1988 June 15

(A. LOIZOU, P., SAVVIDES, KOURRIS, JJ.)

AVRAAM K. PROUSI,

Appellant-Applicant,

v.

REDUNDANT EMPLOYEES FUND,

Respondent.

(Case Stated No. 250).

Employment—Employer/Employee relationship—Salary—Not the sole criterion for its existence—Control by one of the work of another—A necessary prerequisite for the existence of such relationship—Company limited by shares employing at a salary as employee its two sole directors—As on the facts of this case nobody could exercise control or dismiss the appellant, there did not exist the relationship of master and servant between the company and the appellant—Therefore, latter's claim for redundancy submitted upon his dismissal on ground of impending dissolution of company rightly dismissed.

Companies—Veil of incorporation—Lifting of—Claim for redundancy made upon the dismissal of appellant, who was one of the directors of a company limited, from his position as an employee of the company, dismissed on ground that on the facts as proved there did not exist the relationship of Master and Servant—Complaint by appellant that veil of incorporation was wrongly lifted—No question of lifting the veil of incorporation arises, as the evidence was adduced by the appellant himself.

The appellant was one of the two original shareholders of a company limited by shares. Each of such shareholders held the 50% of the share capital of the company.

The appellant was, also, one of the two directors of the company. At some stage he transferred the majority of his shares to his children, but he secured, at the same time, the latters' authorisation to administer such shares at his absolute discretion.

On 4.10.72 the two original shareholders and sole directors of the company appointed themselves employees of the company and started paying social insurance countributions on their salaries.

By a decision of the Director of the company, i.e. of the appellant and the other original shareholder of the 50% share capital, the appellant was dismissed from his employment with the company on the ground of its impending dissolution. Indeed, a few days later the company was put in liquidation, upon petition by the appellant and his children.

The applicant, submitted an application to the Social Insurance Fund for redundancy which he signed as a person employed by the company. Both the application for redundancy allowance submitted by him as well as the questionnaire which is filled in by the employer were signed by the applicant and they were both dated 23rd March, 1985. His application was refused.

The claim was dismissed on the ground that there did not exist the relationship of Master and Servant between the company and the appellant.

Hence this appeal by way of case stated. One of the arguments in support of the appeal was that the trial Court wrongly lifted the veil of incorporation of the company.

Held: (1) No question of lifting the veil of incorporation was raised before the trial Court in the present case but the facts relating to the relation of the appellant and the company were placed by him before the trial Court in his evidence and it is on such evidence that the trial Court made its findings.

(2) The findings of fact of the trial Court cannot be disputed in a case stated but it is only the inferences drawn from such facts, which constitute the legal question placed before us that can be questioned.

(3) Payment of salary is not the only criterion for holding that there exists relationship of employer—employee. For the existence of such a relationship it has to be established that the employer can exercise control over the work of the other.

(4) On the facts of this case, the inference is that nobody could exercise control over the appellant as to the mode of performing his work or dismiss him from his employment.

Judgment of trial Court affirmed with costs against appellant.

Case stated.

Case stated by a Judge of the Industrial Disputes Court relative to his decision of the 2nd May, 1987 in proceedings under sections 16(1) and 18(a) of the Termination of Employment Law, 1967 (Law No. 24/67 - 83) instituted by Avraam K. Prousi against the Redundant Employees Fund whereby applicant' s application for the payment of redundancy allowance was dismissed.

Chr. Christofides, for the appellant.

Chr. Ioannides, for the respondent.

Cur. adv. vult.

A. LOIZOU P.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal by way of case stated by the Industrial Disputes Court in Case No. 93/86 in which judgment was delivered on 2nd May, 1987.

By the above case stated the following question of law was formulated by the Judge of the said Court: «Whether the Court correctly interpreted the meaning of the term 'employed' as defined by the law in the light of the conditions and circumstances of the employment and the termination of the employment of the applicant. In particular whether a natural person vested with the powers that the applicant had in the present case could be considered as an 'employee' within the meaning of the law notwithstanding the fact that he was declared as 'employee' of the legal person».

