 14 years cannot be employed in a shop or office, while any person between 14 and 18 years and any female cannot be employed in a shop or office between 6 a.m. or after 6 p.m. subject to the following exceptions –

(a) Any female of 18 years or more can be employed in the business of a hotel or restaurant between 6 p.m. and 10 p.m.

(b) Any female of 18 years or more can be employed before 6 a.m. or after 6 p.m. in any office maintained by an Airline at an airport on the work of a ground hostess, or in any residential hotel on the work of a receptionist, ladies' cloak room attendant, ladies' linen room attendant or ladies' lavatory attendant.

(c) Any female who has attained the age of 18 years may be employed on or about the business of a shop or office for the period or for any part of the period between 6 p.m. and 8 p.m.

(d) Any male who has attained the age of 16 years can be employed in the business of a hotel, restaurant or place of entertainment between 6 p.m. and 10 p.m.

117. Other restrictions on employment are to be found in the Employment of Women, Young Persons and Children Act (1956) and the Factories' Ordinance Act (1942).

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From August 1984[226] women employed in an industrial undertaking or in a factory shall be permitted to work throughout the night, subject to the following conditions :

i. No woman shall be compelled to work at night against her will.

ii. The written sanction of the Commissioner of Labour must be obtained by the employer prior to his employment of females on night work.

iii. Where a female has, on a particular day, been employed between the hours of 6 a.m. and 6 p.m. (i.e. not necessarily for the whole duration of 6 a.m. to 6 p.m. but at any time during those hours), such female cannot be employed on night work on such day.

iv. For any night work the female must be paid at less than one and a half time the normal payment received by her.

v. There must be female wardens appointed by the employer to see to the welfare of female workers who work at night.

vi. No female can be employed on more than ten days of night work during any month.

The above provisions shall not apply :-

i. to women holding responsible positions of a managerial or technical character;

ii. to women employed in health and welfare services who are not ordinarily engaged in manual work; and

iii. to an industrial undertaking in which only members of the same family are employed.

The term 'industrial undertaking' has a wide meaning and connotes undertakings engaged in working mines and quarries, undertakings in which articles are manufactured, altered, repaired, ornamented, finished, etc. It also includes undertakings engaged in ship building or in the generation, transformation or termination of electricity or motive power of any kind, undertakings engaged in building and civil engineering work or on any construction, repair, maintenance, alteration or demolition work.

[226] Employment of Women, Young Persons & Children, The Factories & the Shop & Office Employees (Regulation of Employment an Remuneration) (Amendment) Act No.32 of 1984.

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The definition of the term 'night' is somewhat complicated and the provisions relating to the employment of women and young persons at night are briefly as follows :-

1. A woman cannot be employed at night for a consecutive period of 11 hours which includes the period 10 p.m. to 5 a.m. In other words a woman cannot be employed for a continuous period of 11 hours commencing at any point of time between 6 p.m. and 10 p.m. For example, if a woman stops work for the day at 6 p.m. she cannot be employed until 5 a.m. the following day; if she stops at 7 p.m. she cannot be employed until 6 a.m. the following day; if she stops at 8 p.m. she cannot be employed until 7 a.m. the following day; if she stops at 9 p.m. she cannot be employed until 8 a.m. the following day; and of she stops at 10 p.m. she cannot be employed until 9 a.m. the following day. *In any event she cannot be employed after 10 p.m. or before 5 a.m.*

2. a) A person under 16 years cannot be employed between 10 p.m. and 6 a.m. in a public or private industrial undertaking, and must have a break between the time of ending the day's work and commencing work the next day;

    i. which is not less than 12 consecutive hours ; and

    ii. includes the period 10 p.m. and 6 a.m.

   b) A person between 16 years and 18 years cannot be employed before 12 consecutive hours have elapsed from the time of terminating employment for the day and the commencing time on the next day subject to the following :-

    i. He shall not commence employment on the next day before 6 a.m.

    ii. His rest period should include at least 7 consecutive hours falling between 10 p.m. and 6 a.m. except that, in the case of trainers in the Banking Trade the 7 hours should be between 9 p.m. and 4 a.m.[227]

   c) The Period of employment cannot exceed 12 hours in any day in the case of young persons under 16 years of age, and cannot also begin before 6 a.m. or end after 6 p.m. In the case of young persons under 18 years of age (i.e. between 16 and 18) the

[227] Women, Young Persons & Children Act (1956) Sec. 33.

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period of employment cannot end after 8 p.m. and on one day of the week after 1 p.m.[228]

The following exceptions, however, have been made to the above prohibitions :

(i) In the occupations referred to in the Employment of Young Persons at Night in Industrial Undertakings Regulations of 1957 there are no restrictions on the employment of young persons if such undertakings are family undertakings (where only parents and their children or wards are employed). The following occupations referred to in the schedule are by and large carried on as family undertakings and form part of the cottage industry of the island.

(a) manufacture, maintenance and repair of fishing nets and gear ;

(b) building, maintenance and repair of fishing vessels or any accessories used by fishing vessels ;

(c) manufacture of mats and basketware ;

(d) manufacture of furniture ;

(e) manufacture of pottery and earthenware ;

(f) manufacture of bricks and tiles ;

(g) making of articles of clothing, embroidery and lace work ;

(h) laundering of clothes ;

(i) manufacture of jewellery ;

(j) carving of wood, stone and ivory ;

(k) making of art ware, brass and silver ware and curios ;

(l) manufacture of footwear ;

(m) manufacture of jaggery and other palmyrah and kitul products ;

(n) manufacture of coir products ;

(o) manufacture of cigars and beedies ;

(p) manufacture of toys ;

[228] Section 67(6) of the Factories Ordinance.

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(q) lacquer work ;

(r) textile weaving ;

(s) twine making ;

(t) indikola weaving.

The employment of 'young persons' in such occupations at night has been permitted because they are largely family undertakings and are not carried on as factory undertakings. However, by virtue of the operation of the Factories Ordinance a number of these premises may come within the scope of the Factories Ordinance in which case the exemption will not apply.

(ii) Women holding posts of a managerial or technical character.

(iii) Women employed in health and welfare services who are not ordinarily engaged in manual work.

(iv) In the event of an unforeseen emergency or where work has to be done in connection with raw materials which are likely to deteriorate. Females employed in connection with such raw materials can be employed at night in any industrial undertaking provided the permission of an Authorized Officer, i.e. an officer of the Department of Labour above the rank of a Labour Officer is obtained.

Thus, subject to the exceptions noted above, the resulting position is that *women* can be employed in industrial undertakings till 10 p.m. and *young persons* (those under 18 years of age of either sex) till 6 p.m.

118. What has been stated above are only illustrative of the principle that contracts of employment must be between the parties who are capable in law of contracting, and contracts which require persons to perform work of a type, or during hours which are prohibited are not valid contracts.

Contracts Which are Illegal or Contrary to Public Policy

119. A contract of employment which is illegal or contrary to public policy is not enforceable. For instance, if a contract of employment requires an employee to perform something which is not permitted by law, then his non-performance cannot be subject to disciplinary action. All terms and conditions in a contract which are illegal will be disregarded by a Court.

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120. Similarly, a contract may contain terms which, though not illegal in the sense that they violate a specific provision of law or require the employees to do something which the law does not permit, are nevertheless contrary to public policy. An example is a term in a contract which prohibits a female from marrying or which provides for the termination of her services on marriage. Such a term is contrary to public policy as being a contract in restraint of marriage. The same principle applies to a term in a contract relating to the pregnancy of a female. As a matter of fact, Section 18E of the Shop and Office Employees' Act prohibits the termination of the services of a female employee on the ground only of her pregnancy or confinement or any illness consequent upon her pregnancy or confinement. Section 18D prohibits the employment of females during pregnancy on any work which may be injurious to her or her child. Section 9A and 9B of the Maternity Benefits Ordinance contain identical provisions applicable to female employees covered by that Ordinance.

121. The question arises as to whether an employee is entitled to rely on a term in a contract prohibiting or restricting marriage or which gives the employer certain rights in the event of pregnancy, where the employer claims that the marriage or pregnancy renders it impossible for the female to perform her contract of employment. We have already seen in the preceding paragraphs that the Shop and Office Employees' Act and the Maternity Benefits Ordinance prohibit the employment of pregnant females on work which may be injurious to her or her child and that a female cannot be dismissed on the ground only of her pregnancy. It could be argued that the prohibition here is against termination for the reason that she is pregnant, and not against termination on a ground flowing from pregnancy, e.g. that she is disabled to the extent that she can no longer work. On any reasonable construction of these provisions it is clear that termination of the contract even for reasons flowing from pregnancy would be prima facie unreasonable. In an extreme case, e.g. where the female suffers a disability which is more or less of a permanent nature, then the employer could make an application to the Commissioner of Labour under the Termination of Workmen (Special Provisions) Act 1971 to effect a non-disciplinary termination, or he may even be in a position to plead automatic termination of the contract by frustration. Such cases would be rare and could arise only in extreme situations. In so far as marriage per se is concerned, it is difficult to contemplate situations where marriage renders a female unfit for employment or renders her incapable of performing her contract of employment. That is why contracts in restraint of marriage sometimes imposed on air hostesses of airlines would probably be deemed to be contrary to public policy. The fact that pregnancy renders her unfit to perform her functions as an air hostess since it would be injurious to her health or that of the unborn child is not, for reasons already noted,

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sufficient grounds for termination of the contract, the incapacity in any event only being a temporary one.

122. Contracts of employment sometimes contain a term which prohibits an employee, without the employer's authority from carrying on any business or having an interest in any business etc. Such a term would not always be enforceable and its breach would not necessarily amount to misconduct unless the employer is in a position to establish that the interest that the employee has in some other business results in a conflict of interests, or in an element of competition, or has or may have an adverse bearing on the employment relationship. In other words, a so called blanket restriction imposed on an employee from engaging in any other activity may be deemed to be an unreasonable one so long as it cannot be established that it has a material or adverse bearing or effect on his employment relationship. In ***The Ceylon Bank Employees' Union v The Bank of Ceylon***[229] the contract of employment contained the following clause :

> "I will give my whole time and attention to the discharge of my duties and will observe the rules and regulations from time to time made by the Bank for the guidance of its employees."

By a circular to its employees the Bank repeated this clause and prohibited any other gainful employment except with the permission of the Board of Directors. In interpreting this clause, read together with the circular, the Supreme Court held that it prevented an employee from carrying on any other business or occupation or employment outside normal office hours other than such occupations which are not of a parallel nature. The Supreme Court stated[230] :

> "In my view a reasonable construction of the words in this clause would mean that the workman must not devote any part of his time to any other gainful employment. This does not mean that the workman for instance, cannot have a poultry run at his home and sell some eggs or grow flowers for sale as a hobby during his spare time, but it certainly prevents him from engaging himself in some parallel business, profession or other employment. The question whether any such engagement falls into the former or latter category is one of fact and must depend on the circumstances in each particular case."

It would appear that in the absence of such a clause in a contract of service an employee is not under a duty to refrain from engaging in some other

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[229] (1979) 79 N.L.R. 133.

[230] At p. 137.

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business so long as it does not conflict with his employment in any way. The Supreme Court stated :

> "It is an implicit condition of service in any contract that the workman must devote the whole of the normal office hours to his work."

It is, therefore, not an implied term of service that an employee cannot engage in any other occupation *outside* his hours of work in such a way that it does not conflict with his employment. It is also an implied condition of service that any employee will not compete with his employer or do anything to prejudice the employer's business in any way. Therefore, any restraint on the employee in regard to his activities outside working hours must be expressly stipulated, but the reasonableness of such a stipulation can always be an issue before a Labour Court. It would seem that the reasonableness of the stipulation in the present instance was not expressly considered by the Supreme Court which appeared to proceed on the basis that it was reasonable to impose a restriction on any gainful employment, other than the exceptions it outlined. The Court did not consider whether such restrictions should be limited to those which are in conflict with the employees' employment or have a material or adverse bearing on the employer's business.

123. A somewhat different situation arises where a contract of employment imposes on an employee a condition which seeks to preclude him from competing with the employer after the particular relationship of employer and employee has ceased. An agreement which restrains an employee from competing in such a situation is always void as being unreasonable, unless there is some exceptional proprietary interest owned by the employer that requires protection.[231] Such an interest could be only the master's trade secrets and his business connections. With regard to trade secrets, the employer must prove definitely that the employee has substantial knowledge of some secret process or mode of manufacture. But a secret which is a mere special method of organisation adopted in the business, or if only part of the secret is known to the employee so that its successful exploitation by him is impossible, there can be no valid restraint. With regard to business connections, an employer may restrain a former employee from enticing away his customers where such an employee has intimate knowledge of customers so as to enable him to do so. In such a case it is necessary that the employee is one who will acquire not merely knowledge of customers, but also influence over them.[232]

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[231] ***Herbert Morris Ltd. v Saxelby*** (1916) (1) AC 688.

[232] ***Herbert Morris Ltd v Saxelby*** at 709.

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124. Even if intended to prevent a misuse of trade secrets or business connections, a restraint will be void if it is unreasonable in the interests of the parties. It must afford no more than adequate protection to the covenantee and in deciding this question the two most relevant factors are the area of restraint and the duration of restraint. The area of restraint is a question of fact in each case. But the covenantee need not prove that the business is carried on in every part of the area to which the restraint extends.[233] It is also a question of fact in each case as to what is a reasonable duration of restraint.

125. Though a restraint is also void if the covenantor proves that it is unreasonable in the interests of the public (even if it is reasonable as between the parties), it is difficult to imagine a restraint which is reasonable as between the parties but unreasonable in the interests of the public.

126. A matter of fundamental importance is the right of an employee to make a claim to enforce rights, legal or equitable, arising from an illegal contract of employment. The principle in English law has been stated as follows :-

> "The current judicial attitude is that an employee whose contract is illegal cannot enforce statutory rights. It is a general principle of contract law that an action founded on an illegal contract cannot succeed and the E.A.T. have held that this principle applies equally to statutory rights dependent on the contract of employment as to contractual rights themselves. As a result, a significant number of employees find themselves without remedy when unfairly dismissed or denied other statutory rights such as a redundancy payment."[234]

The absurdity of this position arrived at through case law is illustrated by the English cases of ***Morner v Rymer***[235] in 1979 where an employee undertook extra work in return for a bonus of one pound a week, which she knew was paid without deduction of income tax. On her dismissal it was held that since she has known about the tax evasion she could not claim that her dismissal was unfair. The amount of the tax evaded was only four pounds.

127. A contract of employment may be illegal in two senses-either because there is a statutory prohibition or because it is contrary to public policy. Statutory

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[233] ***Canners Brothers Ltd. v Canners*** 1940 (4) Al l E.R. 179.

[234] C. Mogridge "Illegal Employment Contracts : Loss of Statuotry Protection" in (1981) Vol. X. *Industrial Law Journal* 23.

[235] Unreported.

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prohibitions may be of several types, and the question that arises is whether in a particular case the legislature intends to prohibit the contract itself. In English law a contract as a result of which a child is employed for more than the statutory maximum hours or during prohibited hours has been held to be illegal.[236] A contract in our law to employ a person below the prohibited age or to employ a female during prohibited hours would fall within this principle. On the other hand, employment of a driver without the requisite qualifications may not be an illegal contract for the reason that the Motor Traffic Act is not intended to prohibit employment.

128. Contracts which are illegal on grounds of public policy are those which have as their object something which is forbidden by the common law or which intends to achieve forbidden objects. Among the examples of contracts of employment which have been held to be illegal on this basis are those which involve a fraud on revenue such as income tax evasion, engagement in the production of the life history of a prostitute (on grounds of public policy) and contracts to assist in the running of a gambling business in breach of the law.

129. The effect of an illegality on the contract of employment varies. Where the illegality is statutory the effect is such as to render it unenforceable. In the case of common law illegality flowing from consideration of public policy :-

> "A distinction is made between a contract illegal *per se,* and one which is *ex facie* legal but illegally performed. In the first case, for example where employer and employee agree to defraud the Revenue in that no tax is to be paid on the employee's wages, the contract is void *ab initio* (i.e. treated as if it had never existed) and neither party can sue on it. Both are aware of the facts constituting the illegality; that they do not know that what they have agreed to do is illegal cannot save them from the consequences of their illegality."[237]

Where the contract itself is legal but its performance is illegal and the latter fact is not known to the employee, he can enforce it, the question of knowledge being determined subjectively.

130. Even in common law where the illegal part of a contract can be separated from the rest of the contract, the legal part may be enforced. Severance of the illegal part can be effected only if it will not alter the scope and

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[236] See C. Mogridge, op. cit.

[237] C. Mogridge, op. cit. at p. 25.

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intention of the contract. The common law has also recognized another exception to the general rule of unenforceability of illegal contracts through the principle that it may allow the less blameworthy party to enforce the contract. Cases falling within this second exception include those where a claimant can establish that he has been the victim of fraud or duress by the other party.

131. The common law in this regard has been, but perhaps should not be, followed in its entirety in Sri Lanka. The just and equitable jurisdiction of our Labour Courts should enable them to recognize that even though public policy dictates that a person should not be allowed to claim on an illegal contract, yet public policy also dictates the need to protect rights flowing from employment, especially since in most cases where a claimant cannot recover an illegal contract it is the employer who benefits, e.g., where an employee unfairly dismissed is refused relief on the ground that the contract was illegal. Thus in an unreported case in 1980 in England,[238] a Tribunal held that an employment contract in terms of which part of the employee's duties consisted of the procurement of prostitutes for the employer's Arab clients was not illegal, and it recognized that a broader view of public policy should be adopted in relation to contracts of employment.

132. In ***Dharmadasa v Perera***[239] a clerk who was employed by the employer for eleven years and whose services were terminated was refused relief by the Labour Tribunal on the ground that the employer was carrying on an illegal business of accepting bets on horse racing. In appeal the Supreme Court reversed the order of the Tribunal and held that the workman was entitled to be heard even if he knew that the employer was carrying on an illegal business, unless the workman was an intentional abettor in the commission of the illegal betting. In such an inquiry before the Tribunal the main test would be whether the employee contracted to do something unlawful with his employer. Referring to the jurisdiction exercised by a Labour Tribunal, the Supreme Court observed –

> "In fact a just and equitable order will be against an employer who contravenes the law to his benefit whereas the servant contravenes it, if he does, out of necessity and to his detriment for the reason that he could not afford the luxury of asking for his dues under the law."[240]

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[238] ***Barnett v Coral Leisure Group Ltd.***

[239] (1975) 77 N.L.R. 285.

[240] Ibid at p. 287.

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A distinction that Rajaratnam, J., in this case drew was between a contract where an employee contracts to do an illegal thing and one where the particular occupation of the workman is lawful although the employer's business may not be. For instance, in the particular case clerical work was not per se illegal though the employer's business was. Further, he quite correctly, emphasized the fact that a Labour Tribunal is not invested with a duty to only enforce a contract of employment but, rather, to consider relief outside it, and quoted the observation of the Privy Council in ***United Engineering Workers' Union v Devanayagam***[241] that "it does not however follow that relief or redress obtainable on an application is obtainable only where a workman has a cause of action or that it is limited to relief or redress in respect of a breach of contract or of an obligation imposed by law." The following statement of Rajaratnam, J., is, it is submitted, an admirable summary of the equitable position, having regard especially to the fact that what a Labour Tribunal is required to consider is not only the rights of parties in common law but their just and equitable rights outside the framework of that law:

> "I do not think that a clerk engaged in an illegal business who keeps accounts, or a cook who serves meals to those patronising a brothel, should necessarily be denied relief and redress, even where they knew that their master was carrying on an illegal business. The question to be always considered is whether the applicant is so well within the pale of the offence as an offender and the offence is such that even the necessity for him to have found a means of livelihood does not wash the dirt off his hands to make him deserve some relief or redress in a just and equitable order. In my view this is the only question to be considered on this point and not the decisions which relate to legal contracts and legal causes of action decided by judges in different claims on a different set of facts, and not in Tribunals as set up under the Industrial Disputes Act of our country."[242]

133. Rajaratnam, J., sent this matter back to the Labour Tribunal for inquiry, and the order of the Tribunal was the subject of a subsequent appeal to the Court of Appeal in ***Perera v Dharmadasa***[243] where two judges of the Court of Appeal held that the workman was not entitled to any relief since he was engaged as an agent of the employer in work involving unlawful bets on horse racing with his full acquiescence and knowledge, in view of which he cannot utilize the law to enforce such a contract.

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[241] 69 N. L. R. 289.

[242] At p. 288.

[243] (1978-79) 2 Sri Lanka Law Reports 287.

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The English cases and statements of the law by text writers referred to by the Court of Appeal proceed on the basis that what disentitles a party to relief on an illegal contract is such person's knowledge of the illegal objects of the other party and his association with such other party in the unlawful or immoral purpose. Therefore, there could be situations where an employee may not know that his services are intended to further an illegal object, in which event relief cannot be denied, while in other situations the employee may be associated with the unlawful object in the sense that he knows that his services are intended to further that object, in which event he would not be entitled to relief. In many cases, therefore, the issue as to whether an employee is entitled to relief would depend on a question of fact.

134. It is submitted that since even the common law has recognized certain exceptional situations in which a party can claim under an illegal contract, there would be justification for the enlargement of such exceptions in the field of employment where considerations of equity outweigh legal rules. It would suffice in the present context to note the principle that where refusal of relief to a claimant will result in the other party being unjustly enriched at the claimant's expense, it is a factor a court can take into account as an equity in the claimant's favour.[244]

135. In ***Peterson v Jajbhay*** A. and B. entered into an illegal lease whereby failure to pay the stipulated rent would render A liable to ejectment without notice. The rent was not paid. It was held that an order for ejectment by B should be allowed because refusal of relief "would put the appellant in a far better position than if the agreement had been legal and this would all be at the expense of the respondent, while a grant of relief would fall far short of putting the respondent in as good a position, as it merely enables him to get possession but not to recover the unpaid rent."

136. In ***Mohammadu Marikkar v Ibrahim Naina*** it was held that although in strict law a person who conveys with an intention of defrauding creditors cannot recover, here recovery was allowed because no person can unjustly enrich himself at the expense of another.

137. In ***Andris v Punchihamy*** the plaintiff sued for a declaration of title and ejectment of the defendant who was the widow of a vendor on a deed by which the latter purported to sell to the plaintiff the land in dispute. The defendant, while admitting the transfer, impeached its legality. Judgement

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[244] ***Mamoojee v Akoo*** 1947 (4) SALR 733, ***Peterson v Jajbhay*** 1940 TPD at 191 ***Mohammadu Marikkar v Ibrahim Naina*** 13 NLR at 191-2, ***Andris v Punchihamy*** 24 NLR 203.

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was given for the defendant on the ground that although in law a person who conveys with an intention of defrauding creditors is not entitled to relief, this was a case where the plaintiff could not be allowed to enrich himself at the expense of the defendant who was in possession of the land.

138. Another factor in the plaintiff's favour would be that the defendant, while claiming his rights under the illegal agreement, has refused to carry out his obligations under the agreement. In ***Peterson v Jajbhay*** the appellant refused to pay rent but claimed the right to remain in occupation of the property under the illegal lease.

139. The equitable question that arises in contracts of employment which are illegal in the sense that the employee is aware of the illegal object and is associated with its fulfillment is whether, by denying equitable relief to the employee, the employer benefits or enriches himself at the employee's expense. For instance, a claim to gratuity based on actual service rendered to the employer is an equitable claim. The question is whether it should be refused on the basis of the illegality. So also where compensation is claimed for wrongful termination. In such situations denial of relief enriches the employer to the extent that he escapes a liability which he would otherwise in equity be liable to meet. As against this consideration must be weighed the fact that it would not be fair to grant equitable relief to a person who is tainted with illegality, on the principle, formulated centuries ago, that –

"No polluted hand shall touch the pure fountains of justice."

The competing interests in this regard are ones which the Courts would have to opt for. It may be equally justified in saying that since a person must come to equity with clean hands, an employee should not be granted equitable relief in such circumstances. However, what appears to be material in contracts of employment is that an employee who claims compensation or gratuity does not, in effect, seek the performance of an illegal object; the position would be different where he claims reinstatement as that relief would imply the continuance of an illegal contract and, indirectly, the enforcement of an illegal object.

Are Written Contracts Necessary ?

140. There is no general requirement of law that a contract of employment must be reduced to writing. It is obvious, however, that a written contract of employment enjoys the advantage of easier ascertainment of the terms and conditions of employment. Where there is no written contract of

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employment, the terms and conditions of employment would need to be spelt out, where applicable, from –

(a) The common law ;

(b) Statutory provisions ;

(c) Collective Agreements or Awards of Labour Courts ;

(d) Customs or usage and practices in the workplace.

However, an exception is provided under the Shop and Office Employees Act, Section 17 of which requires an employer to furnish an employee on the date of his employment with such particulars relating to the conditions of his employment as may be prescribed. Regulation 15 of the Regulations of 1954 prescribe the following matters that must be furnished to the employee :-

(a) The name of employee and designation and nature of the appointment.

(b) The date on which the appointment takes effect.

(c) The grade to which the person is appointed.

(d) Basic remuneration and the scale of remuneration.

(e) Whether remuneration is paid weekly, fortnightly or monthly.

(f) Cost of Living allowance, if any, and other allowances, if any.

(g) (i) The period of probation or trial, if any, and the conditions governing such period of probation or trial.

(ii) Circumstances under which the appointment may be terminated during such probation or trial.

(h) (i) Conditions governing the employment.

(ii) Circumstances and conditions under which the employment may be terminated.

(i) Normal hours of work.

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(j) Number of weekly holidays, annual holidays, casual and privilege leave, which such person is entitled to.

(k) Overtime rate payable.

(l) Provision of medical aid, if any, by the employer.

(m) The provision of and the conditions governing any provident fund, pension scheme or gratuity scheme applicable to the employment.

(n) Prospects of promotion.

The same regulation requires the aforementioned particulars to be duly authenticated by the employer's signature and must be furnished in writing in the language with which the employee is fully conversant. The employee is required to acknowledge receipt of such information on a duplicate to be retained by the employer.

Effect of Collective Agreements, Court Orders and Statutes on Contracts

141. Whatever may be the terms and conditions of employment agreed upon between parties and incorporated in the contract of employment, they are all subject, where applicable, to the provisions of Collective Agreements, Awards of Labour Courts as well as statutory provisions.

142. Where a collective agreement as defined by the Industrial Disputes Act applies, the terms of such an agreement form part and parcel of the contract of employment. Section 8(1) of that Act gives legal force to Collective Agreements in the following terms :

> "Every collective agreement which is for the time being in force shall, for the purposes of this Act, be binding on the parties, trade unions, employers and workmen, referred to in that agreement .... and the terms of the agreement shall be implied terms in the contract of employment between the employers and workmen bound by the agreement."

143. Two other situations in relation to collective agreement terms require analysis. In terms of Section 8(2) of the Act an employer is bound to observe in respect of all the workmen in the workplace terms and conditions of employment which are not less favourable than the terms of a collective agreement even though such workmen are not bound by the agreement unless there is a provision to the contrary in the agreement. In effect, workmen who are not parties to an agreement or are not members of

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a union which is a party to the agreement are entitled to the benefits arising from the agreement, but they are not obliged to observe, or be bound by, its obligations. Therefore, the effect of Section 8(2) is to include into a contract of service those terms of a collective agreement which are benefits to workmen who are not covered thereby. In the situation contemplated by this sub-section the obligations resting on employees do not constitute implied terms. The second situation is section 10 of the Act which empowers the Minister of Labour to extend the provisions of a collective agreement to persons not bound by it. In such an event employers are required to observe either the terms and conditions in the agreement or terms and conditions which are not less favourable than those in the agreement. Where the Minister of Labour has acted in this way, the terms and conditions so extended form part and parcel of the contract of employment.

144. The question arises as to the legal obligations of the parties after a collective agreement has ceased to be in force. While the answer to this vexed question is open to considerable argument, yet the better view is that since it is only the terms of an agreement that is in force that become implied terms in the contract, such terms would cease to be binding as a matter of law once the collective agreement ceases to have effect. While this may be considered the legal answer, yet from a purely industrial relations point of view it would often be impractical to deprive an employee of the terms of a collective agreement on the ground only that the agreement is no longer law. For instance, it is not conceivable that an employer could successfully reduce an employee's salary or leave entitlements on the ground that a collective agreement which contained such terms is no longer operative. Quite apart from the possibility of trade union action in the event of such a reduction, such a step may well result in an industrial dispute which, if referred for settlement by arbitration under the Industrial Disputes Act, would most probably be resolved in favour of the employees. On the other hand, other terms which are more in the nature of facilities or which normally do not form the subject matter of a contract (e.g. right to voluntary arbitration, check off) enjoy less sanctity after a collective agreement has been repudiated than the more fundamental terms of a contract such as salary and leave.

145. In the recent case of ***Hunter & Company Limited v The Ceylon Mercantile, Industrial & General Workers' Union (CMU)***[245] consequences of the repudiation of a Collective Agreement on contracts of employment arose for discussion. In this case, the Employers' Federation

[245] (1997) 1 Sri L. R. 337

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of Ceylon acting on behalf of a number of employers including Hunter & Company, had entered into a Collective Agreement with the Union. That Collective Agreement was repudiated on behalf of the Company. One of the matters covered by the Collective Agreement was the payment of a Non-Recurring Cost of Living Gratuity (NRCLG). For one year and three months after the repudiation the Company continued to make the NRCLG payment. At the end of that period, the Company discontinued that payment as a result of a Memorandum of Settlement entered into between the branch of the CMU within the Company and the Company itself.

The CMU as the "Parent Union" disputed that Memorandum of Settlement as the "Parent Union" had not been informed of the matters being discussed. The dispute was referred for settlement by Arbitration and the Arbitrator made an award on the basis that the repudiation did not bring to nought the implied contracts of employment that were in existence while the Collective Agreement was in force.

Although the Court of Appeal and the Supreme Court both upheld that award in appeal, it was specifically noted that it was the unique circumstances of the case which led to that conclusion. Those circumstances were that the Company continued to pay NRCLG after the repudiation of the Collective Agreement, thus giving the workmen an "acquired right" to that payment; the secretive manner in which the Memorandum of Settlement was entered into and evidence that the three members of the branch union who were signatories to that settlement, received either promotions, salary increases or both shortly after the agreement was signed; and the admission by the Company that it realized that the payment of NRCLG could not be halted without a specific agreement with the Union.

Although this decision supports the more practical view, the peculiar circumstances of the case erodes its usefulness and relevance in formulating a generally applicable principle.

146. The terms of a contract of employment are also subject to the provisions of an award of an Arbitrator or Industrial Court or order of a Labour Tribunal, if applicable in a particular case. For instance, an award in an industrial dispute relating to an increase in wages would be binding on the employer and the workmen covered by the award. The effect of an award of an Arbitrator under the Industrial Disputes Act (Section 19) or that of an Industrial Court (Section 26) is the same as in the case of a collective agreement and the act provides that "the terms of the award shall be implied terms in the contract of employment between the employers and workmen bound by the award." What has, therefore, been stated in the

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preceding paragraph relative to collective agreements and the contract of employment would be equally applicable here.

147. The award of an Arbitrator, like a collective agreement can be repudiated by observing the specific procedures in the Industrial Disputes Act. The effect of an award where it is repudiated and which therefore, ceases to be legally binding is in essence the same as in the case of a collective agreement. However, the matter requires closer analysis due to the decision of the Court of Appeal in ***Thirunavukarasu v United Workers' Union.***[246] In this case the services of two workmen were terminated while some other workmen were deemed to have vacated their posts. The Arbitrator to whom this matter was referred for settlement reinstated the workmen on varying terms. The employer's application to the Supreme Court for a Writ to quash the award was dismissed, whereupon the employer reinstated the workmen, but did not pay the backwages awarded on the ground that the award did not specify the amounts due. Thereafter, the employer repudiated the award. Before the repudiation took effect the Union applied under the Industrial Disputes Act for an interpretation of the award and to specify the backwages. The employer thereupon applied to the Supreme Court seeking a writ on the ground that no matter arose for interpretation and that the arbitrator had no jurisdiction to act on the application for an interpretation in view of the repudiation of the award. The arbitrator nevertheless made order determining the backwages and it is this award that the employer now sought to have quashed by the application.

148. The employer's position was, *inter alia,* that with the repudiation of the award it became inoperative and, therefore, incapable of interpretation. Basing itself largely on Indian decisions interpreting the Indian Industrial Disputes Act, the Court of Appeal held that the repudiation of an award did not necessarily wipe out the rights flowing therefrom. In substance the issue that arose in this case related to the enforcement of a right emanating from the award, namely, backwages, which was quantified only in the subsequent award interpreting the original one. The decision is no authority for the proposition that once an award ceases to have effect either party is in law entitled to claim observance of its terms as a continuing obligation. The situation in this case, namely, the quantifying and payment of backwages contained in the award is different from a situation where an award requires the employer to grant additional terms of employment to his workmen. In the latter event the obligation in law to grant the terms continues so long as the award is operative. If the employer grants the

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[246] C. A. Application 206/78 S. C. M. 21.1.80.

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terms in question for the duration of the award he has complied with the award. On repudiation of the award his legal obligation to grant increased terms (whatever may be the industrial relations realities of not granting them) ceases. The judgement of the Court of Appeal, however, appears to go well beyond the situation covered by the facts of the case and seeks to keep alive legal rights even after the repudiation of an award. This conclusion, which is reflected in the following observations of the Court is, it is respectfully submitted, erroneous –

> "It would appear that the view taken by the Courts in India is that the termination of the Award does not have the effect of extinguishing the rights and obligations flowing therefrom unless the contract of employment is also terminated by notice or the rights and obligations under the award are altered by a fresh contract or by a fresh adjudication under the Industrial Disputes Act. The effect of the termination of the Award is only to prevent enforcement of the obligations under the Award in the manner prescribed by the Act; the rights and obligations which flow from the Award are not wiped out and are unenforceable by a civil suit. On this view of the matter, the contention of learned Counsel for the Petitioner that on repudiation, the Award becomes inoperative seems to me, to be untenable."

149. The effect of statutory provisions on a contract of employment is that in the event of any inconsistency the statutory provisions prevail over the terms of the contract. Express provision to this effect is found in several statutes.[247]

The Theory of Implied Terms

150. Since a contract of employment does not consist only of express terms and since many terms in a contract are not necessarily reduced to writing and may not even have been contemplated by the parties, it is important to determine the circumstances in which terms may be implied in a contract of employment. We have already seen how and to what extent legislative and collective agreement terms as well as awards or orders of courts are implied into a contract of employment. Apart from this, some terms such as those relating to conduct, are implied into every contract of employment and do not really vary from one employment situation to another. The Supreme Court in ***Reckitt & Colman of Ceylon Ltd v Peiris***[248] quoted with

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[247] e.g. Wages Boards Ordinance (Section 62), Shop & Office Employees' Act (Section 70).

