The National Labour court

Labour Appeal No. 15868-04-18; 12372-04-18
Labour Appeal No. 7338-10-17; 34665-10-17
April 07, 2021

The Appellant in 15868-04-18	Gabriel Kotta
The Respondent in 12372-04-18	
	-
The Appellant in 12372-04-18	The Ra'anana Municipality
The Respondent in 15868-04-18	
Filing a Position	Department of Salary and Employment Agreements
The Appellant in 7338-10-17	Dan Rabin
	-
The Respondent in 7338-10-17	The State of Israel - Ministry of Justice
Filing a Position	Department of Salary and Employment Agreements
The Appellant in 34665-10-17	Ze'ev Levy
	-
The Respondent in 34665-10-17	Zeraim Gedera Ltd.

In front of: President Varda Wirth Livne, Deputy President Ilan Itah, Justice Leah Glicksman, Justice Sigal Davidov Motola, Justice Roy Poliak, Justice Hani Ofek Ghendler, Justice Ilan Soffer,

Public Representative (Employees) Ms. Yael Ron, Public Representative (Employers) Mr. Atzmon Lifshitz

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On behalf of the Ra'anana Municipality	Betty Amir, attorney at law Assaf Berenson, attorney at law
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On behalf of Ze'ev Levy	Zvi Helfgott, attorney at law Shay Edri, attorney at law Shani Koplowitz, attorney at law
On behalf of Zeraim Gedera	Oded Steiff, attorney at law Paz Lev-Ran, attorney at law
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Judgment

President Varda Wirth Livne

Introduction

1. Before us we have **four appeals** (LabA 15868-04-18, LabA 12372-04-18, LabA 34665-10-17, LabA 7338-10-17) which are **three cases** (Gabriel Kotta - the Ra'anana Municipality, Dan Rabin - the State of Israel, Ze'ev Levy - Zeraim Gedera Ltd.), discussing **two sectors** (public and private), which raise **one joint legal question**, it being acknowledgment of employer-employee relations in retrospect and the result of such an acknowledgment.
2. In light of the importance of the issue, as well as due to its being a most principled issue in the field of labor law, this Court is required to discuss the question by an expanded panel of seven justices and two public representatives pursuant to section 20(a) of the Labor Court Law, 5729 - 1969. This requirement is due to conflicting case law rulings regarding the manner of offsetting the rights of a self-hired worker acknowledged in retrospect as an employee. This question, which requires a ruling that would outline a uniform manner, is associated also with the question frequently raised in Labor Courts, it being whether the examinations for determining employer-employee relations including their broad implications, should be changed. For this reason, we decided to discuss these questions in an expanded panel. I should first state that my opinion is that the key change required in the proceedings before us concerning determination of employer-employee relations in retrospect is that in the appropriate cases, which I shall discuss in depth below, it should be ruled that there are no employer-employee relations already at "the first stage." **My opinion in this regard is that the question of the worker's good faith may be examined already at the first stage**

of employer-employee relations, and it is certainly possible that there would be cases, which as a result of this, would not be acknowledged as employer-employee relations. This is of course without compromising the possibility, that under certain circumstances where it would be ruled that there are employer-employee relations, the question of the employee's good faith would be taken into account as part of the "second stage" - ruling on the financial rights.

3. Although in each of the proceedings cited above there are additional questions that arise, we decided to hand down a unified ruling in all cases, in view of the broad normative basis they share concerning the main issue - acknowledgment of employer-employee relations in retrospect.

   We should further note that as part of the discussion on acknowledgment of employer-employee relations in retrospect, the use of the term "employee" shall be made yet prior to ruling on his legal status as being such, in light of the use of this term over the years in case law, however our statements do not necessarily mean determination of the status of a John Doe as a legal employee but rather a person employed in the workplace.

4. Our path shall be as follows: First we shall comprehensively review the legal issue of acknowledgment of employer-employee relations in retrospect, and the questions arising in this regard. At the second stage we shall turn to a principled ruling on these questions. Afterwards, we shall discuss each of the cases before us in separate - in each case we shall specify the factual background, the judgments at the Regional Courts and the parties' arguments, and finally we shall implement the principled rulings in each and every case.

