

Application of Sri Lankan Labor Laws on Sri Lankan Virtual Employees

W.M.V.Wanasinghe

Management & Science University (MSU)

Jeong Chun Phuoc

Management & Science University (MSU)

Ali Khatibi

Management & Science University (MSU)

Abstract

This paper aims to explore how the existing legislations in Sri Lanka protect virtual employees and define their terms, conditions, rights and obligations of employment as well as identify the instances virtual employees face discrimination and unfair treatment by their employers. Employing in-depth interviews with 30 different types of virtual employees along with employers, and other key informants such as officials of the Department of Labor, employer's organizations, employee trade unions, and Judiciary, the authors identified how even the basic rights of many virtual employees are not protected, where employers mainly use their discretion to decide the terms and conditions of employment. It was specially observed how virtual employment is misused by employers and how it is used to evade employers' legal responsibilities in a center stage of inadequate legal coverage, poor government monitoring, and employee unawareness. Given the fact that the virtual employees are same as normal employees, protection of their rights through necessary changes to the labor laws, balancing flexibility and protection, is recommended.

Key words: virtual employees, labor law, terms and conditions of employment, employment relationships

Application of Sri Lankan Labor Laws on Sri Lankan Virtual Employees

During the last twenty five years, in consequence to the social, economic and technology changes around the world, Sri Lanka has experienced a change in the types of employer-employee relationships and the manner in which work is carried out. Among these changing and diverse employment relationships such as outsourcing, part time and labor contracting, virtual employment is increasingly becoming popular in Sri Lanka as in many other countries around the world. Virtual employment is generally understood to mean work carried out from home, on the road, or otherwise outside of traditional centralized offices (Wiesenfeld, Raghuram, & Garud, 2001) and has become an important phenomenon “because of its increasing prevalence and also because virtual organizations and virtual workers may be the key factors in the *new economy*” (Wiesenfeld, Raghuram, & Garud, 2001, p. 214). The term ‘virtual’ or remote employment still seem to has no definitional consensus among the experts and sometimes interchangeably used telecommuting, telework and or work from home. (Martino et al., 1990; Maher, 2014). According to MaLennan (2007) definition of a ‘virtual’ employee or worker requires one to understand that:

The word virtual is based on the word virtue. The origin of this word can be traced to the Latin word ‘*vertus*’ and the French word ‘*vertu*.’ Vertus means *trust or worth* and vertu means *goodness or power* ... Virtue is a good work for us to use as the basis for how we want to describe the workers in the virtual world of work (MaLennan, 2007, p. 13).

With regard to the meaning of the word work MaLennan (2007) further explains that it can be a verb or a noun. As a verb its meaning is: to bestow labor, toil, or exertion upon; to produce, accomplish, or acquire; to be the cause of, to effect, to bring about, to work a change. As a noun: that which is done, performed; or action, deed, feat, achievement; that which is made, manufactured, or assembled; an article or product; that which is produced by physical or mental labor (MaLennan, 2007, p. 14).

With this popularity of virtual employment around the world, new forms of challenges have emerged such as managing virtual employees (Wiesenfeld, Raghuram, & Garud, 2001), the risks associated with employee use of electronic communications, monitoring of employees' electronic activities (Milligan, 2009), as well as organizational identification, which reflects how individuals define the self with respect to their organization (Wiesenfeld, Raghuram, & Garud, 2001). Among these challenges, employer-employee relationship of virtual employment has gained center stage with many scholars indicating concern over the 'out of sight, out of mind' (Alexander, 1999, cited in Wiesenfeld, Raghuram, & Garud, 2001) nature of this relationship and the resultant consequences to the employment relationship.

While the normal understanding of employer-employee relationship is thus questioned, virtual employment also raises numerous issues related to the contractual relationship of virtual employees questioning the applicability of terms and conditions of employment together with the legal protection available to them (Helle, 2006; Stone, 2006). That is, the issues raised by Milligan (2009), Wiesenfeld, Raghuram, & Garud (2001) had resulted in an array of legal questions and ambiguities being brought forth, such as, is a virtual employee a permanent employee? Is he a part time employee? What are his rights, duties and responsibilities? Is he considered to be a person with lesser rights? Does attendance become irrelevant along with leave, working hours and other conditions of employment? Who is responsible for the health and safety of these employees? Can they form trade unions? If so, with whom? All these questions and uncertainties are directed towards the labor legislation of a country, which should ideally address these issues in protecting the employer-employee relationship.

However, a general observation is that law and judicial interpretations do not address and protect the new forms of employment relationships including virtual employment, where even the basic rights of a worker is not protected (Stone, 2006) or adequately guaranteed (Helle, 2006). This situation is seen to be very persistent in Sri Lanka where the existing labor laws in the country have failed to acknowledge and protect these virtual employees. Sri Lanka boast the protection of employee rights with more than 45 pieces of legislation specifically addressing employer-employee relationships and various aspects of terms and conditions of employment being passed during the last eighty years. Yet, no comprehensive studies have been conducted exploring how the existing legislation protect virtual employees. Additionally, it is important to understand current labor law definitions includes or excludes virtual employees, and how their conditions, rights and obligations of employment are protected. Additionally, it is important to identify the instances virtual employees face discrimination and unfair treatment at the hands of their employers.

This paper attempts to fill this gap by examining how and when the prevailing labor laws protected or fail to protect virtual employees. It does so, by exploring the legal applicability of virtual workers with regard to minimum wage, maximum hour protection, occupational health and safety protection, leave entitlement, compensation for work-related injuries, trade union rights, and superannuation benefits.

Virtual employment and the labor law

Under the broader umbrella-term 'Virtual employment', there are different types such as telecommuting, e-commuting, e-work, telework, working at home (WAH), or working from home (WFH), all of which has the same characteristic of work carried out outside the traditionally centralized offices. This article refers to all these groups collectively as "virtual employees", and unless otherwise specifically stated, the discussions in the paper apply to all these different groups equally.

