

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 113

Originating Summons No 218 of 1991

Between

Kureoka Enterprise Pte Ltd

... Plaintiff

And

Central Provident Fund Board

... Defendant

GROUND OF DECISION

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Kureoka Enterprise Pte Ltd v Central Provident Fund Board

[1992] SGHC 113

Originating Summons No 218 of 1991
Chan Sek Keong J
30 April 1992

1 Judgment:

2 Cur Adv Vult

3 This is an application by the plaintiffs for a declaration as to whether each of the persons whose names are set out in the schedule to the summons is an "employee" for the purposes of the Central Provident Fund Act (Cap 36) ("the Act") during the periods each of them had worked for the plaintiffs as hostesses at the plaintiffs' lounge called the Ashibi Lounge. The schedule contains a list of more than 200 hostesses who had worked for the plaintiffs from January 1985 to April 1989. The plaintiffs did not make any central provident fund contributions ("CPF contributions") for the benefit of these hostesses as they did not regard them as employees within the ambit of the Act. The defendants' case is that they were employees within the ambit of the Act and were liable to contribute CPF contributions.

4 The following facts are not in dispute. The plaintiffs were the operators of the Ashibi Lounge which offered to guests who frequented the place the services of the hostesses provided by them. The services were in the form of

congenial companionship and conversation in the course of which they would be expected to consume a considerable amount of drinks sold by the plaintiffs. Additionally, each guest had to pay for the time of each hostess at hourly rates prescribed by the plaintiffs. The opening hours of the Ashibi Lounge was 8 pm to 1 am on Sundays to Thursdays and from 8 pm to 2 am on Fridays and Saturdays.

5 During the periods in question, the plaintiffs had two categories of hostesses, classified as full time hostesses and free-lance hostesses. The hostesses, the subject matter of this action, were all free-lance hostesses. The basic terms and conditions on which plaintiffs made use of their services were in writing.

6 A typical letter of employment applicable to a full time hostess read:

7 OFFER OF EMPLOYMENT

8 We have pleasure in offering you employment as Hostess with this company subject to the following Terms and Conditions.

9 DATE OF COMMENCEMENT

10 Your date of commencement will be 5 February 1985.

11 PROBATION

12 a) You will be required to serve a probationary period of three months during which your services may be terminated by either party giving to the other, one day's notice in writing or salary in lieu of notice without assigning any reasons whatsoever.

13 b) Following confirmation of your appointment, your contract of service may be terminated by either party giving to the other one week's notice in writing or salary in lieu of notice.

14 c) Notwithstanding conditions (a) and (b), the company reserves the right at all time to terminate your services if you should be found guilty of misconduct, negligence or breach of any of the Terms and Conditions or Rules and Regulations laid down by the company from time to time governing all or any of its employees.

15 SALARY

16 a) Your basic salary will be \$750.00 per month plus other benefits in accordance with Ashibi's practices.

17 UNIFORMS

18 Uniforms will be issued to service staff. It will be your responsibility to maintain it in proper order. During your probationary period, should your service be terminated voluntarily or by the company due to misconduct, you shall have to pay the company for the cost incurred in making the uniforms.

19 DUTIES AND RESPONSIBILITIES

20 a) You will be required to carry out faithfully and conscientiously such duties and job functions as directed by the company or persons acting on behalf of the company.

21 b) You shall not at any time during your service either directly or indirectly (without prior consent from the company) engage in or interest

yourself, whether for reward or gratuitously, in any work or business other than relating to your duties in the company.

22 c) You shall not disclose or divulge at any time during your service or thereafter, any secrets, transactions or information in or relating to the business of the company which may come within your knowledge or possession in the course of your employment with us.

23 MEDICAL BENEFITS

24 You will be entitled to free medical treatment by the company's doctor. However, the company shall not meet any expenses arising from the following:-

25 a) Maternity

26 b) Dental or optical diseases

27 c) Self-inflicted injury or illness

28 d) Injuries or illness sustained whilst participating in activities outside the normal course of your duties.