5. We shall thus turn to examining the issues in order, in a detailed, clear and relevant manner.

The Legal Discussion

6. Prior to reviewing the substance of the matter, and due to the importance of the issue we are required to rule on, we shall briefly review the normative background of the question of "acknowledgment of employer-employee relations in retrospect" as reflected in case law rulings in the past and present. Then we shall turn over to examine whether the existing situation is the desirable situation, and whether there is place, at this time, to set out other or additional guiding rules and principles than those currently existing.

Acknowledgment of Employer-Employee Relations in Retrospect - Past, Present, Future

Employer-Employee Relations - "Where Were We"?

7. The question of whether or not a person is an employee is a fundamental question of crucial importance in labor law, since most of the protective labor laws and most of the social rights granted by virtue of labor legislation and by virtue of collective labor agreements, apply only to "employees". (For example the Annual Vacation Law, 5711-1951; the Severance Pay Law, 5723-1963; the Hours of Work and Rest Law, 5711-1951 and the Collective Agreements Law, 5717 -1957). (For further details see: Y. Zamir, **Labor Law - Sources, Comments, Problems**, Part I, Academon Publishing 5734 (hereinafter - **Zamir**), pp. 16-17; Lilach Lurie, **Employment and Social Security Laws in the Twenty First Century**, published by the Hebrew University and Nevo (2013) (hereinafter - **Lilach Lurie**), pp. 245-253).

And so states President (ret.) Adler in the introduction to his essay "The Scope of Applicability of Labor Law - From Subordination to Purpose" **Menachem Goldberg Book**, Sadan Publishing of an anvil, 5762 (hereinafter - **Adler from Subordination to Purpose**), p. 19:

> **"The importance of debating on the issue - "who is an employee" - stems from, *inter alia,* the great meaning of classification of the one performing the work as an "employee", particularly regarding coverage of the protection net by virtue of labor law. And how so? Determination that the one performing the work is an "employee" means in practice that this "employee would gain all rights and protections granted by virtue of labor law. On the other hand, non-acknowledgment of the one performing the work as an "employee" would deny that person of these rights and protections. Additionally, the rule is that the protections granted by virtue of labor law - such as protective labor laws, collective agreements, expansion orders, and legislation and case law ensuring equality at the workplace - are granted to those performing work who belong to the traditional category of an "employee" only. As part of labor law, only persons defined as "employees" may hold litigations at the Labor Courts."**

Although in labor law there is no clear reference to the requirement of employer-employee relations, it is assumed that this requirement is a necessary condition for applicability thereof, in light of the terms "employee" and "employer" stated there.

(For further details see: Z. Berenson, **Labor and Social Security Laws**, Mifal Hashichpul Shel Histadrut Hastudentim Publishing, 5718-1958,

pp. 70-81; Yisrael Gil'adi, **Labor law in Israel**, Tarbut Vehinuch Publishing 5723, pp. 20-25; Zamir, pp.17-19; Menachem Goldberg, "On the Essence of the Term Employee", **Hapraklit** 26 (5730), 389; Menachem Goldberg "The Essence of Employer-Employee Relations" **Hapraklit** 32 (5738-39), 81; Shlomit Yanisky-Ravid, "A New Look at Employer-Employee Relationships through the Lens of the Patents and Creations 'of' Employees," **Labor, Society and Law 12**, 381 (hereinafter - **Yanisky-Ravid**), pp. 392-393; for the definition of an "employee" in Hebrew law see: Chaim Yoel Bloch, Daniel Katz, Ido Rechnitz **Mishpetei Erets Responsa**, 5771 (hereinafter - **Mishpetei Erets**), pp. 29-31).

Over the years the Labor Courts were required to provide tools for answering the question "who is an "employee" and who is an "employer"?