While research on virtual employees in Sri Lanka are scarce, the findings of the study revealed that more men than women are likely to be virtual employees and that educational qualifications have a bearing on virtual employment, where employees with higher educational qualifications are more likely to engage in virtual employment than those with lower educational qualifications (Stone, 2006). Virtual employment is said to be more common among white-collar than blue-collar occupations (Stone, 2006). According to Wiesenfeld et al (2001), virtual employees are most often "highly skilled knowledge workers employed in dynamic, flexible, technology-enabled organizations" (p. 214).

With virtual employment becoming a considerable percentage of overall employment in many countries, it has given rise to many challenges and issues in different spheres of management, including human resource management and industrial relations. The fact that “the emergence of new forms of work is usually more rapid than the development of law and contracts” (Helle, 2006, p. 71) has specifically given rise to many labor and employment law issues with related to virtual employees.

Sri Lanka is known in the region for very stringent labor laws that favors and protects employees. Out of the 47 pieces of legislation passed in the sphere of labor law during the last 50 years (Suriarachchi, 2008), 43 pieces are still applicable and addresses different areas in employment. However, virtual employment is not defined nor explicitly addressed in any of these legislation in the country. With virtual employment becoming increasingly popular, this is a notable concern and drawback in this legal system of the country.

Analysis of definitions of employers and employees in important labor legislations such as Industrial Disputes Act No. 43 of 1950; The Shops & Office Employees Act No 19 of 1954, and the Workmen Compensation Ordinance No 19 of 1934 indicate that these definitions do not apply to virtual employment at all.

Further, it was found that the Industrial Disputes Act No 43 of 1950 which is considered as one of the most important pieces of legislation enacted in this area in Sri Lanka, does not define who is an employee, but defines who is a worker. Thus, the Act states that:

a workman' means 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 labor, 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 (Section 48).

This definition was cited in the Sri Lankan case of *Carson Cumberbatch & Co.Ltd. vs. Nandasena* (1974) where it was held that it could be applied to a person who has entered into a contract of service with another. This would mean that the above definition would apply to all employer-employee relationships taking place in all trades and professions. As it can be argued that a contract of service would include a contract of employment as applicable to virtual employees it could be further argued that the above definition in the Carson Cumberbatch case would apply directly to an employer who employs any virtual employees and the fact that the employer may be located abroad does not adversely affect this definition in any way. However, it was observed that there is no case law found in this regard pertaining to virtual employment.

The Shop and Office Employees Act, No. 19 of 1952 is another important Act which demarcates the boundaries of the work carried out by employees attached to shops and offices. This Act states that " it is an Act to provide for the regulation of employment, hours of work and remuneration of persons in shops and offices and for matters connected therein or incidental thereto" (Preamble to the Shop and Office Employees Act No 19 of 1952). Further An 'Office' has been defined as "office or clerical department of any shop, factory, estate, mine, hotel club or other place of entertainment or of any other industrial or commercial undertaking." (Section 68 (1) of the Shop and Office Act, 1954). This confirms that only those persons who work in an office are governed by this Act. Hence virtual employees who work from home are not covered under this Act.

Therefore, it can be said that this Act is applicable to only those shops and offices existing in Sri Lanka. Therefore, the virtual employees working for foreign companies falls outside the purview of the Act resulting in this piece of legislation not being applicable to such employees working here for companies existing outside the territory of Sri Lanka. However, the senior legal advisor of the Department of Labor in Sri Lanka has taken a contrary view in that even those home based virtual employees working for companies in Sri Lanka come within the purview of the Act as they perform an office job from home.

Further Grossenbacher (2008) has stressed the need for care when entering into virtual employment agreements in the USA, as some US local Ordinances restrict the ability of individuals to conduct business in their home and in certain cases working from home is permitted subject to taxation.

In this background it is important to explore the legal position of virtual employees in Sri Lanka and the terms and conditions applicable to virtual employees in light of the existing legal provisions to ultimately identify the importance and the need to address issues raised by this burgeoning type of employment

Methodology

Using the qualitative research approach, in-depth interviews and document analysis was carried out. In-depth interviews were conducted with 39 different types of virtual employees, employers, and other key informants such as officials of the Department of Labor (The main government body established to protect the employment relationship in Sri Lanka), officials of employer's organizations as well as employee trade unions, Judicial officers and legal experts.

In the absence of a proper database/statistics on virtual employees based in Sri Lanka, purposive sampling was employed to select the respondents. Accordingly, 28 respondents who were virtual employees working for Sri Lankan companies as well as UK, American, Australian, Netherland, UAE, and Singapore companies based in Sri Lanka, were selected for interviews. Majority of the respondents were unmarried males between the age of 31-40 and graduates representing the IT and software development category.

Majority of the respondents were on permanent basis. Many of them also had worked overseas previously before being recruited as virtual employees. While 20 respondents were working for foreign employers 08 respondents were from the domestic virtual market and were working for local companies from home. During the in-depth interviews information were gathered on the terms and conditions of their employment, and with their consent, their letters of employments too were scrutinized and analyzed.

The 3 employers interviewed were local employers from whom information related to terms and conditions of employment pertaining to virtual employees were gathered. The other key respondents were selected for their expertise in the area of labor law and 09 Judicial Officers, Labor Officers, Lawyers, and Labor Tribunal Presidents were thus interviewed to gather information on the current labor laws and how it applies to virtual employment and with regard to any changes needed to be made to make it more applicable to virtual employees.

In addition, 8 main labor legislations mentioned below pertaining to terms and conditions of employment in Sri Lanka were analyzed in detail to understand the legal coverage of virtual employees (The Trade Unions Ordinance 14 of 1935; The Wages Boards Ordinance 27 of 1941;; The Industrial Disputes Act 43 of 1950; The Shops & Office Employees Act 19 of 1954; The Employment of Women Young Persons & Children's Act 47 of 1956;; The Employees Trust Fund Act No 46 of 1980 and Payment of Gratuity Act 12 of 1983).