29 GENERAL TERMS AND CONDITIONS OF SERVICES

30 In addition to the terms contained in this offer of appointment, you shall immediately upon entering the service of Kureoka Enterprise Pte Ltd, be subjected to such other existing general terms and conditions of service as may be laid down to govern all of its employees and any rules or regulations that may be introduced from time to time thereafter.

31 Kindly confirm your acceptance of the above terms and conditions by signing and returning the duplicate of this letter.

32 A typical letter of appointment of a free-lance hostess read:

33 POST OF FREE-LANCE HOSTESS

34 We are pleased to offer you the above post with our company subject to the following Terms and Conditions of Employment:-

35 Date of Commencement

36 Your date of commencement will be 8 April 1987.

37 Rates

38 Your daily rate will be \$30.00 per working day.

39 Other Terms and Conditions

40 1. Your services may be terminated by either party giving to the other one day's notice in writing or salary in lieu of notice without assigning any reason whatsoever.

41 2. The Company reserves the right at all times, to terminate your services if you should be found guilty of misconduct, negligence or breach of any of the Terms and Conditions of Employment or Rules and Regulations laid down by the company from time to time governing any or all of its employees.

42 3. You will be required to carry out faithfully and conscientiously such duties and job functions as directed by the Company or persons acting on behalf of the Company.

43 4. You shall not disclose or divulge, at any time during your service or thereafter, any secrets, transactions or information in or relating to the business of the Company which may come within your knowledge or possession in the course of your employment with us.

44 5. In addition to the Terms contained in this offer of employment, you shall immediately upon entering the service of Kureoka Enterprise Pte Ltd, be subjected to such other existing general Terms and Conditions of service as may be laid down to govern all of its employees and any rules and regulations that may be introduced from time to time thereafter.

45 Kindly sign your acceptance of the above Terms and Conditions by signing and returning the duplicate of this letter.

46 It can be seen at once that the terms stated in both letters differed in various respects. A hostess who desired to serve full time had to undergo a probationary period of three months, during which her service could be terminated on one day's notice. After confirmation, her service could be terminated on one week's notice. She was paid a fixed monthly salary and other benefits. She was provided with uniforms free of charge and was given certain medical benefits. In contrast, the appointment of a free-lance hostess could be terminated by either party on one day's notice. She was paid a fixed daily wage and was not entitled to uniforms or any medical benefits.

47 It is also to be noted that the letter of employment and the letter of appointment each expressly contemplated that the hostesses would be subject to terms and conditions and rules and regulations laid down by the plaintiffs from time to time, in breach of which their services were subject to termination for misconduct or negligence. Furthermore, in relation to the duties and responsibilities of the hostesses, they were also required to carry out faithfully and conscientiously such duties and job functions as directed by the plaintiffs.

48 The evidence shows that there were many other terms, rules or regulations which were applicable to all hostesses but not set out in the typical letter of employment or appointment. They were as follows:

49 (a) each hostess had to report to or inform the manager or "mamasan" if she showed up to work; the time of arrival was taken down and if she came late for work, her "salary" would be deducted for each segment of time, with each subsequent segment attracting a higher deduction: for example, the first segment of 15 minutes would merit a deduction of \$3, the next segment of ... etc;

50 (b) a hostess had no right to choose which guest to entertain, unless he was introduced by her; the choice was made by the manager, and this was even so in the case of a previously introduced guest who subsequently did not request the company of the hostess who had introduced him;

51 (c) the manager also had the power to direct a hostess to "run the tables", i.e., when there were not enough hostesses to entertain all the guests, a hostess might be required to "run" from table to table entertaining different guests; but she was not entitled to run the tables on her own;

52 (d) a hostess was entitled to keep the tips and gifts given by a guest to her;

53 (e) she was also entitled to be paid various types of commissions by the plaintiffs; there was an "attendance" commission for attendance on a guest; there was a "request" commission when her company was requested by a guest, and there was a "drinks" commission for every drink ordered by the guest;