[248] S. C. 151/76 S. C. M. 16.01.78 (unrep.).

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approval the following statement from F. R. Batt's "The Law of Master and Servant" (5th Ed.)-

> "In construing a contract of service the Court will, if necessary, supply an implied condition as to reasonableness where duties are not fully defined."

The terms which are implied and which may vary from one employment to another are generally customary practices which we will analyze in the succeeding section. In dealing with implied terms it is necessary to ascertain the basis on which courts may imply terms into a contract. Basically, there are four different theories or views which have been developed by the common law courts to explain the basis of implied terms.

151. The first theory has been stated thus by Bowen, L.J., in *The Moorcock* :[249]

> "What the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen."

152. The second principle, which is a variation of the first, was expressed by Mackinnon, L.J., in ***Shirlaw v Southern Foundries Ltd.*** :[250]

> "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a cry of 'Oh, of course'."

153. The third principle, which was enunciated by the House of Lords in ***Lister v Romford Ice and Cold Storage Co. Ltd.***[251] proceeds on the basis that implied terms are general rules of law attaching to particular kinds of relationship.

154. The fourth principle postulates that implied terms may be accepted where they are established as a custom. Customary practices will be analyzed in the succeeding section.

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[249] (1889) 14 P.D. 64.

[250] (1939) 2 K.B. 206.

[251] (1957) A.C. 555.

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155. There are certain common law principles generally applicable to implied terms, but it is an open question as to the extent to which some of these would be accepted by Courts in Sri Lanka in the sphere of industrial relations. It is clear that generally no implied term arises where it is contrary to an express term. In common law a custom may not be established if it is inconsistent with an express or implied term. The application of this principle is open to some doubt in the field of labour law as would appear from the succeeding section since customary practices or usage can be the foundation or basis for an equitable claim which is contrary to the terms of a contract of employment.

Variation of Contract and Effect of Custom and Usage

156. It is a common feature in industrial relations to find the terms and conditions in a contract of employment being varied from time to time. Variations usually take place as a result of the operation of several factors or events which may broadly be classified as follows :-

(a) Legislative enactments.

(b) Collective Agreements.

(c) Awards of Courts.

(d) Custom and Usage.

(e) Unilateral variation by employer.

157. The effect of legislative enactments, collective agreements and awards of courts on the contract of employment have already been analyzed, while variation of the terms of a contract by mutual agreement requires no comment since contracts can always be varied by the parties agreeing to a variation. The problematic area is variations which occur, or are sought to be effected, through customary practices and unilateral action on the part of one of the parties.

158. It is not possible to state with any degree of accuracy the exact effect of customary practices on the contract of employment because answers in this area depend to a great degree on the particular facts of the case. That is to say, whether custom has the effect of varying the contract of employment would depend on such considerations as whether the custom relates to a fundamental term of a contract or, to what is sometimes referred to as, fringe benefits, whether the custom originated or continues with the knowledge of the other party, for how long the customary practice has

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continued etc. Therefore, what is stated in the succeeding paragraphs are of a fairly tentative nature and must be regarded as constituting only certain broad general principles subject to the facts of each case.

159. There are a variety of problems and uncertainties surrounding custom in relation to contracts of employment and, indeed, other contracts. Custom is not a separate source of law to the extent that it was in early times. Therefore, the question arises as to whether a custom per se affects the terms of employment or whether it affects the employment relationship only where it becomes an implied term of the contract of employment. Distinctions have been made between terms that are implied by law and those which are implied on the basis of facts. For instance, there are customs of which judicial notice will be taken and these would be implied terms in the absence of express provision, irrespective of knowledge of the parties about the custom, e.g. the length of notice required to terminate a contract of employment will be implied in the absence of express provision irrespective of the knowledge of the parties about the custom. Terms regarding the respective rights and duties of the parties to the contract of employment will be implied in the absence of express provision irrespective of the knowledge of the parties. These are all terms implied by law, or custom of which judicial notice will be taken. Customs which do not fall within this category would apply only on the basis of knowledge of the parties and acquiescence by them in the particular practice or practices. The right to suspend an employee without pay, where asserted on the basis of custom in the establishment, is not one which will be implied automatically as a judicially noticed custom. Due to conflicting judicial decisions on these questions, it is difficult to state the correct position with any degree of certainty. For instance, in ***Marshall v English Electric Co. Ltd.***[252] Lord Goddard[253] appeared to suggest that a practice in an establishment in existence for a sufficiently long period may be deemed to be included in the contracts of employment of the employees by custom. But in the same case Du Parcq, L.J.,[254] suggested that the operation of a practice does not per se result in its inclusion in the contract of employment and that some form of acceptance by the parties of the practice is necessary to achieve this result. Thus one writer concludes that "save in the case of customs of great antiquity or customs judicially noted (which seldom if ever bear relation to an individual workplace) no custom can be implied without some indication of voluntary contractual acceptance on the part of the person to whom the custom is imputed."[255]

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[252] (1945) 1 All E.R. 653.

[253] Ibid at 655.

[254] Ibid at 657-58.

[255] J. B. Cronin & R. P. Grime Labour Law (1970) at p. 35-6.

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160. If, as it has been stated in a leading case[256] a custom must be "notorious, certain and reasonable" for it to be enforced, it suggests the requirement of knowledge by the parties and, therefore, acceptance of it. The question that then arises is whether there is such a thing as custom, as distinct from implied terms, in relation to a contract of employment. In other words, is there any difference between saying that something is part of the contractual relationship of employer and employee because it is a customary practice and saying that something is part of the employment relationship because it is an implied term. Perhaps – and this is only a tentative answer – the conceptual distinction is this. The method by which a practice becomes part of the contract is by implication, so that all customs that are part of the contract become so as a result of their being implied terms. Custom is only the evidence of an implied term. But there are implied terms of which judicial notice will be taken or which do not require proof of practice such as the duties relative to the conduct of an employee. This can perhaps be explained on the footing that they are terms implied by *law*. Implied terms not falling within this category are those which are implied on the basis of the existence of certain *factual positions*. It is perhaps in this area that customary practices play a role by constituting the *evidence* on which this type of implied term may be based. In other words, custom does not become part of the contract of employment *unless* it is one implied by *law*. In all other cases, custom represents only the *evidence* of an implied term. Even in the exceptional situation where a custom may be implied by law, it still becomes part of the contract as an implied term.

161. The first principle that must be borne in mind in the field of labour law and industrial relations relative to customary practices is that customary practices cannot have the effect of negating the benefits of legislative enactments, collective agreements and court orders to the detriment of employees. For instance, the fact that employees have been working overtime in excess of the legal maximum permitted by law does not result in an obligation to work overtime in excess of such maximum. On the other hand, customary practices can result in the creation of benefits in favour of employees in excess of legal requirements. For instance, if an employer has customarily paid his employees at an overtime rate in excess of the rate prescribed by law, then prima facie such customary rate would constitute a term of contract in the absence of a bona fide error on the part of the employer.

162. There are circumstances in which customary practices can enure to the benefit of the employer. For instance, in many types of employment it is

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[256] ***Devonald v Rosser*** (1906) 2 K.B. 728 at 734.

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not possible to make an objective determination of what constitutes the duties of an employee. For instance, while the category of a peon is common to most establishments it is not possible to list all the duties which are inherent in the job of a peon without regard to the practice in an establishment and the nature of the business. What can be stated is that certain duties must necessarily form the minimum content of the duties of a peon. Beyond that, practice in the workplace would be relevant in determining whether a particular duty falls within or outside the scope of employment of a peon. Similarly, it is not possible to define the duties of an executive which are largely dependant on the broad concept of executive functions and the practices obtaining in a particular establishment. On the other hand, there are certain circumstances in which the performance of particular functions does not necessarily imply that the employer can compel the employee to perform them in the future other than on the basis of mutual consent. For instance, a clerk who cleans his own table may do so on a purely voluntary basis and the fact that he has done so over a period of years does not result in this particular function being part of his terms of employment. The employee who agrees to make private purchases for executives cannot be dealt with on disciplinary grounds if he should refuse to continue to do so. In short, the question whether the performance of particular functions in a given case results in such functions being, or not being, an implied term of employment has to be determined on the facts of each case having regard to the nature of the employment, the nature of the function performed, the circumstances in which it was performed etc.

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163. The fact that an employer does not exercise certain rights he may have, does not necessarily have the effect of depriving the employer of the right to exercise them in the future. For instance, an employer is entitled to make a proportionate deduction from salary on account of the late attendance of an employee. The fact that he has not done so in the past does not preclude him from commencing this practice in the future. However, in such cases it would generally be prudent, and even fair, to give due notice to employees that the continuance of a particular course of conduct would result in the employer exercising his right of deduction in the future. By way of further example, custom and practice can be relevant in determining whether a particular term is or is not an implied term of employment in circumstances where it is not an express term of employment. The classic case to illustrate this point is the right of transfer. It is an established principle that the right of transfer may be express or implied, and this principle is reflected even in certain collective agreements such as Collective Agreement No.7 of 1981 between the Employers' Federation of Ceylon and the Ceylon Mercantile Union. Whether the custom has or has not been to transfer employees would determine the existence or otherwise of an implied right to transfer. Further the custom or practice in the

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particular establishment would be the most important factor in determining whether an employer has an implied right to suspend an employee without pay where the right of suspension is not expressly stated in the contract of employment or other agreement.

164. The second principle relevant to the question of custom is that practice itself without the knowledge of the other party to the contract cannot have the effect of varying a contract. It follows that what one party may do surreptitiously, or without the knowledge of the other party, cannot affect the rights of the other party. Knowledge and acquiescence are necessary.

165. The third principle is that practices which arise in consequence of bona fide mistakes do not, prima facie, have the effect of converting them into implied terms of employment. For instance, if a person or persons responsible for making overtime payments erroneously pays, and continues to pay, employees at rates in excess of the correct ones, such a practice does not ripen into a customary practice which has the effect of varying the contract of employment. But such a situation must be distinguished from the one where, in the same example, the employer pays overtime at an incorrect rate in excess of what he need pay, under the erroneous impression that the rate he has adopted is the correct one. Such a situation may probably be one which arises due to a mistake of law and, if it has been in practice for a very long period of time, may be difficult, if not impossible, to change. Even here a change could in appropriate circumstances be effected but it is not possible in a publication of this nature to deal with all the variety of circumstances and facts which would have to exist in order to enable a change to be effected. One difficulty that arises is to prove that the rate of payment commenced due to an erroneous view of the law. When an employee claims that he has accepted certain obligations under the mistaken notion that he was bound to do so, the employer need not agree to a variation of the contract except where the variation becomes necessary because otherwise the employer would be violating the law, e.g., in regard to the payment of correct wages or the grant of the correct leave entitlement.

166. Custom has sometimes been expressly recognized by legislation or by Collective Agreements. An example of legislative recognition of custom is Section 70(2) of the Shop & Office Employees' Act which states –

> "(2) Where any person employed in a shop or office was immediately prior to the appointed date entitled or becomes entitled on or after that date under or by virtue of any other law or under any contract, agreement, award or custom to any rights or privileges more favourable than those to which he would be entitled under this Act,

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nothing in this Act shall be deemed or construed in any way to authorize or permit the employer to withhold, restrict or terminate such rights or privileges."

This Section has a very limited application today because it can operate only in relation to a person who was employed prior to the date of the Act, namely, 1954, and who enjoyed, prior to 1954 terms more favourable than those in the Act. The number of employees who were employed by the same employer prior to 1954 on more favourable terms and who still continue in employment are probably so few as to make this Section of little more than academic interest today.

167. An example of a Collective Agreement recognizing custom is Collective Agreement No.7 of 1981 between the Employers' Federation of Ceylon and the Ceylon Mercantile Union. It is of some relevance and importance to consider the entirety of Clause 4 of that Agreement which states as follows :-

"4. **GENERAL TERMS AND CONDITIONS OF EMPLOYMENT :**

(1) The terms and conditions of this Agreement shall, as from the date hereof and during the continuance in force of this Agreement, be deemed to be included in all the contracts of service between an Employer bound by this Agreement and an Employee covered and bound by this Agreement whether such contracts of service be written or oral, which are subsisting as at the date hereof or which come into being during the continuance in force of this Agreement.

(2) Where the existing terms and conditions of employment of an employee covered and bound by this Agreement are more favourable than the terms and conditions provided for in this Agreement then nothing in this Agreement shall in any way affect or prejudice such existing terms and conditions of employment and such terms and conditions of employment shall continue to exist notwithstanding anything to the contrary contained herein.

(3) Where an Employee was immediately prior to the date hereof entitled or becomes entitled on or after that date under or by virtue of any law or under any contract, agreement, award or custom to any rights or privileges more favourable than those to which he would be entitled under this Agreement, nothing in this Agreement shall be deemed or construed to authorize or permit the Employer to withhold, restrict or terminate such rights or privileges."

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168. Clause 4(1) quoted above incorporates the terms of the Agreement into all contracts of service between a covered employer and employee where such contracts –

(i) are written or oral ;

(ii) are ones which exist at the date of the Agreement or which come into existence thereafter during the operation of the Agreement.

This sub-clause has no relevance to, or bearing on, customary practices.

169. Clause 4(2) provides that an employee's terms and conditions existing as at the date of the Agreement, if more favourable than those provided for in the Agreement, are not to be affected or prejudiced and shall continue to exist, notwithstanding anything to the contrary in the Agreement. This sub-clause can only relate to an employee who was in employment at the time of the Agreement since an employee who joined after the date of the Agreement could not have had terms and conditions existing prior to the Agreement. The sub-clause can only operate in a situation where existing terms and conditions of employment can be compared with terms and conditions of employment in the Agreement. For instance, a term in a contract relating to short leave is not preserved by this sub-clause because the Collective Agreement makes no provision for short leave and, therefore, no comparison can be made between a term relative to short leave existing at the time of the Agreement and the terms of the Agreement itself. This sub-clause prima facie has no bearing on, or relevance to, customary practices because what it seeks to preserve are certain terms and conditions of employment. However, since a term of employment may include an implied term, prima facie it would appear possible for a customary practice which creates an implied term to be preserved by the sub-clause, where the Agreement itself contains an express term on the subject – matter of the customary practice. On the other hand, especially in view of the existence of sub-clause (3) referred to below, it could be argued with some justification that the terms and conditions contemplated in sub-clause (2) are express terms and not terms which have become implied on the basis of custom.

170. Clause 4(3) of the Agreement ensures to an employee the benefit of any rights or privileges more favourable than those he is entitled to under the Agreement, where such rights or privileges accrued to him before or after the Agreement, by virtue of the operation of any law or contract or agreement or award or custom. There are situations in which this sub-clause would have no application. For instance, an employer may by custom operate a system of short leave. An employer who seeks to deprive future employees of short leave would not be covered by this sub-clause because short leave is not a term to be found in the Collective Agreement,

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nor would such employees be persons who are entitled to it immediately prior to the Agreement or after the date of the Agreement by virtue of any contract, agreement, award or custom.

171. Clause 18 of Collective Agreement No.5 of 1967 between the Ceylon Mercantile Union and the Employers' Federation of Ceylon provides for a scheme of gratuity or terminal benefits. It also provides that this scheme "shall not apply to employers who operate a more favourable scheme of terminal benefits, including pension schemes." This provision, read together with Clause 4 referred to in the preceding paragraphs, has been interpreted in certain Arbitration Awards, and these Awards are relevant to the question of customary practices.

172. In ***CMU v James Finlay & Co. Ltd.***[257] the Union claimed a pension on behalf of a retired employee in lieu of the terminal benefits scheme in the Collective Agreement. First, the Union claimed that since all employees who had retired prior to the Collective Agreement had been paid a pension, the workman was also entitled to one on the ground that the company operated a pension scheme more favourable than the terminal benefits provided in the Agreement. The court held that the payments made in the past were not entirely in the nature of a pension, that it was a discretionary payment[258] and that there was no pension *scheme* in terms of which the payments had been made,[259] so that the proviso in the Agreement which preserves to employees more favourable schemes of terminal benefits has no application. Secondly, the union relied on clause 4(2) of the Agreement which preserves existing terms and conditions which are more favourable than those prescribed by the Agreement. This clause was held to have no application as the payment of pension was not a term of the particular workman's employment.[260] Thirdly, the union relied on the provisions of clause 4(3) of the Agreement which preserved to employees rights or privileges to which they had become entitled before or after the Agreement by virtue of custom, and which were more favourable than those prescribed by the Agreement. For this purpose the union relied on several decisions which have prescribed certain tests where a claim is made for a customary bonus. These tests were held not to have been satisfied in this case, and the court thought that it –

> "should exercise great caution before acting upon the decisions of Indian Courts on the question of customary bonus for more than one reason. Firstly, it would appear that customary bonus in India is one

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[257] C.G.G. 15,003 of 24th March 1972.

[258] At para 8.

[259] At para 12.

[260] At para 14.

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that is claimed on the basis of a pooja bonus, and as such special rules have been evolved in relation to this type of payment. The decided cases make it clear that a customary bonus can only be claimed in relation to a festival, and this in itself sufficiently indicates the very special nature of this payment. Secondly, courts in Ceylon do not appear to have favoured the distinction drawn in India between a bonus based on implied contract and a customary bonus."[261]

The court further held :[262]

"It was also submitted on behalf of the Company that where a claim is based on custom there must be certainty as to the exact nature and operation of that custom .... in view of my findings that there is no scheme according to which the payments have been made, the impossibility of determining the quantum payable in the event of my holding that Mr. Ramalingam should be paid a pension, the fact that the payments have been made on certain considerations and appear to have been accepted on that footing, and the existence of at least, a serious doubt as to the circumstances in which those payments have been made lead me to conclude that there is no certainty at all in the alleged custom claimed by the Union."

The court also held that since the claim on the ground of implied contract and custom had been made on the strength of payments to *other persons,* greater caution should be exercised in holding that such payments have created an implied contract between the workman and the employer. The court thought that the term 'custom' in clause 4(3) was "more appropriate to a situation where an employee has himself enjoyed certain rights (e.g. working hours, fringe benefits, etc.) and he has been deprived of such rights by the employer.

173. In ***Ceylon Mercantile Union v Bartleet & Co. Ltd.***[263] a claim to a pension under the provisions of the same collective agreement was rejected on the following grounds –

(a) There was no pension scheme in operation before or after the collective agreement. "A scheme envisaged a pre-arranged system of classification or a plan of action devised in order to attain some end.

[261] At para 15.

[262] At para 16.

[263] C. G. G. 15,002 of 17th March 1972.

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It cannot be denied that there were a few instances where a monthly allowance had been paid to certain employees depending on special circumstances, peculiar to each case. Some had joined the Company long before any Provident Fund was thought of; some had died whilst in service; and still others had it only for a stipulated period. These payments have not been made in accordance with any scheme, but 'ad hoc' payments granted at the discretion of the Board then existing. This cannot convert a few isolated cases into a scheme or pattern."

(b) No pension could be claimed on the basis of custom. "Custom denotes a habit, practice or usage which by continuance has acquired the force of law or right. The rest of the words in the clause: 'by virtue of any law or under any contract of employment' clearly indicates that the rights or privileges must be enjoyed by a particular individual employee prior or subsequent to the Agreement ....I have my doubts whether clause 4 of the Collective Agreement applies to situations of this nature."[264]

Unilateral Variation of Contract

174. It is a basic principle of the law of contracts applicable to the employment relationship as well, that there cannot be a unilateral variation of a contract. Obvious as this proposition seems, it is particularly important in the field of employment law and industrial relations because, in many instances the actions of the parties to a contract of employment amount to a unilateral variation of the contract.

175. The application of the principle is well illustrated by certain decisions relating to the age of retirement. In ***Guest, Keen Williams (Private) Ltd v Sterling***[265] the employer framed a rule with effect from 1954 requiring his employees to retire on reaching the age of 55. This rule was held to be inapplicable to workmen who joined the establishment prior to the framing of the rule as there was no retirement age fixed or followed by the employer when they joined the establishment. In ***Workmen of Kettlewell Bullen & Co. Ltd. v Kettlewell Bullen & Co. Ltd.***[266] the court held that 'where rules of retirement are framed by the Company it would have no

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[264] See also ***The Scottish Ceylon Tea Co. Ltd. v The National Union of Workers*** SC 244-49/70 S. C. M. 5.6.73 (unrep.).

[265] 1959 (2) LLJ 405 (SC).

[266] 1964 (2) LLJ 146 (SC).

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application to its prior employees unless it is shown that such employees accepted the rules as part of their conditions of service'. It was also held, in the circumstances of this case, that such acceptance could not be inferred merely from the fact that no dispute had been raised till 1961 in respect of a rule framed in 1947, in the absence of evidence that the rule framed in 1947 was actually enforced in respect of employees who joined prior to 1947. However, where employees who join prior to the enactment of a rule agree to or acquiesce in the rule their retirement in terms of such a rule is justified.[267] A somewhat different view was taken by an Arbitrator in ***Ceylon Bank Employees' Union v The Hongkong & Shanghai Banking Corporation***[268] where the employee joined the Bank in 1929 when there was no age of retirement specified, and in 1954 the Bank introduced a rule of retirement at 55 years with a further five years service at the option of the Bank. The Arbitrator thought that the Bank was within its contractual rights in introducing this rule which was, according to him not an unfair one. Hence retirement in terms of this rule in good faith was held neither to be a breach of contract nor unjust or inequitable. If, as was the case, the rule remained inoperative until it was enforced against the particular employee whose case was the subject-matter of this arbitration, then there was no evidence of agreement to or acquiescence in the rule.

176. In ***Lanka Salu Sala Ltd v Wickremanayake***[269] the workman was employed by the Co-operative Wholesale Establishment (hereinafter referred to as the CWE) in its textile branch. In 1967 it was decided to convert the textile branch into a Limited Liability Company. His services with the CWE were terminated and he was employed by the new Company with an intimation that there would be no change in his terms and that his employment would be under the same rules and regulations as in the CWE. In 1968 the Company, issued a circular to the staff, including the workman concerned, that all CWE rules and regulations will apply until a separate set of rules are formulated by the Company. The workman's age of retirement when employed by the CWE was 60. In 1970 the Company made a policy decision to retire officers at 55 years. A Cabinet decision in 1971 entitled employees of corporations to serve upto 60 years. The workman was retired in 1970, before the Cabinet decision, on reaching the age of 55 years in terms of the 1970 decision referred to. The Supreme Court held that the June 1970 decision to retire at the age of 55 years was not justified in the circumstances where the workman had 24 years service under the CWE

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[267] ***Workmen of Kankanee Colliery v Their Employers*** 1967 (1) LLJ 714 (SC).

[268] CGG 13,679 of 21.06.63.

[269] SC 47/75 S. C. M. 9.4.76.

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(where the age of retirement was 60) and was compelled to enter into a new contract of employment with Lanka Salu Sala Ltd, under the same terms of service. The Supreme Court observed –

> "The subsequent reservation of the right of the new employer to revise these conditions does not justify a policy decision to terminate his services at 55 when under the old conditions he could have worked upto 60 years."

177. In ***Gomes v Sri Lanka State Trading Corporation and Others***[270] the Supreme Court held the Public Administration Circular dated 24.6.1970 which stated that employees would not be entitled to extensions of service beyond the age of 55 years superseded the Rules of Procedure of the Co-operative Wholesale Establishment under which there was an expectation of continuing till the age of 60 unless the employee was retrenched or his services was unsatisfactory.

178. The introduction of a term, as in some of the cases referred to in the preceding paragraph, where there is nothing in the contract of employment governing the question, is different to the introduction of a term which is contrary to an express term. Where a contract of employment or other document makes no reference to the age of retirement, a subsequent stipulation about the age of retirement which is uncontested may in certain circumstances in labour law, be considered valid if it is in all the circumstances fair and reasonable. Such a situation is more in the nature of an addition to the contract, rather than a variation. A rule which seeks to change a term which already exists cannot be valid without agreement on the part of the other party as this clearly amounts to a unilateral variation. The decision in 1970 in ***Lanka Salu Sala Ltd v Wickremanayake***[271] was clearly a variation of, and not an addition to, the existing terms of employment.

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[270] (1983) 2 Sri L.R.260 and also see ***Kulatunga v The Board of Directors of the CWE*** SC.7/81 – S. C. M. 3.10.81, ***K. S. G. N. de Silva v The Sri Lanka State Trading (Textile) Corporation*** – SC 39/76 S. C. M. 9.8.78. ***The Insurance Corporation of Sri Lanka v A. F. Dabare*** S. C. 43/80.

[271] Ibid.

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H. TYPES OF CONTRACTS OF EMPLOYMENT

179. In the field of employment there are many types of contracts of employment and employers often use designations or descriptions loosely. The facts often do not fit the description accorded to a contract of employment. It is also not uncommon to find terms such as 'permanent employment'. This phrase does not fit into any known legal concept of contracts of employment and is a term usually used to refer to persons who are not casual or temporary. In common usage a person described as a 'permanent' employee usually refers to one who is on a monthly contract of employment.

Monthly Contracts of Employment

180. A monthly contract of employment, often referred to by employers and unions as 'permanent employment', is a contract of employment which is automatically renewed every month unless it is terminated by either party with the requisite notice. The fact that a person on a monthly contract of employment is on probation providing for termination without notice during the period of probation does not remove the contract from the category of a monthly contract of employment.

Fixed Term Contracts

181. A fixed term contract is one under which a person is employed for a fixed term without any guarantee that the contract will be renewed on the expiry of the period stipulated, the contract coming to an end by mutual consent at the end of the agreed period. It represents a consensual termination of a contract in that it terminates automatically as a result of mutual agreement on the arrival of the particular date without the necessity for either party to terminate it.

182. Fixed term contracts have important legal applications for two reasons. Firstly, the question arises as to whether a labour court can require an employer to renew the contract of employment on its expiry. Secondly, it is important in relation to the question as to whether a fixed term contract falls within the scope of the Termination of Employment of Workmen (Special Provisions) Act 1971. The second question will be analyzed when dealing with that Act in a subsequent part of this monograph.

183. In so far as a Labour Tribunal is concerned, it has no jurisdiction to reinstate an employee whose services have ceased on the expiry of a fixed term contract for the reason that such cessation of employment is not in

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consequence of a termination by the employer. It has been held in India that where a fixed term contract is terminated during the operation of the contract, reinstatement and backwages cannot extend beyond the date on which the contract ends.[272]

184. The position in regard to an Industrial Court and Arbitrator is different. In order to constitute an 'Industrial dispute' there is no requirement that there should be a termination by the employer. The fact that a contract has expired by effluxion of time does not deprive an Industrial Court or Arbitrator of jurisdiction in regard to a claim by a workman for renewal of the contract. The words "connected with the employment or non-employment or the terms of employment" appearing in the definition of an industrial dispute in the Industrial Disputes Act[273] are wide enough to include the question whether a contract of employment for a fixed period should be renewed on its expiry.

185. Where an employer has, as a matter of practice, renewed fixed term contracts, there might be held to be an implied promise or understanding that the employer would renew the contract in the absence of misconduct, redundancy or inefficiency, thus conferring on the employee certain rights.

In ***G. O. Buyser v Harrison & Crosfield Ltd***[274] the employee was employed on a three year contract which was not renewed on its expiry. In awarding compensation to him in a sum of Rs. 40,000/- on the ground that the non-renewal of the contract was unjustified, the Court was influenced by two factors. First, at the time the employee signed the contract he was informed that it was a mere formality and that he could continue in employment till the age of 55. In fact, he was informed by letter that his age of retirement was 55. He was assured that his contract would be renewed at least till the age of 55. Secondly, the employer admitted in evidence that normally such fixed term contracts are automatically renewed. The only ground urged by the employer for the refusal to renew the contract was that it was not bound to do so as there is a cessation of employment on the expiry of the contract. This argument was rejected in the circumstances for the foregoing reasons. The employee was offered a new contract on entirely different terms much less favourable than the terms of his original contract and his refusal to accept these terms was held to be justified.

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[272] ***Hindustan Steel Ltd v Rourkela Mazdoor Sabha*** 1970 (2) LLJ 533. ***(Oriss.) V. R. M. S. Bus Service v Labour Court*** 1961 (2) LLJ 507 (Mad.).

[273] S. 48.

[274] I.D. 328 C.G.G. 14,800 of 3 may 1968.

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186. In ***Rayala Corporation Ltd. v The Facit Asia & Rayala Corporation Employees' Union***[275] the court held that, in the circumstances of the case, the contract of employment of a workman employed for a period of five years did not automatically terminate by effluxion of time as, inter alia, the contract did not provide for its automatic termination at the end of the stipulated period and other provisions of the contract suggested that the contract was one for a *minimum* period of five years.

187. The question of a fixed term contract arose for decision by the United National Administrative Tribunal in ***Bhattacharyya v The Secretary-General of the United Nations.***[276] The applicant, who was in the service of the government of Orissa, joined one of the units of the United Nations (UNICEF) on a fixed term appointment for two years commencing 2nd June 1963 on secondment from his government. In his standard order of appointment as prescribed by staff rules, it was stated that the appointment did not carry expectancy of renewal or conversion to any other type of appointment in the Secretariat of the United Nations. However, in the correspondence which preceded the appointment, it was stated that persons who join the Unit did have opportunities for regular employment and for more senior posts in the Organisation depending on their qualifications and performance. The applicant's appointment was extended until 30 June 1969 after which date it was not extended on the ground that his post was to be abolished. He was paid five months' emoluments as compensation. During his period of service his record of performance was of a high standard. The applicant claimed reinstatement or, in the alternative, four years' salary as compensation, this sum representing his salary from the date of non-renewal of his contract until the date of his attaining the age of superannuation.

188. The Tribunal held that although as a general rule fixed term appointments do not carry with them the right of renewal, "nevertheless, the Tribunal is competent to examine the surrounding facts in which the letter of appointment was signed. The Tribunal has to consider the contract as a whole, not only by reference to the letter of appointment but also in relation to the circumstances in which the contract was concluded."[277] The Tribunal thought that the contract in question contained special features which give the applicant opportunities for regular employment and for similar posts depending on qualifications and performance. In all the circumstances a reasonable expectancy of continued employment was created in the

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[275] 1972 (2) L.L.J. 389 at 392-4 (Mad.).

[276] 1971 (1) LLJ 588.

[277] Ibid at 594-5.

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applicant's mind. The circumstances of the appointment and the applicant's performance during his period of service created an expectancy of continued employment resulting in an obligation on the part of the employer to provide continued employment. It was further found as a matter of fact that the applicant's seniority was not taken into account and a bona fide attempt was not made to fit him into an alternative position in accordance with the procedure prescribed by the staff rules. Since specific performance of an obligation undertaken is difficult in the case of non-renewal of a fixed term contract, compensation of one year's salary less the five months' salary already paid was awarded by the Tribunal.

189. In certain circumstances it becomes necessary to determine whether a particular contract is a fixed term contract in the strict sense or not. In ***British Broadcasting Corporation v Ioannou***[278] this issue arose in respect of an employee engaged as an assistant in the B.B.C. for three years. This contract was renewed for a further two years and he was then offered a further one year's contract from 7 August 1972 until 6 August 1973, unless it is determined earlier by either party giving the other three months' notice. When this contract expired it was not renewed. The employee claimed compensation on account of redundancy and unfair dismissal. The contract excluded the employee's rights under the Redundancy Payments Act (1965) and the Trade Union and Labour Relations Act (1974), formerly the Industrial Relations Act (1971). Both Acts permitted 'contracting out' of their provisions in the case of contracts of employment "for a fixed period of two years or more". The Court of Appeal held that the 'contracting out' clause in this instance was not valid on two grounds. First, the contract was not for a fixed term as it was terminable by either side with three months' notice; secondly, the contract commencing 7 August 1972 was a new one and not an extension of the old one and was, therefore, for a period less than two years.

190. It is the first ground that concerns us here and in regard to it Lord Denning stated :[279]

> "............. a 'fixed term' is one which cannot be unfixed by notice. To be a 'fixed term', the parties must be bound for the term stated in the agreement; and unable to determine it by notice on either side. If it were only determinable for misconduct, it would, I think, be a 'fixed term' – because that is imported by the common law anyway. But determination by notice is destructive of any 'fixed term'."

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[278] (1975) 2 All E.R. 999 (C.A.) : 1975 I.C.R. 267.

[279] Ibid at 1005.

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191. It is submitted that the existence of a notice clause in a contract for an agreed term and the decision of the Court of Appeal are not relevant in determining the jurisdiction of a labour tribunal under the Industrial Disputes Act, or of the Commissioner of Labour under the Termination of Employment of Workmen (Special Provisions) Act, the issue in either case being not whether the contract is a fixed term contract in the strict or technical sense, but whether on the expiry of the agreed period the contract is determined on the basis of a consensual arrangement or not. The question whether such a contract automatically terminates at the agreed point of time cannot be affected by the existence or otherwise of a notice clause. The Court of Appeal was clearly interpreting the phrase "fixed term contract" in the context of a statutory reference to that term, and not with the question of cessation of employment and how it came to an end.

In ***Y. G. de Silva v Associated Newspapers of Ceylon Ltd***[280] the court pointed out that where a fixed term contract is not renewed the employee would have no claim to reinstatement before a Labour Tribunal, because such claim in terms of S.31B (1) (a) could be made only if his services were terminated by the employer, which was not the case in a fixed term contract because services under such a contract are not terminated by the employer but by mutual agreement on the effluxion of time.

Probation

192. There is a common misconcept that a probationer does not belong to the permanent cadre of employees or, as it is sometimes said, a probationer is not a permanent employee. However, a probationer stands on no different footing to other employees who are on monthly contracts of employment, the only difference being that different principles apply to the termination of his services during the period of probation.

The Supreme Court in ***The State Distilleries Corporation v Rupasinghe***[281] stated the difference thus :

> "What then is the principal difference between confirmed and probationary employment ? In the former, the burden lies on the employer to justify termination; and this he must do by reference to objective standards. In the latter, upon proof that termination took place during probation, the burden is on the employee to establish unjustifiable termination, and the employee must establish at least a prima facie case of mala fides, before the employer is called upon to

[280] (1978 – 1979) 2 SLR 173.

[281] (1994) 2 SRI LR 395.

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adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified."

193. In Sri Lanka it is usual to fix a period of probation of six months, with the right to extend it if the employee's services are unsatisfactory. It is also usual to stipulate in the contract that the services of an employee may be terminated during the period of probation or extended probation without notice,[282] and such a provision would usually be given effect to by a Labour Court unless there are exceptional circumstances which warrant a departure.