Data Collection and Data Analysis

This study will utilize nonrandom, purposeful sampling. The data were collected primarily using snowball method, where an interviewee that participated in the study was asked to identify others who are also working in the field. Additionally, the word of mouth method was also utilized where, it was announced to people who may know virtual employees to identify people who may be willing to participate. Furthermore, this study also interviewed people are experts in the field. Such people were approached due to their well-known status and knowledge of the issue. The primary researcher is also an expert in Sri Lanka on labor law. Therefore, her knowledge of field experts were crucial. Finally, this study also conducted an analysis of existing labor laws and additional documents such as any case law related to the topic. Semi-structured, open-ended interview guides were used to conduct interviews with individual subjects. Semi-structured, open-ended questions are used to retain flexibility to probe questions and to allow subjects the freedom to answer the questions in an order they see fit (Rubin and Babbie, 2009). It allows thick description (Patton, 2002). Tape recorded interviews last approximately from 25-1 hour. Once data were collected they were transcribed and when necessary translated by a graduate assistant. Data were analyzed using content analysis method, a coding techniques developed to gain meaningful themes (Auerbach & Silverstein, 2003). Analysis began with open-coding, which was then followed by repeatable or axial coding, which was then used to develop themes, combing several repeatable codes. The primarily author conducted the analysis of the data and increase reliability second author and others audited and provided feedback on the themes and analysis.

Findings

In-depth interviews with different types of respondents as well as a detailed analysis of the 08 main legislations clearly indicated the legal position of virtual employees in Sri Lanka as well as their current terms and conditions against the legal requirements for other types of employments in the country. More specifically, the findings highlight the extent to which virtual employees are left unprotected by the country's legal system.

Legal position

Employment relationships of virtual employees interviewed were most often very informal and ambiguous, questioning its legal position. In many instances there were no written document such as letters of appointments formally signed by the parties and the employment relationship has been instigated through emails or even verbally. However, this would not theoretically pose an issue in establishing that there is an employment relationship between the employer and the virtual employee as the existing labor law recognizes contracts that are expressed (either written or verbal) as well as implied. Yet, with the absence of a clearly written contract such as a letter of appointment it will be difficult and cumbersome to prove that there is a 'contract of employment' or an employment relationship in such virtual employments. Proving that there exists a 'contract of employment' is important from a legal perspective as the existing labor laws of the country are applicable to those who come within the purview of the "contract of service". The other type of contract, which is the "contract for service" in the Sri Lankan law applies to independent contractors, and does not denote an employer-employee relationship and hence does not provide the coverage of the labor law of the country. Hence, while the mode of the contract (where expressed or implied) of these virtual employees might not be an issue, proving that there exist a contract of employment is imperative to gain legal coverage. However, as Amerasinghe (2013) states "as we have seen if the actual evidence points to a device and nothing more to avoid being identified as an employer the Courts would not hesitate to intervene and hold in favour of a contract of employment".

According to the legal experts interviewed, while a contract of employment between a employer and an employee could be considered as a formal contract, when the employer is a foreign employer in a foreign country it is practically not possible to take action against the employer for breaching the contract or for any other non-compliance. This poses a serious issue and poses a threat to the legal protection granted to the virtual employee. Hence, even though the existence of the contract of employment can be proved issues exist in protecting the employee rights and seeking relief in instances of breach of contract by the employer. An interviewee from the Department of Labor stated that, *"in such instances it is imperative to see whether there are reciprocal agreements in existence between Sri Lanka and the country where the office of the virtual employee is located. If so a judgment obtained by the virtual employee from a Sri Lankan court of law could be enforced against the employer, which is something that needs careful consideration. However, in terms of the Sri Lankan based employers this would not be an issue"*.

Another pertinent issue related to the contract of employment is the legal definition as to the terms and conditions of employment and the relevant laws applicable to these employees. It was seen that in many instances the employment contracts of employees under foreign employers contained terms and conditions of the foreign countries, raising the question of the legal position of such contracts. This remains unclear and the laws of the country does not address this issue satisfactorily.

Another issue that needs deeper exploration in determining the legal position of virtual employment is who is an 'employer' and an 'employee'. This is important specifically to identify the coverage of the legislation (and thus terms of conditions of employment) and legal redress available to each party. Looking at the respondents of the study it was clear that the nature of the work they do makes them office employees. In relation to any office, the employer is the person carrying on, or for the time being responsible for the management of the business for the purpose of which the office is maintained (Employers Federation of Ceylon, 2000).

However, the question related to virtual employment is whether they are covered by the Shop and Office Employees Act. According to the definition of a shop and office, virtual employees and employers are not explicitly covered nor explicitly excluded.

This has been explained in detail below under the terms and conditions and the relevant legislation.

Negotiation on the Terms and Condition of employment and the issuance of the Letter of Appointment

The Shop and Office Employees Act makes it mandatory for employers covered by the Act to provide letters of appointments to their employees. Yet, in practice it is seen that this provision of the Act is not strictly adhered to by employers at all times. (Amerasinghe, 2011). The majority of the virtual employees interviewed have been offered letters of appointments out of which a large number contains only basic information such as the date of appointment, designation and salary. The remainder had been given letters of appointment which included most of the important information such as the salary and other monetary and non monetary benefits, leave entitlement, reporting channel and age of retirement.

As two interviewees stated, *“Yes, definitely I received a letter of appointment. It contains all the necessary conditions such as the title of my job, my immediate supervisor, my salary, leave entitlement, ability to terminate with immediate notice etc. Since it was a very descriptive in nature it is not necessary for me to drop mails or telephone calls to clarify terms and conditions of employment.”* (Employee work for a Company in UAE). Another stated, *“I had to sign a kind of a document before I got the job and it contained the list of jobs that I had to perform.”* (Employee work for a Singapore company).