In this regard it was noted, inter alia, that a person's being an employee is very near a status, and this status is not decided by the parties or any of them, but rather according to the circumstances of the matter in practice (CA 426/63 **The National Insurance Institute v. Eliezer Zinger**, IsrLC 18(2), 299 (1964); Menachem Goldberg "Employee and Employer - Status Report" Iyunei **Mishpat** 17 (5752) (hereinafter - **Goldberg - Status Report**)). It was further noted that "**the status of a person as an "employee" or as "self-employed" is not determined offhand and one fell swoop"** (LCH (National) 43/3-106 **Yechiel Waltner - Gur Betach Insurance Agency Ltd**., 16(1) 085 (1984)). Additionally, since the protective rights cannot be waived, the determination of the parties or any of them as to the nature of their relations, does not necessarily determine their status. The parties' status is legally determined according to all circumstances, the essence of the parties' relations and the facts of the specific case (LabA 300274/96

Shaul Tzedaka - The State of Israel - Galei Zahal, IsrLC 36 625 (2001); LabA 1076/04 **The State of Israel - Adam Shuv** (11.7.2005); LabA 548/09 **Israel Levy - Elite 93, Garage Services Ltd.** (22.11.09)). In this context the Court noted that: **"It cannot be ignored that a person's being an "employee", regarding the rights and duties law awards and cannot be waived or stipulated upon, is something close to "status", and "status" is not established by an agreement and cannot be revoked by agreement, and in the same manner rights cannot be waived or stipulated upon explicitly, those rights cannot be waived by calling the relations between the two any name that denies one being an "employee" and the other being an "employer". The provisions of the agreement may be considered; however, it is clear that what determines is the overall relationship between the parties.** LCH 31/3-27 **The Municipality of Netanya - David Birger**, 3(1) 177 (1971) (hereinafter - the **Birger Case**)). Although in many cases, the answer to the question of whether or not a person is an employee - is clear and may be easily examined by the essence of the relations that were established between the parties in practice, there are cases where the decision is not simple and as stated by the Supreme Court: **The distinction between an employee and an independent contractor... is not easy."** (CA 95/56 **Lavie Et Ahim Mishtzensky v. The Income Tax Assessor, Gush Dan, Ramat Gan**, IsrSC 11 526 (1956)). For the plaintiffs in these cases, the first stage as part of their claims at the Labor Courts is proving they are employees, entitled to the protective rights granted by virtue of their status as such, and that they are not independent contractors, agents, distributors, trustees, partners or free participants, who as a rule, are not entitled to such. For this purpose, over the year's various tests were set for determining the status of "employee."

8. We should already now note that since the term "employee" appears in various contexts and different laws, it is possible it would be defined differently in each law. For example, one performing work may be considered as a self-employed worker for the purposes of labor law, however protections and rights set out in safety at work laws would apply to him. In the same manner the term "employee" is different in tort law, criminal law and tax law than the term in labor law (see: **Goldberg - Status Report**, pp. 23-24; **Adler From Subordination to Purpose**, p. 31 and the references to the judgments there; **Lilach Lurie**, pp. 251-253; we should parenthetically note, that there is controversy whether it is required to adopt a single definition of the term "employee" in respect of all laws, each sector of labor laws (unlike NII law, tax laws, etc.) and at least in all economy laws (unlike laws of different particular purposes, such as safety at work laws, equal opportunities at work works, etc.) - however we are not required to rule on this now.

The "Tests" for Determining Employer-Employee Relations

9. The test for determining employer-employee relations has developed over the years in a way that enabled more and more discretion in exercise thereof. Not once was it clarified in case law that the test should be dynamic, one that varies depending on the changes in the various employment patterns. In the judgment on the **Birger** case, this Court emphasized this issue, in these words:

> **"It should be immediately noted that the test according to which it would be determined whether John Doe is of the status "employee" or "self-employed," cannot be stable for generations, existing under all circumstances and appropriate for implementation for all purposes."**