Probation Defined

194. According to the Concise Oxford Dictionary probation means the "testing of conduct or character of a person". Probation has been defined in various decisions as "a fixed and limited period of time for which an organisation employs a new employee in order to assess his aptitudes, abilities and characteristics and the amount of interest he shows in his job so as to enable employer and employee alike to make a final decision on whether he is suitable and whether there is any mutual interest in his permanent employment."[283] According to ***Venkatacharya v Mysore Sugar Co. Ltd:***[284].

> ".............. a probationer is not in the same position as others in service. He is in a state of suspense attended with the uncertainty of an inchoate arrangement. Prima facie his rights and claims against the employer are less than those of others .... probation is understood to be a stage preparatory and prior to confirmation .... the services of a person on probation can be dispensed with on grounds on which a person appointed without it can be dismissed .... The period denotes the time up to which he will be on trial and not an assured duration of service."

As observed by the Court of Appeal in ***Richard Pieris & Co. v Jayatunge***[285]

> "A period of probation necessarily entails that the probationer should satisfy the employer before the employer decides to affirm him in his

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[282] The services of a probationer could be terminated if his services are not considered satisfactory. ***S. W. R. D. Bandaranaike National Memorial Foundation v M. P. C. Perera*** 1988 2 C.A.L.R. Page 166.

[283] Ayre Globerson "Duration And Extension of Probationary Employment – A Re-Examination" in (1969) Vol. II *The Journ. of Ind. Rel.* 54 at 56.

[284] 1956 I.L.L.G. 41 at 42 M.Y.S.

[285] C.A. 404/80 C. A. M. 9.9.82 (unrep.).

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employment which would place the employer under various legal restraints and obligations and .... any employer should have the right to discontinue a probationer if he does not come up to the expectations of the employer."

In ***M/s. Moosajees Limited v Rasiah***[286] it was stated that :

> "The period of probation is a period of trial during which the probationer's capacity, conduct or character is tested before he is admitted to regular employment. For the purpose of confirmation, the (probationer) must perform his services to the satisfaction of his employer. The employer, therefore, is the sole judge to decide whether the services of a probationer are satisfactory or not."

Probation was observed by the Court of Appeal in ***Ceylon Cement Corporation v Fernando***[287] to be :

> "A fixed and limited period of time for which an organisation employs a new employee in order to assess his aptitudes, abilities and characteristics, and the amount of interest he shows in his job, so as to enable employer and employee alike to make a final decision on whether he is suitable and whether there is any mutual interest in his permanent employment.
>
> It is of the very essence of the concept of probation that such a person is on trial regarding his suitability for regular employment, and is liable to be discharged on being found to be unsuitable for permanent absorption."

The Right of the Employer to Terminate the Services of the Probationer

195. It has been consistently held that in the absence of mala fides the management is the best judge of whether an employee's period of probation has been satisfactory or not :

> "Whether a probationer had put in satisfactory service or not rests with the .... employer. That satisfaction cannot be objectively tested and an employer is not bound to give any reason if he does not confirm a probationer on the expiry of the period of probationship."[288]

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[286] (1986) 1 SRI L.R.365.

[287] (1990) 1 SRI L.R. 361.

[288] ***Caltex (India) Ltd v Second Tribunal*** 1963 (1) LLJ 156 at 158 (Cal).

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A Court would only concern itself with the question whether the employer has acted bona fide.[289] In ***Clement Fernandez v Giovanola Binny Co. Ltd.***[290] the Court, in considering the powers of a tribunal in a case where a probationer's services are terminated, stated :[291]

> "............ no court can question, not even an Industrial Court, the bona fide opinion of an employer that an employee has not satisfactorily completed his probation, even if the opinion is based on insufficient grounds. Whether a court can inquire into the reasonableness of the grounds for forming the opinion is doubtful. But if the grounds are so unreasonable that no reasonable man will form an opinion on that basis, the Court can infer that no opinion was formed."

In ***Ceylon Cement Corporation v Fernando***[292] it was stated that :

> "............ The employer is the sole judge to decide whether the services of a probationer are satisfactory or not. The probationer has no right to be confirmed in the post."

M/s. Moosajees Limited v Rasiah[293]

> "............ The employer, therefore, is the sole judge to decide whether the services of a probationer are satisfactory or not.[294]

In ***K. P. P. D. Siyaguna v Nelu's Advertising Services (Pvt) Ltd***[295] the High Court held that :

> "the employer was entitled to terminate the services of the applicant even without assigning any lawful cause or reasons as the termination took place within the period of probation."

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[289] ***Utkal Machinery Ltd v Santi Patnaik*** 1966 (1) LLJ 398 (SC).

[290] (1971) 39 FJR 357 (Ker.) 1971 (2) LLJ 174.

[291] Ibid; at pp. 361-62. So also at p. 363 : "The employer's reasons, if he chooses to give them, for not being satisfied with the work for conduct of the workman might not bear critical scrutiny; but if the satisfaction has been arrived at bona fide, no Industrial Tribunal can interfere."

[292] op. cit.

[293] op. cit.

[294] See also ***CeylonTrading Co. Ltd. v United Tea Rubber & Local Produce Workers' Union*** (1986) (2) Colombo Appellate Court Report, p. 62.

[295] H.C.L. No. 9 168/91 decided on 30.3.92.

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196. In the ***State Distilleries Corporation v A. D. Jackson Rupasinghe***[296] the Supreme Court, after an extensive discussion of previous decisions, set out the options available to an employer at the end of the period of probation :

"(a) if the employer is bona fide not satisfied with the work and conduct of the probationer (or perhaps even if he entertains a genuine doubt or suspicion), he can dismiss the probationer or extend the probationary period ;

(b) if the employer is in fact satisfied with the work and conduct of the probationer (or if his opinion to the contrary is vitiated by mala fides the wide sense), he cannot dismiss the probationer."

197. Conflicting views have been expressed on the question as to the status of an employee who is continued in employment after the expiry of a period of probation without any express confirmation in his post. The view that has been generally expressed is that in such circumstances there is no automatic confirmation of a probationer and he continues in the capacity of a probationer, unless the contract of employment stipulates a period beyond which the probationary period cannot be extended or unless the contract provides for automatic confirmation in the absence of an intimation to the contrary.[297] This principle was followed in Sri Lanka in ***Tea, Rubber, Coconut and General Produce Workers' Union v Intercom.***[298] But where a contract of employment stipulates a period beyond which the probationary period cannot be extended, continued employment beyond that period amounts to confirmation.[299] The Supreme Court of Sri Lanka had also taken the view that a person appointed to a post on probation was

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[296] op. cit.

[297] ***Express Newspapers Ltd v Labour Court*** op. cit., ***Sukhbans Singh v State of Punjab*** 1963 (1) LLJ 671 (SC). ***Premajan v University of Kerala*** 1965 (1) LLJ 77 (Ker.). ***Girija Singh v Calcutta Transport Corp.*** 1966 (2) LLJ 542 (Cal). ***Ral v Excise Commissioner*** 1967 (1) LLJ 97 (Mad. Prad.). ***State of Uttar Pradesh v Akbar Ali Khan*** 1967 (1) LLJ 708 (SC). ***State of Punjab v Dharam Singh*** (1968) 34 FJR 408 (SC). ***Hindustan Steel Ltd v Rourkela Mazdoor Sabha*** 1969 (2) LLJ 202 at 206 (Oriss), ***Giovanola Binny Ltd. v Industrial Tribunal*** 1969 Lab IC 1473 (Ker.). ***State of Punjab v Dharan Singh*** (1970) 37 JFR 219 (SC). ***Hira Singh v The Union of India*** 1970 Lab IC 593 (Del). ***Amul Roy v The Chief Commissioner of Tripura*** 1970 Lab IC 1326 at 1330 (Tripura). ***Ayodha Prasad Singh v Registrar Co-operative Societies*** Lab IC 1395 (Oriss.). ***Contra Gajamudi Estate v Arumainayagam*** 1957 (1) LLJ 412.

[298] CGG No. 14,917 of 03.07.70 at para 7.

[299] ***State of Punjab v Dharam Singh*** (1970) 37 FJR 219 (SC), ***Shankar Lal Mahra v Chief Engineer*** 1970 Lab IC 176 (Ass.). ***Rajendra Sareen v The State of Haryana*** 1970 Lab IC 814 at 823 (Edl.) So also where the contract of employment stipulates that an employee will be deemed to be confirmed on the expiry of the period of probation in the absence of an order to the contrary – ***Premajam v University of Kerala,*** op. cit. at 276.

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not automatically confirmed on the expiry of the period of probation, unless the contract of employment provides for automatic confirmation in the absence of an order to the contrary.[300] Hence, if a probationer was allowed to continue on probation after the expiry of the period of probation, he continued in service as a probationer.[301]

198. But the Supreme Court, in ***State Distilleries Corporation v Rupasinghe***[302] took a different view :

> "The decision in ***Hettiarachchi v Vidyalankara University*** that there was an automatic renewal of probation is inconsistent with the concept of probation .... If at the end of a long probationary period, an employee had not been expressly confirmed, but it is nevertheless proved, for instance, that internal performance appraisals were uniformly favourable, that increments had regularly been recommended, that frequent commendations had been issued, and that there was nothing against him, how can it be said, months or years later, that he had not duly proved himself ? That would be contrary to all notions of justice, equity and fairness between employer and employee. In such circumstances the employer should have confirmed the employee in service (unless there were extraneous circumstances, such as financial incapacity, which justified refusal).......... Where an employee had manifestly proved himself during his probationary period, having regard to the purpose of probation, dismissal (in the absence of exceptional circumstances), would be *mala fide;* likewise, in such a situation, an express extension of probation (in lieu of such dismissal) would be neither just nor equitable: for if the employee has already 'proved' himself, how can he be required to prove himself again? If in such circumstances an express extension would be proper, it must follow that an extension cannot be implied.
>
> I am fortified in my view that there can be no such 'irrebuttable presumption of renewal', by a consideration of the anomalous consequences of any such presumption. Is such a renewal to be presumed for a like term as the original, or for an indefinite period? If it is for a like period, can the presumption again be drawn at the

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[300] ***Hettiarachchi v The Vidyalankara University*** (1973) 76 NLR 47, So also in India – ***Kailash Chandra Sethia v Rajasthan State Electricity Board*** 1974 Lab IC 103 ; 1974 (2) LLJ 318 (Rajas.), ***Kedar Nath Bahl v State of Punjab*** (1972) 41 FJR 577 (SC).

[301] Ibid.

[302] op. cit.

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end of the extended period? And yet again? Should a Tribunal, with power to give relief against the (harsh) terms of a contract of employment, apply such a presumption merely because a contractual term provides for a probationary period? Probation implies the need for 'testing', and that is so whether it is the original or an extended probationary period. Hence the purpose of an extension will not be achieved unless the employee has been made aware of what is expected of him and of his deficiencies. Where the employer has not expressly alleged, and the circumstances do not suggest, a need for further 'testing', a presumption of renewal is not justified."

In ***All Ceylon Commercial & Industrial Workers' Union v Hentley (Garments) Ltd.***[303] delay on the part of the employer in terminating the services of certain probationers on the expiry of the probationary period for unsatisfactory work led the court to infer that their work was in fact satisfactory. The fact that on the expiry of the probationary period they continued in that capacity was not considered.

199. A period of probation can be extended even though there is no express provision enabling such extension in the contract of employment.[304]

In ***State Distilleries Corporation v Rupasinghe***[305] the Supreme Court stated as follows :

"Employer and employee can make express provision as to probation and confirmation, renewal or dismissal upon the expiry of probation. By agreement, the rights which either party would otherwise have may be enlarged or restricted. Thus they may agree that the employer has an unconditional right to extend the probationary period <u>or</u> that extension can only be for reasons previously disclosed to the employee; that unless and until expressly confirmed, an employee will continue to be on probation, <u>or</u> that if the employer does not dismiss the employee or expressly extend probation, the employee will be deemed to have been confirmed. Prima facie, such terms will be valid (subject perhaps, to the provisions of section 31B(4)). Thus the contractual provisions may even confer on an employee a right to confirmation upon satisfying specified conditions (e.g. section 11 of the Establishments Code: ***Bandara v Premachandra;*** see also ***Elsteel Ltd v Jayasena*** .... If the contractual terms are ambiguous, or admit of more than one interpretation, both equity and the principles of interpretation concur in requiring that they be

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[303] I. D. 239 C. G. G. 12,797 of 8th December, 61 at para 16.

[304] ***Caltex (India) Ltd. v Second Tribunal*** (1963) (1) LLJ 156 (Cal).

[305] SC Appeal No.91/93 S. C. M. 2.3..94.

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interpreted *contra proferentum,* against the Employer and in favour of the applicant. If in respect of an eventuality provisions might have been made – one favourable to the Employer, the other to the Applicant – the Court ought not imply the former: because the Employer having been in a position to do so, refrained from including the provision advantageous to himself...."

Disagreeing with the approach in Hettiarachchi v Vidyalankara University that, because there was no express provision in the letter of appointment to the effect that on the expiry of the probationary period the employee shall stand confirmed there was an automatic renewal of probation, the Court held that 'that interpretation gives the employer the benefit of the ambiguity or uncertainty arising from his own, avoidable lapse'.

200. It has been held in India in ***Bulsand Sugar Co. Ltd v Dargan***[306] and by the Court of Appeal in Sri Lanka in ***Richard Pieris & Co. Ltd v Jayatunge***[307] that an employer is not required to inform an employee during his period of probation that his services are not satisfactory. Even if this be the correct legal position, at least pragmatic and equitable considerations require that an employee should be informed during his period of probation of his unsatisfactory performance. Firstly, an employee may not be aware that he is not measuring up to the employer's expectations. Secondly, an employer who does not inform a probationer of his unsatisfactory performance during the period of probation runs the risk of placing his credibility in issue before a Labour Court, especially where a probationer whose services are terminated for unsatisfactory performance disputes the termination on the ground of mala fides. It is obvious that an employer who has informed a probationer of his dissatisfaction during the period of probation is in a better position before a Labour Court than an employer who has not done so. It is therefore desirable, both from the point of view of fairness to the employee and from the point of view of the employer, to inform a probationer during his period of probation where his performance or conduct, as the case may be, is not satisfactory.

This position was confirmed in ***State Distilleries Corporation v Rupasinghe***[308]. The Supreme Court commented that :

"In two of the decisions cited, the view was taken that 'there is no requirement under the law that an employee should be forewarned

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[306] 1952 LAC 181.

[307] C.A. 404/80 C. A. M. 9.9.82 (unrep.). The view expressed by the Court of Appeal was *obiter* because in this case the employee had been informed during his period of probation about the employer's dissatisfaction in regard to his performance.

[308] op. cit., p. 403

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orally or in writing so that he may adjust himself to the requirements of his service'. However, that was no more than obiter, because in both cases the Court did come to the conclusion, after examining the evidence, that the deficiencies of the probationer had in fact been brought to his notice. Besides, that view is inconsistent with the concept of probation as being a period of trial, at the end of which the employer must judge the performance of the probationer. There can be no proper 'trial' of a probationer unless the employer has given him (except in regard to obvious matters) adequate information and instructions, both as to what is expected of him, and as to his shortcomings and how to overcome them. It would hardly be just and equitable for an employer to say that an employee has not proved himself by relying on his failure to fulfil undisclosed expectations, or to remedy uncommunicated deficiencies."

201. The matter on which conflicting views have been expressed is whether a probationer's services can be terminated during the period of probation, as distinct from a termination at the end of the period of probation, where the employee is found to be unsuitable. It is clear that in any event a distinction has to be drawn between unsatisfactory conduct which results in a termination and mere unsuitability. Where a probationer misconducts himself during the period of probation, quite clearly an employer is not required to wait until the end of the probationary period to terminate his services. In such a situation the normal rules of misconduct would apply, subject to the qualification that the type of misconduct which would justify the dismissal of a probationer may be less serious than in the case of a confirmed employee.

202. The question as to whether termination for unsuitability can be effected only at the end of the period of probation arises in relation to a situation where the employee is not suitable for reasons other than the commission of an act or acts of misconduct. It has been held in India that termination of a probationer's services on grounds of unsuitability can only occur at the end of the probationary period. As stated in ***Giovanola Binny Ltd v Industrial Tribunal :*** [309]

"It would .... be totally meaningless to refer to a person's employment as being on probation if the management has the right to terminate his services only on grounds of proved misconduct; it is of the very essence of the concept of probation that the person is on

[309] 1969 Lab IC 1473 at 1475 (Ker.). But ***Contra Venkatacharya v Mysore Sugar Co. Ltd.*** 1956 (1) LLJ 41 (Mys.).

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trial regarding his suitability for regular employment and is liable to be discharged on being found to be unsuitable for permanent absorption .... In this respect, the only difference between a probationer whose term of probation has not expired and one who is continuing in service after the expiry of the stipulated period of probation without any order of confirmation having been passed, is that the former has a guaranteed period of trial, namely, the probationary period during which he is not liable to be discharged on the ground of unsuitability whereas the latter is liable to be discharged at any time."

In India decided cases have held that an appointment on a fixed period of probation gives the employer no right to terminate the employee's services before the expiry of the period of probation except on grounds of "misconduct or other sufficient cause."[310] It would appear that the position would be different where the right to terminate during the period of probation on grounds of unsuitability has been contracted for.[311] It is submitted however, that there is no justification for the view that an employer who wishes to terminate the services of a probationer whose performance is unsuitable, as distinct from a probationer who is guilty of misconduct, must await the end of the probationary period and cannot terminate the contract during the period of probation. If in principle the services of an employee who is not on probation can be terminated for unsatisfactory performance, it is illogical to require the lapse of a particular period of time before an employer can terminate the services of a probationer on similar grounds. Whether an employer should wait until the end of the probationary period before exercising his right of termination must surely depend on the exact reasons for the employee's unsuitability. For instance, in a particular case it is possible that an employee's performance is prima facie unsuitable only for the reason that he has not had a sufficient period of time within which to familiarize himself with the work. In such a case it would only be equitable to give him the benefit of the probationary period, at the end of which an assessment can be made of the employee's total performance. In other cases his unsuitability resulting from his performance may be such as to justify termination during the

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[310] ***Express Newspapers Ltd. v Labour Court*** 1964 (1) LLJ 9 at 11 (SC), ***Agra Electric Supply Co. Ltd. v Alladin*** (19700 37 FJR 416 at 425 – 6 (SC). If termination during the period of probation is on grounds of misconduct, the probationer would be in the same position as any other employee. ***All Ceylon Commercial & Industrial Workers' Union v Hentley (Garments) Ltd.*** ID 239 CGG 12,797 of 8th December 1961 at para 18.

[311] See ***Utkal Machinery Ltd. v Santi Patnaik,*** 1966 (1) LLJ 398 (SC) ***Parameshwara Ayyar v Mysore Machinery Manufacturers Ltd.*** 1967 (2) LLJ 169 (Mys.).

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period of probation. Hence, the better view is that expressed by the Court of Appeal in ***Richard Pieris & Co. Ltd. v Jayatunga***[312] that :

> "If the employer could have terminated the services of the workman at the end of the term without showing good cause, I see no reason why the same provisions should not apply when he terminated his services during the period of probation. At best the workman can claim compensation for the period upto the conclusion of the probationary period."

In this particular case the workman's services were terminated fifteen days before the expiry of the period of probation, which the Court held the employer was entitled to do.

As stated in ***M/s. Moosajees Ltd. v Rasiah***[313]

> "............. The employer, therefore, is the sole judge to decide whether the services of a probationer are satisfactory or not. Thus, the employer is not bound to show good cause where he terminates the services of a probationer at the end of the term of probation or even before the expiry of that period."

Re-employment on Probation

203. There have been several instances where workmen have been re-employed by a former employer on probation, after ceasing to be in employment for a period. In ***United Tea, Rubber & Local Produce Labour Association v Hayleys Ltd.***[314] it was stated that :

> "............. the Applicant – Respondent had been in service for a period of 13 years prior to the general strike. He had already served satisfactorily and there was no complaint by his employer as regards his efficiency. In the circumstances we are of the view that the re-employment of the Applicant – Respondent on probation was improper as he was no longer a probationer."

But in the case of ***Liyanamanage v Road Construction & Development (Pvt) Ltd***[315] where a Technical Officer was employed by one employer,

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[312] C. A. 404/80 C. A. M. 9.9.82.

[313] op. cit.

[314] (1987) 1 CALR 129.

[315] SC Appeal 3/93 S. C. M. 23.8.93.

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Company which was subsequently taken over by a new Company, the Technical Officer was required to enter into a fresh contract of employment with the new Company subject to a period of probation. His services were terminated thereafter during the probationary period, and in challenging such termination he submitted that requiring him to subject himself to a period of probation was an unfair condition having regard to his satisfactory service with the previous employer, his experience, etc. Kulatunga, J., held that in view of his written consent to probation, he was a probationer.

Casual Employment

204. There is no type of employment which has given rise to as many disputes, uncertainties and difficulties of interpretation as the employment of casual workers. Many problems in this connection stem from two circumstances. Firstly, there is no single test which can be applied to distinguish a casual employee from one who is not. Secondly, many employers use the term to describe employees who cannot, on any reasonable test, be regarded as casual employees.

205. A casual employee is one employed by chance on no contract to employ, e.g. a window cleaner employed at irregular intervals when the owner of the house thinks that the windows require cleaning. If there is an arrangement that he should come regularly once a month, he is not a casual employee for his employment is stable and periodical.

However, the reality in South Asian countries is that the term casual employee means very much more. In fact, the Establishments Code of the Government shows that the State itself recognizes that there is a "status" of casual employment. The Establishments Code defines a casual officer as a person appointed as such on a daily pay basis for a short period to a post approved as a casual post, or as a stop gap measure to a temporary or permanent post pending the filling of the post on temporary or permanent basis. It would appear that a casual officer in the public service is therefore in what is strictly in the nature of temporary employment. Under the Establishments Code it is possible to move from a casual appointment to that of a temporary officer, and after the lapse of five years to qualify for permanency.

206. In the private sector however, it is important to note that merely using the terminology of casual employment does not grant any sanctity or help to maintain that it is the status of an employee. Depending on the facts a Labour Tribunal or an official of the Labour Department might conclude that the employment is in fact not capable of being treated as casual employment.

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207. In ***All Ceylon Commercial & Industrial Workers' Union v Peiris***[316] the business in question, which was commenced in 1948, was one of building bodies for buses and lorries. The Court held that it was impossible for it to accept the employer's position that –

> "for carrying on a business of this size and nature his entire labour force consisted of casual workers. Some of the workers have been employed by him almost from the commencement of his business .... The fact that these workers are not employed on a monthly contract of service or that they are only paid for the days on which they work is quite insufficient to show that they are casual workers. According to section 3 of the Contracts of Hire and Service Ordinance .... 'verbal contracts for service shall be deemed and taken in law to be contracts of service for one month unless otherwise expressly stipulated ....' In the present case the agreement between the Proprietor and the employees is that the contract may be terminated by one day's notice, but that does not make the nature of the employment casual. As usually understood, a casual employee is one who is engaged to do a particular job of work for a short period of time and is paid for on the completion of the job or on the expiration of the period. In the present case the workmen are paid at the end of each week for the number of days they have worked during that week and their names are retained in the check-roll unless they keep away for a long period of time. Further, these workers have continued coming regularly to work in the Proprietor's business for several years. In view of this position we hold that the employment of these workers was of a non-casual nature."[317]

It is submitted that while the Court was correct in holding that the workmen were not casual and that the period of payment, duration of employment and such matters are relevant indications, the specific definition of a casual employee given by the court is not a satisfactory one because it is equally consistent with a temporary employee.

208. In this connection a distinction has sometimes been drawn between a casual employee and employment of a casual nature. In the former case the matter is to be decided by reference to the workman and in the latter case by reference to the type or nature of the employment on which he is engaged. Thus, in interpreting Regulation 3 framed under the Employee's Provident Fund Act[318] which excluded a person employed on any work

[316] ID 44 & 58 CGG 11,471 of 8th August 1958.

[317] Ibid at para 8.

[318] No. 15 of 1958. This Regulation is now rescinded.

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which is usually performed by the day or by the job or by the journey, it has been held that what was intended to be excluded was not a casual workman but employment of a casual nature, for which purpose one must look to the kind of employment from the point of view of the employer. Thus the Supreme Court in ***Sinnathamby v Ratnaweera***[319] stated :

> "Mr. Perera, for the appellant, suggested that, in the case of these cigar rollers, the true position is that there is not a continuous employment but a series of employments or engagements by the employer. Crown Counsel submitted that these men are not engaged in isolated jobs of work each of which is complete at that hour of the day on which he chooses to leave the factory and go home, but in work of a continuous nature, viz. the turning out of cigars. The learned Magistrate himself took the view that regulation 3 was intended to exempt work of a casual nature. As examples he has mentioned the case of the work of an odd-job gardener or a person who undertakes to wash and polish a car. These examples could be multiplied. In this case he was inclined to think that there was nothing casual in the nature of the work of cigar rolling itself. Any element of casualness was not a characteristic of the work itself, but rather to be attributed to the worker himself. On the question before him he has in my opinion reached a correct finding ...."

209. There does not appear to be any adequate test to distinguish between a casual and permanent workman. As pointed out by T. S. Fernando J. in ***Ratnasabapathy v Asilin Nona :***[320]

> "There is a class of cases where it is quite clear that the employment is regular, permanent, stable and not casual. There is another class of cases on the other side of the line where manifestly the employment is of a casual nature. Between these two it may become more and more difficult to say on which side of the line the individual case falls. In those cases it is a question of fact to be determined by considering not only the nature of the work but also the way in which the wages are paid, or the amount of the wages paid, the period of time over which the employment extends, indeed all the facts and circumstances of the case."

Variability in the attendance of an employee does not in itself or by itself establish the casualness of a workman's employment.[321] In ***Eksath***

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[319] (1966) 67 NLR 518 at 520-1.

[320] (1960) 61 NLR 548 at 551.

[321] ***All Ceylon Commercial & Industrial Workers' Union v Fernando & Sons Ltd.*** ID 168 CGG 12,087 of 18th March 1960 at para 12.

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Engineru Ha Samanya Kamkaru Samithiya v Samson Perera[322] the Court held that the employees in question were not casual workers because, inter alia they were paid weekly, their names appeared on the check-roll and some of them had worked for a long time regularly.

210. One important test appears to be that a casual employee has no right to expect employment and, conversely, the employer has no right to expect him to report for work. In other words, a casual employee can report for work as and when he likes and he can be employed as and when the employer pleases, so that such an employee has no right to expect employment beyond the day or job on which he is employed. Hence no question of termination of a casual workman's services can properly arise and such workmen cannot, in strict law, claim any right to notice of termination.[323] In ***Arumugam v Nagammal***[324] A had a contract to unload wagons. S worked under him and engaged coolies. A was generally at the workplace and S supervised the work of the coolies. A cooly who was working for about eight months died as a result of an accident in the course of his employment. The deceased was held not to be a casual employee. Referring to the nature of the deceased's employment, the court said that he was not "merely a casual cooly employed that day only to assist in unloading but .... he was fairly regularly employed in unloading wagons by its contractors."[325] In ***Hill v Begg***[326] a man who earned his living by doing odd jobs was employed by the occupier of a house to clean his windows at irregular intervals of about six weeks during a period of two years. He was usually sent for when the windows required cleaning and was paid daily for his work. There was no agreement between the parties of either permanent or periodic employment. He was held to be a casual employee.[327]

211. In ***River Valleys Development Board v United Engineering Workers' Union***[328] the question arose as to whether certain employees were casual

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[322] CGG 14,297 of 22nd January 1965.

[323] ***Nidahas Karmika Saha Velanda Sevaka Vurthiya Samithiya v Adamjee Lukmanjee & Sons Ltd.*** ID 202 CGG 12,125 of 6th May 1960 at para 7. In ***Tea, Rubber, Coconut & General Produce Workers' Union v Henderson & Co. Ltd.*** ID 99 CGG 11,670 of 20th February 1959 the employees in question were held to be temporary and not casual.

[324] AIR 1949 Madras 462.

[325] Ibid at 464.

[326] (1909) 2 KB 802.

[327] "There was no agreement that he should be employed. No complaint could have been made if any other person had been employed." : ibid at 804. The Court seems to have thought that the character of the employment (whether casual or not) does not depend on the tenure of employment (ibid at 805) and a person may be regularly employed in an employment of a casual nature (ibid at 806).

[328] SC 56/71 S. C. M. 27.03.73 (unrep.).

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workmen. The Supreme Court held that although the workmen were termed 'casual' their employment had assumed a regular character which was openly recognized by the employer by the mode of payment which was fortnightly and not daily, and also by the climate created by the employer who, throughout, held out to them that they were not casual but were employed on a regular basis, despite the artificial breaks which were periodically imposed on their employment. Therefore, these employees were held to be entitled to the benefit of certain disciplinary rules which were operative in the employer's establishment, although these rules did not apply to employees who were actually engaged on a casual basis.

212. In another case decided by the Supreme Court[329] the workman was treated as a casual workman from April to June 1973, when he was made a temporary workman. His services were terminated in April 1974. The employer claimed that he was a workman only from June 1973 and, therefore, not covered by the Termination of Employment of Workmen (Special Provisions) Act 1971 as he had less than one year's service, and that his period of casual employment prior to June 1974 cannot be taken into account for the purpose of determining his period of service. The Supreme Court held that in April and May 1973 the workman had worked on the maximum number of days it was possible to work, excluding holidays. He had also worked on the only two working days in June before he was made a temporary workman. The Supreme Court observed :

> "On the facts therefore in the absence of any significant gaps in the period of employment we find that the workman has been regularly employed during the period of two months .... In all these circumstances it cannot be said that the workman remained in the casual pool of workers depending on his luck to be called and given employment as and when it was necessary for the purposes of his employment."

Therefore, it was held that the Commissioner of Labour was justified in counting his period of alleged casual employment in holding that the workman had one year's service, thus bringing him within the ambit of the Act.

213. In ***Ceylon Ceramics Corporation v Weerasinghe***[330] the workman was employed as a Trainee Sales Assistant from 10.7.73. At the end of her training appointment she was employed from 6.8.73 as the Officer in

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[329] SC 359/75 S. C. M. 18.05.76 (unrep.).

[330] SC 24-25/76 S. C. M. 25.7.78 (unrep.).

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Charge of a Sales Room in a hotel on a daily wage. She was transferred on 31.5.74 and was subsequently transferred again. Her services were terminated on 21.11.74. The employer claimed that she was employed on a casual basis and that her services were terminated when they were no longer required. The Labour Tribunal held that she was not employed as a casual employee and ordered her reinstatement. The Supreme Court confirmed the Tribunal's order that her employment was not on a casual basis and that the termination of her services was not justified. In reaching this conclusion about the character of her employment, the Supreme Court considered it relevant that she was trained, her daily wage was increased, although daily rated she was paid monthly, she was given full responsibility for running the various sales centres at which she was employed, she was required to furnish security in a sum of Rs.1,000/- and no reference was made to her alleged casual status in the letter issued to her, the first reference to it being the letter of termination. The Supreme Court discounted the fact that in evidence she admitted knowledge that she was employed on a casual basis and that she was so informed by the employer.

214. On the basis of decided cases as well as from a conceptual point of view, the following principles are suggested as broad guidelines only, relevant to the problems surrounding casual employees. However, it is useful to bear in mind the words of an English judge many years ago :[331]

> "There is a state of facts in which it would be impossible for a reasonable Tribunal to say that work was casual, and equally there is a state of facts in which it would be impossible for a reasonable Tribunal to say that it was permanent; but I am unable to formulate the test which would determine the boundary between two conditions as a matter of law, and I think .... that when the state of facts is midway between these two states, so that the question is reasonably debatable, it must be for the County Court judge to decide."

While some of the tests which are referred to below are useful, ultimately it must depend to a large extent on the facts of each case.

215. The first principle, about which there can be no dispute, is that the description of a workman as a casual employee and his acceptance of this description does not conclude an issue about his status. Such a description, which is generally imposed by an employer unilaterally in a situation where the workman has little or no bargaining power, can at best be only

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[331] Hamilton, L.J., in ***Knight v Bucknill*** (1913) 6 B.W.C.C. 160 at 164-5.

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one relevant factor which may be of little or no consequence in the context of other circumstances.

216. Secondly, there is some justification for considering whether the particular employment in which an employee is said to be a casual employee is, in itself, an employment or work of a casual nature. In other words, it is sometimes useful to look at the problem from the point of view of the employer's work, rather than from the point of view of the employee. However, it would be an exaggeration to say that the only casual employees that the law would recognize as such are persons who are employed in work or employments of a casual nature and that there can never be a casual employee engaged on work which is of a regular nature or which forms part and parcel of an employer's normal business. The test only means that where the work or employment is also of a casual nature it is easier to conclude that workmen employed in such work are also casual employees. The fact that work or employment of a casual nature is a concept distinct from a casual employee has been recognized in decided cases, as in ***Hill v Begg***[332] where, in considering certain words in the English Workmen's Compensation Act of 1906, since repealed, Buckley, L.J., said :

> "I pause here to point out that the words are not 'who is casually employed', but 'whose employment is of a casual nature'. I have to investigate what is the character of the man's employment, not what is the tenure of the employment. Is the employment one which is in its nature casual ?......... Suppose that a host when from time to time he entertains his friends at dinner or his wife gives a reception or a dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, it may be said that their employment is regular. But the employment is of a casual nature. It depends upon the whim or the hospitable instincts or the social obligations of the host whether he gives any, and how many, dinner parties or receptions, and the number of men he will want will vary with the number of guests. In such a case the waiters may not incorrectly be said to be regularly employed in an employment of a casual nature."

If an employee is employed by an employer for the purpose of colour washing his premises or to effect certain repairs, it is easy to designate the employee as a casual employee for two reasons. Firstly, the work is of a

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[332] (1908) 2 K.B. 802 at 805-6.

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non-recurring or casual nature arising as and when occasion demands. Secondly, it is not an essential or integral part of the employer's business. The fact that the employment or work itself is of a casual nature is not in itself the test but one indicator which assists in the final conclusion that the employee is a casual employee. On the other hand an employer may, on a particular day, recruit employees from a 'pool' or otherwise to cover absenteeism of his regular employees on that day. Such employees may also reasonably be designated as casual employees, although the engagement is on work which forms part and parcel of the employer's normal business. If, however, the employer continues to employ such employees regularly, then it may destroy the casual status of the employees concerned. It is not possible to devise a test to determine the point at which the employees are transformed from casual to non-casual employees and each situation will have to be determined on its own facts. For instance, if on most days of the year an employer employs a certain minimum number of casual employees, it may be said that the employer has a need for that minimum number of regular or permanent employees in his establishment and that the employment of employees who are designated as casuals is only a label or device and they are not in law or in fact casual employees.