It was specifically observed that those employees who are working for companies established in Sri Lanka have been given such letters of appointment. While a few employees have not received any formal appointment letter, some of them have entered into a confidential agreement but a copy of the document was not given to them. As one participant stated, *“I was not given a formal letter of appointment as such. An email was sent informing I have got selected for the appointment, my compensation package and the list of duties were there. However if they do not have work, if there’s a shortfall of work in Melbourne the company will be hit and I will also be hit-because I will be getting less work...Actually I didn’t get a letter of appointment, I signed a document but I didn’t get a copy.”* (Employee work for a USA company). In such cases, there exists a risk for both parties, as certain conditions may be enforceable in the circumstances. In such situations it is vital that both parties maintain a position of mutual trust to a great extent in order to carry out the agreed tasks progressively. As one employee stated, *“We have to trust them to a great extent because if they don’t make payments or something like that you can’t go there and sue. We have to be practical about it. The same risk is there for them as well”* (Employee work for a UK company work for an Australian company).

In this sphere of employment, most of these employees have had the opportunity to negotiate some of the terms and conditions in their employment contract, such as working hours, annual leave, and payments. One interviewee, working for a company in Canada, demanded that since he is not entitled to become a member of the social service fund in Canada, his salary should be fixed to commensurate with the EPF, ETF and Gratuity, to which the employer had agreed. Another employee working for a USA based company was informed that he could negotiate the terms and conditions of employment to his satisfaction. However when he received the letter of appointment he found that those terms and conditions he specified were not included to his satisfaction. Yet he accepted the conditions as the salary offered was higher than the market rate. A few employees informed that, there was no opportunity to negotiate with their employer and they had no say regarding their terms and conditions of employment, as a result of which they are helpless in such a situation. As two employees who are working for Australian and Singapore companies, expressed their views as follows, *“As a virtual employee work for a Sri Lankan company I get the same salary that a non- virtual worker in the same position get in my office. But I save money and time by not travelling to my office every day”*(Employee work for a Singapore company), and the other said, *“Pay is on monthly basis. I know my monthly salary is higher than the salaries paid to local employees. They deposit money in my RFC bank account.”*(Employee work for a Singapore company).

Working Hours of virtual employees

In Sri Lanka, the working hours of employees are governed by the Shop and Office Employees Act and the Wages Board Ordinance as well as The Employment of Women, Young Persons and Children’s Act. While these Acts specify working hours (generally 8 hours for a day without calculating the one hour lunch interval and imposing certain restrictions with regard to employment of young persons between the ages of 14 -18 years and employing women in the office after 10 pm), due to the very nature of virtual employment the working hours varied for the respondents. In many instances respondents worked more than 8 hours. However, even though the number of working hours exceeded the legally stipulated maximum working hours in certain instances, there was flexibility for respondents to decide their working times. However, many of the respondents who were working for foreign employers had to work late hours, which were in-line with the time differences. Hence women employees interviewed also had to work after 10 pm.

However, the respondents mostly stated that they only work 40 hours a week and that sometimes they work extra hours if there is a need to meet an urgent deadline. This is in-line with the legal requirement according to the Shop and Office Employees Act, where the maximum working hours for a week is stipulated as 45 hours.

According to the Shop and Office Employees Act and Wages Boards Ordinance working in excess of the normal hours has to be treated as overtime, paid at a rate not less than one and a half times the hourly rate. However, virtual employees did not get such overtime payments for working extra hours. As one field expert stated, *"This is similar to the practice with normal workers in Sri Lanka, where the executive group (white collar) workers generally are not entitled to Over Time where this practice is considered as an administrative relaxation on the part of the Department of Labor"*.

Leave Entitlements

In Sri Lanka, leave is also governed by the Shop and Office Employees' Act and the Wages Boards Ordinance. As informed earlier whether virtual employees who work for companies outside the territory of Sri Lanka as well as those who work from home come within the above legislation is not clear. However, all virtual employees working for local companies confirmed that they are given leave according to the regulations stipulated in the Shop and Office Act and that none of them fell within the purview of the Wages Board Ordinance. According to (Shop and Office Employees Act) employees are given 7 days casual leave and 14 days annual leave. The virtual employees working for local companies were given these leave entitlements and in certain instances more beneficial/additional leave were granted to them.

The question arose with regard to virtual employees who were working for foreign employers. Such employees were granted leave according to the labor rules and regulations of the employer's country. Hence in such instances 'Poya' (which is a Buddhist based major Sri Lankan holiday), Public and Mercantile Holidays declared by Sri Lanka were not granted to them. Only a very few such employees were granted leave on Poya days after negotiations. However, majority of these employees had negotiated to take leave on Sundays. As one employee stated, *"I have to work according to the Australian calendar. Even though Saturday is a half day I managed to take full day leave. Anyway I have to take their (Australian) holidays and have to work during Sri Lankan holidays."*(Employee work for UK Company). Another stated, *"Though it is not specifically mentioned in the Agreement on inquiry they informed me that I am entitled for annual leave of 14 days as well. Sick leave is only 7 days but when I want was going to apply leave for special reason they ask me to be online and always I have keep my computer with internet on. Therefore it cannot be considered as 'proper leave'"* (Employee work for USA company).

The majority of the respondents appear to have a system of proper procedures and systems to apply for casual, sick and annual leave and all interviewees working for local companies from home informed that this was practiced in their companies. However a few respondents working for foreign companies informed that they do not have access to any procedure to apply for leave. Sometimes these leave procedures change according to the labor laws and regulations of each country. As one stated, *"My letter of appointment is silent about leave. Actually I don't have any leave; if I take leave then my salary will be deducted."*(Employee work for UAE Company).

Remuneration

The Shop and Office Act and the Wages Board Ordinance regularizes payment of salaries to employees. The main powers and functions of the Wages Board under the Ordinance are the determination of minimum rate of wages for piece work, rate of wages for time work, rate of overtime and number of hours of a working day or working week and the number of days making up a working month. However the provisions in the Ordinance are applicable to certain carefully identified trades due to their organized nature, industrial competition, exploitation and lack of protection. (Index to labor laws in Sri Lanka 2008:24). Virtual employment is also an area where exploitation and lack of protection prevails. However this piece of legislation has no bearing on those who are on virtual employment irrespective which industry those workers belong to.

According to the basis of payment for the virtual employees, the majority are paid on a monthly basis while some of them are eligible for payment on an hourly or project basis. However, the scale of the salaries can vary with the qualifications and experience of the employee and they can negotiate their salary increments and bonuses on this basis. At the same time if some virtual employees want to get any early payment this could be arranged.