54 (f) a hostess was required to attire herself in a presentable manner appropriate for the type of work and also for the occasion; the manager or supervisor was entitled to check her attire each evening and to direct her to change her it if she considered it unsuitable: for example, (i) on ordinary nights she was required to wear a cocktail dress and would not be allowed to wear any clothes suitable for working in an office; and (ii) on special nights, like "Tarzan Night" or "Aladdin Night", she was expected to dress according to the theme of the night;

55 (h) free transport was provided by the plaintiffs to send the hostesses home when the lounge closed for the night;

56 (i) the manager or supervisor would call meetings periodically at which all the hostesses were expected to attend to discuss various matters in connection with the business of the plaintiffs, e.g, how to improve the business; why business was lacking; how the hostesses should dress and behave themselves; also the hostesses would be admonished for being habitually late with threats of deduction of basic salary should the situation not improve, etc; (j) an evaluation of the performance of each hostess was carried out every quarter, based on the number of attendances on guests, attire, number of

requests, etc, and the best performer would get a performance bonus of \$700, the second best would get \$500, and so on;

57 (k) each hostess was paid every fortnight and payment was by way of crediting her bank account.

58 The hostesses were not physically differentiated in any way in terms of their mode of dress or services to be provided to guests. None could tell just by looking at the other whether the other was a full time or a free-lance hostess. However, free-lance hostesses enjoyed an advantage over full-time hostesses; they were entitled to work in some other capacity during the day. There is evidence from the defendants' witnesses that probably they were not allowed or expected to work as a hostess in a rival lounge whilst under contract to the plaintiffs. At least, that restriction was generally understood as there was no instance of a hostess having done it. If she performed well, her basic daily pay would be increased, say from \$28 per day to \$33. If a guest had "bought" her time for the entire night, she was free to leave the lounge before closing hours. She was free not to turn up for work, in which event she would not be paid for that night, whatever the reason for her absence might have been. However, she was required to inform the manager beforehand if she did not want to turn up for work. It would appear that this was a rule which a free lance hostess either followed as a rule or as a matter of courtesy.

59 However, there was credible evidence free-lance hostesses were not as free as the plaintiffs have attempted to make them out to be. The defendants' witnesses testified that they were required or, at least, expected to work at least 20 days in a week. The documentary records produced by the plaintiffs would tend to confirm this evidence. They showed that most of the free-lance hostesses regularly worked more than 20 days each week. Some of them even worked

every night in the month during some months. However, the plaintiffs' explanation for this was that the hostesses must have done so voluntarily because they either liked the pay or the work.

60 There was also evidence from some of the defendants' witnesses that they were required to give at least two weeks' notice of termination as a matter of courtesy to the plaintiffs. It would appear that such notices were in fact given out of courtesy rather than in compliance of a term of the contract. The plaintiffs have produced conclusive evidence that many free-lance hostesses gave one day's notice of termination.

61 It is not disputed that free-lance hostesses had to provide their own clothes and cosmetics and also to pay their own medical expenses. They were also not entitled to annual paid leave or an annual bonus.

62 Except for the differences described above, the full time hostesses and the free-lance hostesses were treated equally and enjoyed the same benefits. There was evidence from the last witness for the defence, whose evidence I accept as completely reliable in all respects, that she had started work as a probationary full time hostess and that subsequently when she elected to become a free-lance hostess, she could not perceive any change at all in her conditions of work.

63 Certain free-lance hostesses gave evidence on behalf of the plaintiffs. All their evidence was, strictly speaking, irrelevant as their work experience with the plaintiffs fell outside the period of time that is material in this case. The plaintiffs' manager, Rose, also gave evidence, but again, her testimony related to the time after the periods for which the defendants are claiming arrears of CPF. She testified that the conditions of work remained essentially the same.