The facts of the case as set out in the case stated by the learned trial Judge are as follows:

The applicant in 1958 set up a partnership in equal shares with one Nicos Houloudes for the making of illuminated signs. In 1971 they turned their partnership into a company limited with a capital of £20,000.- under the name of Selas Neon Signs Co. Ltd. Originally the shares belonged 50% to each one of the two said shareholders. At a later stage the applicant transferred to his two childred 8,000 shares, 4,000 to each one of them and he kept for himself 2,000 shares. At the same time he secured an authorization from his children to administer at his absolute discretion their shares and represent them at the Board of

Directors of the company. In fact, as found by the trial Judge, the applicant had the absolute control of 50% of the shares. The applicant and his partner remained the only Directors of the Company and by virtue of Article 18 of the Articles of Association each one of them had full authority to exercise all the powers of the company.

On 4th October, 1972, the aforesaid Directors decided to be appointed as employees of the company. In consequence of such decision they started paying their contributions to the Social Insurance Fund in addition to what was paid by the company. Selas Neon Light Co. Ltd was wound up by order of the District Court of Nicosia dated 19th June, 1985, in an application filed by the applicant and his two sons. The winding up order was published in the official Gazette of the Republic on 12th July, 1985.

On 17th January, 1985 by a decision of the Directors his employment with the company and that of his co-director were terminated on the ground of the prospective dissolution of the company. The notice given to him was not produced before the trial Court to indicate as to who signed it but in an answer to a questionnaire submitted by the Social Insurance Fund to the employer such questionnaire was signed by the applicant. In answering one of the questions set out therein he stated that besides himself he also dismissed other employees mentioning four other names including that of his co-director. The applicant submitted an application to the Social Insurance Fund for redundancy which he signed as a person employed by the company. Both the application for redundancy allowance submitted by him as well as the questionnaire which is filled in by the employer were signed by the applicant and they were both dated 23rd March, 1985. His application was refused and as a result he applied for remedy to the Industrial Disputes Court which dismissed his application for the following reasons:

1. The applicant owned and/or administered 50% of the shares of the company.

2. The applicant in accordance with Article 18 of the Articles of Association could exercise all the powers of the company.

3.Besides being a shareholder and administrator of 50% of the shares of the company he was also a co-director with the other main shareholder of the company.

4. The decision of the company to offer employment to the applicant in the capacity of an employee was taken by the company with the participation of the applicant in the taking of such decision.

5. At the time when he submitted his application the company had not yet been wound up and for its winding up an application was submitted by the applicant and his two sons due to personal differences with the other main shareholder.

6. The notice of termination of employment as well as of other relevant documents i.e. his obligation to the fund and the questionnaire which is submitted to the Fund by the employer were signed by the applicant acting in a different capacity on each occasion.

7. In answer to a question contained in the questionnaire as to whether he had also dismissed other employees he mentioned that he dismissed four other employees including the other main shareholder.

The Court after directing its attention to the provisions of the law came to the conclusion that the provisions as to redundancy applied only to cases of persons in the employment of another and that in the circumstances of the present case the relationship of master and servant did not exist between the applicant and the company and in consequence he was not entitled to any redundancy payment.

Counsel for applicant submitted that once the company was employing the applicant, paid its share of contribution to the Social Insurance Fund corresponding to the salary of the applicant and the applicant was also contributing as an employee of the company the relationship of employer and employee existed under the provisions of s.24. Such contributions, counsel added, had been paid continuously since 1972 and, therefore, the relationship of employer and employee that existed between the company and the applicant could not now be disputed. «Employer» within the meaning of s.2 of Law 24/67 is not the Director of a company but the company itself. In the present case, counsel argued, the Court cannot lift the veil of corporation in order to find out the relationship between the applicant and the company. In any event a contract of service existed in the present case according to which the company was the employer and the applicant the employee.

Counsel for respondent, on the other hand, submitted that the position of a Director in circumstances like those of the applicant could not coincide with that of an employee.