In certain instances the salary scales are calculated on an hourly basis which is then changed over to a fixed hour's contract on monthly basis in project basis jobs; there is an uncertainty as regards the continuation of the same pay scale which can also vary from project to project.

When the salary scales of virtual and non virtual employees of the same capacity are compared, in virtual employment, there is no proven practice for overtime work. It is seen that the majority of the respondents are not engaged in any overtime. Therefore only a few virtual employees are drawing overtime, but it is not on a regular basis or schedule and they can work overtime on request when they are unable to meet deadlines. Further, they do not get to earn more for the sake of working more because of the tax component which taxes higher earners more. The majority of the respondents are subject to deduction of salary by their employer who has to attend to various other payments of taxes and rates. When considering the above salary deductions from virtual employees, deductions such as government taxes, medical insurance, EPF and ETF, leave deduction and CSR donations account for a certain number of deductions. However, some of the virtual employees we talked to seem to be satisfied with what they are getting, as one worker said, *“As a virtual employee work for a Sri Lankan company I get the same salary that a non- virtual worker in the same position get in my office. But I save money and time by not travelling to my office every day”* (Employee work for Sri Lankan company). Another also said, *“Pay is on monthly basis. I know my monthly salary is higher than the salaries paid to local employees. They deposit money in my RFC bank account.”* (Employee work for UK Company).

Superannuation benefits

There are three types of superannuation benefits/employee welfare in the country, as the Employees Provident Fund (EPF – formed under The Employees Provident Fund Act No. 15 of 1958), Employees Trust Fund (ETF – established under The Employees Trust Fund Act No. 46 of 1980) and Gratuity (established under the Payment of Gratuity Act No. 12 of 1983) were set up mainly to protect employees who had worked many years and had nothing to sustain them in their old age or if the worker had to pre-maturely retire due to sickness or some other reason.

EPF is the first piece of welfare legislation set up to benefit the workers in the country (de Silva, 1978, p7). According to the provisions of the EPF Act, regardless of the nature of employment of the employee or the number of employees, the employer has to contribute 12% of the employee’s salary and the employee has to contribute 8% of his salary to the EPF. Those who fail to comply are to be punished in a Court of law (Section 36 of the Act). EPF benefits are mainly paid to members/employees when they reach the retirement age (50 years for female employees and 55 years for male employees). In addition there are other special instances that the employee can claim EPF before they retire.

The main objective of the ETF Act is to provide non-contributory benefits to employees on retirement or at the time of cessation of employment. Under ETF the employer has to contribute 3% of the monthly total earnings of the employee. The ETF Board has also introduced a range of non contributory insurance and benefit schemes for employees such as medical insurance, life insurance, and permanent disability benefits.

The Payment of Gratuity Act came into being primarily to recognize the employee's long and dedicated record of service. According to the Act, in order to be eligible for this payment one has to be a permanent employee and should have worked for more than five years continuously with an unblemished service record in an establishment which has 15 workers or more. Employees are eligible to receive half of the monthly salary for each year of service.

It was interesting to note that the majority of the respondents stated that they do not receive these benefits. While some of the employees working for local employers did receive these benefits, employees under foreign employers did not receive the benefits at all. As one respondent stated:

“We are not eligible to receive social benefits according to the laws of my employer’s country as they live outside our country and I do not get such benefits in accordance with the laws of Sri Lanka as the Company does not exist within Sri Lanka”

However, two respondents who are virtual employees in Canada and United Kingdom informed that since they are not eligible to receive EPF, ETF and Gratuity according to the laws in Sri Lanka, they were paid higher salaries from their employers in lieu of such benefits.

The fact that the virtual employees believe that they are not eligible for these benefits because they are virtual employees needs highlighting as according to the particular Acts, such exclusion is not mentioned. As stated earlier, if these employees failed action in the local courts against their employers located overseas and obtained judgments against them, if a reciprocal agreement exist between Sri Lanka and the country where the company is located, it is possible to execute judgments given by Sri Lankan courts to be executed there.

Maternity Leave

The Maternity Benefits Ordinance No 32 of 1939 and the Shop and Office Employees' Act No 12 of 1978 deal with maternity benefits of the employees in Sri Lanka. Accordingly among other benefits, the female employees at child birth are entitled to maternity leave of 84 working days. As discussed before, none of these Acts are applicable for virtual employees working for companies outside Sri Lanka and those who are working for Companies in Sri Lanka have to abide by the provisions of the Shop and Office Employees' Act.

At the interviews conducted in this regard almost all females working for Companies in Sri Lanka informed that they are eligible to receive maternity leave according to the provisions of the Shop and Office Act. However those women employees working for companies outside Sri Lanka were of the view that their employers do not allow them to obtain leave as they have to attend to day today office work on line.

At discussions held with legal experts, the majority of them were of the view that even though these Acts are not applicable to the virtual employees in foreign countries, since they are operating from home they need not have maternity leave as such as they can look after the child when ever they have to. A field expert at labor ministry said, "*However it can be counter argued that the whole purpose of granting maternity leave is not only to breast feed but to relax mentally as well and with office work this purpose will be lost*".

Trade Union Practices in Virtual Employment

The Trade Unions Ordinance, No. 14 of 1935 came into force primarily in order to establish register and control Trade Unions in the country. Trade Unions are usually set up by employees in a particular field to protect their rights. The above Ordinance was amended 4 times and it identifies a Trade Union as an association or combinations of workman or employers whether temporary or permanent employers, between workman and workman, between employers and between employers and employees setting up of restrictive conditions with regard to the conduct of Trade or business representation of either workman or employers in trade disputes, promotion or organization or financing of strikes, lockouts in any trade or industry and making provisions of payments to members during such strike or lockout. Thus the above Ordinance enshrines the fundamental rights such as freedom of association and of joining Trade Unions as contained in the Constitution.

