

THE TEST ON WHEN AN INDEPENDENT CONTRACTOR IS LEGALLY AN EMPLOYEE (CASE UPDATE)

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INDEPENDENT CONTRACTOR OR EMPLOYEE?

The Singapore High Court, in its recent decision in *Public Prosecutor v Jurong Country Club and another appeal* SGHC 150 (“PP v JCC”), reviewed the test for determining whether a particular person providing a specific service is an employee or an independent contractor. An employer is *inter alia*, required to make Central Provident Fund contributions in respect of employees but this obligation does not extend to independent contractors.

The current test, which is a multi-faceted test that turns on the specific facts of each case, has been said to be unsatisfactory as it is not always the case that working arrangements would be structured and that leaves some uncertainty as to whether the worker is legally an employee or an independent contractor.

While the Singapore High Court in *PP v JCC* did not change the above test, it clarified that a Singapore court, in determining whether a person is an employee or an independent contractor, will first look at the parties’ intentions and then consider whether the reality of the parties’ working relationship is consistent with their intentions. This presumes that both parties are clear as to the nature of their relationship from the start and that this relationship does not in fact change over the years. What happens if there is a change in circumstances?

The background of the case and the decision of the Singapore High Court in respect of the above test are summarised below.

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Background

The complainant in this matter was Mr Mohamed Yusoff Bin Hashim ("**Yusoff**"). Yusoff was employed by Jurong Country Club Pte Ltd ("**JCCL**") on 1 February 1991 as its gym instructor. On 1 November 1998, JCCL converted his status to that of an independent contractor and Yusoff stopped receiving Central Provident Fund ("**CPF**") contributions from JCCL. His other employee benefits were also revoked. When Jurong Country Club ("**JCC**") took over the business of JCCL on 1 December 2003, JCC continued to engage Yusoff as an independent contractor until JCC ceased operations on 31 December 2016.

After Yusoff found out that JCC would be closing down, he asked CPF Board ("**CPFB**") if he was entitled to employer's CPF contributions. CPFB found that he was entitled to employer's CPF contributions for the period December 2003 to December 2016 (i.e. after JCC took over the business of JCCL). JCC commenced legal proceedings to make a determination on CPFB's findings (which were later struck off and dismissed), and thereafter, CPFB commenced criminal proceedings against JCC for failing to pay employer's CPF contributions to Yusoff.

The High Court's decision

The High Court Judge held that in determining whether a particular person is an employee for the purposes of the CPFA, a court should have regard to the parties' intentions, either expressly stated or evinced through the terms of the engagement, and whether the totality of the parties' working relationship was consistent with the parties' intentions. In doing so, the court would consider all relevant factors and engage in a qualitative balancing exercise that is sensitive to the specific facts of the particular case.

The High Court Judge noted that it would not be helpful to set out general rules as to which factors should carry greater weight, and therefore, the fact that the factors of control, personal service and mutuality of obligations are present would not necessarily be conclusive that a person is an employee.

Some of the factors considered by the High Court Judge and his findings are summarised as follows:-

- Mutuality of obligations - while Yusoff was obliged to provide his services and JCC was obliged to pay and provide work, this was not inconsistent with an independent contractor relationship;
- Ownership of assets - the gym was an essential part of JCC's business and it was not unreasonable for Yusoff to rely on the gym equipment provided by JCC;
- Financial risks and earnings - Yusoff had an element of control over how much he earned as he designed the programmes with limited input from JCC; and
- Comparative working arrangements and benefits - Yusoff's working arrangements and lack of employment benefits as compared with those that applied to JCC's other employees clearly indicated that the parties intended for Yusoff to be an independent contractor.

In view of, *inter alia*, the above factors, the High Court Judge found that the reality of the parties' working

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relationship was not inconsistent with the parties' express intentions for Yusoff to be an independent contractor, and there was no clear indication of the existence of an employment relationship.

Conclusion

The High Court Judge's decision in the case of *PP v JCC* illustrates again that there will not be an exhaustive list of factors that will be taken into account by a Singapore court when deciding whether a person is an employee or an independent contractor. It would also not be possible to pre-assign relative weights to each of these factors as the weight of each factor would depend on the facts of each case. However, what can be gleaned from this decision is that the court would, in its analysis, give due regard to the parties' intentions and working relationship.

It may be possible that the courts took into account the fact that the complainant did not take any action or made any complaints when his status was converted in 1998, and only sought to take action when he found out that JCC would cease operations in 2016.

In view of the above, employers may wish to put in place measures to clearly evidence parties' relationship as independent contractors, and not as employees if that is the intention. One way is to ensure that such intention is clearly set out in the contract and reflected in actual working arrangements. For example, the employer may make a distinction in the different benefits conferred and levels of control imposed on its employees and independent contractors.

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