217. Thirdly, it has been suggested that a casual workman is one who is employed only for the day with no expectation of work thereafter and with no obligation on the part of the workman to offer himself for work thereafter. From a conceptual point of view this test suffers from more than one weakness. There is no justification for limiting casual employment to a day. For instance, a person may employ a casual employee to cut the grass on his lawn and for its purpose he may require two days. This does not destroy his casual status. Secondly, the test is equally consistent with a temporary employee. The fact that there is no obligation on the part of the employer to offer work or for the workman to offer himself for work beyond the particular day or job, as the case may be, is also, equally consistent with temporary employment. In practice when employers describe employees as casual, they often assign that label to persons who are really temporary workmen. The only guideline that can be indicated in the context of a test linked to the duration of employment is that the longer the period of employment the greater the chance that the employee will be a temporary, rather than a casual employee coupled with the possibility that the employee may be regarded as a permanent employee or, at least, he may have an equitable claim to permanent employment. On the other hand, employment for the day only with no expectation of work thereafter and with no obligation to report for work assists in the conclusion that the employee is a casual one. It is one indicator, and not a final or conclusive test.

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218. A fourth test which has been adopted from time to time is the mode of payment. In other words, if payment for work is made at the end of each day it has been thought that it is consistent with a casual status, whereas payment at the end of the week or month has sometimes been a factor which has been considered to be inconsistent with a casual status. We have seen that this test played a part in the conclusions in ***All Ceylon Commercial & Industrial Workers' Union v Peiris,***[333] ***Eksath Engineru Ha Samanya Kamkaru Samithiya v Samson Perera,***[334] ***River Valleys Development Board v United Engineering Workers' Union,***[335] and ***Ceylon Ceramics Corporation v Weerasinghe.***[336] Here again it is difficult to see the rationale behind the time of payment. By way of example – an employer may inform a workman that he has casual work for an intermittent period over a few days and that, for administrative convenience, he will be paid at the end of the week for the number of days on which he has been employed. There does not appear to be any justifiable reason as to why such an arrangement should destroy an otherwise casual status of the workman. Further, even at the present time there are several Wages Boards which prescribe a daily rate of pay thus entitling the employer if he so wishes, to pay his workmen at the end of each day of work. This would not in any way assist the employer in contending that the workmen in question are casual employees because they are paid at the end of each day. It appears to be more correct to say that a contract to perform casual work need not be limited by a day and can well be limited by the time it takes to perform the job. Here again, the mode of payment can be regarded as only one test among many others, and payment at the end of the day may sometimes be indicative of the fact that there is no expectation of work thereafter and no obligation on the part of the employee to report for work. To that extent the mode of payment is of relevance, but is not conclusive.

The question of casual employment became important in the context of a Labour Tribunal application, as the Courts have held that a casual employee is not entitled to reinstatement. In such cases therefore, the Court has to go into the merits of the particular application and decide whether in fact the relationship was one of a casual employee or of a permanent one. In the case of the ***All Ceylon Commercial & Industrial Workers' Union v Peiris*** it was held that in view of the magnitude of the business conducted it was unreasonable to treat the entire labour force as casual workers. The Court was not impressed by the fact that the employees were paid only for

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[333] I.D. 44 & 58 CGG 11,471 of 8th August 1958.

[334] CGG 14,297 22 January 1965.

[335] SC 56/71 S. C. M. 27.3.73 (unrep.).

[336] SC 24-25/76 SCM 25.7.78 (unrep.).

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the days on which they worked, and it was pointed out that these workers had continued to work for several years.

In ***Merril J. Fernando & Co., v Deimon Singho***[337] it was held that a casual employee has no right to reinstatement as there is no former position in which he can be placed again or a previous state to which he can be restored. Hence a casual employee not being entitled to reinstatement is not entitled to compensation in lieu of reinstatement.

The term casual employment therefore does not mean anything as far as the private sector and the legislation applicable to it are concerned. However, it must be noted that Collective Agreements usually cover only those on monthly contracts of employment, and the so called casuals are not given the benefits of the Collective Agreements as they are on daily rates of pay.

Temporary Contracts of Employment

219. The question arises as to what distinguishes casual employment from a temporary employment and a casual employee from a temporary employee. Employment or work of a casual nature is easier to distinguish from work of a temporary nature since the latter arises in relation to work which is part and parcel of the employer's business, e.g., a sudden and temporary increase in an employer's export orders, the need to employ a temporary telephone operator in place of one who is on three months' leave and so on. The distinction between a casual employee and a temporary employee is more difficult, and the only reliable guideline is to say that the longer the period of employment the more likely that the employee is temporary, rather than casual. Further, a temporary employee is one who would be employed on work which is part and parcel of the employer's normal business, which is not necessarily so in the case of a casual employee.

220. A temporary employee is one who is employed to satisfy an employer's temporary need, the duration of which is limited either by the job or by time. An employer who employs a temporary employee in place of a telephone operator who is on six months' leave would be an example of temporary employment being limited by time. In some cases it is not possible to stipulate in advance a particular period of time for which the employee may be required. Such cases are ones which are limited by the job.

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[337] (1988) 1 S.L.L.R 242.

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221. Where possible, an employer employing a temporary workman should do so on a contract of employment which limits the period of employment by time. It is also desirable to stipulate in the contract that it will automatically cease on the arrival of the stipulated date, but that it may be terminated earlier if the need no longer exists or if the workman's conduct is not satisfactory. If the need continues beyond the stipulated date, then it is preferable to issue a new contract of employment on similar terms. If it is not possible to stipulate the period of the temporary employment by reference to the date on which it will cease, then the contract should state that it will terminate on completion of the particular job.

222. Several statutes create liabilities as far as the employer is concerned without distinguishing between what the employer may call permanent and non-permanent employees. For example :–

i) The Termination of Employment Act states that if an employee has worked for 180 days in a period of 12 months immediately preceding his termination that he is covered by the Act.

ii) Various Wages Boards prescribe annual leave merely on the basis of the number of days worked, and do not refer to the status of the employee. Therefore, even though a person is called a non-permanent employee, he is still entitled to the benefit of annual leave. He would also be entitled to any overtime payments for work on holidays under different Wages Board decisions.

iii) Under the Shop & Office Employees' Act any person who works more than 28 hours in a week becomes entitled to paid weekly holidays. No distinction is drawn between permanent and non-permanent employees.

Seasonal Contracts of Employment

223. Certain employments, by their very nature, are seasonal. Examples include tobacco drying[338] and employment in residential hotels where, during the tourist season, there is a need to employ additional staff to meet the increased demand which is not necessarily of a continuing nature throughout the year.

224. The question arises whether seasonal employees have a lien on their posts and are entitled to re-employment on the commencement of the following

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[338] See ***Industrial & General Workers' Union v Ceylon Tobacco Co. Ltd.*** CGG 14,930 of 30.10.1970.

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season. The answer must depend on the facts of each case. In two circumstances such employees may have a claim to re-employment: first, where their contracts of employment confer on them the right to re-employment in the succeeding season, and second, if they can establish that the custom or usage in the particular business is that a seasonal employee has a right to re-employment in the next season. Apart from these two circumstances, an employer is generally free to employ anyone he chooses on seasonal work and the employer cannot be compelled to renew their contracts in the succeeding season.[339]

Apprenticeship and Training

225. The legal framework expressly recognizes three forms of apprenticeship and training, which are –

(a) Apprentices or trainees as determined by certain decisions of Wages Boards such as those for the Engineering, Printing and Garment Manufacturing Trades.

(b) Trainees employed under the Employment of Trainees (Private Sector) Law No.8 of 1978.

(c) Apprentices under the National Apprenticeship Act No.49 of 1971.

However, before analyzing the abovementioned three categories of apprentices or trainees, it is necessary to analyze the general concept of an apprentice, particularly in the light of certain other provisions to be found in our labour laws.

226. Under the general law a contract of apprenticeship differs from one of service :

> "Under a contract of service one person agrees to perform service for another, either gratuitously or for payment. But an apprentice is a person bound to another for the purpose of learning his trade or calling, not necessarily in order to earn money by such contract: and the contract is of the nature that the master teaches and the other serves the master with the intention of learning."[340]

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[339] Ibid, following ***Kandimalla Ramamurthy & Co. v Labour Court*** (1970) 37 FJR 160.

[340] G.H.L. Fridman *The Modern Law of Employment* (Stevens, London 1963) at p. 24. See also ibid at p. 973. A contract of apprenticeship does not involve a relationship of master and servant – ***Horan v Hayhoe*** (1904) 1 KB 288 but an apprentice is a workman within the meaning of the Industrial Disputes Act in Sri Lanka.

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A contract of apprenticeship is one where one party, the employer, agrees to instruct or teach the other, the apprentice, in his trade and to maintain him during the existence of the relationship, and the apprentice agrees to serve the master and to learn from him.[341] Since an apprentice is a person who enters into a service to learn a trade, it necessarily implies a trade in which some skill is required and has to be acquired. In some respects an apprentice stands on a similar footing to that of a probationer, though in the case of probation the emphasis is on conduct and aptitude for work, while in the case of an apprentice the emphasis is on the learning of a skill :

> "The period of apprenticeship depends upon many many factors viz. nature of the job, its intricacy, and the complicity and aptitude of the apprentice. The probationer is generally appointed against a job of a permanent nature and is selected with reference to his general ability for the job for which he is intended and an apprentice, on the other hand, is a learner............. He has to learn the job, but a probationer generally knows the job for which he is intended and has only to give a test how he works during the probationary period................[342]

227. It has been held in English law that since the object of a contract of apprenticeship is to enable the apprentice to fit himself to get better employment and wages, where there is a breach of a contract of apprenticeship by the employer the apprentice is entitled to damages for the diminution of his future prospects by the loss of the benefit of the training, in addition to damages for loss of earnings and training during the remainder of the agreement :[343]

> "A contract of apprenticeship is significantly different from an ordinary contract of service if one has to consider damages for breach of the contract by an employer. A contract of apprenticeship secures three things for the apprentice : it secures him first, a money payment during the period of apprenticeship, secondly, that he shall be instructed and trained and thus acquire skills which would be of value to him for the rest of his life, and thirdly, it gives him status, because .... once a young man, as here, completes his apprenticeship and can show by certificate that he has completed his time with a well known employer, this gets him off to a good start in the labour market, and gives him a status the loss of which may be of considerable damage to him."[344]

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[341] Cockburn, C.J., in ***Parish of Clapham v Parish of St. Pancras*** (1860) 29 LJMC 141 at 143-4.

[342] ***Rai v Patna Electric Supply Co.*** 1955 LAC 545 at 549.

[343] ***Dunk v George Waller & Son Ltd.*** (1970) 3 All ER 30.

[344] Ibid at 634.

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228. Many of our labour laws have brought apprentices or trainees within the definition of a 'workman' and, therefore within the ambit of those laws. Examples include the Industrial Disputes Act (1950), the Employees' Provident Fund Act (1958) and the Termination of Employment of Workmen (Special Provisions) Act (1971). In so doing, these particular labour laws have brought apprentices within their protection.

229. The first category of apprentices, which is of little practical importance today, is apprentices covered by various decisions of Wages Boards. Since, as we shall see, many of the skills included in this category are now covered by the National Apprenticeship Scheme, the employment of Wages Board apprentices has considerably diminished. Wages Boards such as those for the Garment Manufacturing Trade, the Hosiery Manufacturing Trade, the Printing Trade and the Engineering Trade prescribe a minimum wage or allowance for apprentices as well as the period of training. An apprentice employed in terms of the decisions of a Wages Board cannot be employed on a period of training in excess of that stipulated by the particular decisions. The Engineering Trade provides for a four year period of apprenticeship, a year being defined as 365 days of continuous employment. The Garment Manufacturing and Hosiery Trades prescribe 156 working days as the period of training. The Printing Trade provides 4 to 5 years as the period of apprenticeship and a year is defined as 288 days of continuous employment.

230. The Wages Boards Ordinance requires that in any trade for which a Wages Board has been established, employment of an apprentice or a learner shall only be with the written permission of the Commissioner of Labour. This requirement is generally not observed or insisted upon in practice by the Department of Labour. The Ordinance also prohibits the employer from taking a premium from or on behalf of an apprentice, unless it is a premium which forms part of the conditions of an agreement entered into at or about the time of the commencement of the apprenticeship and provided the payment is made not later than four weeks from the date of commencement of the apprenticeship.

231. The Employment of Trainees (Private Sector) Law (1978) entitles an employer to employ trainees under that law. This Act provides as follows :-

(a) Without prejudice to any scheme of training of, or to the employment of apprentices in any other Law, an employer may enter into a contract of training with a person for a period not exceeding one year for the purpose of providing practical training to the trainee in any of

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the following vocations and on the payment of an allowance specified below :

(1) Clerks, stenographers, bookkeepers, typists, supervisors, salesmen, shop assistants, storekeepers, telephone operators, cashiers, foremen or any other similar vocation :

Rs. 275/- per month.

(2) Watchers, caretakers, bicycle orderlies, peons, liftmen, office and shop labourers, outside messengers, tea boys or other vocations :

Rs. 240/- p.m. or Rs. 10/- per day for each day on which he is engaged.

(3) Any vocation in a factory or in any trade for which a Wages Board has been established under the Wages Boards Ordinance other than a vocation specified in items (a) and (b) :

Rs. 180/- p.m. or Rs. 7.50 per day on which he is engaged.

(b) This law applies only in respect of an employer and a trainee who have entered into a contract under the provisions of this law.

(c) Apart from the allowance specified above, the trainee is not entitled to any other allowance other than overtime calculated at 1 1/2 times the normal hourly rate of the allowance where he is engaged on work beyond the normal working hours. The hourly rate is obtained by dividing the monthly rate by 240 or the daily rate by 8 as the case may be.

(d) The normal working hours of a trainee shall not exceed 9 hours (inclusive of one hour for a meal) in any one day or 45 hours in any one week.

(e) A trainee is entitled to 7 days medical leave with pay on grounds of ill health supported by medical certificates issued by a registered medical practitioner. The provisions of the following laws will not apply to the trainees :

1. The Shop & Office Employees' Act.

2. Industrial Disputes Act.

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3. Wages Boards Ordinance.

4. Trade Union Ordinance.

5. Termination of Employment Act.

6. Any Collective Agreement.

(f) On the conclusion of the period of training the employer is required to provide employment to the trainee in a vocation specific in (a) (1), (2) & (3) above for which he has been trained or in the alternative find him other suitable employment.

(g) An employer who fails to pay to the trainee the allowance specified in the law or who fails to give him employment as referred to in (f) above is guilty of an offence and is liable on conviction to a fine or imprisonment or both.

(h) An employer may terminate a contract of training under this Act –

1. on disciplinary grounds ;

2. with the permission of the Commissioner of Labour on the ground that the trainee has failed to acquire the required degree of proficiency for employment in the vocation for which he has been trained.

A trainee may terminate his contract of employment with 30 days' notice or by the payment to the employer of the allowance paid to him in the preceding month.

(i) The provisions of the Employees' Provident Fund Act and the Workmen's Compensation Ordinance will apply to trainees who are engaged under this Law.

232. The most important apprenticeship or training scheme in the country in the National Apprenticeship Scheme formulated under the National Apprenticeship Act No.49 of 1971. The following is a summary of the main provisions of that Act.

233. *Objects :* The Act and the Regulations are designed to achieve the objective of the Government of training a required number of persons in special skills. The emphasis is not merely on the skill but also on the training of

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not more than a required number of persons in the particular skill. The whole scheme of the legislation is designed to ensure that there will not be an excess number of persons possessing certain skills and thereby adding to the already acute state of unemployment. The provisions of the Act and Regulations apply to all categorized trades and persons undergoing Apprenticeship Training under a contract of apprenticeship entered into under the Act.

234. In keeping with this objective, the legislation broadly empowers the Apprenticeship Board to requisition an available number of places for apprentices in each establishment for the purpose of training. Vacancies will be so allocated by the Board for training only after consultation with the establishment in question. In terms of the Act the National Apprenticeship Board will, inter alia, look into matters connected with –

(i) the training requirements of the country ;

(ii) the relevant areas and categories in which training is required ;

(iii) the training programme and syllabus for each category of apprentice ;

(iv) the administrative machinery to implement these decisions ;

(v) setting standards and conducting trade tests for apprentices in apprenticeable trades ;

(vi) issuing certificates to those who successfully complete their periods of apprenticeship.

All training establishments are expected to conform to the requirements of the Act and Regulations.

235. A further objective of the Scheme is that the training of categorized apprentices should be according to training standards laid down by the Board and such apprentices should not be utilized as cheap labour. The Board does not permit establishments to train such apprentices except in the particular skills for which they have been recruited for training.

236. Most skills in the country are now covered by the National Apprenticeship Scheme and, although there is no express legal prohibition against the recruitment of apprentices by employers outside the provisions of this Scheme, yet the National Apprenticeship Board discourages recruitment of apprentices outside the Scheme.

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237. *National Apprenticeship Board :* The Act established a National Apprenticeship Board, the general objects of which are :

(a) to formulate, implement and supervise a scheme of training to cover each category of apprentice;

(b) to establish apprenticeship standards in relation to such training, to determine the periods of training for each category of apprentice and the numbers, nature and content or the type and level of training to be undergone by each such category;

(c) to determine the trade tests to be undergone by each category of apprentice and their proficiency, and to issue certificates to those who qualify;

(d) to determine, in consultation with the Minister the amount of allowances payable to each category of apprentice;

(e) to determine the hours and conditions of work, leave entitlements, holidays, and other conditions to be observed by each category of apprentice; and

(f) to do all such other acts or things as are necessary for, or are incidental to, the attainment of the objects hereinbefore mentioned.

238. The Board comprises the Director of Apprenticeship as Chairman and certain representative members as specified in Section 9 appointed by the Minister.

239. *Division of Apprentices :* The Minister is empowered, by Gazette notification, to divide apprentices into different categories. The Minister has done so by several Regulations published in the Gazette. The provisions of the Act apply only to such categories of apprentices as are specified by the Minister by gazette notification.

240. *Engagement of Apprentices :* Section 42 provides that a person is disqualified from being engaged as an apprentice in any category –

(a) If he is under 16 years.

(b) Where he is between 16 and 18 years but the prior sanction of the Board has not been obtained. In this connection the Board is precluded from giving its approval unless the requirements of that category of apprentice makes it necessary that apprentices should be recruited under the age of 18.

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(c) Unless he satisfies the prescribed standards, of education and physical fitness applicable to that category. The standards of physical fitness are set out in Clause 9 of the Regulations published in Gazette Extraordinary 41/5 of 11th January, 1973.

241. No person shall be engaged as an apprentice unless a contract of apprenticeship has been signed by or on his behalf and his employer and such contract has been registered with the Director of Apprenticeship. If the apprentice is a minor the contract must be signed on his behalf by his parent or guardian. Notice of engagement of an apprenticeship must be given to the Director in the manner set out in Clause 10 of the Regulations in Gazette Extraordinary No. 41/5 of 11th January 1973 and the contract of apprenticeship registered in the manner set out in Clauses 11, 12 and 13 of the same Regulations.

242. The contract of apprenticeship must specify the period of training and such period will be the period prescribed in respect of the category. Where an apprentice has been trained in a school recognized by the Board and has passed the prescribed trade tests conducted by the proper authorities, the period of apprenticeship will be such period as determined by the Board.

243. *Training and Attendance of Apprentices :* Section 47 of the Act contains the general statutory provisions regarding the practical training of apprentices. Attention is also drawn to clauses 20, 21, 22, 23, 24 and 26 of the Regulations published in Gazette Extraordinary No.41/5 of 11th January 1973. These Regulations prescribe that every apprentice undergoing practical training in an establishment must be given a course of related instruction appropriate to his trade. Any time spent by an apprentice in attending related instruction classes is treated as time served. Absence without leave from such instructions is absence due to the default of the apprentice and the employer is entitled to make a deduction on that account from the apprentice's allowance. An employer is not entitled to call upon an apprentice to perform work during the time when he is required to attend related instruction classes. An apprentice must put in a minimum attendance of 250 days a year on training out of which 50 days may be devoted to related instructions and 200 days to practical training. An apprentice who is unable to fulfil this requirement regarding attendance must be given an opportunity to make up the short fall in the following year so that he may be eligible to sit for the trade test conducted by the Board. If despite this the apprentice is unable to put in the minimum period of attendance referred to above, he will not be considered as having completed the full period of training and the employer may extend his period of training with the consent of the Director of Apprenticeship.

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244. *Leave :* In terms of Clause 5 of the Regulations published in Gazette Extraordinary No.41/5 of 11th January 1973, an apprentice is entitled to the following types of leave subject to the conditions specified under each kind of leave. During the first year of training the grant of this leave shall be on a proportionate basis :

1. **Casual Leave :**

(i) Casual leave shall be granted for a maximum period of 14 days in a year.

(ii) Any holidays intervening during the period of casual leave shall not be counted for the purpose of the limit of 14 days.

(iii) Casual leave not utilized during the year shall stand lapsed at the end of the year.

(iv) Casual leave shall not be combined with medical leave. If casual leave is preceded or followed by medical leave, the entire leave taken shall be treated either as medical or casual leave. Provided that he shall not be allowed to exceed the maximum period prescribed in respect of medical or casual leave as the case may be.

(v) Except in the case of extreme urgency application for such leave shall be made to the proper authority and sanction obtained prior to the availing of leave.

2. **Medical Leave :**

(i) Medical Leave upto 7 days for each year of training may be granted to the apprentice who is unable to attend duty due to illness.

(ii) Any holiday intervening during the period of medical leave shall be treated as medical leave and accounted for in the limits prescribed under Clause (i) above.

(iii) The employer may call upon the apprentice to produce a medical certificate from a registered medical practitioner in support of his medical leave. A medical certificate shall be necessary if the leave exceeds three days.

(iv) It shall be open to the employer to arrange a special medical examination of an apprentice if he has reason to believe that

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the apprentice is not really ill or the illness is not of such a nature as to prevent his attendance.

3. **Extra-ordinary Leave :**

Extra-ordinary leave without pay upto a maximum to be determined by the Employer may be granted to the apprentice after he has exhausted the entire casual leave or medical leave, if the employer is satisfied with the grounds on which the leave is applied for. In establishments where proper leave rules exist for the workers, such leave to apprentices may be granted by the employer in accordance with these rules.

The rules and regulations governing leave referred to above are applicable to those apprentices under the National Apprenticeship Scheme and whose allowances are met by the Apprenticeship Board. Any leave facilities granted to other apprentices by virtue of any Collective Agreement or any other law will not be applicable to apprentices under the National Apprenticeship Scheme and whose allowances are met by the Board.

245. *Payment of Apprentices :* Every apprentice under the Act undergoing training is paid an apprenticeship allowance by the Board of an amount determined by the Board. Such an apprentice is not entitled to receive any other payment direct from his employer, or to be paid on the basis of piece work, or to be paid any sum by way of bonus or incentive bonus payable to other employees in the establishment.

246. *Transfer of Apprentices :* An employer can apply, in terms of Clauses 15 and 16 of the Regulations published in Gazette Extraordinary No. 41/5 of 11th January 1973, to transfer an apprentice to another employer to serve the unexpired portion of the contract.

247. *Conditions of Work :* Section 50 of the Act prescribes the following matters regarding conditions of work :

(a) the hours of work of an apprentice will be as determined by the Board ;

(b) an apprentice cannot be required to work overtime except with the approval of the Director of Apprenticeship who shall not grant such approval unless he is satisfied that such overtime is in the interests of the training of the apprentice ;

(c) an apprentice is entitled to such leave as may be prescribed by Regulation and such holidays as are observed in the establishment in which he is being trained ;

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(d) the provisions of the Factories Ordinance relating to health and safety of workers, the Workmen's Compensation Ordinance relating to compensation payable on account of injury or death and the Employees' Provident Fund Act apply to apprentices under the Act.

248. *Obligations of Employer and Apprentice :* Section 48 of the Act casts on every employer the duty –

(a) to provide an apprentice with the training suitable to the category of apprentice to which he belongs in accordance with the provisions of the Act and the Regulations ;

(b) to ensure that a duly qualified person is placed in charge of the training of the apprentice if the employer is himself not so qualified ;

(c) to discharge all his obligations under the contract of apprenticeship.

Similarly, Section 49 casts on the apprentice the duty –

(a) to attend both practical and instructional classes in accordance with the approved training programme and to endeavour to qualify in the particular trade, vocation or profession in which he is being trained ;

(b) to carry out all lawful orders of his employer and supervisors in the establishment in which he is being trained ; and

(c) to discharge his obligations under the contract of apprenticeship.

The obligations of the employer and the apprentice are more fully set out in the written contract of apprenticeship and is to be found in the Regulations published in Gazette Extraordinary No. 41/5 of 11th January 1973.

249. *Termination of Contract and Disciplinary Control :* A contract of apprenticeship entered into under the provisions of the Act terminates on the expiry of the period specified therein, but even prior to that either party can apply to the Director of Apprenticeship to terminate the contract, in which event the Director may or may not allow the application. If an application to terminate the contract before its expiry is allowed on the ground that one party has failed to carry out his obligations, then :

(a) If such party is the employer he is required to pay the apprentice such compensation to be determined by the Director.

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(b) If such party is the apprentice he is required to refund to the employer as the cost of training an amount determined by the Director.

(c) If a party is dissatisfied with the Director's decision he may appeal to the Board.

250. *Records to be Maintained :* Section 65 requires every employer to maintain records of the progress of training of each apprentice undergoing apprenticeship training in his establishment in such form as may be prescribed, and he must furnish to the Board such information and returns as may be prescribed. The records to be maintained by every employer in regard to each apprentice undergoing training is set out in the 4th Schedule of the Regulations published in Gazette Extraordinary No. 41/5 of 11th January 1973. The returns and statistics to be submitted to the Director by every employer annually is also set out in the same Schedule.

251. *Appeals to Apprenticeship Board :* Where a person makes an appeal to the Board he can, by written notice to the Secretary of the Board, intimate his desire that the Board should hear evidence or arguments on the appeal (Clause 38 of the Regulations published in Gazette Extraordinary No. 41/5 of 11th January 1973).

252. *Application of Other Laws :* Except for the statutes referred to under the heading "Conditions of Work", an apprentice under the Act is not a workman and the provision of any law applicable to workmen will not apply to him. Nor will the provisions of any Collective Agreement be applicable to him. It follows that the provisions of the Industrial Disputes Act and the Termination of Employment of Workmen (Special Provisions) Act 1971 have no application to them. In all matters of conduct and discipline Section 51 of the Act prescribes that an apprentice will be subject to the internal rules and regulations of the establishment in which he is undergoing training.

Legal Status of Non-Permanent Employees

253. The different legal categories into which an employee may fall has important legal consequences from the point of view of both statutory and non statutory labour law.

254. The only important legal consequence of a fixed term contract is from the point of view of its termination. Unlike a monthly contract of employment, it requires no termination by either party because its termination occurs by an effluxion of time, i.e., the arrival of the particular date agreed upon by the parties. Another important consequence which we have noted on the

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basis of a decided case when analyzing fixed term contracts, is that such a contract in its true sense does not contemplate termination by either party before its expiry except on grounds justifying summary dismissal. That does not mean that if parties enter into a contract for it to terminate on an agreed date such termination would be nullified by a provision in the contract for prior termination. The distinction between a contract of such a nature which provides, and does not provide, for prior termination is important in the context of English statute law, but is of no consequence in our labour law which contains no statutory definition of a fixed term contract. Its importance in our law is primarily in relation to the Termination of Employment of Workmen (Special Provisions) Act and Labour Tribunals. Such a contract does not strictly fall within the former and, so far as Labour Tribunals are concerned, an employee who is a party to such a contract would not be entitled to claim the relief of reinstatement or compensation in lieu.

255. A probationer is a permanent employee for all purposes and the period of probation is usually relevant only in the context of termination. In other words, the fact that the employee is on probation gives the employer larger rights than otherwise in the matter of termination. In other respects, however, a probationer is not excluded by the labour law or statutes governing matters of employment. However, a probationer has sometimes been placed on a different footing by collective agreements in respect of particular matters. For instance, the collective agreements between the Employers' Federation of Ceylon and several unions covering manual categories of workmen provide that a probationer is not entitled to paid sick leave during the period of probation. Further, those collective agreements and the collective agreement between the Employers' Federation of Ceylon and the Ceylon Mercantile Union covering white collar categories provide for termination of a probationer's services without notice.

256. The truly casual employee stands in a position of disadvantage in relation to a claim he may make before a Labour Tribunal for reinstatement or compensation because the basis of his employment is that there would be no expectation of work. He is, however, like other employees entitled to the benefits of the Employees' Provident Fund Act and the Employees Trust Fund Act. He is also entitled to the benefits of the Shop & Office Employees' Act (if covered by it) in relation to such matters as maximum working hours as well as paid weekly holidays if he qualifies for them by working the requisite number of hours in a week; but he would not be entitled to paid statutory holidays. The question of leave would not strictly arise if he is in law a casual employee. Decisions of Wages Boards would

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apply to a casual employee so far as maximum working hours and minimum wages and overtime rates are concerned. The question of leave would not strictly arise since such an employee would not normally qualify for the leave provided by working the requisite number of days in a year.

257. The temporary and seasonal employee is in a position similar to that of a casual employee in so far as the relief he can claim from a Labour Tribunal is concerned because the duration of his employment is normally pre-determined and known to him. He is entitled to the benefits of the Shop & Office Employees' Act, including leave if he qualifies in terms of that Act. Decisions of the Wages Board would be applicable to a temporary employee in matters such as maximum working hours, minimum wage and overtime rates and statutory holidays if they fall within the period of temporary employment. The law relating to superannuation would equally apply.

258. In considering temporary employees, it is of some interest to note[345] that in many European countries a temporary employee is either a worker who is employed by an employer for a short duration or is one supplied by an intermediary for the benefit of the user for a limited period of time. In our system of industrial relations the second category is commonly referred to as contract labour. Many of the problems connected with this second category which have arisen in Britain, do not exist in Sri Lanka due to the absence of Employment Agencies of the type to be found in Britain. In countries such as Germany, France, Belgium, Denmark and the Netherlands the temporary worker is understood to mean a person supplied by another for a definite period or, in some cases, for a defined task or to temporarily replace a permanent workman. The important point to note is that in English law there is no contract of service between the employee supplied by an Employment Agency and the user of such labour.[346] The absence of such a relationship has several important consequences; for example the problem of preventing the user of such labour from paying less than collective agreement wage rates. Thus Hepple and Napier[347] conclude :

> "The 'temporary worker' needs to be separately identified as a category within British labour law. At present rights are haphazardly allocated to short term workers and many of these workers are denied legal protection simply on grounds of various ill-assorted and

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[345] B. A. Hepple & B. W. Napier "Temporary Workers and The Law" in (1978) Vol. 7 *The Industrial Law Journal* 84.

[346] Ibid at p. 94

[347] Ibid at p. 99.

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inexplicable lengths of service. What needs to be identified are the valid reasons why temporary work is required, for example : (1) to meet seasonal changes in demand, particularly for catering work and retail distribution; (2) to fill gaps caused by illness, pregnancy and confinement, medical suspension and holidays of permanent staff; (3) to provide training including working holidays for young persons from abroad; and (4) to perform specific tasks, such as a short term research project funded from a source outside the undertaking. A Temporary Work Act could make special provision for groups such as these, including the 'contracting out' of certain statutory provisions, while preventing the illegitimate use of short term workers in order to evade statutory duties."

259. In our law an employee supplied by a third party would stand a greater chance of being regarded as the workman of the user as well. For instance, the Industrial Disputes Act defines an employer as –

> "any person who employs or on whose behalf any other person employs any workman .... and any person who on behalf of any other person employs any workman."

The phrase "on whose behalf any other person employs" would normally bring a large category of employees supplied by a third party into a contractual relationship with the user of such employees.

260. Although in common law an apprentice does not have a contract of service, in our law an apprentice is covered by our various statutory provisions. There are two exceptions: the first exception is apprentices under the National Apprenticeship Act who are only entitled to the protection of the Factories Ordinance, Workmens Compensation Ordinance and the Employees Provident Fund Act as noted in paragraph 247. The second exception is apprentices under the Employment of Trainees (Private Sector) Law 1978 who are expressly not covered by the Shop and Office Employees Act, the Industrial Disputes Act, the Wages Boards Ordinance, the Trade Unions Ordinance and the Termination of Employment Act.

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I. SCOPE OF TERMINATION OF CONTRACT

261. Many of the principles applicable to termination of contracts of employment on disciplinary grounds, including the procedure that ought to be followed in that regard, have been covered in the author's Monograph No.2 entitled "Disciplinary Action and Disciplinary Procedures in the Private Sector." In the succeeding parts of the present Monograph it is intended to cover a variety of aspects connected with the termination of a contract of employment not covered in the earlier Monograph referred to, other than the grounds which amount to misconduct.

262. In the first instance, it is necessary to appreciate that a contract of employment may terminate in a variety of ways and that they broadly fall within the following :-

(a) Termination by the employer on disciplinary grounds and constructive dismissal.

(b) Termination by the employer on non-disciplinary grounds. This has assumed particular importance in view of the Termination of Employment of Workmen (Special Provisions) Act, 1971.

(c) Termination by operation of law, which includes termination of a contract due to such factors as frustration of contract and impossibility of performance.

(d) Termination by effluxion of time, e.g., by the arrival of a mutually agreed date.

(e) Termination by the employee, which may arise due to a variety of circumstances such as resignation, vacation or abandonment of employment or repudiation of the contract by the employee.

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J. RESIGNATION

263. Resignation is one method by which a contract of service may come to an end. It has been said that a workman may withdraw a notice of resignation before, but not after, its acceptance by the employer,[348] so that in ***Shankar Dutt v Auraiya Municipality***[349] an employee who tendered on 24th February, a letter of resignation dated 01st April was held entitled to withdraw it before the latter date. It has been held by the Supreme Court of Sri Lanka that where the employer issues a notice of termination to an employee who, before receipt of such notice, tenders his resignation which is accepted by the employer, the notice of termination has no effect and resignation is complete.[350]

264. Some of these propositions reflect a certain degree of conceptual confusion. Whether a notice of resignation can be withdrawn before acceptance and, indeed, whether a notice of resignation needs acceptance at all in order to terminate the contract are questions to which the answers are not as simple as some of the decided cases appear to suggest. The views expressed in ***Harish Chandra Gupta v State of Madhya Pradesh***[351] that the resignation of a permanent employee takes effect only when it is accepted by the employer and may be withdrawn before acceptance and, further, that a resignation "merely amounts to an offer to quit the service and unless the offer is accepted by the employer .... it cannot bring about the termination of service of the employee concerned"[352] are, to say the least, questionable legal propositions. It is on the premise that a resignation becomes effective only when it is accepted[353] that decided cases have concluded that a notice of resignation may be withdrawn before acceptance.[354] In ***S. B. Patnaik v State of Orissa***[355] the workman, during the course of a month, tendered his resignation effective at the end of the month. It was accepted subject to verification of accounts. The audit into

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[348] ***Jairam v Union of India*** A.I.R. 1954 S.C., 584 ***Jawala Prasad v State of U.P.*** 1954 (2) L.L.J. 698 (All).