Under this Ordinance, self-employed persons and unpaid employers and employees cannot form a Trade Union. However, members of the Judicial Service, Armed Forces, Police Force, Prison Staff and the Agricultural corps cannot form a Trade Union. Both private and public sector employees can form Trade Unions, while private sector employees can have a political fund and also can federate without restrictions while the Government Sector Trade Unions cannot do this. Trade Unions are granted immunity in civil actions and in tort (delict) as regards acts done in furtherance of Trade Union matters. Unions can be sued or sued in their own name. However, it must be pointed out that Trade Unions cannot be involved in any criminal, illegal or unlawful matter. As can be seen from the above, joining a Trade Union is a right available to all Sri Lankans. In many instances the act of joining such a body gives one additional strength, security and bargaining power.

The knowledge that one is not alone and that there is someone out there to give assistance when needed is guaranteed to give one much self-confidence and assurance in doing ones job. However this right is given only to those virtual employees whose employer is located here, it does not apply to overseas employers. However, even those employees who are legally allowed to form or join a Trade Union apparently have not done so. This is probably due to the fact that they do not work in an office with other employees has a great deal to do with it. As they work alone, they are unaware of other employees and this alone prevents them from getting together and forming or joining a Trade Union. In this instance, the very nature of their work has deprived them of such rights as the above.

As regards overseas employers, it is evident that they are not bound by the laws of Sri Lanka and as such they need not recognize a Trade Union, in the unlikely event such an entity is formed by their employees. As regards such employees, the same argument as regard the issue of non-formation of a Trade Union applies equally well here as in the preceding paragraph. This is a disadvantage to them as they cannot have one voice when there are disputes. This is a common issue to virtual employees as Stone (2006), state "There are, however, practical difficulties in organizing home workers because they are dispersed and there is no central place to reach them for the purposes of organizing" (Stone, 2006. p. 278).

According to Kellner (2000), virtual employment also has implications with respect to the legal standards applicable when a union seeks to represent a group of workers in the US. Union representation is obtained with reference to an 'appropriate bargaining unit' and to decide this, the National Labor Relations Board (NLRB) in the USA a 'community of interest' test that was developed in the context of an industrialized economy with fixed worksites. Under this test the NLRB considers factors such as common supervision, contact among employees and common work locations. Application of these traditional factors becomes more difficult when dealing with virtual employees who may have little or no physical contact with each other and do not have common work locations.

Therefore, there is no significant tendency to form or become a member of a Trade Union, since most of the virtual employees are working individually. Legal experts are of the view that there should be at least seven employees under an employer to form a Trade Union. There is a question whether there are seven employees in any particular virtual employment. Due to the nature of the job and his isolation an employee would not know how many others are working virtually for his company in Sri Lanka. However if this company is within Sri Lanka, then there is a clear path available because the employer is bound by the Sri Lankan laws. The country lacks large numbers of registered Trade Unions. Apparently they do not even take into their membership employees who are in casual or contract employment in registered companies. Thus, they state that Trade Unions will have nothing to do with this type of employment. As explained further, other than in UAE, all the other countries in which virtual employees are providing their services recognizes trade union activities as a legal right.

Virtual Employee Termination with Immediate Effect

Various laws have been enacted to protect employees from unfair dismissal. Subjected to such restrictions, services of employment could be terminated either on disciplinary grounds or non disciplinary grounds. It was only after various land mark Acts in the field of Labor law such as the Industrial Disputes Act, the Shop and Office Employees Act, the Wages Board Ordinance, the Employment of Women, Young Persons and Children's Act and the Termination of Employment of Workmen Act were enacted that the employee was given sufficient protection against unreasonable and arbitrary termination of his services by his employer (De Silva, 1998).

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, (Section 41 (1) (j)) or because he became entitled to the benefits of any collective agreement, settlement or award by an Industrial Court, Arbitrator or order of a Labor Tribunal (Section 41 (1) (k)).

It is also an offence for an employer to terminate an employee without approval of court in an instance where an industrial dispute has been referred for settlement to an Industrial Court, Arbitrator or Labor Tribunal but before an award or order has been made for any act or omission on the part of the employee (Section 41 (1)).

The Wages Board Ordinance states that it is illegal to terminate the services of an employee due to the fact that such workman becomes a member of a Wages Board, (Section 49) or has given information to any authority with regard to matters under the Ordinance after informing the same to the employer before doing so (Section 57) or has not attended work as he was a member of a Wages Board or is entitled to any benefit under any decision of a Wages Board. Shop and Office Employees Act has stated that any attempt to terminate any employee because he or she has disclosed any information to any authority with regard to matters under the Act or is entitled to any benefit by or under the Act (Section 18) is illegal.

The Shop and Office Employees Act also prohibits the termination of the employment of a female employee because of her pregnancy or confinement or any illness consequent upon her pregnancy or confinement as well as dismissing such female employee during her maternity leave period.

This indicates that at present an employer cannot terminate an employee in any way he wishes and then attempt to justify the said termination on the grounds that the terms and conditions in the contract of employment allowed him to do so. That is, the employer cannot terminate on the grounds denoted in the above Acts. However, if it is on disciplinary grounds, if the employer wants to challenge the purported termination before a Labor Tribunal, it will inquire whether the employer had followed the rules of natural justice namely that one should not be his own judge and that both parties should be given an equal opportunity of being heard. However, it is allowed by law to terminate the services of an apprentice or a probationer with immediate effect.

With regard to the aspect of termination as it affects virtual employees, on perusal of the letters of appointment of those virtual employees working in local companies, it was observed that all letters of appointment were specific on the termination of their services after giving 3 months' salary and the employee had the right to resign from the job after giving one month's prior notice or one month's salary in lieu of prior notice. Usually the contract of employment stipulates a period of notice to be given by both parties. When the employee decides to resign in a manner deviating from the stipulated provisions in the contract, the employer has to request payment in lieu of notice in accordance with the contract.

From the above, it is seen that as far as local virtual employees are concerned, they have all been issued letters of employment and are strictly bound by the rules and regulations of the various Acts described above. In such a situation, it would be very difficult for a virtual employer to escape liability from our local labor laws as his employees are here, along with him and they all come within the purview of these laws. Thus the fact that a company which may be owned by a foreign country but which has established an office and factories here and has employees drawn from the local population on its payroll clearly indicates that it has a permanent presence in our country which brings it within the purview of all the local laws of this country, including our labor laws.