On the other hand, the last witness for the defendants testified that she had worked under three managers and Rose was not one of them. Having regard to the fact that there were many more terms and conditions and rules and regulations governing the services of the free-lance hostesses than were contained in the specimen letters of appointment, I would give greater weight to the testimony of the defendants' witnesses where they differed from that of Rose as regards the terms and conditions of service.

64 In effect, the plaintiffs have produced little material evidence of the conditions of work applicable to the free-lance hostesses apart from the specimen letters of appointment, the attendance records and the admissions, under cross-examination, of the defendants' witnesses. What I have summarised above is substantially all the material evidence before me relating to the terms and conditions applicable to or affecting the free-lance hostesses.

65 I now consider the legal relationship between the plaintiffs and the free-lance hostesses. Counsel for both parties have cited many authorities on the relevant tests to be applied to determine whether the free-lance hostesses were employees or independent contractors. Was the contract between each free-lance hostess a contract of service or a contract for services? The Act applies only to employees in the common law sense. I do not propose to examine all these authorities. They all agree that no single test or factor is decisive of the issue. In *LEE TING SANG v CHUNG CHI-KEUNG* < 1990 > 2 AC 374, PC, the appellant was a mason who worked for a subcontractor, S, at a worksite chiselling concrete as instructed by S. He used tools supplied by S and his work was not supervised but was inspected by the main contractor's foreman. Depending on the nature of the work he had to do, the appellant was paid either a piece-work rate or a daily rate for working from 8 am to 5 pm. If he finished his work early he assisted S to sharpen tools. He sometimes worked for other

subcontractors but he gave priority to urgent work of S telling those whom he was then working to replace him. He was injured when working at the site. He applied for compensation under the Employees' Workmen Ordinance. The judge held that he was an independent contractor. The Court of Appeal affirmed that decision. The Privy Council allowed the appeal, holding that he was an employee.

66 Lord Griffiths, in delivering the judgment of the Privy Council said, at pp 382-383:

67 ... The question is to be answered by applying English common law standards to determine whether the workman was working as an employee or as an independent contractor.

68 What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases. Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J. in *Market Investigations Ltd. v. Minister of Social Security* < 1969 > 2 Q.B. 173, 184-185:

69 "The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes,' then the contract is a contract for service. If the answer is 'no,' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The

most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

70

71 Upon these findings of fact their Lordships would have had no hesitation, if sitting as a court of first instance, in concluding that the applicant was working for the first respondent as an employee and not as an independent contractor. All the tests, or perhaps it is better to call them indicia, mentioned by Cooke J. in *Market Investigations Ltd. v. Minister of Social Security* < 1969 > 2 Q.B. 173, 184- 185, point towards the status of an employee rather than an independent contractor. The applicant did not provide his own equipment, the equipment was provided by his employer. He did not hire his own helpers; this emerged with clarity in his evidence when he explained that he gave priority to the first respondent's work and if asked by the first respondent to do an urgent job he would tell those he was working for that they would have to employ someone else: if he was an independent contract in business on his own account, one would expect that he would attempt to keep both contracts by hiring others to fulfil the contract he had to leave. He had no responsibility for investment in, or management of, the work on the construction site, he simply turned up for work and chipped off concrete to the required depth upon the beams indicated to him on a plan by the first respondent. There is no suggestion in the evidence that he priced the job which is normally a feature of the business approach of a

subcontractor; he was paid either a piece-work rate or a daily rate according to the nature of the work he was doing. It is true that he was not supervised in his work, but this is not surprising, he was a skilled man and he had been told the beams upon which he was to work and the depth to which they were to be cut and his work was measured to see that he achieved that result. There was no question of his being called upon to exercise any skill or judgment as to which beams required chipping or as to the depths that they were to be cut. He was simply told what to do and left to get on with it as, for example, would a skilled turner on a lathe who was required to cut a piece of metal to certain dimensions.

72 Taking all the foregoing considerations into account the picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own account as an independent contractor with all its attendant risks. The applicant ran no risk whatever save that of being unable to find employment which is, of course, a risk faced by casual employees who move from one job to another, and such casual employees are specifically covered by the Ordinance.