[349] A.I.R. 1956 Allahabad 70. But see ***de Silva v de Silva*** (1942) 42 NLR 531.

[350] ***The Ambagamuwa Korale Multi-Purpose Cooperative Societies' Union v The All Ceylon Cooperative Employees' Union*** – SC 147/67, S. C. M. 19.12.68 (unrep.).

[351] 1972 (2) LLJ 369 (Mad. Prad.).

[352] Ibid at 371.

[353] ***Abdu Salam v State of Kerala*** 1973 Lab. I.C. 1584 (Ker.).

[354] ***S. B. Patnaik v State of Orissa*** 1973 Lab. I.C. 1360 (Oris.).

[355] Ibid.

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the accounts was over only in the following month and when the audit was complete, the workman withdrew his resignation. The court held that –

> "................. a resignation can be withdrawn before its acceptance .... but if resignation has been accepted before its withdrawal, then the withdrawal becomes ineffective and the service terminates with effect from the date of acceptance of resignation ...."

Since the resignation had not been accepted before withdrawal, it was held not to have taken effect.

265. Many of the problems and inconsistencies relating to resignation flow from the failure to distinguish between a notice determining the contract, a repudiation and a termination of a contract by mutual consent. In ***Harris & Russel Ltd. v Slingsby***[356] it was held that an employee who gives notice of the termination of his contract cannot thereafter unilaterally withdraw such notice. The following dictum of Buckley, L.J., in ***Decro – Wall International S. A. v Practitioners in Marketing Ltd.***[357] in relation to the law of contract was applied :

> "A repudiation and a notice of determination are clearly different things. A repudiation may be withdrawn at any time before acceptance; a notice of determination validly given cannot thereafter be withdrawn without agreement."

266. The above statement, it is submitted, represents the correct legal position. A notice of resignation is a notice by the employee that he is determining his contract. Where the notice is *in terms of the contract* the employee is acting within his contractual rights just as much as an employer may legally terminate a contract by giving the notice contemplated by the contract. Such a notice does not require acceptance by the employer or the employee, as the case may be, to determine the contract of employment on the arrival of the date or event specified in the notice. If it did require such acceptance it would imply, firstly, that the notice is invalid until accepted and secondly, that the employer can prevent the determination of the contract by withholding his acceptance. Neither implication is correct because either party to a contract of employment has the *legal* right to determine the contract unilaterally, whatever may be the equitable rights of the parties. A notice of resignation *in terms of the contract* is, therefore, sufficient, without more, to determine the contract and, once given, cannot be unilaterally withdrawn.

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[356] 1973 I.C.R. 454 (NIRC).

[357] (1971) 1 W.L.R. 361 (CA).

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267. The position, however, is different where a notice amounts to a breach or repudiation e.g. a notice which is not in terms of the contract. Such a notice of repudiation is a breach of contract which may be withdrawn before acceptance by the employer. Once an employer accepts such a repudiation it can be withdrawn only with the employer's consent.

268. It is fundamental to a contract of employment that an employee cannot be compelled to specifically perform his contract if he wishes to determine it. Therefore, an employee may leave his job at any moment, with or without notice, whether he is in breach of contract or not, and the employer's only remedy is one of damages where there is a breach of contract. The existence or otherwise of a breach of contract does not detract from the fact that the employee may unilaterally determine the contract or that the contract does come to an end without the need for acceptance by the other party.

269. Thus in every case of resignation the first issue is whether the employee has acted in terms of his contract. If he has, the contract terminates without the necessity for any acceptance by the employer and, therefore, the employee cannot unilaterally withdraw his notice of resignation. Where the resignation is not in terms of the contract and therefore amounts to a repudiation of the contract, the acceptance by the employer is an acceptance of the termination of the contract despite the breach and, until such acceptance, but not after, the employee may withdraw his resignation.

270. Since a resignation amounts to nothing more or less than a termination of the contract by the employee, a resignation which is tendered under duress would amount to a dismissal or to a constructive termination by the employer.[358] Sometimes inducements offered to an employee may amount to a forced resignation, but the question in each case would be the exact effect that the inducement has had on the employee. In ***Sheffield v Oxford Controls Ltd,***[359] the Company was owned by two families, A. & B. Mr. A. was a Director and an employee and his wife an employee. The other family B, who had the voting majority, threatened Mrs. A. with dismissal, whereupon Mr. A. threatened to leave if his wife was dismissed. Thereupon B threatened Mr. A. that if he does not leave he would be dismissed as a result of B using their voting majority. After discussion Mr. A. signed a written agreement in terms of which he agreed to resign in consideration of certain financial benefits. On a complaint by Mr. A. of unfair dismissal, it

[358] ***Abraham Rehen v Karachi Municipality*** A.I.R. 1929. 69 ***Stephenson v London Joint Stock Bank Ltd.*** (1903) 20 T.L.R.. 8, ***Rubel Bronze & Metal Co. Ltd. v Vos.*** (1918) 1 KB 315.

[359] (1979) I.C.R. 396.

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was held he had not been dismissed and that he had resigned. The Court proceeded on the principle that an employee who resigns because of a threat of dismissal or because he is required to do so by the employer must be deemed to be dismissed. The reason is that the cause of resigning is a threat. But if the resignation is caused not by a threat but, as in the present case, by accepting financial inducements, then he has resigned because it was not caused by a threat. The Court observed.[360]

> "In such a case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory. (The) threat is no longer the operative factor of his decision; it has been replaced by the emergence of terms which are satisfactory."

271. In Sri Lanka, it has been held that in order to become operative, a letter of resignation must be tendered to, and accepted by, the proper authority. I n ***Abeywickrama v Pathirana***[361] the Supreme Court held that the letter of resignation did not bring about a valid termination of the workman's contract of service because it was not addressed to nor accepted by, the appointing authority. In this case, the workman was a grade III principal. He tendered his resignation from service to the Regional Director of Education. The Regional Director accepted the resignation. However the appointing authority was the Educational Services Commission. The resignation was held to be inoperative. The decision proceeded on the premise that the position was a status conferred by a particular authority, which could not be surrendered without an acceptance by that authority.

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[360] At p. 402-403.

[361] (1986) 1 Sri L.R. 120 also see ***Abeywickrama v Pathirana*** (1984) 1 Sri L.R. 215.

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K. DOCTRINE OF CONSTRUCTIVE TERMINATION

272. It is not proposed to cover in this Monograph the various grounds on which an employer may dismiss an employee for misconduct. However, it is essential to bear in mind that in law a termination by the employer or by the employee can arise in consequence of the conduct of the employer or the employee, as the case may be. In other words, either party may, in a given situation, though not expressly terminating the contract of employment, by his conduct in relation to the other party, be guilty of what is generally described as a constructive termination.

273. Where the conduct of one party amounts to a constructive termination, then the law deems the contract in question to have terminated as a result of the action of the party who has so misconducted himself. Therefore, if the employer has conducted himself in relation to the employee is such a way as to amount to a constructive termination of the contract, then the termination of the contract will be deemed to be by the employer and such a termination attracts the consequences of an express termination by the employer, e.g., the employee can have recourse to a Labour Tribunal on the basis that the employer has terminated his services.

274. The difficult question arises in connection with what amounts to a constructive termination of employment and, in examining this question we will confine ourselves to a constructive termination by the employer for the present. In conceptual terms it can be said that where an employer breaches a fundamental obligation of the contract of employment the employee is entitled to treat such a breach as a constructive termination by the employer which puts an end to the contract. It is open to the employee to elect whether he will treat the contract as terminated, or whether he will act on the basis that the contract still continues in which event he calls upon the employer to comply with or conform to the latter's fundamental obligations.

275. Many examples can be given to illustrate what is meant by a constructive termination by an employer. For instance, if an employer refuses to pay an employee his salary in circumstances which make such refusal illegal, the employee can treat the employer's refusal as a constructive termination of the contract. Or again, the employer may seek to unilaterally vary the contract on a fundamental matter, e.g., demote him. In ***Sri Lanka State Plantations Corporation & Another v the National Union of Workers***[362] it was held that an order of suspension was not a constructive termination.[363]

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[362] (1992) 1 Sri L.R. 171.

[363] ***Pfizer Ltd. v Rasanayagam*** (1991) SLR 290 it was held that the order of the Employer to the workman to report to a Junior Officer was tantamount to a demotion in the absence of a lawful explanation for such order, and that there had been a constructive termination.

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In such cases the employee often purports to resign from the service of the employer for the reason that the latter has compelled him to do so. Such a resignation is in law a constructive termination by the employer and does not preclude the employee from claiming relief before a Labour Tribunal on the basis that there has been a termination by the employer. The mere use of the term "resignation", by an employee does not by itself preclude him from claiming relief on the footing of a constructive termination by the employer. A situation where an employer exercises duress on an employee to obtain his resignation would also amount to a constructive termination by the employer. Whether there has been duress in order to convert a normal resignation into a constructive termination is a question of fact in each case.

276. However, the doctrine of constructive termination is beset with a number of problems and uncertainties. The generally accepted view is that constructive dismissal occurs where the employer acts in breach of the contract of employment. English Law has attempted to extend this concept so as to entitle an employee to terminate the contract on the basis of an employer's unreasonable conduct, or conduct which is not in keeping with good industrial relations practice. The vagueness of this concept is such that in the application it can effectively stifle the employer in the proper management and administration of the establishment. When this development was arrested by the decision of the Court of Appeal in ***Western Excavation (ECC) Ltd. v Sharp***[364] which held that the test in constructive dismissal must be a breach of *contract* and not a breach of reasonable conduct, the non contractual doctrine came to be developed again by the suggestion that many types of conduct may be breaches of *implied terms* of the contract of employment, so that this development seeks to whittle down the difference in practice between the contractual and reasonable conduct tests. As a result, *Patrick Elias*[365] concludes :

> "There are now a growing number of cases which support the view that the employer is under a duty to behave co-operatively, a vague obligation of uncertain dimensions. Occasionally it may have positive connotations. For example, it has been held that the employer is under a duty to give support and encouragement to a supervisor carrying out the employer's policy, and that a failure to provide this to an extent which significantly undermines the supervisor's position amounts to a repudiation of the contract sufficient to entitle the employee to leave without notice. Usually, though, this duty of co-operation is of a more negative character. It

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[364] (1978) 1 All E.R. 713.

[365] "Unravelling the Concept of Dismissal, *The Industrial Law Journal* (1978) Vol. 7, 100 at 102.

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places the employer under an obligation which has been described as a duty not to destroy the trust and confidence in the employment relationship. Many actions of the employer which are in fact unreasonable but do not involve a breach of any direct, specific contractual terms can be readily assimilated under such a loose and open ended obligation. For example, upbraiding a supervisor in the presence of a third party, unreasonably doubting the integrity of the employee such as by falsely accusing him of theft, failing to treat a long serving employee with dignity and consideration, and even making persistent and unwanted amorous advances to a female employee, have all been considered to amount to a breach of contract which may, in appropriate circumstances, entitle the employee to terminate the contract.

Perhaps another way of stating this test is to say that just as it is a breach of contract for one party to the contract to make it physically impossible for the other to perform, so in the employment context the courts are developing the idea that it is a fundamental breach for the employer to make it psychologically impossible for the employee to perform ....

It is impossible at this stage to be more precise about these vague duties. The cases suggest that the status of the employee and the conduct of the employer assessed over a period of time will frequently be particularly relevant factors to consider when determining whether the employer's conduct involves a breach of this duty to maintain trust and confidence. In Sharp's case Lawton, L.J., commented that 'sensible persons have no difficulty in recognizing such conduct when they hear about it,' and that lay members of tribunals will readily recognize 'the kind of employer of whom an employee is entitled without notice to rid himself'. Perhaps so: but it is fair to say that given this kind of guidance as to the content of these vague duties, the certainty which practitioners are seeking, and which they see reflected in the Sharp decision, may prove something of a chimera."

277. Even where the employer acts in terms of his rights under the contract of employment (e.g., in the matter of a transfer), the question arises whether an employer who acts arbitrarily or mala fide can be deemed to have acted in breach of contract in such a manner as to amount to a constructive dismissal of the employee. We have seen that in ***Secretary of State for Employment v A. S. L. E. F.***[366] the Court of Appeal held that an employee

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[366] (1972) 2 All E.R. 853.

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would be acting in breach of his contract if he worked to rule in such a manner as to negative the commercial objectives of the contract. If that be so, it is a short step to concluding that an employer acting so unreasonably as to amount to an abuse of his rights, or victimization or mala fides must be deemed not to have exercised his rights at all, on the similar principle that a statutory body cannot exercise its powers in such a manner as to frustrate the purposes of the statute.[367] Thus in ***Gardener Ltd v Beresford***[368] the employee received no increase in salary for two years although some other employees received three increases during that period. The employee left the services of the employer claiming that she had been constructively dismissed. The Tribunal held that normally an implied term can be read into the contract that the employer will not treat his employees arbitrarily, capriciously or inequitably on questions of remuneration and that a deliberate discrimination on this account would be a repudiation of the contract by the employer. The Tribunal stated that mere unreasonable conduct would not amount to constructive dismissal and, as observed by Patrick Elias,[369] "the rationale of the case seems to be that any victimization or arbitrary discrimination could constitute such a repudiation sufficient to entitle the employee to terminate..............".

278. In considering the application of the principles discussed so far in our labour law and industrial relations system, it is important to bear in mind several important distinctions. Firstly, some of the principles and concepts evolved in English labour law have been enunciated in the context of certain statutory provisions, including statutory concepts of unfair dismissal. Our labour law does not, in its statutes, refer to the concept of unfair dismissal, it being left to our labour and higher courts to determine what is a justified or unjustified dismissal. Secondly, our labour courts are by statute expressly required to make just and equitable orders and awards and, for this purpose, are statutorily or otherwise entitled to give relief contrary to the terms of a contract of employment. It would be no exaggeration to say that our labour courts are perhaps less influenced by the legal technicalities, general common law and contract law principles, and have found little need to develop legal "fictions" in order to do justice and equity in particular cases. The exact terms of a contract of employment perhaps play a less important role in the decisions of our labour courts than they do in British labour law. In view of these distinctions, caution must be exercised in introducing into our law all the developments and concepts of

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[367] ***Padfield v Minister of Agriculture*** (1968) A.C. 997. See on this whole question the excellent discussion by Patrick Elias "Unravelling the Concept of Dismissal" op. cit at 103 et seq.

[368] (1978) I. R. L. R. 63.

[369] op. cit. at 105-6.

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constructive dismissal to be found in British labour law. We will see that a similar caution needs to be exercised also in the area of frustration of contracts of employment.

279. Bearing in mind the above distinctions and the fact that our labour courts are required to make just and equitable orders unfettered by the contract of employment, it could be said with a reasonable degree of certainty that breach of a fundamental term of employment would be regarded by our labour courts as a constructive dismissal of the employee if the latter decides to treat the breach as a repudiation by the employer. In ***Thaksala Weavers v Dhanawatule Perera***[370] where an employee was suspended and served with a charge sheet, but no further action was taken despite an explanation being submitted by the employee and a request being made for a domestic inquiry, the Supreme Court stated that "where an employer failed to take disciplinary proceedings and at the same time did not allow the workman to work, there was arguably a breach of contract. The workman had the option of accepting the employer's repudiation of the contract and treating it as having been terminated or of insisting on specific performance", and held that the employer's conduct amounted to a constructive termination.

280. A so-called resignation by the employee in circumstances of a breach of contract by the employer would confer on a Labour Tribunal jurisdiction to entertain a claim for relief on the basis of a termination by the employer. Being courts of equity, it could also be said that an employer's conduct which does not amount to a breach of an express term of employment but which is so wholly unreasonable as to make it impossible for the employee to continue in employment may also be regarded as a constructive dismissal where the employee elects to treat it as such. The conduct on the part of an employer which would amount to a constructive dismissal would have to amount to at least a breach of an implied obligation fundamental to the employment relationship. For instance, repeated transfers of an employee from one geographical locality to another in circumstances which make it impossible for the employee to comply would, even where an express right of transfer exists, amount to a mala fide exercise of that power, thus amounting to a constructive dismissal of the employee. This is supported by the decision in the case of ***Superintendent, Abbotsleigh Group & Others v Estate Services Union,***[371] where the employer had informed an employee that disciplinary action would be taken against him if he did not assume duties upon a transfer. The employee refused to

[370] SC (Special) Leave to Appeal No. 90/93 S. C. M. 14.7.1993

[371] (1991) 1 SLR 380, 385.

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assume duties until quarters provided to him had been repaired. The Court of Appeal held that the basis on which the workman asserted that his services had been constructively terminated "do not directly relate to the duties he has to perform, or to his salary and emoluments. There is also no direct evidence that provision of quarters is a term of his contract of employment". It was held, therefore, that an inference of constructive termination of the workman's services was not warranted. Ultimately the question will have to be decided on the facts of each case.

281. In ***Ceylon Workers' Congress v JEDB,***[372] where the employer had refused to give the workman any work until such time as he left a line room forcibly occupied by him, the Supreme Court held that there was only a suspension of the workman's services and not a constructive termination.

Repudiation of Contract

282. The next and far more difficult question relates to the repudiation of a contract of employment by an employee and its effect on the contract of employment. The following questions arise for consideration in this connection :

(a) What is a repudiatory breach of contract ?

(b) Does the concept of a repudiatory breach apply to contracts of employment ?

(c) Does it automatically terminate the contract or does it require acceptance by the innocent party to terminate the contract ?

283. An examination of the English law on many aspects of repudiation reflects a totally confusing and conflicting situation which is almost incapable of being satisfactorily resolved. It would seem – and this is of vital importance when we consider the application of English law principles to our situation – that English courts have reached some of their conclusions in two circumstances which have no application in Sri Lanka. The first is that the legislation in that country is such that apart from redundancy, an employee seeking to claim relief in certain situations must come within the statutory concept of an unfair dismissal. In other words, it is difficult in British labour law for an employee to remain in employment and claim relief of a type which is available in our system. On the other hand, in Sri Lanka an employee who is adversely affected by unlawful or unreasonable conduct in relation to him by his employer can keep the contract alive and raise an industrial dispute, secure its reference to arbitration under the

[372] (1987) 2 SLR 73.

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provisions of the Industrial Disputes Act, whereupon the arbitrator makes an award on the basis of what is just and equitable, in the process of which he can even vary or modify the contract of employment. This important consideration makes it unnecessary in many cases for an employee to treat the contract as repudiated and for courts to resort to many of the legal niceties to which English judges have been driven. The second consideration is that our Courts are as yet unfettered by the maze of precedents which exist in English Law and can, therefore, look upon some of these matters in a fresh light.

284. A repudiatory breach is a breach of contract of so serious a nature that it entitles the innocent party to treat it as a repudiation of the entire contract by the guilty party, in which event it is the guilty party that really terminates the contract. The innocent party is not necessarily compelled to treat the contract as at an end, and he can, if he so wishes, choose to waive the breach and affirm the contract, i.e. not to treat the breach as terminating the contract.

285. The leading case of ***Hare v Murphy Bros.***[373] illustrates one of the circumstances in which a repudiation may take place. Here an employee was sentenced to one year's imprisonment for unlawfully wounding and, on his release, was informed by his employer that his job had been filled and that there was no alternative employment for him. It was held that the sentence of imprisonment amounted to a breach by the employee of so serious a nature that it constituted a repudiation of his contract of employment which, therefore, terminated on his imprisonment. Hence there was no dismissal by the employer. The court observed :

> "It is obvious that the sentence of imprisonment rendered it impossible for the employee to continue to perform his part of his contract of employment as a foreman employed by the employers. This is not a frustrating event because it was brought about by his own act in committing the offence for which he was sentenced to imprisonment. It was, however, a breach by him of his contract of so serious a nature, bearing in mind the length of time during which he would be away from work and the importance of his position as foreman, that it went to the root and constituted a repudiation of his contract of employment. A repudiation of such a contract differs from a repudiation of other contracts in that normally it automatically and at once terminates the contract and no acceptance is required in order that this result shall flow. If authority for this proposition is needed, it is to be found in the judgement of Jenkins L. J. in ***Vine v National Dock Labour Board*** (1956) 1 Q.B. 658, 674 which was

[373] 1973 I.C.R. 331.

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approved by Viscount Kilmuir, L.C., on appeal (1957) A.C. 488, 500. The exceptional case in which this result does not flow is illustrated by ***Hill v C.A. Parsons & Co. Ltd.*** (1972) Ch. 305, but that case was in no way comparable with the present. In our judgement, it would have required the employer's assent to some variation of the contract of employment, whereby the employee's obligation to attend their premises and work as a foreman was suspended during his term of imprisonment if the contract of employment were to be maintained in existence during that period. Despite the failure to return the insurance cards, there is no evidence upon which the tribunal could have found that any such variation of the contract of employment was agreed. Accordingly, the effective date of the termination of the contract of employment was June 1971, and not February 28, 1972."[374]

In appeal the decision of the National Industrial Relations Court was confirmed by the Court of Appeal.[375] The court held[376] that the long sentence of imprisonment terminated the contract of employment at that date as it made it impossible for the workman to continue to perform his part of the contract[377] and also that it frustrated the contract.[378]

286. The general principle in the law of contract is that a repudiation must be accepted by the other party to put an end to the contract since "an unaccepted repudiation is a thing writ in water."[379] This principle has been accepted in Sri Lanka for, as Gratian, J., said in ***Alawdeen v Holland Colombo Trading Society Ltd*** :[380]

"Repudiation by one party does not terminate a contract – it takes two to end it, by repudiation on the one side and acceptance of the repudiation on the other."

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[374] Ibid at 334-5.

[375] ***Hare v Murphy Brothers Ltd.*** 1974 I.C.R. 603 (CA).

[376] Per Stephenson and Lawton J.J.

[377] Per Lord Denning. He did not agree with the N.I.R.C. that the event was not a frustrating event and that it amounted to a breach of contract. In determining whether a contract of employment has been effectively brought to an end, one must look to the length of his employment and absence from work as well as the position he holds – ibid at 607.

[378] As to whether a wrongful repudiation of a contract of employment by the employer puts an end to the contract see ***Sanders v Ernest A. Neale Ltd.*** 1974 I.C.R. 565.

[379] Asquith L.J. in ***Howard v Pickford Tool Co. Ltd.*** (1951) 1 K.B. 417 at 421.

[380] (1952) 54 N.L.R. 289. This judgement was reversed by the Privy Council – (1954) 56 N.L.R. 385 – on another point, So also ***Senanayake v Anthonisz*** (1965) 69 N.L.R. 225 at 229, ***Noorbhai v Karuppan Chetty*** (1925) 27 N.L.R. 325 (PC).

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The contrary view is that a repudiatory breach automatically terminates the contract unless the innocent party decides to waive the breach and affirm the contract, so that there is no necessity for acceptance of the breach in order to put an end to the contract.[381] In ***Vine v National Dock Labour Board***[382] Viscount Kilmuir thought that "if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract."[383] Since according to Viscount Kilmuir[384] himself, the instant case was not an ordinary master and servant case, his statement is obiter.[385] Lord Keith stated the position as follows (obiter) :

> "Normally, and apart from the intervention of statute, there could never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."[386]

These statements, in effect, postulate that a wrongful repudiation of a contract of service terminates the contract without more, as specific performance is a remedy which would not be available to the aggrieved party. In ***Sanders v Ernest A. Neale Ltd.***[387] the court held that repudiation of a contract of service terminates the contract without the need for acceptance by the aggrieved party and that this constitutes an exception to the general rule that an unaccepted repudiation does not terminate a contract.

287. The second view – and perhaps the more accepted and better view – is that repudiation terminates the contract only if accepted by the other party. There are several authorities in support of this view. Thus in ***Decro-Wall International S. A. v Practitioners in Marketing Ltd.***[388] which did not deal

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[381] See J.M. Thomson "The Effect of a Repudiatory Breach" in (1978) Vol. 41 *The Modern Law Review* 137, J. M. Thomson in (1979) Vol. 42 *The Modern Law Review* 91.

[382] (1956) 3 All E.R. 939 (HL).

[383] Ibid at 944.

[384] Ibid.

[385] In ***Sanders v Ernest A. Neale Ltd.*** 1974 I.C.R. 565 the court followed the dictum of Viscount Kilmuir. On the question whether the dictum was obiter, the court said : "Even if this is correct, and we are not sure that it is, these expressions of opinion are of considerable persuasive authority": ibid at 569.

[386] Ibid at 948.

[387] 1974 I.C.R. 565 (NICR). See (1975) Vol. 4 *The Industrial Law Journal* 40 for a discussion of this case.

[388] (1971) 2 All E.R. 216, following ***White & Carter (Councils) Ltd v McGregor*** (1961) 3 All E.R. 1178 (HL).

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with a contract of employment, the Court of Appeal held[389] that repudiation does not of itself discharge the contract, but would have that effect only if accepted by the other party. Salmon, L.J., thought that the principles applicable to a master and servant relationship do not apply to other contracts, and in any event thought that a repudiation of even a contract of service does not automatically bring it to an end. The following statement of Salmon, L.J.,[390] sets out his position :

> "Counsel for the plaintiffs argues that this breach by the plaintiffs, if breach it be, automatically brought the contract to an end. In support of his argument he seeks to liken this case to a case of master and servant. He relies on ***Denmark Productions Ltd. v Boscobel Productions Ltd.*** (1968) 3 All E. R. 513. In the present case, however, the facts are very different. I confess that I can see no similarity to a master and servant relationship. In any event I do not think it matters. I doubt whether a wrongful dismissal brings a contract of service to an end in law, although no doubt in practice it does. Under such a contract a servant has a right to remuneration, including what are sometimes called fringe benefits, in return for services. If the master, in breach of contract, refuses to employ the servant, it is trite law that the contract will not be specifically enforced. As I hope I made plain in the *Denmark Productions* case, the only result is that the servant, albeit he has been prevented from rendering services by the master's breach, cannot recover remuneration under the contract because he has not earned it. He has not rendered the services for which remuneration is payable. His only money claim is for damages for being wrongfully prevented from earning his remuneration .... I doubt whether, in law, a contract of service can be unilaterally determined by the master's breach. Perhaps the servant could sit still whilst the contract ran its course with the knowledge that the contract was, in law, still alive. But in practice, this knowledge could be of little real comfort to him because he would be failing to take reasonable steps to minimize his loss and, since a claim for damages is his only money remedy, he would be prejudicing that claim by doing nothing. Accordingly he would, as a rule, be far better off to treat his contract as if it were at an end; and this is usually what happens."

Buckley, L.J., however, conceded the possibility that a contract of service may be an exception to the general rule when he said :

> "It may be that contracts of service between master and servant should be regarded as an exception to this general rule.[391] Where a

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[389] See ibid at 223, 228, 233.

[390] Ibid at 223.

[391] The reference here is to the rule that a repudiation determines a contract only on acceptance.

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master wrongfully refuses to employ a servant contrary to such a contract, the servant's remedy lies in damages for wrongful dismissal and the cause of action arises immediately on the breach."[392]

288. In ***Hare v Murphy Brothers Ltd.,***[393] as we have already seen, the National Industrial Relations Court thought that a contract of service stands on a different footing to other contracts in that the repudiation of the former automatically terminates the contract without the necessity for acceptance. In appeal,[394] though the ultimate decision of the NIRC was confirmed, the reasoning was not. Lord Denning[395] disagreed that the workman was guilty of any breach of contract since the offence in respect of which he was imprisoned was unconnected with his employment. He thought that the sentence of imprisonment itself "was not a breach by him. If he had been given a suspended sentence or put on probation he would not be guilty of any breach of his contract of employment. Nor is it when he is sentenced to 12 months. That was the act of the court which sentenced him. It was no breach by him. But nevertheless – contrary to the Industrial Court – I think there was a frustrating event. I know that it was brought about by his own act, namely, the unlawful wounding. In that way it may be said to be 'self-induced', but still it was a frustrating event. If Mr. Hare had been grievously injured in a road accident – due to his own fault – and incapacitated for eight months the contract of employment would be frustrated .... where the man committed an unlawful act and was sentenced to 12 months, the event was so unforeseen and the delay so long that the contract of employment was brought automatically to an end when the sentence was imposed ...."[396] Stephenson, L.J., also preferred to put the case on the footing of impossibility of performance.[397] Thus the judgement of the Court of Appeal do not assist in determining the issue as to whether repudiation of a contract of employment requires acceptance to determine the contract.

289. The issue about the need or otherwise for a repudiation to be accepted to put an end to a contract came up for decision by the Court of Appeal in

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[392] (1971) 1 All E.R. at 233.

[393] 1973 I.C.R. 331 (NIRC). See (1975) Vol. 4 *The Industrial Law Journal* 40 for a discussion of this case.

[394] 1974 I.C.R. 603 (CA).

[395] Ibid at 606-7.

[396] Ibid at 607. But quaere whether, even though the contract was also frustrated, the contract was also repudiated by the workman because he had, by his *unlawful* conduct, put it beyond his power to perform a fundamental term of his contract (i.e., to work), and the examples of a suspended sentence and probation are irrelevant because they would not have prevented the performance of his contract.

[397] Ibid at 608.

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Gunton v Richmond-upon-Thames London Borough Council.[398] Buckley, L.J.,[399] held that principles of repudiation applicable in the law of contracts equally apply to contracts of employment, and he disagreed with any attempt to treat employment contracts as an exception to the general rule that a repudiation must be accepted to terminate a contract.

290. Therefore, the question of repudiation of a contract involves several views. The orthodox view is that repudiation determines the contract only if it is accepted by the other party. The second view is that repudiation of contracts of employment do not require acceptance to determine the contract which terminates on such repudiation, because they constitute an exception to the general rule. These different views have been stated as follows :[400]

> "It is settled law that the doctrine of repudiation dictates that no right of action accrues unless and until the innocent party accepts the repudiation by electing to treat the repudiatory breach as determining the contract.[401] As to how the doctrine applies to contracts of employment there are, generally speaking, three views. First that, such contracts do not constitute an exception to the general rule, so that the employee must accept the repudiation before the contract is terminated.[402] Secondly, that employment contracts are *sui generis,* so that the repudiatory conduct brings the contract automatically to an end, denying the innocent party any right of election.[403] Thirdly, that while the repudiation normally puts an end to the contract *de facto,* in special circumstances acceptance of the repudiation will be necessary to terminate it *de jure.*[404] The authorities are conflicting and inconsistent."

The better view, it is submitted, is that repudiation of a contract determines it only if accepted by the other party, and there is no legal or equitable, or even social, justification for regarding contracts of service as an exception

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[398] (1980) 3 WLR 714.

[399] At 729.

[400] (1981) Vol. 44 *The Modern Law Review* at 449-450.

[401] "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind" : per AsquithL.J. in ***Howard v Pickford Tool Co., Ltd.*** (1951) 1 KB 417, 421.

[402] See the most recent example in ***Thoms Marshall (Exports) Ltd. v Guinle*** (1978) I.C.R. 905 (Megarry V.C.).

[403] See e.g. ***Vine v National Dock Labour Board*** (1956) 1 Q.B. 658, 674 (per Jenkins L.J.) and ***Sanders v Ernest A. Neale Ltd.*** (1974) L.C.R. 565 (N.I.R.C.).

[404] See for example ***Hill v C. A. Parsons & Co. Ltd.*** (1972) Ch. 305, 314 (per Lord Denning M.R.).

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and for stating that no acceptance is required in the case of these contracts only. While there may have been some justification for drawing a distinction between contracts of service and other contracts on the basis of remedies (i.e. a court will not award specific performance of a contract of service), yet the basis of the distinction has little validity today in a system of law such as ours which has developed a separate branch of law (labour law) which gives a statutory power to certain courts and tribunals to award reinstatement. Besides, the doctrine of instant termination of contracts of employment is socially undesirable at a time when the law is concerning itself more and more with security of employment, so that one writer has been prompted to say :

> "Instant termination of the contract of employment is a reminder of the nineteenth century law of master and servant whose extension should not be welcomed at the present day."[405]

291. Legal consequences may well flow from the distinction between a repudiation ipso facto terminating a contract and a repudiation terminating a contract only on its acceptance. J. M. Thomson states :[406]

> "The present writer's insistence that it is the repudiatory breach and not the disadvantaged party's acceptance of it which brings a contract to an end, is not simply a matter of theoretical importance. For there is evidence to suggest that adherence to the 'acceptance' analysis may work injustice in the law of unfair dismissal. It has now been settled by the Court of Appeal that an employee is only constructively dismissed for the purpose of unfair dismissal when his employer is guilty of a repudiatory breach which the employee has elected to treat as discharging him from further performance. On the 'acceptance' analysis the employee terminates the contract by resigning: on the 'automatic' determination theory, the contract is terminated by the employer's repudiatory breach, i.e. by the employer's wrongful act and the employee's resignation is merely evidence that he is not affirming the contract."

292. In considering these different and divergent views, it is useful to understand the rationale behind them. The basis of the general rule in the law of contracts that a repudiation requires acceptance to terminate the contract is that otherwise the defaulting party can evade his obligations by a mere repudiation and the innocent party would be unable to hold him to

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[405] (1975) Vol. 4 *The Industrial Labour Journal* at 42.

[406] (1979) Vol. 42 *The Modern Law Review* at p. 92.

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the contract which would be deemed to be terminated irrespective of the violation of the innocent party. When applied to a contract of employment this rationale does not apply because there is no way in which the employer can hold the employee to the contract in the sense of securing specific performance of it. In other words, since in a contract of employment the requirement of acceptance or its absence does not place the innocent employer in any position of advantage or disadvantage, acceptance of a repudiation has little practical value in employment contracts. Hence the theory that contracts of employment constitute an exception to the general rule of the law of contracts that acceptance of a repudiation is necessary to terminate the contract.

293. In any event, in many situations the question will arise as to whether the innocent party has waived the breach or has not accepted the repudiation as terminating the contract. This question would usually arise if acceptance of a repudiation is not considered necessary and the question is whether there has been a waiver. It could also arise if acceptance is considered necessary and the question is whether the innocent party has accepted the breach or has instead affirmed the contract. Although according to J. M. Thomson[407] silence will usually not be evidence of waiver, he says :

> "but as waiver is ultimately a question of fact, there may be circumstances when the innocent party's silence, contrary to the general rule, will be taken as evidence that the contract is still subsisting. For example, while in theory a strike will usually amount to a repudiatory breach of the strikers' contract of employment,[408] in practice neither employer nor striker contemplates that the contract is terminated as a result of that breach. Accordingly, it is now settled that, in the case of a strike, the employer's silence will be treated as evidence that he does not wish to treat the contract of employment as at an end: if an employer does wish to regard the contract as terminated by the strike, he must within a reasonable time give the employees notice that he regards their repudiatory breach as terminating the contract.[409] An employer's silence will only be evidence of waiver when the repudiatory breach is a strike: in the

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[407] "The Effect of a Repudiatory Breach" in (1978) Vol. 41 *The Modern Law Review* 137 at 142.