Until the establishment of the Labor Courts, when the courts were required to rule on the question of existence of labor relations, they exercised the test of subordination and supervision ("control"). According to this test, an employee is a person who is subordinated to another person and supervised by him, as part of his employment (see: CA 47/48 **Arye Agushevich v. Zvi Putterman**, IsrSC 5 4 (1950) (hereinafter - the **Agushevich** Case) - this judgment discussed the definition of an employee in the context of tort law, regarding the Workers' Compensation Ordinance, 1947, however over the years served as a guiding judgment on the issue of employer-employee relations and the test for determining them; CA 454/71 **Yoshua Valancy v. Pioneer Concrete (Israel) Ltd.,** IsrSC 26(2) 322 (1972); CA 431/72 **"Beit She'an" Cooperative Bakery in Beit Shean v. Hanna and Mordechai Fierstein**, IsrSC 27(2) 066 (1973)).

The origin of the control test is in English law. In lack of a determination in Israeli law, and by virtue of the affinity to the English law, case law adopted the control test and it served as an exclusive test for a long time. (See: R. V. Negus (1873) 42 L.J.M.C. 62.; Yewens V. Noakes (1880) 6 Q.B.D. 530.; M'credy V. D.J. Dunlop & Co. (1900) 2 F. 1027; the **Agoshevich** case).

Upon the establishment of the Labor Courts, and the many different cases that were brought before them, case law was not satisfied with the control test as an exclusive test, and started adopting the "integration" test as a central test which stands on its own (see: HCJ 319/78 **Shemen Industries Ltd. V. The National Labor Court in Jerusalem** 34(2) 75 (1979); HCJ 123/81 **Electra (Israel) Ltd. V. The National Labor Court**, 36(1) 423 (1982); LCH 31/1-4 **Bank Otsar Ha-Hayal - The Beer-Sheva Workers' Council** 2(1) 260 (1971); the **Birger** case; LCH 48/3-137 **Tamar Adar - Melnik Advertising Ltd**., 20(1) 060 (1988);

LCH **Shlomo Nakash - The State of Israel**, 21(1) 180 (1989); LCH 39/3-114 **The Advertisers' Union - Chaya Prost**, 11(1) 144 (1989)).

Over the years, upon the development of the various employment patterns, case law was required to modify the test to a broader and more flexible test, one that adapts itself to the various employment patterns. Case law attempted to develop a test that could provide a more appropriate and accurate legal solution than that provided by the integration test alone, for various cases that arrived at the labor courts. Consequently, case law modified the determining test to the "combined test", which includes at its center the integration test and additional secondary tests (see HCJ 5168/93 **Shmuel Moore v. The National Labor Court,** 50(4) 628 (1996) (hereinafter - **HCJ Moore**)). And so the Court noted in LCH 52/3-254 **Fritz Haim - Mifal HaPais**, 26(1) 372 (11993): **"It is not intended to abandon the customary tests, but rather only change the perspective. In difficult cases the tests set out in case law turn from tests with absolute weight to relative tests, as the answer to the question of existence of employer-employee relations, the Court studies the accumulated weight of all tests."**

<u>The Combined Test, as the Integration Test is at its Center</u>

10. The integration test has two cumulative aspects - the positive aspect and the negative aspect (see: the **Birger** case; LCH 34/0-181 **Muhammad Ali Qawasamah - The National Insurance Institute**, 6(1) 234 (1975); LCH 43/3-82 - **Yitzhak Hershlikovich Et Al - Paz Gaz Marketing Company Ltd**, 17(1) 097 (1985); LCH 33/0-30 **The National Insurance Institute - Katz Bakery Ltd.,** 4(1) 393 (1973); LCH 32/2-12 **The State of Israel - Marjorie Acker**, 4(1) 203 (1973); LCH 32/9-44 **Yosef Karuani - The State of Israel**, 5(1) 011 (1973); LCH 42/3-

123 **Thiya Segal Rachel Gur -** , 14(1) 190 (1983); LCH **Avraham Olu - Hans Heylig**, 8(1) 085 (1976)).

The positive aspect of the integration test examines whether there is a production plant for the provision of services or another manner of performing work it is possible to integrate into, whether the action performed is necessary for the ordinary activities of that plant and whether the one performing thee work constitutes part of the organizational layout of the plant rather than a party outside it.