73 I have cited the judgment of the Privy Council in extenso for the reason that it mentions most of the factors that have been applied by the courts in determining whether a worker is an employee or an independent contractor. The fundamental test approved by the Privy Council is: were the free-lance hostesses performing their services as persons in business for their own account? In my view, many of the factors referred to by the Privy Council in LEE TING SANG which are consistent with a contract of service rather than a contract for services have been satisfied in this case.

74 Firstly, the factor of control. Although a free-lance hostess was contractually free not to report for work regularly, once she did turn up, there

was substantial control by the management over her services, not in the manner in which they were provided but to whom they were provided. She had no control over the guests she desired to entertain. If her services were specifically requested by a guest, she was required to entertain that guest. If her services were not required by a particular, she would have to entertain those guests assigned to her by the management. Further, she could only leave the lounge before closing time when the guest had booked her time for the entire evening. Condition 3 of the letter of appointment gave the plaintiffs full control over the functions of the hostess.

75 Secondly, she had to render her services personally to the plaintiffs. She could not use a substitute for herself. It had to be her. No doubt she had to provide her own clothes and cosmetics but most employees in most occupations had to do the same. The clothes and cosmetics were not their equipment for the purpose of entertaining the guests. Their work was not to display their clothes but their charms and their ability to please and fulfil the needs of the guests whilst in the lounge.

76 Thirdly, they had no responsibility for investment in, or management of, the business nor any financial risk in it. They simply reported for work whereupon they subjected themselves to the authority of the management as to whom they should entertain and for how long.

77 Fourthly, the hostesses had no right to price the value of their services to the guests. The pricing was done by management, both as to what the guests had to pay and what the hostess was to be paid. Moreover, they were paid a daily rate when they reported for work, whether or not there was work.

78 Fifthly, there was no question of the hostesses being called upon to exercise any skill or judgment as to which guests to entertain. They were simply instructed by the manager to entertain the guests selected by the manager. The argument that the hostesses had to provide particular skills in entertaining a guest appears to me to have been overstated in this case. They were not even required to go through any formal course of training to acquire a recognised set of skills on how to entertain the sort of guests who might frequent the Ashibi Lounge. In any case, the opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service: see *MARKET INVESTIGATIONS LTD v MINISTRY OF SOCIAL SECURITY* < 1969 > 2 QB 187, at page 188B.

79 Sixthly, the provision in the contract for termination by the plaintiffs of the services of a hostess on the ground of misconduct and termination on one day's notice suggested that the letters of appointment were contracts of service. In *PAULEY v KENALDO* < 1953 > 1 WLR 187, the presence of a right to dismiss did not prevent a restaurant cloakroom attendant, who was remunerated only with tips and who did not need to keep any fixed working hours, and was free not to attend whenever she pleased, from being an independent contractor in law. However, in that case, she was entitled to and indeed was required to provide a substitute whenever she did not work.

80 Seventhly, the free-lance hostesses were an integral part of the business of the plaintiffs in the operation of the lounge. It was a place for guests to relax and unwind in the congenial company and companionship of the hostesses. Without the hostesses, there would be lounge and no business to carry on. The hostesses were not accessories to the main business of the plaintiffs. They were the business of the plaintiffs. I do not think that on the evidence, the free-lance hostesses were in business on their own account.

81 The non-provision of medical benefits to the free-lance hostesses was of little moment. It could simply have meant that the benefits accorded to full time hostesses were better in this respect. The intention of the plaintiffs as to treat the hostesses as independent contractors and not as employees was not conclusive. Similarly, the intention of the hostess herself as to her own status is also not conclusive. In this case, the intention of either was rather nebulous as the evidence of all the hostesses, including those called by the plaintiffs, was consistently to the effect that they were told that if they elected to work as free-lance hostesses they would not be liable to pay CPF contributions. In those circumstances, the hostesses would be less concerned with their status in law and more with their take-home pay.