[408] See the recent case of ***Simmons v Hoover*** (1976) I.R.L.R. 266 in which the E.A.T. rejected Lord Denning M.R.'s suspension theory of strikes which he enunciated in ***Morgan v Fry*** (1968) 2 Q.B. 710 and, instead, held that a strike was a repudiatory breach of an employee's contract. Of course, there will be no breach at all if the strikers have terminated their contracts of employment by giving the required notice.

[409] ***Gannon v Firth*** (1976) I.R.L.R. 415. For a full discussion on this question, see Thomson "The Effect of a Strike on the Contract of Employment" (1977) J.R. 187.

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case of any other repudiatory breach by an employee, the employer's silence is not evidence of waiver and the contract of employment will cease at the date of the breach in accordance with the general rule."[410]

294. Still another aspect of the question of repudiation remains to be considered. It has been suggested that a wrongful repudiation of a contract of employment does not always determine the contract and, in exceptional circumstances, the court may keep the contract alive. This was recognized in ***Hill v C. A. Parsons & Co. Ltd.***[411] Hill was given one month's notice of the termination of his contract. An application by him to the High Court for an interim injunction to restrain the Company from acting in terms of the notice was refused. On appeal the majority of the Court of Appeal, while accepting the general rule that even a wrongful repudiation of a contract of employment without acceptance would put an end to the contract, though that in extra-ordinary cases the courts may keep the contractual relationship alive. The fact that Hill was employed as an engineer for 35 years and was due to retire in two years on a pension constituted, in this case, special circumstances which could not be appropriately met by damages in the context of the hardship Hill would suffer. The majority of their Lordships also took into account the fact that a valid notice of termination would have brought Hill within the ambit of the Industrial Relations Act (1971) which limited terminations of the present type. The relevance of special circumstances was also recognized by the Privy Council in ***Francis v Kuala Lumpur Councillors***[412] but, referring to this latter case, the court in ***Sanders v Earnest A. Neale Ltd.***[413] thought that it was an "example of a case in which employment was under a statutory scheme and the notice of dismissal was not merely wrongful; it was given by the wrong person and was a complete nullity."[414]

295. It is difficult to state with any degree of certainty the legal rules which would apply in Sri Lanka on the question of repudiation of a contract of

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[410] See ***Hare v Murphy Bros.***

[411] (1971) 3 All E.R. 1347. See (1972) Vol. 35 *The Modern Law Review* 310 (1972) Vol. 1 *The Industrial Law Journal* 37.

[412] (1962) 1 W.L.R. 1411.

[413] 1974 I.C.R. 565 at 569.

[414] It must, therefore, be noted that repudiation by dismissal will not determine the contract where the employer's right to dismiss is affected by statute – ***Vine v National Dock Labour Board*** (1956) 3 All E.R. 939 (HL), or where the contract of service provides for dismissal only on certain grounds and the dismissal is not on one of such grounds – ***McLelland v N. Ireland General Health Services Board*** (1957) 1 All E.R. 129. ***Hotel Galaxy (Pvt) Ltd & Others v Mercantile Hotels Management Ltd*** (1987) 1 Sri L.R. 5

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employment by an employee. It is suggested that the following principles be followed :

(a) Repudiation of a contract of employment gives the employer the right to terminate the contract, or to waive the breach, or to treat the contract as at an end in consequence of the repudiation by the employee. Where the employer himself terminates the contract instead of treating the contract as having been terminated by the employee, then the employer must justify the non employment on the basis of a termination by him. If he waives the breach and condones the conduct, then the contract continues.

(b) The type of conduct that would amount to a repudiation should go to the root of the contract.

(c) Where the employer wishes to treat the contract as at an end in consequence of the employee's repudiation, then, in view of the conflicting decisions in regard to the question of acceptance by the employer of the repudiation, it would be safer for the employer to accept the repudiation as being a necessary pre-requisite to the contract terminating in consequence of the repudiation. In short, the better view is that a repudiation, in order to terminate the contract, requires acceptance by the employer.

(d) In exceptional situations a repudiation may not determine the contract and a court may, as we have seen, keep the contract alive.

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L. FRUSTRATION OF CONTRACT AND IMPOSSIBILITY OF PERFORMANCE

296. Another method by which a contract may come to an end without the necessity for the employer to terminate the contract is in circumstances where the law will consider the contract to have terminated by frustration or due to impossibility of performance.

297. The doctrine of frustration may operate to bring any contract to an end automatically. In ***Davis Contractors Ltd. v Fareham U.D.C.***[415] it was said :

> ".......... frustration occurs whenever the Law recognizes that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract........"

298. A useful starting point when considering the application of these two doctrines to contracts of employment is the South African decision of ***Beretta v Rhodesia Railways Ltd.***[416] In this case the plaintiff, who was employed by the defendant on 1st January 1907 was, on 10th June 1940, interned because he was an Italian subject. The plaintiff communicated with the defendant with regard to his position and was informed that in view of his internment his employment had automatically terminated and that he was not entitled to a pension as he had not qualified for it. The plaintiff was released on 4 February 1941. It was held that a contract of employment is not automatically terminated by the temporary inability of the servant to fulfil his obligations thereunder but that it might be terminated by the employer if the inability persists. Therefore, the contract was not terminated by operation of law on the plaintiff's internment, nor by his continued internment. The question as to the stage at which the defendant would have become entitled to treat the continued absence of the plaintiff as justifying termination of the contract was not decided.

299. In considering the legal consequences of the plaintiff's internment Tredgold, J., stated that when a contract becomes finally and completely impossible of performance by reason of an act of State it is discharged, but this result does not follow where one party is temporarily disabled from fulfilling his obligations.[417] In respect of the latter situation Tredgold, J., said :[418]

> "It is nowhere suggested that the immediate effect of such temporary disability is to end the contract, and this is not surprising, for any

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[415] (1956) A.C. 696, H.L. per Lord Radcliffe at 728 – 729.

[416] 1947 (2) S.A.L.R. 1075.

[417] Ibid at 1078.

[418] Ibid.

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such suggestion would involve consequences so extreme as to be unthinkable. The benefits, for example of a lifelong service might be totally forfeited by a day's enforced absence. Two possible views have been advanced: (a) That, when one party is disabled from performing his obligation for an unreasonably extended period, this gives the other party the right to cancel the contract; and (b) that such disability when prolonged beyond a reasonable period has the effect of automatically terminating the contract as from the time when the disability originated."

The latter view has been accepted in English Law.[419] According to Tredgold, J., the English law has been complicated by the doctrine of frustration which is artificial and involves certain difficulties :

> "It is postulated that the contract is not at once discharged. But after the passage of an unspecified time, which must vary greatly with the circumstances of each contract, a situation arises which has retroactive effect and discharges the contract as from a prior date .... the contract continues for a period as a matter of substantive law and later, as the situation develops, is discharged in respect of the same period. The correct method of dealing with any rights which may have vested during this period remains an enigma."[420]

Tredgold, J., expressed preference for the first view, namely that disability from performing the contractual obligation for an unreasonably long period gives the other party the right to terminate the contract :

> "The former view presents no such difficulties. Upon a temporary disability preventing one party from fulfilling his obligations the contract continues. If the disability persists for a period which, judged on the circumstances of the particular case, renders it unreasonable that the other party should continue bound whilst receiving no benefit from the contract, such party is entitled to terminate the contract. The contract thereupon ends and the respective rights and obligations of the parties fall to be determined at the date of his positive action without the complication of retroactive action.
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> Moreover if the discharge is by operation of law after a lapse of a certain time then such discharge must be mutual and this would lead

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[419] ***Unger v Preston Corporation*** (1942) 1 All E. R. 200.

[420] ***Beretta v Rhodesia Railways Ltd.*** op. cit. at 1079.

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to curious results. The party, other than the one who is prevented from fulfilling his obligation, may desire to maintain the contract in existence. The possible future value of the contract may be such that he is prepared to endure the inconvenience caused by the temporary suspension of the obligation. Is he compelled to release the party in involuntary default, however much he may wish to hold him bound? .... the position would be unique in the law of contract in which a breach, whether voluntary or involuntary, discharged the party on whose side the breach lay from any portion of the obligation it still lay within his power to perform."[421]

300. These principles were in substance followed by the labour tribunal in ***The Lanka Estate Workers' Union v The Superintendent, Hewagama Estate.***[422] This case related to a workman who was in police custody and was released about two years later. On his return he reported for work but was refused employment. The employer's position was that the workman abandoned employment or that the contract of employment ceased to exist as a result of the operation of the doctrine of frustration. The Tribunal held that there was no abandonment as the workman had no intention of abandoning his employment :

> "Whilst, ordinarily, persistent absence may give rise to the presumption of abandonment it does not necessarily follow that such a presumption is inevitable; and if circumstances are such that an intention to abandon employment cannot reasonably be drawn, in my view, the physical aspect of the workman's conduct cannot be singled out and taken in law to signify an abandonment of the contract. The physical absence and the mental intent should co-exist, ... there is ample admitted evidence to show that when the applicant did not report for duty his failure arose out of a physical impossibility to do so arising out of his imprisonment so that it is not reasonable to draw the presumption that he intended to vacate employment. On the other hand a presumption to the contrary can be drawn from the fact that he reported for duty immediately after the physical restraints forced upon him were removed."

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[421] Ibid. at 1079. See ibid at 1079 *et seq.* for the authorities in support of this view. Tredgold, J., also pointed out : "It is well established that in the case of illness of a servant the contract of service is not ipso facto discharged but may be terminated by the master if the illness is protracted" : ibid at 1080.

[422] L.T.R. 1212 decided on 15 January 1969. An appeal by the employer from the order of the tribunal was dismissed by the Supreme Court on 2 February 1970 in S.C. 7-9/69.

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The Tribunal further held that the doctrine of frustration is alien to Roman-Dutch law and does not therefore, apply to a contract of employment in Sri Lanka :

> "Since the doctrine of frustration does not apply to the arrest of the workman and .... subsequent imprisonment may have in law entitled the respondent to determine the contract of employment which he has not done. The Roman-Dutch law does not recognize the involuntary frustration of contract but acknowledges that supervening circumstances may make it impossible for the contract to be performed in which event either party could take steps to revoke or repudiate the contract. If the imprisonment of the workman made it impossible for him to perform his part of the bargain, this would of itself not bring the contract to an end automatically but would entitle the respondent to terminate the contract on that ground. On the other hand the employer is not obliged to determine the contract and he is free to call upon the workman when the difficulty passes to perform his obligations under the contract."

The Tribunal pointed out that s. 10 of the Service Contracts Ordinance reflects the Roman-Dutch law on this matter in respect of written contracts and excludes the application of the English doctrine of frustration. That section states :

> ".......... no contract entered into and required to be in writing under the provisions of this Ordinance shall be determinable .... except by the mutual consent of the contracting parties .... or except when the party contracting to be employed shall have been convicted of an offence or have become a prisoner, or permanently disabled from completing his contract *and* his employer shall elect to determine the contract............"

The section applies only to contracts required to be in writing. The only contracts required to be in writing are those specified in s. 7, namely, contracts for terms of service exceeding a month but not exceeding three years, so that monthly contracts of employment fall outside the scope of s.s. 7 and 10. Hence the tribunal's reliance on the Service Contracts Ordinance was erroneous.

301. The differences sought to be drawn between the Roman-Dutch law and English law and the conclusion reached by the above authorities that in Roman-Dutch law impossibility of performance or frustration does not determine the contract but only gives a party the right to terminate the contract, are without substance. There is no difference in this regard

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between a contract of service and other types of contracts and possibly an automatic discharge is all the more reasonable in a contract of service which is a contract of personal service. As pointed out by C. G. Weeramantry :[423]

> "............ in the Roman-Dutch law the presumption would seem to be that the contract is subject to an implied condition that the impossibility operates as a discharge, unless the parties contract to the contrary, whereas in English law the presumption would seem to be in favour of an absolute contract unless it can be shown that the parties had contracted on the basis of a condition that impossibility was to discharge the contract."

He goes on to say :[424]

> "The doctrine that a contract was discharged by supervening impossibility was well recognized by Roman and Roman-Dutch law. Where performance becomes impossible either physically or legally, the debtor is discharged from liability if the impossibility of performance is due to vis *major* or *casus fortuitus.* A condition exempting a party from liability when through no fault of his own the contract becomes impossible of performance is taken to be implied. Such an implication arises also when the subject matter of the contract is destroyed or when the condition or state of things contemplated by the parties as the foundation of their contract has ceased to exist or not been realized or if performance becomes legally impossible .... the Roman-Dutch law does not distinguish between cases where the parties may or not have foreseen that performance would be impossible."

Tredgold, J., did recognize that even under Roman-Dutch law when a contract of service finally becomes impossible of performance it is discharged. The stage or time at which the contract becomes impossible of fulfillment is a question of fact in each case and the answer does not depend on which system of law is applicable.

302. The consequence of frustration is that the contract is deemed to be at an end provided the frustration is not self-induced.[425] *Vis major* is not confined to an act of God or to such matters as piracy, ship-wreck, war, etc.[426] An

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[423] The Law of Contracts (Colombo, 1967) Vol. 2 section 787.

[424] Ibid. section 788.

[425] Ibid section 801.

[426] Ibid, section 788 f.n. 18.

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obvious case of frustration is a situation where the business which the employer is engaged in and on which the employee is employed is taken over by the State. Implied in every contract of employment, unless expressly excluded, is the condition that the work on which the employee is employed and which, therefore, forms the foundation or subject matter of the contract,[427] continues to exist and will not be destroyed by factors beyond the control of the parties to the contract. When the law recognizes that an Act of God puts an end to a contract, it is recognizing this implied condition and therefore discharges the parties from any further obligations on the happening of that event which is beyond the control of the parties. By frustration is meant that there has been such a change of circumstances that the performance of the contract has become unlawful, or that events make it physically impossible for the contract to be performed (as where the employee is permanently disabled), or that, although performance is not physically impossible, there has been such a change as to destroy the whole object of the contract and to make performance no longer viable in commercial terms. Thus the 'call-up' of a comedian by the army was held to frustrate a contract under which he had given the exclusive management of his performances to a manager for a period of ten years as there has been such a change in circumstances.[428] There are numerous instances in the law of contract which recognize that State intervention e.g., requisition by the State, may frustrate a commercial contract.[429] The principle is applicable with even greater force to a contract of service as it requires personal service. Even at a time when State intervention was minimal the law recognized that State intervention could determine a contract. It is all the more important today in a society such as ours when the State occupies a position of power and authority much greater than before, and the legal system includes hitherto unthought of legislation such as the Business Acquisition Act.

303. The true position, then, is not that our law does not recognize frustration of a contract of employment, or that impossibility of performance does not automatically determine a contract but only entitles a party to terminate the contract. What is material is whether the frustrating event rendering a contract of employment impossible of performance is of a purely

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[427] See also where a party to the contract dies: "......... where a party to a 'personal contract', such as a contract of service or agency, dies, the contract is deemed to be discharged. The personality of the contracting party or parties is essential to the performance of such a contract and may be termed the 'subject matter' of the contract; and in the absence of such party, performance is an impossibility" – C.G. Weeramantry *The law of Contracts, op. cit.* Section 791.

[428] ***Morgan v Manser*** 1948 (1) K.B. 184.

[429] See Chitty *The Law of Contracts* (23 ed.) Vol. 1 sections 1273 f.n. 66, 1279 – 81, 1291 – 93, 1296 f.n.59.

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temporary nature not determining the contract, the temporariness of the disability or impossibility being decided by reference to the nature of the contract, the position of the parties, the duration of the disability and any other relevant considerations.

304. A situation which arises not infrequently is the imprisonment of an employee, either pending the conclusion of criminal proceedings against him or as a sentence imposed on him by a court. Still another situation of even greater frequency is the inability of an employee to perform his contractual obligations due to illness. Both these situations require consideration in the context of the doctrines of frustration of contract and impossibility of performance.

305. A sentence of imprisonment may in certain circumstances amount to a repudiation by the employee of his contract of employment in terms of the doctrine earlier analyzed. It may also amount to a frustration of the contract. Whether it does so depends on the facts of each case and on various factors such as the length of imprisonment, the nature of the contract and the length of the employee's service.

306. Where a workman is in custody or remand without a sentence, depending on various factors such as the length of internment, the contract becomes impossible of fulfillment and is frustrated without the need for the employer to terminate the contract. This consequence would probably not flow where the employer secures the internment of the employee as, then, the employer is responsible for the impossibility of performance. Where, however, the employee is sentenced to a term of imprisonment, then he himself is responsible for the impossibility of performance, irrespective of whether or not the initial internment was secured by the employer.

307. We have seen that the doctrine of impossibility of performance and frustration was applied by the Court of Appeal in ***Hare v Murphy Bros.***[430] to a situation where an employee was sentenced by a court to 12 months' imprisonment. This principle applicable to a case of imprisonment for a specific period should be equally applicable to a case of internment for an unspecified period as, in the latter case, the question as to when the contract would become possible of performance would not be known. Thus in the ***Lanka Estate Workers' Union v The Superintendent Pussella Group***[431] the workmen, who were governed by the Estate Labour (Indian) Ordinance, were arrested on 15th April 1962, and on 17th May 1962 the

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[430] 1974 I.C.R. 603 see text at f.n. 58 ante.

[431] S.C. 195/68 S. C. M. 6.3.71 (unrep.).

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employer informed them that their names had been struck off the estate register. The workmen were in custody for a period of two years. The Supreme Court endorsed the conclusion reached by the tribunal that "the contract of employment between the parties had been frustrated due to circumstances outside the control of both and the contractual obligations were over."

308. The principle of impossibility of performance in such circumstances was applied in the South African case of ***Schelengemann v Meyer, Bridgens & Co.***[432] to a case where the managing director of a company was interned as an enemy alien whereupon the company was held entitled to treat the contract as terminated. The decision in ***Peters Flamman & Co. v Kokstad Municipality***[433] was followed and the following statement in ***Distington Hematite Iron Co. Ltd. v Possehl & Co.***[434] was quoted with approval :

> "This is a contract which establishes a continuous relationship between the parties, involving continuous effort on both sides, among other things effort on the part of the defendants to push this iron, an effort on the part of the plaintiffs in the sense of referring enquiries to the defendants, and it seems to me that to affirm such a contract as standing generally, although for the present moment and for the indefinite time in the future, it cannot be acted upon, is not to maintain an existing contract, but to substitute an entirely new one."

309. In ***Ceylon Cold Stores Ltd. v The Industrial & General Workers' Union***[435] a workman was released from custody after seven months. On his internment his father and a fellow employee informed the employer of his inability to turn up for work but the employer suspended the workman pending inquiries and thereafter terminated his services. In view of the employer's action in terminating the employee's services the question of frustration of the contract did not arise. Referring, however, to ***Unger v Preston Corporation***[436] Wijayatilake, J., stated that the principle set out therein –

> "dealt with the rights of an alien refugee from Germany interned during his employment as an enemy alien on the outbreak of war. I do not think this principle would apply to the facts before us in a labour dispute of this nature as it dealt with an action to recover

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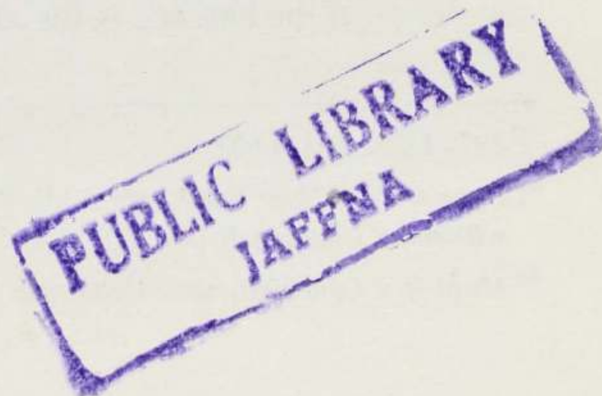
[432] 1920 C.P.D. 494.

[433] 1919 A.D. 435.

[434] 115 L.T. 412.

[435] S.C. 117/71 S. C. M. 19.2.74 (unrep.).

[436] (1942) 1 All E. R. 200.



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arrears of salary or damages for breach of contract. In the instant case we are dealing with a dispute pertaining to our industrial law."

This statement was made *obiter* since the court concluded that the employer had terminated the contract, so that the case is no authority for any proposition relating to frustration of a contract of employment on the internment of a workman. Moreover, the distinction drawn is unwarranted since the principle would be applicable in appropriate circumstances whether one has to determine the termination of a contract of employment by operation of law by reference to labour law or otherwise, there being no special rules in labour law as to when a contract of service terminates. Where labour law differs in this respect from the common law is in regard to remedies.

310. The mere imprisonment, by sentence of court or otherwise, does not *ipso facto* terminate the contract in all cases, as where the absence is only for a day. As pointed out by Lord Denning in ***Hare v Murphy Bros. Ltd.***[437] which was a case where the employee was sentenced by a court to one year's imprisonment and the Court of Appeal held that the contract of employment had terminated by operation of law due to its frustration or impossibility of performance :

> "In the case of a contract of employment, you must look at the length of time he has been employed, the position which he held, and, of course, most important of all, the length of time which he is likely to be away from his work and unable to perform it-and the importance of getting someone else to do his job meanwhile........... if it then appears that his job has been effectively brought to an end, the contract is frustrated."

311. It is hardly necessary to emphasize that absence for a long period may entitle the employer, subject to the provisions of the Termination of Employment of Workmen (Special Provisions) Act (1971), to terminate the contract. Thus where an employee is held by the Police for a long period even without fault the contract may be terminated.[438] The employer's right to terminate the contract in such circumstances is not based on misconduct, but is analogous to frustration of the contract of employment. In one case[439] the court observed :

> "It is immaterial whether the fault lies with the servant or not. Even if the absence is for causes completely beyond the servant's control,

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[437] 1974 I.C.R. 603 at 607.

[438] ***Burn & Co. v Their Employees*** A.I.R. 1957 S.C. 38 (2 years detention), ***New Bhopal Textiles Ltd. v Ramdutt Chaturvedi*** 1961 (2) L.L.J. 580 (Mad. Prad.) (3 months).

[439] ***Municipal Commissioner v Dattatraya Sadashev*** A.I.R. 1946 Nagpur 347.

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the employer is justified in taking action provided he is not responsible. Even if it be assumed that the plaintiff was wholly guiltless in respect of his service, it is quite evident that the defendant had to suffer. The defendant's work has to go on and it had to employ somebody else in the plaintiff's place during the period of his absence. That person had to be paid. So, whether or not any of this was the plaintiff's fault, the defendant was out of pocket. Now the rule is that when one of two innocent parties has to suffer .... the burden is thrown on the one most nearly responsible .... The plaintiff is the one who undertook to serve and he is the one who did not come. He is the one who did not fulfil his undertaking. He may conceivably be excused in the sense that no damages for the breach of his contract can be claimed from him .... but he can certainly not insist on performance of the contract by the other side (in paying him three year's salary) when he admits he did not fulfil his part and that it is no longer possible for him to do so."

312. In ***Indian Iron and Steel Co. v Their Workmen***[440] the Supreme Court of India stated :

"It is true that the arrested men were not in a position to come to their work, because they had been arrested by the Police. This may be unfortunate for them; but it would be unjust to hold that in such circumstances the Company must always give leave when an application for leave is made. If a large number of workmen are arrested by the authorities in charge of law and order by reason of their questionable activities in connection with a labour dispute, as in this case, the work of the Company will be paralyzed if the Company is forced to give leave to all of them for a more or less indefinite period. Such a principle will not be just; nor will it restore harmony between labour and capital or insure normal flow of production. It is immaterial whether the charges on which the workmen are arrested by the Police are ultimately proved or not in a court of law. The Company must carry on its work and may find it impossible to do so if a large number of workmen are absent. Whether in such circumstances leave should be granted or not must be left to the discretion of the employer. It may be readily accepted that if the workmen are arrested at the instance of the Company for the purpose of victimization and in order to get rid of them on the ostensible pretext of continued absence, the position will be different. It will then be a colourable or *mala fide* exercise of power under the relevant Standing Order ; that however is not the case here."

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[440] A.I.R. 1958 S.C. 130 at 137.

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313. Where an employee is disabled from performing his contractual obligation due to illness, a distinction must be drawn between a temporary illness which does not put an end to the contract and a protracted illness which may determine the contract due to impossibility of performance. As stated by the Court of Appeal in England in ***Warburton v Co-operative Wholesale Society Ltd.***[441] :

> "A servant incapacitated by illness........ does not cease to be employed unless the illness is such as seriously to interfere with or frustrate the business purpose of the contract."

314. In ***Marshall v Harland & Wolff Ltd.***[442] the employee, a shipyard fitter, was absent from work without pay for 18 months due to illness. The contract of employment provided that no wages were payable for absence due to sickness or injury. It was found as a fact that it was not the employer's policy or practice to terminate employment on grounds of sickness. There was no medical evidence as to the duration of the employee's incapacity but the employee thought that after an operation he would be able to resume work. The employer decided to close down the shipyard and terminated the employee's services. The question was whether the employee was dismissed for reasons of redundancy or whether *inter alia,* his contract of employment was determined by frustration. The court held that the employee had been dismissed for reasons of redundancy and that his contract of employment had not been frustrated. Whether or not the contract had been determined by frustration was held to depend on whether his incapacity was of such a nature that further performance of his obligations in the future would either be impossible or be something radically different to that which he undertook under his contract. Since the employee might recover and resume work, it was not the employer's policy or practice to terminate employment on grounds of sickness and it had been expressly agreed that no wages were payable during sickness, further performance of the employee's obligations in the future was not impossible nor something radically different from that which he undertook under his contract. The court formulated in the following terms the test to be applied when considering whether an employee's illness has frustrated the contract :

> "The Tribunal must ask itself : 'was the employee's incapacity looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him, and

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[441] (1917) 1 K.B. 663 at 668.

[442] 1972 I.C.R. 101 (NIRC).

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agreed to be accepted by the employer under the agreed terms of his employment?' "

The court thought that in determining the issue of frustration, the questions that require to be answered and the answers to them are as follows :[443]

"(a) The terms of the contract, including the provisions as to sickness pay. The whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which such sick pay is payable. But the converse is not necessarily true for the right to sick pay may expire before the incapacity has gone on, or appears likely to go on, for so long as to make a return to work impossible or radically different from the obligations undertaken under the contract of employment.

(b) How long the employment was likely to last in the absence of sickness. The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job than if it was expected to be long term or even life long.

(c) The nature of the employment. Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.

(d) The nature of the illness or injury and how long it has already continued and the prospects of recovery. The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.

(e) The period of past employment. A relationship which is of long standing is not so easily destroyed as one which has but a short history. This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period or periods of sickness than over a shorter period."

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[443] Ibid. at 105.

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315. An exception to the rule that a temporary illness will not terminate the contract is a case where performance of the contract at a particular time is of the essence of the contract e.g., in theatrical and similar engagements. In ***Bettini v Gye***[444] a singer was unable to be present at rehearsals due to illness but was willing and able to perform at the places the contract provided for. Since rehearsals were not essential to the contract, it was held that the contract was not discharged. But in ***Poussard v Spiers***[445] where illness prevented an opera singer from being present at the rehearsals as well as at the opening performance of the opera, the contract was held to be terminated as both rehearsals and the performances were considered essential to the contract.

316. Where a contract of employment is frustrated the relationship is determined by operation of law independent of the violation of the parties and no act or statement by the parties or a party is necessary; nor is it necessary to be able to point to a precise point of time at which the relationship ended, though the impossibility of asserting that the contract was frustrated not later than some date or event may indicate that there was no frustration.[446]

317. In conclusion, it is necessary to note the recent development in English labour law which has attempted to exclude the application of the doctrine of frustration to contracts of employment. In England the protection afforded to employees by legislation on unfair dismissals is removed in situations where the contract of employment may be deemed to be frustrated because there is no dismissal where the contract has terminated by operation of law. In order to avoid the problem of frustration in relation to their legislation on unfair dismissal the courts have attempted to restrict frustration to those situations where a dismissal itself would be fair.[447] An extreme method of avoiding the consequences of frustration in relation to their unfair dismissal legislation is reflected in ***Harman v Flexible Lamps Ltd.***[448] which has attempted to exclude the application of the doctrine of frustration to employment contracts. In this case the employee, who joined the employer's services in October 1977, was absent on account of illness for 12 weeks in 1978 and 9 weeks in 1979 upto April. There was no evidence that she would be fit to return to work in the foreseeable future.

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[444] (1876) 1 Q.B.D. 183.

[445] (1876) 1 Q.B.D. 410, also see ***Jackson v Union Marine Insurance Co. Ltd.*** (1876) L.R. 10 C.P. 125.

[446] ***Marshall v Harland & Wolff Ltd.***, 1972 I.C.R. 101 at 106 (NIRC), but see ***Thomas v John Drake & Co. Ltd.*** (1971) 6 I.T.R. 146 with which the court disagreed in Marshall's case.

[447] ***Egg Stores Ltd v Leibovici*** (1977) I.C.R. 260.

[448] (1980) I.R.L.R. 418.

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In over-ruling the decision of the Industrial Tribunal that the contract was frustrated or, in the alternative, that the dismissal was fair the court stated :

> "In our judgement the circumstances of this case are a very long way indeed from any situation in which a contract of employment is discharged by ...(frustration). This contract was in any case terminable at a week's notice and once the employer decided that the ill-health of Miss. Harman made it necessary to replace her nothing was easier than to give her notice .... In the employment field the concept of .... frustration is normally only in play where the contract of employment is for a long term which cannot be determined by notice. Where the contract is terminable by notice there is really no need to consider the question of frustration........."

318. As pointed out by Richard Gillis[449] this decision seeks to limit frustration to contracts not terminable by notice and excludes its operation to contracts which may be terminated by notice. The decision over looks other decisions such as ***Hart v A. R.Marshall Ltd.***[450] which recognized the application of frustration to short term contracts terminable by notice. In ***Norris v Southampton City Council***[451] the court held that frustration did not operate where the inability to perform resulted from the employee's own fault or own conduct and disagreed with the contrary conclusion in ***Hare v Murphy Bros. Ltd.*** Richard Gillis,[452] commenting on both cases, makes the following observations :

> "Two interesting points arise. Firstly, on a general level, the case shows how the doctrine of frustration is totally out of place in these types of cases. In the classic contractual situation, it is the party who is potentially in breach who raises the defence of frustration to avoid liability under the contract, and it is his own fault that may prevent the defence from succeeding. In the employment cases, however, when the employer raises the argument of frustration it seems that it is open to the employee to argue that the defence must fail because he himself (the employee) was at fault. Why as a matter of principle the employer's defence of frustration should fail because of the employee's fault is unclear and seems quite perverse, as is the fact that the employee puts himself in a stronger position by arguing his own fault. Secondly, the case emphasizes that frustration cannot

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[449] (1982) Vol. II *The Industrial Law Journal* 127.

[450] (1977) I.R.L.R. 51.

[451] (1982) I.R.L.R. 141.

[452] op. cit.

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operate where the inability to perform the contract arises from the employee's own fault. The line, then, between frustration and wrongful repudiation obscured by Lord Denning in ***Hare v Murphy Bros. Ltd.*** has now been clarified, and once again the area in which frustration can operate has been strictly limited. All Lord Denning's examples in ***Hare v Murphy Bros. Ltd.*** of what he regarded as self-induced frustration (e.g. injury in an accident which the employee himself negligently caused) must now be regarded as outside the scope of frustrating events. If the employer wishes to terminate the employment contract in such cases he must accept the employee's wrongful repudiation and thus dismiss him. Both of these decisions indicate that the judicial approach to the jurisdictional problem caused by frustration is no longer to try and ameliorate the consequences of applying frustration, but to limit the scope in which frustration will apply. Both cases suggest that so far as possible the problem of frustration will be solved by narrowly interpreting frustration and recategorising all other 'frustration-like' cases as examples of wrongful repudiation which need acceptance by the employer and are thus dismissals within section 55(2) E.P.C.A. 1978."

319. It is submitted that these developments in English law are not likely to be followed by courts in Sri Lanka which have, on the purely legal issue as to when and how a contract of employment may terminate, followed the common law principles where they have not been expressly modified by statute. Looked at from the point of view, for instance, of Labour Tribunals, the question of an unfair dismissal arises only in a situation where the law regards a contract of employment as having been terminated *by the employer.* In circumstances where the contract is not terminated by the employer, either expressly or constructively, our tribunals have never resorted to arguments to bring within the concept of dismissal situations which do not traditionally fall within it. It is only after the legal issue as to whether the contract has been terminated by the employer is answered in favour of the employee does the Tribunal commence exercising its just and equitable powers in the matter of determining whether the termination was fair and what relief, if any, should be awarded to the employee. In other words, our courts have not developed the theory that justice and equity are involved in the consideration of jurisdictional questions such as whether the contract of employment was terminated by the employer or by the employee or by operation of law. It is, therefore, the author's view that the developments in English law noted in the preceding paragraphs have no application in our law and that those developments must be considered purely in the context of the legislative provisions and their objectives in England.

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320. The different situations in which a contract may come to an end due to its frustration or due to impossibility of performance are, as we have seen, numerous. It is useful to note the following summary of such situations :

(a) It is obvious that in the absence of an express provision to the contrary, a contract of employment terminates on the death of either party. In the case of a partnership the death of one partner will have this effect only if the contract of employment depends on the deceased partner being a member of the partnership.

(b) Physical impossibility in regard to the performance of the contract would terminate it. A temporary illness of short duration would have this effect only if it is fundamental to the relationship, as in ***Poussard v Spiers,***[453] where the inability of an opera singer to perform at the opening of a new opera due to illness was held to have frustrated her contract. An illness which incapacitates the employee from further performance would result in the termination of the contract. The difficulty arises in relation to illnesses which are short of permanent incapacity but which are reasonably long. In this connection some of the principles have been referred to in paragraphs 314 – 316. Physical impossibility resulting in the determination of the contract may arise from the imprisonment of an employee analyzed in paragraphs 304 – 312. In the case of imprisonment which results from a sentence by a Court (as distinct from a case of mere custody), it may also amount to a repudiation of the contract by the employee entitling the employer to accept the repudiation if he so wishes.