These questions are examined by case law according to several characteristics, including: The measure of the employer's supervision over work hours, the place of performing such, distribution of the tasks among employees, the composition of the work teams and the hierarchy between the different employees; the centrality and necessity of the activities of the one performing the work for the overall operations of the employer; the processes of engagement with the employee; the continuity of relations between the parties; the employer's power to impose varying tasks on the one performing the work; the employer's control over the manner of performing the work; the subordination of the one performing the work to the employer; the exclusivity of the one performing the work and affinity to the plant; the one performing the operation's assistance by other employees for performing his work; the place of performing the work; the manner of payment; supply of material for performing the work, etc.

On the other hand, the negative aspect examines whether the one performing the work has his own business, or more precisely, whether integration in the said plant was not conducted through his business (LabA 300021/98 **Zeev Trainin Adv. - Michael Harish and the**

Labor Party, IsrLC 37 433(2002); **Adler From Subordination to Purpose**, p. 22).

Additionally, the negative aspect has also been examined by case law according to a number of characteristics including: Bearing risks, benefit from streamlining, ownership of equipment or production tools, bearing expenses, and more.

(For further information on the implementation of the positive and negative aspects of the integration test see: Eyal Zamir "Employee or Contractor," **Mishpatim** 22 (5753-5754 (hereinafter - **Eyal Zamir**); for implementation of the various characteristics see, for example: LCH 52/2-5 **Varda Da'abul et al - the Jerusalem Municipalit**y, 29(1) 481 (1996); **Dr. Shmuel Friedland - Clalit Health Services** (03.08.2006)).

The "secondary tests", which constitute additional indicators that this person is an employee, and giving them weight in cases where the balance does not direct to one direction or another, are: The personal nature of the occupation, subordination, the power to hire and dismiss an employee, the manner of deduction of income tax and payments to the National Insurance Institute and the VAT Authority, and the way the parties consider the relations between them (see **HCJ Moore** mentioned above; LCH 3-43/32**Yigal Halperin vs. the " Hadassah" Medical Organization**, IsrLC 4(1), 281 (1973); LCH 300256/98 **Uri Izaak v. Tahal Israel Water Planning Ltd.** IsrLC 36(2001) 817 (2002) (hereinafter - the **Izaak Case**); discussion of the implications of the name the parties gave in respect of status - see: Ruth Ben Israel, **Labor Law II**, pp. 388-389).

11. We should once again note that at times some tests would indicate data that tip the scale and determine that there were labor relations between the parties, as at the same time, other data referring to that case, could

establish the determination on the engaging parties' being customer and independent contractor. Not once the case would be a "borderline case" in a manner that the scale is balanced. In any event, the Court's ruling whether such are labor relations would be based on the overall circumstances of the case. This Court pointed this out, noting that:

> **"The distinction between an employee and an independent service provider is not always easy and many times a thin line separates the two. Also in the case at hand there are data that could indicate classification of the Appellant as "an employee" and there are data indicating his being an independent "service provider.' In this case and other cases, the overall picture, as indicated by the factual data, would tip the scale and as it is examined by a combined test that includes all the tests: Supervision, integration, personal service, presentation of the issues by the parties themselves, as expressed in the agreements signed between them, how the employee viewed himself, etc.**

(LabA 414/04 Shlomo Ben Haim - Kaduri Urban Development Ltd. (8.1.2007) and see also: LabA 3829/09 The Israel Television News Company Ltd. - Shahar Zarfati (14.2.2016) (hereinafter - the Zarfati Case); LabA 26932-12-14 Cellcom Israel Ltd.- Vacheslav Iliyagoyev (01.05.2018)).

12. It should be noted that pursuant to case law, so long as the during the engagement period the parties acted as if there are no labor relations between them, the burden of proving that labor relations existed between the parties is imposed on the one claiming this is the case (LabA 300064/96 **Pelley Karni - The Israel National Trade Union**, IsrLC 36 241, 245 (2001) (hereinafter - the **Karni Case**).

