THE CONCEPT OF A CONTRACT OF SERVICE AND ITS APPLICATION IN MALAYSIA

BY

ANI ak SOLEP

A project paper submitted in partial fulfillment for the requirements of a Diploma in Law Syllabus

MARA INSTITUTE OF TECHNOLOGY

SHAH ALAM

SELANGOR

4 December 1985

PREFACE

'The Concept of a contract of service and its application in Malaysia' becomes a choice for my project paper because it is an area of law that has aroused my interest. It is a perpetual wonder to me that after dealing with the contract of service concept for over a hundred years the court is left almost where it begun. Admittedly the statutes passed have been of some assistance but the mystery of the contract of service concept lingers on. My objective therefore is to put in writing what the said concept is about together with rights, duties, obligations and liabilities that naturally arise from such a relationship.

In the course of writing this project paper I have relied mostly on articles, textbooks and decided cases. The reason is that, I feel that the topic is almost purely of academic interest and the layman have very scanty knowledge about it.

I would like to thank Denny for suggesting the topic of this project paper and En Darby Hashim, Course Tutor Diploma In Law for making amendments to my original phrasing of the topic. My special thanks are due to my Supervisor, Mr Teh Hock Kee for his constructive criticisms and advice. I am also greatly indebted to my typist, Sharifah Fazilah Syed Agil who managed to complete typing the manuscripts on time although she was given a very short notice. Lastly I would like to extend my appreciations to my cousin Julia Roning Minjat and my family for their moral and financial support.

4 December

Ani ak Solep

TABLE OF CONTENTS

Chapter I

AN INTRODUCTION TO THE CONCEPT OF CONTRACT OF SERVICE

The common law concept of a contract of service has been adopted into our employment law.[1] Although the court first attempted to determine the existence of a contract of service about a century ago,[2] until today no definite test has been formulated to dertermine whether or not a contract of service exists in a given situation.

A. Historical background

A brief principal stages in the historical development of the present contract of service or the employer and employee relationship is as follows :

1. The earliest stage was the period of slavery or a relationship akin to slavery.

2. Then came the period of serfdom or vassalage which was most significant during the Middle Age.

3. The third stage was the 'Gild' system of the later Middle Ages.

4. And finally the 'laissez-faire' or freedom of contract approach of the eighteenth century moving into the later Industrial Revolution period and eventually into the statutory control of the twentieth century.

[1] By virtue of s.3 and s.5 of the Civil Law Act 1956

[2] Yewens v Noakes (1880) 6 Q.B.D. 530

The above development stages took place in England. The final stage is of importance as it was at this stage that the judges were frequently called upon to interprete the statutory provisions passed which were intended to improve the economic and social position of those who work under a contract of service.

In Malaysia during the early days the population was self-sufficient and at times people were engaged in barter trading to satisfy their wants. It was only after the emergence of agricultural, mining and other industrial developments that the necessity for employment arose.

Local statutes affecting the employer-employee relationship were mostly passed in the 1950s.[3] The contents of these statutes were almost entirely derived from England and other Commonwealth countries. The assmimilation of these legal principles into our local law inevitability brought with it the controversy that has plagued the common law judges - who among the work men should benefit from these statutes. The first case to reach the High Court[4] illustrates the point that the local courts, bound by the decisions of the common law judges, found to their dismay that they were not spared from the headache long suffered by their common law counter parts. However, where the statutory provisions expressly define the term "employee", it is relatively easy for the judge to conclude whether or not a worker is an employee.

B. Contract of service and contract for service distinguished

It is a traditionally accepted view that the right of control is the governing distinction between a contract of service and a contract for service.

[3]Employees Provident Fund Ordinance 1951 Trade Unions Act 1959 Workmen's Compensation Act 1952

[4]Chye Hin Co. (Perak) Ltd v Public Prosecutor (1960) 26 M.L.J. 137