(c) Impossibility of performance may also arise in consequence of an act of State e.g., where the business is taken over by the State, or its continuance is prohibited by law. It may also arise from an Act of God e.g., where the business is destroyed. In ***Satchithanandan v Ghanum***[454] an employee claimed reinstatement and backwages as relief for the termination of his services, where the employer's industries and head office had been destroyed by ethnic violence. The Court of Appeal held that there was no termination of the workman's services by the employer as the contract had come to an end through operation of law by a frustrating event for which neither party was responsible.

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[453] (1871) 1 Q.R.D. 410. See also ***Unger v Preston Corp.*** (1942) 1 All E.R. 200 and ***Condor v The Barron Knights*** (1966) 1 W.L.R. 87.

[454] C.A. No.476/86, C. A .M. 18.8.93 (unrep.).

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M. VACATION OF EMPLOYMENT

321. It is common place to find employers asserting that a workman who has been absent without leave or authority has vacated his employment. By the use of that term the employer usually means that the employee has deserted or abandoned his employment, which is a somewhat different concept. The assertion of vacation of employment is more often than not based on the fact of absence alone, over-looking the need for the presence or inference of an intention on the part of the employee not to return. Here again, the term 'vacation' is sometimes used to cover situations in which the employee has actually repudiated his contract of employment, or has only misconducted himself and thus given the employer sufficient grounds to dismiss him. There is also a statutory concept of vacation of employment which has formed part of our law from time to time and which we will analyze.

Absence of the Employee beyond the Contractual Period

322. Before analyzing vacation of employment and allied concepts such as desertion or abandonment of employment, it is of some interest to examine an inequitable doctrine resulting from a decision of our Supreme Court almost a century ago in the little known case of ***Meyyan v Alegamma.***[455] According to this case, which was in relation to employees covered by the Estate Labour (Indian) Ordinance, in any situation where the absence of an employee exceeds the contractual period of one month, a monthly contract of employment is not renewed. This consequence would flow whether the absence is due to imprisonment or illness. The consequence of the decision, if applied, would deprive most employees of access to a Labour Tribunal in circumstances in which it is generally recognized that they would be entitled to claim relief.

323. It is necessary to determine whether the same principles, at least from a purely legalistic point of view, are applicable to workmen not governed by the Estate Labour (Indian) Ordinance. Section 5 of that Ordinance states :

> "Every labourer who shall enter into a verbal contract with the employer for the performance of work not usually done by the day or by the job or by the journey, or whose name shall be entered in the check-roll of an estate and who shall have received from the employer any advance of wages in respect of which the employer is authorized, by or under the provision of any other written law, to

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[455] (1889-91) 9 SCC. 156.

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make a deduction from the wages of the labourer, shall, unless he has otherwise expressly stipulated, and notwithstanding that his wages shall be payable at a daily rate, be deemed and taken in law to have entered into a contract of hire and service for the period of one month, to be renewable from month to month; and every such contract shall be deemed and taken in law to be so renewed unless one month's previous notice be given by either party to the other of his intention to determine the same at the expiry of one month from the day of giving such notice."

The Ordinance applies only to a defined class of persons[456] and the section applies only to verbal contracts with the employer, written contracts being provided for in s. 7. The section has no application to contracts for the performance of work usually done by the day or by the job or by the journey. Section 3 of the Service Contracts Ordinance provides :

"Every verbal contract for the hire of any servant, except for work usually performed by the day, or by the job, or by the journey, shall (unless otherwise expressly stipulated, and notwithstanding that the wages under such contract shall be payable at a daily rate) be deemed and taken in law to be a contract for hire and service for the period of one month, and to be renewable from month to month, and shall be deemed and taken in law to be so renewed, unless one month's previous notice or warning be given by either party to the other of his intention to determine the same at the expiry of a month from the day of giving such notice."

This Ordinance applies only to a servant who shall unless otherwise expressly qualified, extend to and include menial domestic and other like servants, pioneers, kanganies and other labourers, whether employed in agricultural, road, railway or other like work.[457] The Ordinance also applies to chauffeurs[458] and domestic servants.[459]

324. In the full bench decision of ***Meyyan v Alegamma***[460] a workman governed by the Estate Labour (Indian) Ordinance was prosecuted by his employer on a charge of unlawfully quitting his service in February 1891. The workman was granted leave of absence for the whole of October 1890, but

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[456] See s. 3.

[457] s. 2.

[458] Ordinance No. 23 of 1912.

[459] Registration of Domestic Servants Ordinance (1871) Cap. 137 L.E.C. (1956) as amended.

[460] (1889-91) S.C.C. 156.

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never returned though he promised to do so at the end of that month. It was held that the workman was not in the employer's service at the time of the alleged desertion, namely, February 1891. Burnside, C. J., said[461]

> "It is not questioned that if a servant during the existence of his contract of service avails himself of his employer's leave and does not return to his service on the expiration of such leave, that would be quitting the service of his employer without leave *before the end of his term of service*; but the non-return must be during the term that is he is in the employers' service. Now, under the Ordinance the contract for service of servants.... must be deemed and taken to be a contract for service for the period of one month, renewable from month to month, and shall be presumed so renewed unless one month's previous notice be given, and ...... so long as the contract of service in fact existed, the law would deem it renewed from month to month; but where, by mutual agreement, such as the master giving and the servant taking one month's leave, the service has been suspended for a month, the master is not bound to pay wages; nor the servant to render service, and consequently, at the end of the leave, there is no existing contract of service which the law can operate on and renew, and a servant who does not then return to service cannot be said to have quitted before the end of his service. When he left he had leave to do so, and when he did not return there was no existing contract of service."

325. According to this decision absence for a month or more of a workman governed by s. 5 of the Estate Labour (Indian) Ordinance has the effect of preventing the automatic renewal of a monthly contract of employment.[462] If leave of absence has the effect of preventing the automatic renewal of the contract, absence for any other reason would have the same effect. While and Industrial Court of Arbitrator would be entitled to call upon the employer to re-engage the workman if it considers it just and equitable to do so, the legal consequence of absence for the contractual period on the contract of employment is important from the point of view of the jurisdiction of a labour tribunal which cannot entertain an application for reinstatement or compensation since the contract has not been terminated by the employer. It has to be borne in mind that this decision was made at a time when there were no labour laws or Courts with an equitable

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[461] Ibid. at 157. See also Clarence J. at 158.

[462] *Quaere* whether, where the absence is with the employer's leave, the workman can successfully claim that though the earlier contract is at an end, he be re-employed on a new monthly contract on the footing of an implied agreement to that effect implicit in the employer's decision to grant him leave.

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jurisdiction as we know it, so that while the decision assisted the workman from criminal liability at that time, yet it has enormous consequences adverse to employees in the present context of social policy and industrial relations. In other words, to apply the decision today would amount to depriving many employees of their right of recourse to a Labour Tribunal.

326. In ***The National Union of Workers v Wanarajah Tea Co. of Ceylon Ltd.***[463] the workman, who was governed by the Estate Labour (Indian) Ordinance, refused to accept an order of transfer from 1st September 1966 and stayed away from work from that date. On 24th December 1966 the employer informed him that he was deemed to have vacated his employment. The Supreme Court held that the workman had vacated his employment on 1st September 1966 and that the contract of employment had been terminated by operation of law.[464] Alles, J., said :

> "Under section 5 of the Estate Labour (Indian) Ordinance (Cap.133), every contract of service is of monthly duration, renewable from month to month unless notice be given by either party of the intention to determine the contract and the labourer shall be entitled to have his name entered in the check-roll. Under section 6(2) the monthly wages shall be computed according to the number of days the labourer was able and willing to work, and actually demanded employment. The burden was on Perumal to satisfy the tribunal that he had complied with the conditions specified in section 6(2). It is insufficient for Perumal through his union to protest at the transfer and maintain that thereby he was exonerated from complying with the provisions of the law. The contract of service was terminated by operation of law ...... Perumal's services were lawfully terminated because he vacated his employment on 1.9.66."

327. The question arises whether the principles enunciated by the Supreme Court in the aforementioned decisions which related to cases under the Estate Labour (Indian) Ordinance are equally applicable to workmen not covered by that Ordinance but who have monthly contracts of employment. It is clear that there is nothing in the Ordinance which necessitated the Supreme Court reaching the conclusions it did. When s. 5 of that Ordinance refers to contracts for the performance of work it does not introduce any new legal concept but merely reflects the common law position of contracts of service which are in essence for the performance of work. The Service

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[463] S.C. 59/67 S. C. M. 16.10.68, reported in (1969) 20 *Ceylon Labour Gazette* 243.

[464] There is some conceptual confusion here. If a workman vacates his employment, *he* terminates the contract and, therefore, there is no contract to terminate by operation of law. Therefore, either the workman terminates his contract *or* it terminates by operation of law.

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Contracts Ordinance is no different in this regard. Hence the principle so far enunciated would apply to any contract of service and the workmen's absence for at least the contractual period would prevent the automatic renewal of the contract at the end of the contractual period.

328. However, it can be stated with almost certainty that the principles enunciated in this case will not be followed today in regard to situations where the absence of an employee would be considered justified in all circumstances by the court. The harshness involved in a strict application of the principles would be mitigated by a labour court. For instance, it is inconceivable that a court today would conclude that mere absence for reasons of illness for the period contemplated by the Supreme Court decision would result in an automatic non renewal of the contract of employment. Whether such absence would justify a termination by the employer is a matter which would have to be determined on the facts of each case.

Intention to Desert or Abandon Employment

329. The non statutory concept of vacation of employment really involves situations where an employee may be described as a 'deserter' or 'bolter'. In such situations the workman is deemed to have deserted or abandoned his employment[465] and is treated as having, by his conduct terminated his employment.[466] Desertion or abandonment consists of absence without leave and an intention not to return. Both elements must co-exist. A person who is on leave may nevertheless be a deserter where he executes a plan to stay away permanently.[467] Intention to remain away permanently may be inferred from the employee's conduct.[468] Where the employee lives on the employer's premises the fact that he has left with his personal property would be indicative of animus sine revertendi,[469] while the fact that he has not taken such property would indicate the contrary.[470] Since motive is

[465] This is the only sense in which the term 'vacation of employment' may properly be used and the latter term is, more often than not, misapplied and used in situations where the true position is desertion, frustration or repudiation of the contract.

[466] Desertion, if it does not involve an actual abandonment of the job, is serious misconduct – See *Alfred Avins Employees' Misconduct* (Law Book Co. Alahabad, 1968) at p. 23 et seq.

[467] Police Court case No.24356 Matale 2 Beling 83 (Ceylon S. C. 1865), Police Court case Galle No.83566, 3 Grenier Reports 6 (Ceylon S.C. 1873).

[468] See ***The Ceylon Mercantile Union v Donald & Co.*** C.G.G. 12,061 of 12th February 1960, ***The Samastha Lanka Bakery, Bojanasala, Velanda Sappu Sevaka Sangamaya v Proprietor, Dhawalagiri Bakery*** C.G.G. 12,102 of 8th April 1960. See also *Alfred Avins Employees' Misconduct,* op. cit. at p. 25-7.

[469] Police Court case Galle No.83566 2 Grenier Reports 6 (Ceylon S.C. 1873).

[470] ***Bell v Dillo*** (1882) Wendt Reports 102.

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important in determining the intention of an alleged deserter, absence on a temporary escapade is not desertion.[471] Long absence without leave or authority is evidence of desertion. Thus –

> ".......... if an employee continues to be absent from duty without obtaining leave and in an unauthorized manner for such a long period of time .... an inference may reasonably be drawn from such absence that by his absence he has abandoned service.........."[472]

Alfred Avins[473] says :

> "The basis of this rule is that the longer the employee stays away, the more opportunities he has to think about coming back, and to actually return if he so chooses. The fact that he constantly rejects these opportunities at the moment of choice gives rise to a logical probability that during one of these points where the employee had to choose in his own mind between returning, staying away temporarily, or staying away permanently, he chooses not only to reject returning in favour of a temporary absence but rather in favour of a permanent absence. Thus the more opportunities for choice which presented themselves by the lapse of time, the greater is the mathematical probability that at one of these choice-points the employee chose a permanent absence over a temporary one. One such choice is enough to complete the offence of desertion."

330. In the case of ***Jayawardena v ANCL***[474] Senanayake, J., stated that :

> "No employer could indefinitely keep a post vacant without receiving any information from the worker of his inability to come to work.......(The employer) had even given an opportunity for the applicant to tender any explanation or inform (the employer) about his inability to report to work.........."

The Court of Appeal held that the worker had vacated his post because if he "had the intention of not vacating his post, there was no difficulty to inform (the employer)............ but he had not taken any action whatsoever to inform (the employer) about his health and inability to report for work."

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[471] Ibid.

[472] ***Jeewanal Ltd v Their Workmen*** 1961 (1) L.L.J. 517 (SC).

[473] *Employees' Misconduct, op. cit.* at p. 28.

[474] C.A. No.562/87 C. A. M. 9.9.93).

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331. In the light of the foregoing it is necessary to emphasize that the practice in terms of which employers sometimes regard employees as having vacated their employment on account of absence for a week or two without authority or intimation, cannot be sustained. Such short periods of absence, without more, cannot lead to an inference that the employee has abandoned his employment. There must be other circumstances or facts which, coupled together with the absence, lead to the inference of desertion or vacation. For instance, an employee who absents himself for a short period without any intimation and who accepts employment with another employer may be deemed to have terminated his employment with the employer irrespective of the period of absence. On the other hand very long absence may sometimes entitle an employer to draw an inference of vacation of employment. What the length of absence should be must necessarily depend on the facts and circumstances of each case. Where, for instance, an employee is absent for a period of two months due to the fact that he is in custody but has not informed the employer, it does not follow that there has been desertion from employment since his absence does not necessarily indicate an intention not to return, although the circumstances may amount to a repudiation by the employee of his contract of employment. In ***Building Materials Corporation v Jathika Sevaka Sangamaya***[475] the Supreme Court held that long absence without obtaining leave or authority is evidence of desertion or abandonment of service. In this case the Applicant was absent without leave for a period of approximately two months. Despite several letters written by the employer to the workman to furnish a medical certificate in accordance with the rules set out in the relevant circular the workman had failed to satisfy the employer that he was in fact ill and that he was not fit to report for work. The Supreme Court stated that it was clear from the evidence that the employee by his conduct, had severed the contract of service.

332. In the case of ***Pfizer v Rasanayagam***[476] it was argued on behalf of the employer that the refusal by an employee to carry out orders and to obey instructions given by the employer was an abandonment of employment and that although the employee is physically present at the place of work his conduct amounted to a vacation of post. The Court of Appeal held that in the light of the evidence that the employee had been willing to continue to work for the employer and that he had only questioned the reasonableness of this order given to him, and in the absence of an explanation by the employer as to the lawful nature of such orders, it could not accept the contention that the employee had vacated his post.

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[475] (1993) 2 SLR 316.

[476] (1991) 1 SLR 290 at 294.

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Emergency Regulations and Vacation of Employment

333. From time to time there has existed in Sri Lanka a statutory concept of vacation of employment. This concept has not been a permanent feature of our industrial relations system and has been invoked in situations where the government has thought it fit to declare a state of emergency. For instance, with the outbreak of violence in 1971 (commonly referred to as the 'insurgency') and the consequent declaration of a state of emergency, regulations were framed under the Public Security Ordinance declaring certain trades, industries and commercial activities 'essential services' and deeming persons employed in such services as having vacated their employment in certain circumstances. These laws lapsed when the state of emergency ceased to exist, but in this instance an emergency was declared for a continuous period of about five years. Again, these Regulations were invoked in mid 1980 when several trade unions organised a general strike. While the definition of an 'essential service' varied to some extent from one state of emergency to another, the following provision relating to vacation of employment has appeared unchanged whenever a state of emergency was declared over the last one-and-a half decades:

> "Where any service is declared by Order made by the President, under regulation 2 to be an essential service, any person who, on or after........ was engaged or employed, on any work in connection with that service, fails or refuses, after the lapse of one day from the date of such Order, to attend at his place of work or employment or such other place as may from time to time be designated by his employer or a person acting under the authority of his employer, or who fails or refuses, after the lapse of one day from the date of such Order, to perform such work as he may be directed, by his employer or a person acting under the authority of his employer to perform, he shall, notwithstanding that he has failed or refuses to so attend or so work in furtherance of a strike –
>
> (a) be deemed for all purposes to have forthwith terminated or vacated his employment notwithstanding anything to the contrary in any other law or the terms or conditions of any contract governing his employment, and
>
> (b) in addition, be guilty of an offence.

334. This provision contains the important phrase "fails or refuses." While the two words must necessarily bear different meanings – the former being negative and the latter positive in character – the question is whether the term "fails" requires that a person should intentionally fail to report for

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work or whether a failure due to circumstances beyond a workman's control would result in the vacation of his employment. In ***Ceylon Mercantile Union v Heath & Co. (Ceylon) Ltd.,***[477] a workman who was in police custody for a year and was released thereafter without any charges being framed against him was deemed to have vacated his employment. The court held that the phrase "fails or refuses" cannot be read *ejusdem generis* and that the background in which the Regulations were enacted would be relevant in ascertaining its intention i.e. the situation which existed in 1971 constituted a threat to the security of the State and therefore, if the law had intended exceptions it would have used such words as "except for reasons beyond his control". It is submitted that this case was wrongly decided and the better view is that failure to report for work for reasons beyond a workman's control would not come within the ambit of the Regulations. Thus the Supreme Court in ***The Superintendent, Hattanagalla Estate v The Ceylon Estates Staffs Union,***[478] held that the Regulations have no application to a workman whose failure to report for work in involuntary, so that a workman who is unable to report for work due to illness cannot be deemed to have vacated his employment. In reaching this conclusion the Supreme Court took account of the fact that a person who vacates employment in consequence of the operation of these Regulations is guilty of an offence and is liable to imprisonment as well as to forfeiture of all his property. The phrase "fails or refuses" therefore "envisages willful default on the part of the workman – that which he could do but would not do and does not penalize involuntary absence."[479] This principle was applied in the ***Superintendent, Marigold Estate v The Ceylon Estates Staffs Union***[480] in concluding that the Regulations had no application to a workman who failed to report for work on account of the fact that he was in police custody.

335. In order to deem an employee as having vacated his employment it is not necessary that, for instance, the employer should expressly instruct him to report for work, although such a situation is also covered by the Regulations. Vacation of employment includes absence in consequence of a strike and a refusal to carry out instructions. Vacation under the Regulations is an offence for which severe penal sanctions have been prescribed. The type of situation contemplated by the Regulations would not necessarily amount to vacation of employment under the ordinary law and only amounts to vacation because the Regulations deem them so.

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[477] Gazette of Sri Lanka No.100 of 22nd February 1974.

[478] S. C. 231/72, S. C. M. 8.11.74 (unrep.).

[479] Ibid.

[480] S. C. 278/73, S. C. M. 9.12.74 (unrep.).

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336. An employee deemed to have vacated his employment under the Regulations is not entitled, when his employer refuses to offer him work thereafter, to seek re-employment through the intervention of the Commissioner of Labour under s.6 of the Termination of Employment of Workmen (Special Provisions) Act 1971.[481]

337. There are many problems and questions of interpretation that arises in connection with the Order defining essential services. In view of the fact that these Regulations may be invoked again in the future in appropriate circumstances, there is one aspect which merits some detailed consideration.

Section 2(II) of the Essential Services Order

338. When the Regulations are invoked an Essential Services Order is promulgated declaring certain services to be of public utility or to be essential to the life of the community. Some of the services so declared are specific ones such as the supply of electricity and water. The Order has usually contained a general clause intended to bring within its ambit activities which may not fall within the specific descriptions in other parts of the Essential Services Order. This general clause is to be found in Section 2 (II) of the Order which states as follows –

> "The services provided by any mercantile or commercial undertaking engaged in the importation, exportation, sale, supply or distribution of goods of any description whatsoever."

339. Sometimes there are many activities carried on by a particular undertaking or establishment. For instance, it may import or export goods, or manufacture goods, or provide certain services like a motor garage which effects repairs to vehicles of customers. The question arises whether a business that does not fall within the other descriptions in the Order and which carries on any of the activities referred to above fall within the ambit of Section 2(II) quoted above. It has been suggested that this sub clause is concerned with goods and not with the supply of services, so that, to take a specific example, workmen employed in a motor garage for the purpose of repairing vehicles cannot be said to be engaged in an essential service.

340. It is submitted that this view is erroneous. In the first instance, it must be noted that the relevant provision quoted in paragraph 317, which deems an

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[481] *Ceylon Mercantile Union v de Mel* (1974) 76 NLR 390.

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employee in certain circumstances as having vacated his employment, begins by stating –

> "Where any service is declared by Order made by the President .... to be an essential service, any person who .... was engaged or employed, on any work *in connection with* that service.........."

These words do not require employment directly in the services which is declared to be essential, and it is sufficient if the employee is engaged on work in connection with that service. This has the effect of enlarging the operation of the types of employee who may be covered by the Order.

341. The argument that the subsection is concerned with goods and does not cover the supply of services is untenable also because what is declared to be essential is the *services* which are provided by certain types of undertakings referred to in Section 2(II). The reference to undertakings engaged in the importation, exportation, etc., of goods of any description is only relevant to determine the *types* of undertakings that are covered. In other words, any undertaking which does any of the things referred to in Section 2(II) are covered, and all *the services* provided by such an undertaking are covered. What has to be ascertained is not whether a *workman* was concerned or involved in the import, export, sale, supply or distribution of goods, but whether he "was engaged or employed on any work in connection with" the *services* provided by an undertaking which is engaged in import, export, sale, supply or distribution of goods. It is irrelevant that an employee was, or was not, engaged *in* the import, export, sale, supply or distribution of goods, and it is sufficient that he was engaged in work in connection with any services provided by such an undertaking. An employer engaged in the import or export or sale of goods, may have ancillary or other services that need to be performed if the main business of the employer is to continue without interruption. The Regulations cast on the *employer* as well a duty to keep essential services uninterrupted. Since there are a variety of businesses, the details of which vary from establishment to establishment, the legislature naturally thought it fit to cover by the Essential Services Order all the activities of an employer who is engaged in the type of business described in Section 2(II), without going into the impossible task of determining whether some services performed by the employer are necessary to ensure uninterrupted sales, distribution, import or export.

342. The weakness of the argument which seeks to limit Section 2(II) to goods and not to services can be illustrated by simple examples. An employer who is engaged in the manufacture of an article and its sale employ workmen who service and maintain the machinery. Such workmen, if held

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to be performing only services in relation to the machinery and not involved in the manufacture or sale of goods would, on the contrary argument, fall outside the ambit of section 2(II). In that event the Emergency Regulations would be rendered in effective in as much as the manufacture and/or sale of the particular item would be essential to the life of the community, but that service cannot be continued with because the maintenance workforce are on strike and fall outside the ambit of the Regulations. As a result of the inability of the employer to maintain his machinery the manufacture and sale will be interrupted. To take another example, as employer sells and distributes drugs to the public by means of a van Service. In order to continue such sale and distribution the mechanics who repair and maintain the vehicles are essential. Or again, an employer sells highly sophisticated machinery. This activity is covered by Section 2(II) because the employer sells the item in question. But the machinery or item cannot be installed or worked without the workmen who have the special skill and knowledge to install the item or machinery and train the customer's employees in this regard. On the contrary argument the mechanics, etc., who install the said machinery or item can engage in a strike without the consequence contemplated in Section 2(II) and, thereby, interrupt or stop the sale or supply of the said machinery or item which is an essential commodity. The examples can be multiplied ad infinitum.

343. The case of a motor garage also raises interesting questions peculiar to the activities of such an activity. For instance, a Company which has a motor garage imports and sells spare parts for motor vehicles. A customer may opt to purchase the part and take it away with him, or else have it fitted to his vehicle in the employer's garage. In the latter event, the spare part is of no value to the customer unless the employer effects the fitting for him. The fitting of the part constitutes an essential link in the sale of the part to the customer, the only difference being that the customer pays for the fitting as well. The employees who fit the part are directly *connected with* the sale of the part to the customer and, for this reason also, are employed in an essential service. Further, in the same example the employer also imports vehicles for customers. The vehicles are made road-worthy by the employer before it is handed over to the customer. The employees of the motor garage are engaged in making the vehicles road-worthy and are, therefore, involved in the import and/or sale and/or supply of the vehicles to the customer.

344. On the above analysis it is clear that the Essential Services Order covers services as well as goods, the only test being whether the *undertaking* is engaged in any of the activities specified therein. Even if only goods are covered by Section 2(II), persons who are engaged or employed on work in connection with the sale, etc. of such goods are covered.

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345. The construction of Section 2(II) came up for decision by the Supreme Court in the ***Ceylon Mercantile Union v De Mel.***[482] In this case the Supreme Court took the view that :

(a) The purposes of paragraph 2(II), in referring to a mercantile or commercial undertaking, was to include within the meaning of an "essential service" *the services of* any business undertaking which carries on for profit the sale, supply or distribution of any goods whatsoever. Therefore, an employer whose principal business consists of the publication of newspapers was held to be a mercantile or commercial undertaking within the meaning of Section 2(II). The decision supports the position that services, and not merely goods, are covered by Section 2(II) in as much as what is relevant is whether the *undertaking* carries on the type of business enumerated, and not whether an employee is rendering service or is engaged in the sale, distribution, etc.

(b) An undertaking which does not buy goods for re-sale or supply falls within the ambit of Section 2(II) if what it does is to produce or manufacture goods for sale or supply.[483] In rejecting the argument that an undertaking which buys textiles or footwear for re-sale is covered but not one which manufactures them and supplies them to the community, the Court observed : "If this be correct, then the intention of the Order to ensure to the public a full supply of textiles and footwear would be implemented only by ensuring that undertakings engaged in the business of buying and selling these goods will remain open for business; but there would be no assurance that manufacturing concerns, which may be the principal and at times perhaps the only reliable source for the supply of textiles or footwear will remain open. If one is compelled to accept such a construction the Order will fail to ensure a proper supply of textiles and footwear for the public.

(c) Having regard to the fact that the Essential Services Order was not intended to regulate employer/employee relations but sought to ensure the maintenance of supplies essential to the life of the community by requiring both the employer and the employee to continue their normal functions in the economy, a court "must strive to avoid a construction of the Order which will gravely restrict its operation."[484]

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[482] (1974) 76 N.L.R. 390.

[483] Ibid at p. 394-95.

[484] Ibid at p.396.

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346. This judgement of the Supreme Court was confirmed in appeal by the then Court of Appeal in ***Ceylon Mercantile Union v De Mel,***[485] in which the Court, in holding that the words "mercantile or commercial" in Section 2(II) should not be construed narrowly and that the production and sale of newspapers as a business venture is an essential service, observed :[486]

> "We are, therefore, with respect in agreement with the findings of the learned Chief Justice that paragraph 2(II) of the Essential Services Order is intended to include the services of any business undertaking which carries on for profit, sale, supply or distribution of any goods whatsoever, and that accordingly the 3rd respondent-company is a mercantile or commercial undertaking within the meaning of that paragraph."

Quite clearly the Court of Appeal contemplated that the *services* provided by an undertaking of the type described fall within the definition. As stated by the Court :[487]

> "The 3rd respondent company was engaged in the sale, supply and distribution of newspapers. It is necessary to consider the position of those of its employees who were engaged in their production. Once a service is declared by an Order under Regulation 2 to be an essential service, Regulation 38(1) applies to any person engaged or employed in any work in connection with that service. As the production of the newspaper is ancillary to and necessary to its sale, supply or distribution, the Regulation would apply to those engaged in its production."

[485] (1975) 77 N.L.R. 1.

[486] Ibid at p.5.

[487] Ibid at p. 5.

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N. NON-DISCIPLINARY TERMINATIONS – TERMINATION OF EMPLOYMENT OF WORKMEN ACT

Introduction

347. An employer's legal right to terminate a contract of service on non-disciplinary grounds has been removed from the area of an employer's control and discretion by the Termination of Employment of Workmen (Special Provisions) Act.[488] The Act was preceded by Emergency Regulations under the Public Security Ordinance which contained the main provision of the subsequent Act. With the passage of the Act in October 1971, retrospective to 21st May 1971, the Emergency Regulations on the subject ceased to operate. The Act was amended in 1976,[489] and the amendments were themselves made retrospective to 21st May 1971.[490]

348. The substantial reason for the Act was the need felt at that time by the State to exercise a greater degree of control over retrenchment and lay-off of employees in the private sector on grounds of loss of business, lack of raw materials and so on, and in those instances where such grounds are found to exist, to keep the number of persons so retrenched to the minimum. The Act was not intended to preclude termination on good grounds, but was intended to prevent resort to retrenchment and lay-off in circumstances not warranting it and to ensure that employees would receive relief expeditiously, if laid off or terminated. The need felt by the State to exercise a greater degree of control over non-disciplinary terminations became urgent at that time in the context of increasing unemployment in the country. In introducing the Bill before Parliament[491] the Minister of Labour alleged that there were several instances of workmen being laid off or dismissed on the false premise that there was a lack of raw materials. The Bill was also intended, according to him, to enable the Commissioner of Labour to intervene and have consultations with other Departments and Ministers when there is a shortage of raw materials to ensure continuance of work at the workplace.

349. Even prior to the Act there were legislative provisions intended to protect employees in the event of retrenchment.[492] These earlier legislative

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[488] No. 45 of 1971

[489] By Law No. 4 of 1976

[490] Except for one amending provision.

[491] Hansard 3rd June 1971 at pp. 1042-46

[492] Sections 31F – 31H and 50 Industrial Disputes Act (1950) as amended. See S. R. de Silva, *The Legal Framework of Industrial Relations in Ceylon* (H.W. Cave & Co. Colombo, 1973) ch.32.

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provisions applied only to a case of retrenchment while the present Act, as we shall see, is much wider in its application. Further, the Industrial Disputes Act prescribed a procedure in the event of retrenchment but, provided the procedure was followed, did not preclude an employer from exercising his right of termination. The Act, on the other hand, imposes a prohibition on the employer in the exercise of his right of termination and makes such termination conditional on either the workman's written consent or the written approval of the Commissioner of Labour.

Nature of Prohibition on Termination And Exceptions to the Operation of the Act

350. No employer shall terminate the scheduled employment of any workman without (a) the prior consent in writing of the workman or (b) the prior written approval of the Commissioner of Labour.[493] The expression 'workman' bears the same meaning as in the Industrial Disputes Act, subject to the proviso that it does not include a workman not covered by the Termination of Employment Act.[494] Thus the Act does not apply to :

(1) A workman not in a scheduled employment.

(2) An employer by whom less than fifteen workmen on an average have been employed during the period of six months preceding the month in which the employer seeks to terminate the employment of a workman.[495]

In determining whether or not an employer comes within this exception persons who are 'workmen' within the meaning of that term in the Act must be included. Thus, since a working director would be a workman within the meaning of the definition,[496] such directors would have to be included in ascertaining whether or not the employer has employed less than fifteen workmen.

(3) The termination of employment of any workman who has been employed by an employer for a period of less than one year.[497]

This is one of the many problematic provisions in the Act. Where an employee is employed on a monthly contract of employment there is

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[493] s. 2(1)

[494] s. 19

[495] s. 3(1)

[496] See paragraphs 76-81

[497] s. 3(1)

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no difficulty in ascertaining whether or not he has been employed for a period of less than one year. Difficulties, however, arise in the case of casual employees or persons employed intermittently over a long period of time. The question is whether in such cases their periods of service could be added so as to make up the period of one year, or whether a period of one year presupposes the existence of an unbroken or uninterrupted contract of employment for one year. While the matter is not free from difficulty the former interpretation would lead to absurdities and practical difficulties. For instance, if interrupted periods of service can be added to make up a period of one year, it would lead to the absurd conclusion that occasional employment over a period of, say, five years could bring a workman within the scope of the Act if the total number of days on which he has been employed during that period amounts to a year or more. The better view is that the phrase "for a period of less than one year" refers to a period which has in law not been interrupted. There should be continuity of employment for a period of one year. In an unreported case,[498] which has been analyzed in paragraph 212 of this Monograph, a workman who was purported to have had a period of casual employment was held to be covered by the Termination of Employment Act and the Commissioner's finding that the alleged period of casual employment should be counted as service for the purpose of determining the one year period was held to be justified on the facts. In this case the Supreme Court found that there were no significant gaps in the period of employment in question and that the workman had been regularly employed. Therefore, the case is no authority for any proposition that a period of casual employment should be counted in calculating the one year period because on the facts it was held that the workman had worked everyday and there were no significant gaps in the period of employment.

(4) The Government in its capacity as an employer.[499]

(5) The termination of employment of any workman where such termination was effected by way of retirement in accordance with the provisions of any collective agreement in force at the time of such retirement or any contract of employment wherein the age of retirement of such workman is expressly stipulated.[500] Here again several problems of interpretation arise. For instance, does the exclusion apply where the retirement is at an age *beyond* the age

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[498] SC Application 359/75, S. C. M. 18.5.1976 (unrep.)

[499] Ibid

[500] Ibid

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specified in a collective agreement or contract of service. The answer would appear to be in the negative since such a retirement would not be "in accordance with the provisions" of such agreement or contract, though it hardly causes any prejudice to the workman. Further, whether stipulation of the age of retirement in standing orders of a notice amounts to an express stipulation in a contract of employment depends on the facts of each case, because standing orders may form part of a contract of employment as where the contract specifically states so, whereas in other cases it may not form part of the contract.

(6) The Local Government Service Commission in its capacity as an employer.[501]

(7) Any local authority in its capacity as an employer.[502]

(8) Any co-operative society in its capacity as an employer.[503]

(9) Anybody (whether corporate or unincorporate) whose capital is wholly provided by the Government in its capacity as an Employer.[504] It follows that public corporations are excluded from the operation of the Act.

(10) The termination of employment of any workman who has been employed by an employer in contravention of the provisions of any law for the time being in force.[505]

Definition of Scheduled Employment

351. The Act prohibits a termination in breach of the procedure in the Act only in a 'scheduled employment'. The latter phrase is defined in the Act[506] to mean employment in :

(a) Any trade in respect of which a Wages Board has been established under the provisions of the Wages Boards Ordinance, and includes the work of any workman referred to therein but specifically excluded from the operation of such Wages Board decisions. This means in effect that the Act covers workmen employed in any *trade*

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[501] Ibid

[502] Ibid

[503] Ibid

[504] Ibid

[505] Ibid

[506] s.19

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for which a Wages Board has been established and, therefore, applies to workmen who are covered by the decisions of a Wages Board as well as workmen who are specifically excluded from the operation of such decisions even though they are employed in that *trade*. The test is whether the workmen are employed in the trade, and not whether they are covered or excluded by the Wages Board decisions for that trade. For example, the Wages Board decisions for the Tea Export Trade prescribe the categories of workmen covered by such decisions but expressly exclude certain categories of workmen such as storekeepers. Although such excluded workmen are not *covered* by the decisions of the Board, they are covered by the Termination Act if they are employed in the *trade* for which the Wages Board has been set up.