13. In conclusion of this part, we should note that the tests that have developed over the years for determination of employer-employee relations by various tribunals worldwide, more or less reflect the same indicators (Davidov, Guy 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection', *The University of Toronto Law Journal*, vol.52/no. 4, (2002) pp. 357-418.

As a rule, courts worldwide act in a manner similar to the labor courts in Israel and ask in each case that requires ruling on the existence of labor relations, two main questions: First, to what degree was the worker controlled by the employer or subordinated to him Second, does it concern a worker who is financially independent who runs his own independent business. Meaning, the tests for determining the existence of labor relations are the control and subordination test and the financial dependency test. Over the years, it may be seen that in the Common Law legal systems most attention has been given to the control test, while in the Continental Law legal systems emphasis is placed on the subordination test. In legal terms, in practice, these tests reflect pretty much the same meaning.

The control test, originally addressed direct and systematic control over the worker's actions and the manner of his performance of work. With time, and in light of the many developments in the types of employment, courts worldwide understood that the reality of the new types of employment require expansion of the test, and accordingly, acknowledged as control also cases of indirect control, were satisfied with examining the right to control, and focused on the examination of whether the worker constitutes part of the employer’s ordinary business (for further information on the control test, see: Moran, Jenna Amato

'Independent Contractor or Employee? Misclassification of Workers and its Effect on the State', Buffalo Public Interest Law Journal, vol. 28/ (2009), pp. 105. Stevenson Jordan and Harrison Ltd. v. Macdonald and Evans, [1952] 1 T.L.R. 101 at 111 (C.A).

An additional development in California, USA, is the ABC classification test the court adopted in the Dynamex Operations West. Inc v. Superior Court 4 Cal.5th 903 (2018). which is intended to overcome the legal uncertainty of previous judgments and provide more protection of employees' rights. The test includes three parts:

A. Part I: What is the extent of the employer's control over the worker's work? A. It is required to examine the employer's control over the worker in practice, not by the definitions set by the parties, and this in accordance with the "Borello tests". set in the matter of S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal. 3d 341 (1989).

B. Part II: Is the worker's work an ordinary part of the business's activities? Does the worker perform tasks we would expect to be performed by the employer's employees? Are the worker's activities at the core of the business operations? Did the employer attempt to avoid defining the worker as an employee?

C. Part III: Did the worker integrate into the employer's businesses, or does he manage an independent business outside the customer's business? Did the worker consciously and clearly choose to run an independent business? What is the measure of the worker's investment in establishing the business - did he obtain a license to do so? Did he invest in purchasing supplies and materials? Does he market his business? Did the company force the employee to establish an "independent business"?

After handing down the judgment, the AB5 Law was enacted, which enshrined the ABC test in the law. Enactment of the law added section Cal. Lab. Code § 2750.3(a)(1), according to which the terms of work of a hired employee would be determined based on his classification as an employee rather than an independent contractor, unless the employer proves that the employee should be classified as a contractor pursuant to the ABC test. The law took effect on January 1, 2020. The law is applied broadly and provides protection of employees' rights not only by virtue of the terms of wages that were set in Industrial Wage Commission Orders, but rather also other terms of work that were enshrined in the California Labor Code and Unemployment Insurance Code, concerning work accidents, unemployment pay, insurance and sick pay. The law prescribes certain areas of employment that are not examined according to the ABC tests, but rather according to the prior classification tests, for example areas of employment that are regulated by a license (medicine, psychology, law, commercial fishing, accounting, etc.).

The subordination test also underwent similar development, and most of the courts in Continental Law, over the years, started to examine the subordination test in its broad meaning. Additionally, they developed various indications that assist in examining the existence of control or subordination, including - is the employee able to refuse to perform the work? Is it possible for him to send another person to perform it instead of him and how long did the relations between the parties take place? An answer to this type of questions assists in examining the degree of the worker's being part of the organization (see: Wolfgang Daubler, Working People in Germany, 21 Comp. Lab. L. & Pol'y J. 77 (1999)). Since these tests did not satisfy most of the courts, they developed an additional test, the financial dependency test. The purpose of this test is

examining whether the worker is financially dependent on his employer, including, which party bears the risks of loss and the prospect of financial gain (an example of development of this test Market Investigations Ltd. v. Minister of Social Security, [1969] 2 Q.B. 173 at 184-5 (C.A.). Additionally, see - Ready-Mixed Concrete (South East) Ltd. v. Minister of Pensions, [1968] 2 Q.B. 497 (C.A.).