82 The strongest argument advanced by counsel for the plaintiffs that the free-lance hostesses were not employees was that there was a lack of mutuality in their relationship in that each of them was free not to work. In *O'KELLY v TRUSTHOUSE FORTE PLC* < 1984 > 1 QB 90, the banqueting department of the defendants kept a list of some 100 casual catering staff who were known as "regulars" because they could be relied upon to offer their services regularly and in return assured of preference in the allocation of available work. Some of the "regulars", including the three applicants, had no other regular employment. The applicants complained to an industrial tribunal that they had been unfairly dismissed, and so the question arose as to whether they were employees under the Employment Protection (Consolidation) Act 1978. The majority of the tribunal held that although the relationship of the company to the applicants had many of the characteristics of a contract of service, the one important ingredient of mutuality of obligation was missing and that the applicants were in business for their own account as independent contractors supplying services and were not employees. In making their assessment, the industrial tribunal took into

account nine factors which they considered consistent with a contract of employment, four factors which were not inconsistent with such a contract and five factors which were inconsistent with such a contract. The appeal tribunal allowed the applicants' appeal holding that each individual contract was a separate contract of employment and not a contract for services. On appeal by the company, the Court of Appeal allowed the appeal on the ground that although the question whether the applicants were employees under a contract of employment within the meaning of the 1978 Act was a question of law, the answer involved questions of degree and fact which it was for the industrial tribunal to determine and the appeal tribunal was not entitled to interfere with the industrial tribunal's decision unless it had misdirected itself in law or its decision was one which no tribunal, properly directing itself on the relevant facts could have reached.

83 If mutuality alone were a decisive factor in deciding whether in this case a free-lance hostess was an employee, then I would have to agree that she was probably not an employee of the plaintiffs in so far as she was under no obligation to serve the plaintiffs. But mutuality or lack of it is only one factor to be taken into account.

84 The TRUSTHOUSE FORTE case dealt with another issue of law which is more relevant to the facts of this case. The issue was whether there were separate contracts for each engagement of a "regular". The Court of Appeal held that the separate contract argument was not sustainable as it was inconsistent with the finding of the industrial tribunal that the "regulars" were in business for their own account.

85 In this case, I am of the view that the terms of appointment were such that they bound the plaintiffs to provide employment to the free-lance hostesses

once they reported for work. In this sense there was mutuality. Once a free-lance hostess reported for work, she was obliged to serve and the plaintiffs were obliged to allow her to serve. This is reinforced by the term that they were entitled to a daily wage, irrespective of whether their services were required or not. To adopt the words of Webster J in *WHPT HOUSING ASSOCIATION LTD v SECRETARY OF STATE FOR SOCIAL SERVICES* < 1981 > ICR 737, the hostesses reported for work to provide themselves to serve the plaintiffs and not to provide their services to the plaintiffs. The plaintiffs did not need their services. Their guests needed them. There are other factors in this case which were consistent with the free-lance hostesses having been employed on a continuous basis. Although under the terms of appointment each hostess was free not to turn up for work, the documentary records prove that they did turn up regularly. If they did not turn up for work, they had to inform the management. They had to give reasons for not turning up to work although their reasons were invariably accepted. They were not allowed to select their off-days. All these practices could not have arisen unless there was some understanding that they had to be followed. The threat of dismissal was always there.

86 Having regard to all the factors I have mentioned, I am of the view that each free-lance hostess had an umbrella contract of employment with the plaintiffs which either party could terminate on one day's notice. There was nothing in the letter of appointment that a free-lance hostess was entitled to refuse to work the minimum number of 20 nights a month. If I am wrong in this finding, then I am of the view that there were successive contracts of service between each free-lance hostess and the plaintiffs each time a hostess reported for work.

87 Accordingly, I declare that the free-lance hostesses listed in the schedule to the summons were "employees" within the ambit of the Act.

Chan Sek Keong J

Woo Bih Li with Simon Tan for the plaintiffs
Sarjit Singh Gill with Gan Kum Yuin for the defendants