According to the above Acts in instances where the employee has been unreasonably terminated, the Labor Tribunal of Sri Lanka has the power to step outside the purview of the existing contract of employment and grant relief to the aggrieved employee in the exercise of its just and equitable jurisdiction. With the rise of Trade Unions and the passing of the Trade Unions Act, the employees' position was strengthened and any collective agreement to which the employee became a party automatically became implied terms in any contract of employment entered into by him with his employer.

If the employer too is located within Sri Lanka then the Tribunal will have jurisdiction over him and summons will be issued in the same manner as in any other case and the employer will have to appear once he has received summons. In this regard if a virtual employee employed to Sri Lankan employer wishes to obtain redress from his employer for unreasonable termination through the Labor Tribunal then he has to first file a case there. This part is similar to the procedure adopted by an employee in an ordinary non virtual employment situation. If it is on disciplinary grounds, if the employer wants to challenge the purported termination before a Labor Tribunal, the tribunal will inquire whether the employer had followed the rules of natural justice namely that one should not be his own judge and that both parties should be given an equal opportunity of being heard. However it is allowed by law to terminate the services of an apprentice or a probationer with immediate effect. If the termination is on non-disciplinary reasons (i.e. retrenchments, lay-offs and closures of businesses the employers have to adhere to the provisions in the Termination of Employment of Workman's (Special Provisions) Act). Accordingly any termination made deviating from the Act will become invalid compelling the employer to reinstate the employees. Compared with formal employment, considering the risk of getting terminated under virtual employment a situation of mutual trust must be established to make fair negotiation between employee and employer.

However it is observed that the majority of the virtual employees are those who work for companies outside Sri Lanka and their employers are not bound by law to follow legislation enacted in Sri Lanka and therefore such employees have no legal protection as compared to those employees who are working for companies within Sri Lanka. The Tribunal has no jurisdiction over the foreign employer and even if the summons is sent to the employer overseas, he is not legally bound to come to Sri Lanka for the case. This practical issue exists for not only this tribunal but for all courts here as they have no jurisdiction overseas. Therefore, at the present moment unless there is an international treaty or a reciprocal agreement in force where a foreign judgment could be enforced in another jurisdiction, filing an action against a virtual employer located overseas is practically an exercise in futility and of no purpose whatsoever. However, if there is a reciprocal agreement in force between Sri Lanka and the country where the company is located, then judgments obtained have could be enforced in that country.

However, companies which do not have a presence here and over which the courts have no jurisdiction do not adhere to the local labor laws and as a result if there is any problem it is extremely difficult to file action to obtain relief in a foreign court which has no jurisdiction here unless there is, as stated earlier a reciprocal agreement in force between the countries in question.

Conclusions and Recommendations

Virtual employment is the future of employment. However, without adequate laws in place, both the employer and employee can have a volatile and unpredictable relationship. The analysis of the 8 labor legislations revealed that while Sri Lanka is a country with a comprehensive and complex system of labor laws where the employees' interest is deemed to be of paramount importance, there are no specific laws enacted to deal with the rights and responsibilities of virtual employees. This situation is mainly due to the fact that our labor laws are archaic and old fashioned and still cater to the traditional concept of the employer employee relationship where the employee physically works in an office under the eye of his employer.

Therefore it is clear that our labor laws do not have the necessary provisions to deal with the rights of virtual employees and as a result have to undergo major changes in the future to order to address such issues. In view of the above, it appears that the virtual employer deals from a position of strength as compared to his traditional non virtual counterpart. The above 8 Acts do not have any provisions specifically introduced to cater to the requirements of virtual employees. Therefore, there are endless possibilities for exploitation. Thus, the virtual employees' rights must be protected and obligations ensured through the introduction of legislation specifically created for this purpose.

An important issue that needs to be considered here is that as many virtual employees especially those whose employer was overseas did not have any rights to any terminal benefits such as EPF, ETF, gratuity, insurance, pension and other similar benefits, they had nothing to fall back on as a financial safety net once they retired or became too old or unable to work. Thus, if they had failed or were unable to save anything from their income, they became destitute and would be reduced to desperate circumstances in order to survive. This would create an unfortunate socio economic problem for society and the state to resolve, both of which appear to be vastly ill equipped to do so.

As regards the payment of taxes, it was discovered that only a handful of virtual employees paid income tax to the state, the others, by their very nature of employment, avoiding the payment of same. This is something which needs to be looked into, mainly as the employees themselves draw higher salaries as compared to their office bound counterparts and evade taxes, while their office going colleagues, though drawing a lower income, pay their taxes. This, ultimately results in a loss of income to the State which may impact the economy in a negative manner.

As regards the type of such employees, it was found that the virtual employees interviewed, hailed from two groups .In the first one both the employer and the employee were living in the same country, namely Sri Lanka, with the virtual employee differing from his traditional office bound counterpart by the fact that he operated from home. It was found that where any labor issue arose, such an employee had the freedom of taking his employer to court the same as any traditional employee. In this regard, it was observed that such an employee was in a similar position to his office bound counterpart as his employer was also located here and by this very fact came within the purview of our laws.

The problem arose where the employer lived abroad, while his employee was here and they communicated virtually. In such a situation the lack of development of our labor laws became obvious where the employee sued his overseas employer here in Sri Lanka and the court issues a judgement against him. Such a judgement is of little practical value as it cannot be enforced by our courts overseas, as it does not have any jurisdiction in a foreign land.

It could be seen that this situation immediately placed such a virtual employee at a distinct disadvantage as compared to another virtual employee whose employer was located in Sri Lanka. This is because the employee whose employer was located here came within the jurisdiction of our courts while the other employee, by the very fact that his employer was overseas, was denied the right to same.

A comparative analysis of the labor laws pertaining to this issue of jurisdiction was carried out which revealed that in certain western countries such as the USA, the UK, and certain Commonwealth countries the concept of reciprocal jurisdiction applies.