Most courts worldwide use a combination of these three tests. For example - the financial dependency test used in the United States regarding the Fair Labor Standards Act requires examination of six indications, them being:

1) Is the employer able to control the manner of performing the work?

2) Which party is given the opportunity to gain and lose?

3) Who bears financing of equipment and materials?

4) Does the service provided require special skills?

5) What are the duration and the degree of regularity of the labor relations?

6) To what extent does the provided service constitute part of the employer's organization?

In fact, these indications combine the control and subordination test with the financial dependency test.

Also in Common Law, although the primary focus is on the control test, several indications were developed, which reflect an examination of financial dependency (in this regard, see: Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992)).

In Canada, the most common test combines the examination of three indications:

1) Control.

2) Ownership of materials and tools.

3) Loss risks and profit prospects.

Meaning, this combination too includes the control and subordination test and the financial dependency test. Additionally, Canadian law, Canada Labour code R.S.C., ch. L 2 (1985) acknowledges in addition to the “employee” or “independent contractor” categories, also the categories of “contractor who is not independent”/ “dependent contractor". The main difference between the independent contractor and the dependent contractor is the financial dependency on the employer. The independent contractor has no financial dependency on the employer, while the dependent contractor, is similar in essence to the independent contractor, however is financially dependent on his employer. The meaning of classification as a “dependent contractor” is that unlike an independent contractor, a dependent contractor is entitled to various collective rights. This mid-way category is a practical development that extends granting rights, which according to the classic classification of an “independent contractor” they would not be entitled to. Miriam A. Cherry & Antonio Aloisi, Dependent Contractors in the Gig Economy: A Comparative Approach, 66 Am. U. L. Rev. 635 (2017).

In the Ontario District law, a specific definition of the "dependent contractor” was enshrined in the Ontario Labour Relations Act 1995 c 1, sch. A, s. 1, and it was additionally set that this type of contractor is considered a hired employee for the purpose of work rights he is entitled to receive pursuant to the law. The definition of the dependent contractor is that of a worker who performs work or provides services for a person for a fee or benefit, so that the work terms establish a state of financial dependency. These terms alongside the contractor's commitment to perform the work, make him appear more like a hired employee than an independent contractor. The definition of a contractor

of this type does not depend on the question of whether or not he is engaged as part of an employment contract, nor whether he owns the tools, materials and equipment or does the employer own them.

Also in the UK there are several categories of employee types, as classification in one of the categories entitles to different social rights. The categories acknowledged by the UK courts are:

1) “Employee” - employee.

2) “Worker” - a “mid-way” category of an employee.

3) “Self-employed” - an independent employee.

4) “Director and contractor” - an independent contractor.

The existence of more specific categories enable the courts space of activity, and more accurate adaptation of the social rights to each type of worker. Workers who are not considered classical employees, however still need certain protections, would be able, under UK law, to enjoy certain protections by their classification in the other categories. For example, the “occasional employees” are entitled to basic protective rights (for this matter see - Aslam v. Uber (28.10.2016), 2202550/2015 (London Employment Tribunal)) such as minimum wage, vacation days, break times, prohibition to be employed for over 48 hours in weekly average without the worker's consent and prohibition of discrimination.