The definition of an 'employee' or 'employed person' is given under s.2 of Law 24/67 as amended by s.2 of Law 67/72 as follows:

> «'Εργοδοτούμενος' σημαίνει πρόσωπον εργαζόμενον δι' έτερον πρόσωπον είτε δυνάμει συμβάσεως εργασίας ή μαθητείας είτε υπό τοιαύτας περιστάσεις εκ των οποίων δύναται να συναχθή η ύπαρξις σχέσεως εργοδότου και εργοδοτουμένου, ο δε όρος 'εργοδότης' θα ερμηνεύηται αναλόγως και θα περιλαμβάνη την Κυβέρνησιν της Δημοκρατίας.»

The translation in English reads as follows:

> «'Employee' means any person who works for another person either under a contract of service or apprenticeship or under such circumstances from which the existence of a relationship of employer and employee may be deduced, and the expression 'employer' shall be construed accordingly and shall include the Government of the Republic.»

The question which poses for consideration is whether the applicant falls within the definition of «employee».

The question as to whether the relationship of employer and employee exists is always a question of fact and the facts of each particular case have to be taken into consideration. The only criterion for making a person an employee of another is not the payment of a salary for services rendered by him but also it has to be established that the employer can exercise control over the work of the other.

In Palmers Co. Law, 21st Edition, p.522, we read the following in this respect.

> «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.....»

and he goes on the same page as follows:

«For the purposes of the National Insurance (Industrial Injuries) Act 1965, a director, even though in salaried employment of the company, is not employed in insurable employment if there is nobody - and that will be the normal case - who exercises control over the manner in which he does his work. This, however, is a question of fact, and the position may be different where one director, e.g., the governing director of a private company exercises control over the other directors with respect to their work; in that case, it is thought, the other directors, if in salaried employment of the company, may well be regarded as being in insurable employment within the Act.»

To a similar effect are the notions prevailing also in Greece where in Toussi and Stavropoulos Labour Law, 1967 at p.35 we read the following:

«Κριτήριον της ως άνω διαστολής μεταξύ της παροχής ανεξαρτήτων υπηρεσιών και της ειδικώς υπό της κοινωνικής νομοθεσίας προστατευομένης συμβάσεως εργασίας αποτελεί η προσωπική εξάρτησις του εργαζομένου από τον εργοδότην, ήτοι το δικαίωμα του εργοδότου προς διεύθυνσιν και εποπτείαν της εργασίας του μισθωτού και η αντίστοιχος υποχρέωσις του τελευταίου τούτου να υπακούη εις τας οδηγίας του εργοδότου.»

«The test to distinguish between rendering services and the contract for service, which is specially protected by social legislation is the personal dependence of the servant on his employer, i.e. the right of the employer to manage and supervise the work and the corresponding obligation of the servant to obey the instructions given by his emloyers».

And in the footnote at p.36 reference is made to the French authorities to the effect that the notion of dependency in a contract of employment does not emanate solely from the fact that a person works for a third person but mainly from the obligation of the employee to work in accordance with the orders and directions of the employer.

No question of lifting the veil of corporation was raised before the trial Court in the present case but the facts relating to the

relation of the application and the company were placed by him before the trial Court in his evidence, and it is on such evidence that the trial Court made its findings. The findings of fact of the trial Court cannot be disputed in a case stated but it is only the inferences drawn from such facts and which constitute the legal question placed before us that can be questioned.

The applicant though contributing to the Social Insurance Fund as an employee was not an employee in the strict sense of the law because though he was paid a salary on the basis of a decision taken by him and his co-director nobody could exercise control over him as to the mode of performing his work or dismiss him from his employment.

Bearing in mind the fact that the legal relationship of employer and employee did not exist in the present case the Court rightly came to the conclusion that the applicant was not a person entitled to redundancy payment under the provisions of the law. Therefore, our answer to the question submitted by the trial Court is that in the circumstances of the case the applicant was not an «employee» within the definition by the law in the employment of another.

In the result the judgment of the trial Court is affirmed with costs against the appellant and the case is remitted back to the Industrial Disputes Court for any further directions, if necessary.

Order accordingly.
Costs against appellant.