This concept applies where a virtual employee sues his employer who is living in another country, for redress in his local court, then if there is a labor treaty or reciprocal agreement in force between the countries, the judgement could be enforced by the court in the employers country against him and the required relief could be made available to the aggrieved employee. The author came across a small but significant number of foreign case law in this regard. However Sri Lankan cases where judgments were enforced overseas through reciprocal jurisdiction were not found due to the reason that our law had not reached, the level of development of its western counterparts in this sphere of the law.

In view of the above prevailing situation, the following recommendations are made. It is seen that the 8 labor legislations in question do not sufficiently grant rights to virtual employees as they came into being many years ago when there was only traditional employment methods in existence and as such these legislations fall short of granting adequate rights duties and obligations to these employees.

It was observed that many virtual employees were unaware of their rights and responsibilities to a certain degree as regards their employment while others appeared to be indifferent to this issue, their main concern being the fact that they were making much more money than their office bound counterparts. This seemed too many to be sufficient compensation for the fact that the protection of the law would be denied to them in instances where labor issues had arisen between them. This had led certain employers to exploit their virtual employees.

In the circumstances, in order to offer a viable solution, it is recommended that steps should be taken to fully educate these virtual employees on their legal rights and duties in this field through the holding of seminars, conferences, workshops and discussions with the labor department as well as legal experts and academics with these employees. The employers should also be included in the above activity in order to offer a more acceptable solution to this problem. In this regard apart from educating the employees and their employers, it is recommended that awareness programs should be initiated among lawyers, the labor department, judges, academics specializing in labor law as well as members of the legislature as some of these categories are not sufficiently aware that there is such a segment of the labor population operating in this area of the law.

Apart from the above, as a fundamental step in the right direction it is recommended that we take steps to bring our old fashioned and inadequate labor laws up to date in the interests of justice so that it will adequately grant the necessary protection and guidance as well as relief to this increasing segment of the workforce.

It is also recommended that the State hold meaningful discussions with other States having this issue of the rights and duties of virtual employees, as well as with the ILO for the purpose of entering into Treaties and Agreements pertaining to the issue of reciprocal jurisdiction as regards the enforcing of court judgements overseas. It could be said that it is this issue of reciprocal jurisdiction that will be crucial for the continued betterment of these employees' rights in the long run.

While these are the recommendations made, it could be said finally that if they are taken note of and successfully implemented, then many of the problems and issues raised above, could be satisfactorily resolved so that the rights and duties of these virtual employees would be adequately protected in the long run.

References

- Alexander, G. (1999). Is telecommuting right for you? *Black Enterprise*, 29 (11), 61 -62.
- Amerasinghe, F. G. (2013). *Employee relations in Sri Lanka* (2nd ed.). Rajagiriya, Sri Lanka: Employers Federation of Ceylon.
- Amerasinghe, E. F. G., & International Labor Organization. (2009). *The current status and evolution of industrial relations in Sri Lanka*.
- Amerasinghe, E. F. G. (2011). *Employee relations in Sri Lanka*. Colombo: Cornucopia Grossenbacher, K
- "Managing the risks of telecommuting get it in writing" Law Journal Newsletters employment law Strategist 2008 ed Inc, <https://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-/working-from-home-blogs/archive/2012/09/25/legal-issues-for-employers.aspx#sthash.2aXx1r1z.dpuf>
- Auerbach, C. F., & Silverstein, L. B. (2003). *Qualitative Data*. New York, New York University Press.
- De Silva, S. R. (2004). *The transformation of Labour Law and Relations*, Stamford Lake 2004 HW Cave & Co p 40.
- Employers Federation of Ceylon. (2000). *Employment in terms of the Shop and Office Employees' Act* (Vol. 17). Rajagiriya, Sri Lanka: Employers Federation of Ceylon.
- Helle, M. (2006). New forms of work in Labour law. In E. J. Andriessen, & M. Vartianinen, *Mobile virtual work: A new paradigm* (pp. 71-93). Berlin Heidelberg: Springer.
- Kellner, R. (2000), Telecommuting - being virtually there, retrieved from <http://www.gfrlaw.com/pubs/GordonPubDetail.aspx?xpST=PubDetail&pub=489>
- Maher, A. (2014). Leading remote and virtual teams: A real challenge for leaders and entrepreneurs" retrieving from toc.proceedings.com/21558webtoc.pdf
- MaLennan, K. J. (2007). *The virtual world of work: How to gain competitive advantage through the virtual workplace*. Charlotte, NC: IAP. 2007: 13
- Milligan, T. E. (2009). Virtual performance: employment issues in the electronic age. *The Colorado Lawyer*, 38 (2), 29-35.
- Patton, M. Q. (2002). Two decades of developments in qualitative inquiry: A personal experiential perspective, *Qualitative Social Work*, 1(3), 261-283.
- Rubin, A., & Babbie, E. (2008). *Research methods for social work* (6th Ed.). Belmont, CA: Thomson Brooks/Cole.
- Stone, K. V. (2006). Legal protection for atypical employees: employment law for workers without workplaces and employees without employers. *Berkeley Journal of Employment and Labor Law*, 27 (2), 251-286.
- Suriyarachchi M, (2008) Index to Labour Laws of Sri Lanka, Department of Labour Sri Lanka p.3
- The Carson Cumberbatch & Co. Ltd. vs Nandasena (1974) 77 NLR p 73
- The Trade Unions Ordinance 14 of 1935;
- The Wages Boards Ordinance 27 of 1941;
- The Industrial Disputes Act 43 of 1950;
- The Shops & Office Employees Act 19 of 1954;
- The Employment of Women Young Persons & Children's Act 47 of 1956;
- The Employees Trust Fund Act No 46 of 1980
- The Employees Provident Fund Act No. 15 of 1958
- The Payment of Gratuity Act 12 of 1983
- Wiesenfeld, B. M., Raghuram, S., & Garud, R. (2001). Organizational identification among virtual workers: the role of need for affiliation and perceived work-based social support. *Journal of Management*, 27, 213-229.