(b) Every shop or office within the meaning of the Shop and Office Employees' Act.

(c) Every factory within the meaning of the Factories Ordinance.

Most workmen, other than those expressly excluded, would in practice be employed in a scheduled employment.

352. It has been held by the Supreme Court in ***Kotmale Valley Estate Co. of Ceylon Ltd v Drieberg***[507] that the Superintendent of an estate is in a scheduled employment because he is covered by the Shop and Office Employees' Act, the Factories Ordinance and the Wages Board decisions for the relevant plantation trade. This decision is not of much practical relevance today because Superintendents of plantations which are owned by the public sector would be excluded from the operation of the Act in as much as the employer would be a corporation or is a body whose capital is wholly provided by the Government. In ***Mendis v Ceylon Luxury Hotels Ltd***[508] the Court of Appeal held that the employee who was an Executive Director and Secretary of the Company was in a scheduled employment because he was covered by the Shop and Office Employees' Act.

Definition of Termination

353. The Act defines[509] the types of termination covered as follows:-

"For the purposes of this Act, the scheduled employment of any workman shall be deemed to be terminated by the employer if for any

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[507] S.C. Application 336/72, S. C. M. 16.7.1974

[508] C.A. Application 960/77, S. C. M. 26.11.1982

[509] s.2(4)

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reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer, and such termination shall be deemed to include –

(a) non-employment of the workman in such employment by his employer, whether temporarily or permanently; or

(b) non-employment of the workman in such employment in consequence of the closure by his employer of any trade, industry or business."

The above definition involves four concepts, each of which requires close and separate analysis since the definition of 'termination' is central and fundamental to the Act. The first concept is that of a non-disciplinary termination, the second a termination by the employer, the third is non-employment by the employer and the fourth is non-employment consequent upon closure.

Non-Disciplinary Termination

354. This is a concept on which the Commissioner's jurisdiction is based. It is a matter of significance that what the Act excludes from its operation is a termination "otherwise than by reason of a punishment imposed by way of disciplinary action." What is excluded, therefore, from the scope of the Act is not a termination connected with a disciplinary situation but a termination which is a punishment imposed by way of disciplinary action. While termination on grounds of misconduct are outside the provisions of the Act, difficulties arise in relation to terminations on grounds of inefficiency or incompetence or prolonged illness and a termination on the ground of loss of confidence. While negligence amounts to misconduct and a termination on that ground is a disciplinary one since negligence is made up of an act or omission which is culpable as the act or omission was within the employee's control, inefficiency or incompetence beyond the control of an employee being not deliberate or culpable only represents an employee's inability to perform his job and is, therefore, strictly outside the scope of misconduct. The latter is not punishable as misconduct and is covered by the Act if the contract of employment is to be terminated. This view is supported by the decision of the Court of Appeal in ***St. Anthony's Hardware Stores v Kumar***[510] which recognized that retrenchment and lay off are not the only non-disciplinary grounds of termination and that "to oust the Commissioner's jurisdiction the termination has to be not only by

[510] C.A. Application 1461/78, C. A. M. 23.7.1979

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way of disciplinary action, but also by reason of punishment imposed by way of disciplinary action." It was the position of the employer that incompetence means lack of ability or capacity to perform the task and that failure to provide the required skill is a breach of an express or implied duty to provide that skill and, therefore, amounts to misconduct. Referring to the common law which reflects this view, the Court stated that incompetence may be equated to misconduct in a case of damages for wrongful dismissal since an employee who does not have the requisite skill need not be continued in employment. On the other hand in the context of the Act, incompetence cannot be regarded as a form of misconduct in respect of which an employee's services can be terminated as a punishment by way of disciplinary action. The Court thought that "inefficiency and incompetence denote a person's inability to perform the work allotted to him, and it is difficult to see how they could be equated to misconduct for which punishment by way of disciplinary action may be imposed, within the meaning of the Act."

355. In ***Sri Lanka Samanya Kamkaru Samithiya v Wilfred & Co. Ltd***[511] where a workman was severely injured in the course of, and within the scope of her employment, and without any negligence on her part, the employer terminated her services on the ground of inability to perform her work. The High Court, in appeal, held that the termination was null and void in as much as the employer had failed to obtain the written approval of the Commissioner of Labour prior to such termination, as required by the Act.

356. A termination on the ground of loss of confidence presents some problems because loss of confidence is not in itself misconduct, but is an inference or result flowing from an employee's conduct, sometimes not provable, which may in certain circumstances entitle the employer to terminate the contract. Sometimes loss of confidence is stated as a ground of termination in addition to a specific act of misconduct, in which event the termination is clearly a punishment imposed by way of disciplinary action. But where the loss of confidence is the sole ground for severance of the contract it may sometimes be difficult, depending on the facts of the case, to demonstrate that it is a punishment imposed by way of disciplinary action. It may simply amount to a severance of the contract on the ground that the confidence reposed by the employer in the employee is now non-existent.

357. A further and more common example is absence over and above an employee's leave entitlement over a period of years but which is covered by medical certificates. In many such cases the employer is aware that the employee is malingering but is unable to obtain the necessary proof and

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[511] H.C. Appeal 70/91 decided on 8.3.1993 (unrep.)

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establish that the medical certificates in question are false. In such circumstances the employer must be deemed to have accepted the fact that the employee's absence was on grounds of illness and, therefore, the termination the employer proposed on grounds of frequent absence must necessarily be a non-disciplinary one. Where the absence is very prolonged (which is a question of fact in each case) or the illness has incapacitated the employee to the extent that he is no longer able to perform his job, it is possible for the employer in appropriate cases to take himself outside the provisions of the Termination of Workmen (Special Provisions) Act by relying on the concept of frustration of the contract of employment.

358. In ***Isadeen v Fernando,***[512] the employer, without making an application to the Commissioner under the Act, terminated the services of some workmen on the ground that the business that they were engaged in was running at a loss and that the termination was in consequence of the business needs and therefore justified. The Court rejected this argument and held that the termination was illegal and unlawful in that the employer was under a legal duty to apply to the Commissioner for permission in the event of a bona fide closure.

359. The types of termination which fall within the scope of the Act include retrenchment and lay-off, retirements not excluded by the Act, terminations on grounds of incompetence and terminations by notice under a contract of employment which is not by way of a punishment.

Termination and Non-Employment by the Employer

360. The second and third concepts involved in the definition of termination, i.e. termination by the employer and non-employment by the employer other than on grounds of closure, may conveniently be analyzed together. The definition of a termination falls into three parts. The first limb of the definition, which states that employment is deemed to be terminated where "the services of such workman in such employment are terminated by his employer", covers the usual type of termination of a workman's services by the employer as known to the common law. For instance, most contracts of employment reserve to either party the right to terminate the contract with notice or by payment in lieu of notice. An employer's right to so terminate a contract is removed by the Act unless the workman's written consent or the written approval of the Commissioner is first obtained. The first limb of the definition creates no problems of interpretation, other than the problem of determining those terminations which fall within the meaning of a punishment imposed by way of disciplinary action.

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[512] H.C. LT. Appeal No. 123/91, decided on 28.12.1992 (unrep.)

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361. The uncertainties surround the second part or limb of the definition which states that a termination "shall be deemed to include non-employment of the workman in such employment by his employer, whether temporarily or permanently." This limb constitutes a statutory extension of the common law meaning of 'termination'. The Act "deems" such non-employment to be a termination so that, if such a non-employment does not amount to a termination within the meaning of the ordinary law, it may still amount to a termination for the purposes of the Act. 'Non-employment' is wide enough to cover an ordinary case of termination which is covered by the first limb of the definition, so that the two limbs may well overlap to some extent. But since the second limb cannot be regarded as surplusage, it was obviously intended to cover situations not coming within the ambit of the first part.

362. In determining what types of employment are contemplated by the second limb, the question arises as to whether that limb relates to cases where a contract of employment continues to subsist or whether it relates to situations where such a contract does not subsist. In favour of the view that the second limb covers a case of 'non-employment' under a contract which continues to subsist is the fact that a situation where the contract ceases to subsist would be covered by the first part of the definition. The second limb was primarily intended to include what in industrial relations is called "lay-off". The concept of 'lay-off' applies to a situation where an employer informs his workmen that he is unable to give work *and* to pay wages for a specified or unspecified period due to reasons beyond his control such as shortage of raw materials, and, therefore, the employees are laid off until the employer is able to provide work *and* pay wages. While it is debatable whether even under the general law an employer so laying off his employees in the absence of an express right to do so under the contract of employment, a collective agreement or statute, is in fact terminating the services of the employees concerned with a promise of re-engagement, this was one of the practical situations intended to be covered by the Act. Two other situations contemplated by the second limb of the definition would be a lock out and a suspension of a contract without wages on non-disciplinary grounds. A lay off may well fall within the latter. The second limb of the definition applies to a non-employment under a subsisting contract of service which involves non-payment of wages or salary.

363. It may also be urged that 'non-employment' includes a case where an employer does not, or cannot, provide work but nevertheless continues to pay wages. If so, the definition removes the employer's right to withhold work as distinct from wages and is a fundamental departure from the common law position. It is submitted that the second limb does not prohibit the non-offer of work provided wages are paid. 'Non-employment' simply

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means 'not to employ' which in turn means not to employ under a contract of employment. We have seen[513] that apart from exceptional cases a contract of employment does not oblige an employer to provide work but only to pay wages. There appears to have been no necessity for the legislature to cover cases of non-offer of *work* so long as wages are paid as it causes no real prejudice or damage to the employee. The object of the Act was to exercise control over situations of a non-disciplinary nature where there is a loss of *employment* involving a loss of earnings. The Act seeks to protect not an employee's right to *work* but to *employment.* Besides, it would be patently unjust to visit the criminal sanctions in the Act on an employer who cannot possibly provide work and the impossibility of so providing work often arises long before the Commissioner can make an order on an employer's application if he is required to so make an application.

The addition of the words "whether temporarily or permanently" does not add to the meaning of 'non-employment' because that phrase was only intended to indicate or make clear that the indefiniteness or otherwise of a non-employment is not relevant in determining whether or not there has been a non-employment within the meaning of the definition. Indeed, if the non-employment was "permanent" it would surely amount to a termination of the contract as is known to the common law, thus falling within the ambit of the first part of the definition.

364. Another possible interpretation of the second limb of the definition is that 'non-employment' covers not only a situation where there is a non-employment under a subsisting contract of employment but that it is equally applicable to a situation where a contract of employment has terminated otherwise than by an act of termination by the employer and thereafter the employee demands employment which is refused by the employer. A case in point is a contract of employment that has terminated by effluxion of time or by mutual agreement, as in the case of a fixed term contract. In support of this view is the fact that the phrase 'non-employment' in the definition of an 'industrial dispute' in the Industrial Disputes Act[514] is sufficiently wide to cover such a situation. In having resort to the meaning of 'non-employment' in the Industrial Disputes Act it must be borne in mind that under that Act an industrial dispute includes the non-employment of *any person* and not merely *any workman,* and such dispute need only be "connected with" the non-employment of 'any person'. On the other hand, under the Termination of Employment of

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[513] See para 22-27

[514] s.47

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Workmen Act the definition relates only to the non-employment of a *workman*. Since the term 'workman' bears the same meaning as in the Industrial Disputes Act, it may be urged that 'non-employment' under the Termination of Employment of Workmen Act includes instances of refusal by an employer to give employment to a person who was previously employed but who at the relevant time has no contract of employment for the reason that such contract has terminated for some reason other than on account of its termination by the employer.

It is submitted that 'non-employment' under the Act does not bear such a wide meaning so as to include a case where there is a demand for employment by a workman whose contract has ceased to exist by, for instance, effluxion of time. If the position were otherwise it would follow that where a workman resigns from employment and thereafter demands employment, a refusal by the employer would amount to a non-employment. In that event one would be compelled to accept the absurd conclusion that the employer would be required to obtain either the workman's prior consent or the Commissioner's prior written approval to refuse employment to a workman in such circumstances. Further, there are other indications in the Act which suggest that it was not intended to cover refusal to give employment to a workman whose employment has ceased otherwise than by an act on the part of the employer. For instance, the retirement of a workman in the circumstances provided for in the Act is excluded from the scope of the Act. Similarly, a termination of a contract with a workman's written consent is excluded. Thus the Act covers only those cases of termination or non-employment which are effected in consequence of a unilateral act by the employer. It is misleading to import into the Termination of Employment of Workmen Act the meaning of 'non-employment' in the Industrial Disputes Act which deals with the much wider concept of industrial disputes. The meaning of 'non-employment' must be ascertained having regard to the scope and purposes of the Termination of Employment of Workmen Act which was intended to cover situations of loss of employment consequent upon some act by an employer as is evident from the preamble to the Act which states :

> "An Act to make special provisions in respect of the termination of the services of workmen in certain employments *by their employers*."

This conclusion is supported by the decisions of the Supreme Court in ***Ceylon Mercantile Union v de Mel***[515] that employees in an essential service who are deemed to have vacated their employment by virtue of the operation of the Emergency Regulations read with the Essential Service

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[515] (1974) 76 N.L.R. 390

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Order 1972 made thereunder are not entitled, when their employer refuses to offer them work thereafter, to seek re-employment through the intervention of the Commissioner of Labour under s.6 of the Termination of Employment of Workmen Act. This decision supports the view that the Act has no application to a situation where a contract of service terminates by operation of law or by some act on the part of the workman.

365. The better view, therefore, is that the first and second limbs of the definition of a termination cover –

(a) A non-disciplinary termination by the employer of a contract of employment as known to the common law.

(b) A non-disciplinary non-employment of a workman under a subsisting contract of employment which involves a loss of wages, where such non-employment is the result of an act on the part of the employer. Non-employment does not, therefore, include a mere refusal to give work provided wages are paid, or a refusal to employ after a contract of service has terminated otherwise than by an act on the part of the employer, as by operation of law, effluxion of time or frustration. The types of non-employment contemplated by the definition are a lay-off, lock-out and a non-disciplinary suspension of a contract of employment involving the non-payment of wages.

Non-Employment as a Consequence of Closure

366. The fourth concept, and in fact the third limb of the definition of a termination, is the non-employment of a workman in consequence of the closure by the employer of any trade, industry or business. Several problems arise in connection with this fourth concept.

367. The first problem relates to the meaning of closure as the term is not defined in the Act. It is not a closure but only a non-employment of a workman consequent upon a closure that is covered by the Act. Closure, as distinct from retrenchment, presupposes that the employer will not be carrying on the business which is being closed.[516] The Act nowhere defines "trade, industry or business." The Industrial Disputes Act,[517] however, defines 'industry' to include –

"(a) Trade, business, manufacture and agriculture, any undertaking or occupation by way of trade, business, manufacture or agriculture,

[516] See S. R. de Silva *The Legal Framework of Industrial Relations in Ceylon* (H. W. Cave & Co. Colombo, 1973) at pp.489-501 on the question of closure generally.

[517] s.48

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and any branch or section of trade, business, manufacture or agriculture.

(b) Service, work or labour of any description whatsoever performed by persons in the employment of a local authority or of a corporation established by or under any written law for carrying on an undertaking whether for the purpose of trade or otherwise;

(c) every occupation, calling or service of workmen;

(d) every undertaking of employers."

The above definition may be used as a guide, at least for the purpose of concluding that the phrase 'trade, business or industry' includes any branch or section of a business and closure does not necessarily mean the closure of all business activities of the legal entity that constitutes the employer. The Court of Appeal held in ***Satchithanandan v Ghanam***[518] that the provisions of the Act are not applicable where the Factory and headquarters of the employer were destroyed, as termination was due to the frustration of the contract and not due to dismissal.

368. The second problem relates to the test to be adopted to determine whether the ceasing of a particular activity can be regarded as a closure of a branch or section for the purposes of the Act. No single test is adequate to determine this question and it is necessary to adopt or apply several tests for this purpose. For instance, to regard a particular activity as a department or a section of a business for the purpose of coming within the closure provision of the Act,[519] it is necessary to determine whether that department or section is functionally separate; whether its profit or loss is capable of being ascertained separately; whether administratively it is regarded as a separate entity and so on. But the most important and crucial test, if there be one such test, is whether employees are transferred, or perhaps even transferable, to and from that particular department or section. If the answer is in the affirmative that particular activity may not be separable from the legal entity to which it belongs, to be regarded as an industry, trade or business for the purposes of the Act. If the answer is in the negative, the Commissioner's powers will, as we shall see, be those he is entitled to exercise in the case of a closure. However, the question as to whether a particular department or branch or section can be treated as a separate entity for this purpose must depend on the facts of each case. The

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[518] C. A. No. 476/86, C. A. M. 18.8.93 (unrep)

[519] The importance of determining whether a closure of a department is a closure within the meaning of the Act will be evident when we consider the powers of the Commissioner of Labour on an application for approval to terminate.

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test suggested above must be considered in the light of the facts and in one set of circumstances a particular test may assume greater importance than in different circumstances.

What is a prior Consent in writing of a workman ?

369. The written approval of the Commissioner of Labour is not required where the workman has given his prior written consent to the termination of his services. It is trite law that consent must be given voluntarily and consent given under duress will be invalid. The question, however, is what is meant by "prior" consent.

370. While the consent given must be prior to the termination, the issue is whether the consent must be given at or about the time of termination or whether it is sufficient if it is given at any time before the termination. There is nothing in the Act to suggest that the consent must be given at or about the time of termination and, therefore, the better view is that the consent may be given at any time prior to termination. This conclusion is subject to two qualifications. Firstly, the consent must be given subsequent to the date of the operation of the Act since a workman cannot consent to the surrender of a right he did not have at the time he gave such consent. Secondly, the consent must relate to a termination on an ascertainable date e.g., on reaching a particular age or on the arrival of a particular date. Thus a consent given by a workman to the termination of his services generally is not such a consent, but amounts to the conferring of a power on the employer to terminate the contract and does not, therefore, take such termination out of the scope of the Act.

Consequences of Terminations in Breach of Act and Commissioners Powers

371. *Powers on an Application :* Where an employer makes an application under section 2 of the Act to the Commissioner of Labour to obtain his written approval to terminate the services of a workman :

    (a) Such approval may be granted or refused by the Commissioner in his absolute discretion. His decision on an application made by an employer is final and conclusive and shall not be called in question whether by way of writ or otherwise in any court; or in any court, tribunal or other institution established under the Industrial Disputes Act.[520] Any person who fails to comply with any decision made by the Commissioner under s. 2 (2) is guilty of an offence and is liable to a fine or imprisonment or to both.[521]

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[520] s.2(2)

[521] s. 2(3)

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(b) The Act states that the Commissioner "shall" grant or refuse such application within three months from the date of receipt of an application.[522] It has been held that the Commissioner's failure to make an order within three months does not vitiate the order as the time limit is not mandatory.[523]

(c) The Commissioner is required to give the employer and workmen notice in writing of his decision.[524] As a matter of practice the Commissioner's order, granting or refusing approval, never states the reasons for the order.

However, in ***Karunadasa v Unique Gemstones Ltd.,***[525] the Supreme Court held that previous decisions, such as ***Samalanka v Weerakoon***[526] which affirmed that the Commissioner did not have to give reasons for his decision, were made without the benefit of relevant precedents. It concluded that principles of natural justice were applicable to inquiries by the Commissioner under this Act, and that those principles entitled a party not only to the hearing of his evidence and submissions, but also to a reasoned consideration of the case which he presents. The failure to give reasons was considered to be all the more serious because it deprived the aggrieved party of the right to equal protection of the law guaranteed by Article 12(1) of the Constitution, and because, in this case, it had not been the Commissioner who held the inquiry.

(d) The proceedings at any inquiry held by the Commissioner for the purposes of the Act may be conducted by the Commissioner in any manner not inconsistent with the principles of natural justice which, to the Commissioner, may seem best adapted to elicit proof or information concerning the matters that arise at such inquiry.[527] It should be noted that the requirement of conformity with the principles of natural justice apply not only to an inquiry on an

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[522] s. 2(2)

[523] ***Nagalingam v de Mel*** S. C. Application 650/74, S. C. M. 10.12.1975, ***Mendis v Ceylon Luxury Hotels Ltd*** C. A. Application 960/77 C. A. M. 26.11.1982. The Supreme Court took the view that the 3 month time limit was intended to discourage bureaucratic delays and not to deprive the Commissioner of jurisdiction after the lapse of 3 months. The same conclusion regarding the 3 month rule was reached by the Supreme Court in SC Application 884/75 S. C. M. 29.03.1976.

[524] s. 2(2)

[525] S. C. Appeal 27/96, S. C. M. 5.12.96.

[526] [1994] 1 Sri L. R. 407.

[527] s.17

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employer's application under Section 2, but to all inquiries by the Commissioner conducted by him for the purposes of the Act. It would therefore also apply to an inquiry by him under Section 6 of the Act to be referred to later. It has been held that in an application to the Commissioner under Section 2 he must satisfy himself of such matters as whether the employee is covered by the Act and on such preliminary issues which effect his jurisdiction the parties must be given an opportunity of being heard.[528] It has also been held that it is not a violation of the principles of natural justice for a Deputy Commissioner of Labour to hold an inquiry and for the Commissioner to make the order.[529] As a matter of fact Section 11(2) of the Act expressly states that the Commissioner "may delegate to any officer of the Department of Labour any power, function or duty conferred or imposed on him under this Act."

(e) The Commissioner may in his absolute discretion decide the terms and conditions subject to which his approval should be granted, including any particular terms and conditions relating to the payment by the employer to the workman of a gratuity of compensation for the termination of such employment.[530] It is open to the Commissioner in his order to also require the employer to settle such matters as earned wages and payment on account of unavailed of annual leave. In the matter of compensation, while it is difficult to point to any particular yardstick in regard to quantum, if any principle is discernible it is the payment of approximately six months' salary as compensation, this amount being enhanced or reduced by the existence of special circumstances. It is important to ensure that the conditions attached by the Commissioner to his approval to terminate are complied with because the right to terminate in terms of the Commissioner's approval is conditional on the employer fulfilling the conditions on which the approval is granted. When the Commissioner grants his approval to terminate he is lifting the ban or prohibition, so to speak, so that the employer is granted the right to terminate. This right need not be exercised by the employer if, at the stage at which it is conferred on him, he decided for any reason not to exercise it by not effecting the termination, but if he decides to exercise the right so conferred on him it is dependant on his willingness to comply with the conditions on which the exercise of that right depends.

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[528] ***Omer v Cherubim*** SC Application 413/75, S. C. M. 17.12.75.

[529] ***Kotmale Valley Estates Co. of Ceylon Ltd. v Drieberg*** SC Application 336/72, S. C. M. 16.7.74.

[530] S. 2(2).

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372. *Powers on an Illegal Termination :* Where an employer terminates the employment of a workman in breach of the Act such termination is illegal, null and void and is of no effect whatsoever.[531] It follows that what is a nullity cannot be cured by the employer on the ground, for instance that, none the less the termination was just and equitable on the merits. In the event of an employer terminating a workman's services in breach of the Act, Section 6 states that the Commissioner "may" order the employer to continue to employ the workman as from a date specified in such order in the same capacity in which the workman was employed prior to such termination and to pay the workman his wages and all other benefits which he would have otherwise received if his services had not been so terminated. The Commissioner is required to cause notice of such order to be served on the employer and the workmen and the employer is required to comply with such order.[532] Failure to comply with the Commissioner's order under Section 6 is an offence[533] and in any prosecution for such an offence the burden of proving that the employer has complied with the order is on the accused.[534] It has been held by the Supreme Court[535] that Section 6 does not compel the Commissioner of Labour to order reinstatement in a situation of an illegal termination by an employer. In ***Gunadasa v Commissioner of Labour***[536] where the Commissioner ordered reinstatement and backwages, the Court of Appeal held that the order had been made without jurisdiction as the workman had only prayed for compensation and gratuity contrary to which he had been awarded reinstatement and backwages; furthermore he had not come to a finding as to whether the terminations were justified in law or not, and the rules of natural justice had not been complied with.

Effect of an Application made under the Act

373. Several decisions of the Superior Courts have interpreted the second limb of Section 31B (5) of the Industrial Disputes Act[537] as debarring a workman who applies to the Commissioner of Labour under the Termination of Employment Act from applying to a Labour Tribunal for relief in respect of the same matter. In ***Ceylon Tobacco Co. Ltd. v Illangasinghe***[538] where a

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[531] S. 5.

[532] S.6.

[533] S. 7 (1).

[534] S. 7(2) See also s. 8 for additional penalties on conviction of an employer for an offence under s.7

[535] SC Application 884/75, S. C. M. 29.3.1976.

[536] CA No.418/91, C. A. M. 15.12.1993 (unrep.).

[537] S. 1B(5) "...... and where (the workman) has first resorted to by other legal remedy, he shall not thereafter be entitled to (make an application to a Labour Tribunal for relief)".

[538] (1986) 1 SLR 1.

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workman applied to the Labour Tribunal for substantially the same relief after, the Commissioner held that she was not entitled to the protection of the Act since she had consented to the termination of her services, the Court of Appeal interpreted the expression 'legal remedy' to mean a remedy provided by law, though not including administrative relief, and held that the ordinary meaning of the word 'resorted to' is 'to have recourse to, to apply to' (citing the majority judgement in ***The United Engineering Workers Union v Devanayagam***[539]). The decision in ***Illangasinghe*** was followed in ***Construction Liaison v Fernando.***[540] This approach seems to be more restrictive than that taken in prior cases such as ***Mendis v River Valleys Development Board***[541] and the majority decision in ***Devanayagam,*** in which the view was that what the second limb is intended to prevent is obtaining more than one remedy in respect of the same matter and not seeking such remedies.

374. *Illegal Termination on Closure :* We have seen that the definition of a termination includes the non-employment of a workman in a scheduled employment in consequence of the closure by his employer of any trade, industry or business.[542] We have also seen that where an employer terminates the services of a workman in breach of the Act the Commissioner may order the reinstatement of the workman.[543] But where a termination in breach of the Act is in consequence of the closure by the employer of any trade, industry or business, the Commissioner may order the employer to pay the workman on or before a specified date any sum of money as compensation as an alternative to reinstatement and any gratuity or any other benefit payable to a workman.[544]

375. It is submitted that for the following reasons the Commissioner of Labour cannot refuse to grant his written approval on an application by the employer to terminate the services of his workman on the closure of his trade, industry or business :

(a) We have seen that where an employer, other than in consequence of a closure, terminates the services of a workman in breach of the Act, the Commissioner may reinstate the workman but he need not necessarily do so. He can for, instance, award compensation in lieu.

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[539] 69 NLR 289 at 305.

[540] (1988) II CALR 122.

[541] (1971) 80 CLW 49.

[542] S. 2(4).

[543] S. 6.

[544] S. 6A (1). See s. 6A (2) for where the employer fails to pay the workman such sum of money.

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(b) But where the termination in consequence of a closure is in breach of the Act the statute requires him, where he orders the reinstatement of the workman, to give the employer the option of paying compensation in lieu. This distinction clearly contemplates that the employer cannot be compelled to reinstate the workman against his wishes.

(c) This is only reasonable since an order for reinstatement without an option to pay compensation in lieu would amount to a legal compulsion on the employer to re-open or continue his business despite his decision to close it down. Such a consequence is to say the least, unthinkable. It would mean, in effect, that a person who commences a business can cease doing that business only if the Commissioner approves it.

(d) If an employer who acts in breach of the Act in effecting termination on closure cannot be compelled to reinstate the workman, it follows that an employer who makes an application to the Commissioner prior to effecting a termination on closure cannot be in a worse position. Hence, on an application to terminate, the Commissioner must necessarily give permission if the ground for termination is closure of the business. In other words, if the Commissioner can refuse to grant his written approval on an application made prior to closure, it would lead to the absurd conclusion that if an employer wishes to get rid of his employees on closure he would be better off if he acts in breach of the Act and then compels the Commissioner to grant him the option of paying compensation in lieu of reinstatement.

(e) Therefore, on an application by an employer to the Commissioner for his written approval to terminate the services of workmen on the closure of a business, quite apart from the fact that in equity an employer must be permitted to close his business if he so wishes,[545] the Commissioner must grant his approval subject to the conditions he may attach to such approval.

376. It may be possible, in certain circumstances, for an employer to circumvent some of the provisions of the Act in the case of a total closure of a business resulting in liquidation of the Company. The Act provides[546] that where an offence is committed by a body of persons, if such body of persons –

(a) is a body corporate, every director and officer of that body corporate;

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[545] See S. R. de Silva *The Legal Framework of Industrial Relations in Ceylon* (H.W. Cave & Co., Colombo, 1973) at pp. 493-500.

[546] S.9.

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(b) is a firm, every partner of that firm;

(c) is a trade union, every officer of that union;

(d) is a body unincorporate other than a firm or a trade union, the president, manager, secretary and every officer of that body;

shall be deemed to be guilty of that offence, unless such person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of that offence. Where, in the case of a company, the directors resign simultaneously with the workmen being informed of their non-employment in view of the liquidation of the company, the Directors become *functus* in law and the penal sanctions in the Act cannot be enforced against them. It is not an illegal termination without the requisite consent or approval that is an offence, but the failure to comply with an order made by the Commissioner under s.2 or s.6. In certain circumstances, however, the liquidator may be deemed to be an officer of the company and step into the shoes of the directors. Thus L.C.B. Gower states :[547]

> "The exact legal status of the liquidator is difficult to define. The closest analogy seems to be that of directors, whose functions he assumes on appointment, and like them he is probably best described as a fiduciary agent of the company.[548] Again, like directors he is often described as a trustee, but this appears to be equally inaccurate in his case."[549]

It is a moot point, therefore whether in the case of a company the liquidator would be regarded as a director or officer for the purposes of the penal provisions contained in s.9 of the Act.

377. In any event, since the legal personality of a company continues despite the resignation of the Directors, at least the non-penal provisions of the Act would continue to apply. For instance, in a situation where the directors are functus but the legal personality of the company continues, the Commissioner may be entitled to make an order for compensation and gratuity where the termination is in breach of the Act. Since a termination in breach of the Act is null and void, it may plausibly be argued that the company's liability on account of wages continues until such time as the Commissioner makes an order under s. 6A.

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[547] *The Principles of Modern Company Law* (Stevens, London 1969) 3rd ed. at p. 654.

[548] Knowles v Scott (1891) 1 Ch. 717.

[549] Ibid Re. ***Windsor Steam Coal Co.*** (1928) 1Ch. 609; (1929) 1 Ch. 151 (CA).

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9670

Conclusions

378. There is probably little doubt that the Act has considerably reduced the incidence of terminations consequent upon redundancy since such terminations are more carefully scrutinized after the Act came into operation. If looked at from the point of view of employees and their unions, the Act has constituted a protection against unfair terminations on non-disciplinary grounds.[550] The Act also ensures, where approval to terminate is granted, that relief is awarded and received by workmen simultaneously with their termination so as to enable them to subsist until they obtain alternative employment, if any. This is in contrast to the position prior to the Act when employees retrenched had to await an adjudication by a labour court to obtain relief, and such determinations were made long after the termination was effected. Thus expeditious relief is one of the benefits employees have received under the Act.

379. It is somewhat unfortunate, however, that the scope or coverage of the Act extends beyond redundancy, lay-off and closure situations to cases of terminations on other non-disciplinary grounds such as incompetence. It is really in the field of redundancy that mass unemployment arises. Having regard to the existence of labour tribunals, there is little justification for enacting the legislation in such wide terms.

380. The Act has also brought mutual benefits to both employers and employees. In situations of raw material shortages the Commissioner has sometimes intervened so as to expedite the supply of such materials by other agencies, thus benefiting both employers and employees. The Act has also compelled some employers to reorganize their business in a more efficient manner so as to deploy surplus labour into areas which require more labour and at the same time reduce under employment in other areas. An employer with surplus labour today is more likely to first examine the feasibility of re-organisation before making an application to the Commissioner under the Act.

381. As in the case of other legislation, what really needs to be determined is how the Act works in practice. Some applications, especially those relating to redundancy, are seldom concluded within the prescribed three month period due to the prolonged nature of the inquiry. This is a matter in respect of which the Department of Labour cannot be blamed since the Department has generally taken all reasonable steps to dispose of applications within a reasonable period of time. Besides, the Commissioner is under a legal duty to ensure conformity with the principles of nature justice, which naturally

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[550] See D. P. A. Weerasinghe "Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971" in (1974) 25 *Ceylon Labour Gazette* 277 at 280 for statistics between July 1971 and December 1973 in regard to applications made and disposed of and the amount of relief awarded.

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involves extending to the parties the right to a proper inquiry which in some cases, results in voluminous evidence. The delay inherent in all such inquiries affects the employer to the extent that he cannot reorganise his business in a situation of economic adversity until the result of his application is known. The situation is particularly serious where there is a necessity to lay-off because such application often cannot be disposed of until the need for the lay-off is over. Employers, therefore, may consider it imprudent to employ persons in excess of their actual requirements due to the difficulties involved in reducing staff on grounds of redundancy. While, therefore, the Act was intended to alleviate the hardship of unemployment, it may also have reduced employment opportunities so that it is difficult to assess whether the Act has, in fact, achieved its objective.

382. The orders[551] made by the Commissioner until recently did not need to contain reasons for such orders. While this is understandable in the light of the fact that an order is final and the giving of reasons may involve delays in making of orders, it prevents the creation of precedent and the building up of 'case-law' which could act as a guide for both employers, employees and the Commissioner himself in the future.

383. The statistics relating to applications by employers under Section 2 of the Act and complaints under Section 6 of the Act during the period 1976 to 1980 show a marked decline. The reasons for this decline are a combination of several factors. Firstly, the amendment to the Act in 1976 removed from the Act retirements in terms of a Collective Agreement or an express provision in a contract of employment. Secondly, with the new policies of the government since 1977 and the creation of greater employment opportunities the need for retrenchments diminished substantially. Thirdly, even where retrenchments become necessary there is a greater likelihood of a negotiated settlement without the need to resort to the provisions of the Act as workmen are in a position to obtain alternative employment and find, therefore, a monetary settlement more attractive than before.

384. The increase in the terminal benefits awarded, despite the reduction of the number of applications and complaints, does not necessarily imply an increase in the formulae adopted. Any inferences from the increase in the total benefits awarded is not possible without proper statistics of the number of workmen involved in applications and complaints, how many applications were allowed (since the question of terminal benefits arise only where an application is granted and not where it is refused) and so on. Further, an increase in the total terminal benefits awarded may also be explicable on the basis that with enhanced wages and salaries an application of the same formula would result in a greater quantum of money.

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[551] *Karunadasa v Unique Gemstones,* S. C. Appeal 27/96, S. C. M. 5.12.96

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