Acknowledgment of several categories of workers’ types as is in the UK, adapts itself to the various developments of the types of employment in the modern era, and through it more social rights are applied to the types of employees. However, the test for determining the mere existence of employer-employee relations in the UK, the control test, is a limited test and is also implemented by the courts in a relatively literal manner. Over the years, the courts in the UK were careful to adhere to the wording of the employment contract, although

it was clear that employers could make use of it for avoiding the applicability of the labor laws. In the last decade, the Supreme Court in the UK ruled (Autoclenz Limited v. Belcher, [2011] UKSC 41, par. 35 (UK Supreme Court) that the courts are required to examine the essence of the relations in practice, and in so it reducing the weight that is given to that stated in the employment contract (Guy Davidov "Purposive Interpretation in Labor Laws: Who is an Employee", **Steve Adler Book** (hereinafter - **Davidov Purposive Interpretation**) (2016).

In Israel indeed the various formats of types of employment were not legally acknowledged as such were acknowledged in the UK. However, the "combined test" in Israel is broader, significantly, than the test existing in the UK and even those existing in most countries worldwide, so that it includes many cases in which it is possible to acknowledge employment relation, which may make redundant the need, practically, of formal acknowledgment of the various types of employment.

14. We discussed above that the starting point over the years was that a person's being an "employee" is something close to "status". The practical meaning of this was that in most cases that were brought to be heard by the Labor Courts, for discussing the question of acknowledgment of the existence of employer-employee relations, it was ruled that indeed there are employment relations between the parties, and the discussion mainly engaged with the rights resulting from this.

    Thus, the question of the legitimacy and authenticity of the employment, good faith, agreements between the parties, the desire to be self-employed during the work period - all these were perceived to be considerations that cannot affect the mere status and turned over to examine the "second stage" of the discussion, meaning the rights and

offset calculation, however I believe, and as I stated above, it is required to examine and rule on the implications of this already at the "first stage".

Hence we shall turn to review the current manner of calculating the rights pursuant to case law.

Settling Accounts in Retrospect, offset (and Restitution) - "What Have We Done So Far"?

15. The question of how it is required to calculate the rights of an employed person who was defined retroactively as an "employee" raises several secondary questions integrated with each other to be discussed. The first question is the question regarding the basic wages, which would serve for calculating the social rights of the employed person, as an employee, if this is the consideration he was paid in practice as self-employed, or alternatively wages of a hired employee should it be proven. Should alternative wages be proven, a question arises regarding settling accounts retroactively. Meaning, did the terms for such settling of accounts hold true, and offsetting sums had these been over-paid to the Respondent as self-employed, compared to the wages he would have been paid had he been employed as a hired employee.

16. As of this time, two main approaches arise from the rulings of this Court in recent years as to settling accounts with a worker who was defined as an employee in retrospect. One approach is expressed in the judgment in the **Rofeh** case (LabA 110/10 **Rafi Rofeh - Mirkam Insurance Agency Ltd.** (22.12.11) hereinafter: The **Rofeh** Case) by my colleague Justice Sigal Davidov Motola. The second approach is expressed in the **Anat Amir** judgment (LabA 3575 10-11 **Anat Amir - The Israel Television News Company Ltd.** (21.1.15), hereinafter -

Anat Amir (stated by President (ret.) Yigal Flitman. We shall briefly discuss the main points of the two approaches.

17. In the **Rofeh** case Justice Davidov Motola reviewed the rulings of this Court on the issue over the years, which indicates the main position of the Court those days, as follows:

> **"An employee who was erroneously classified as "self-employed" would be entitled to monetary compensation for the social rights that were denied of him, based on the estimated wages he would have been paid had he been defined as an "employee" to begin with, and without any possibility to offset from it any sum of the rights he would be given for supposedly "over" payment. An exception of with would be allowed in situations of extreme lack of good faith on the part of the worker, as would be learned from the overall circumstances and considering the secondary tests set out in case law, in order to prevent double payment that exploits labor laws, and in any event the worker would not have liability exceeding the sums he was awarded in his claim.**
>
> **The secondary tests, as clarified in the position of President Adler and above, is the existence of a considerable gap - usually 50% or higher - between the consideration as "self-employed" and the alternative wages. Additionally, and in aggregate, factual ruling that choosing the format of "contractor" was that of the worker rather than the employer - whether of his initiation for his own reasons, or after he had been given a real possibility to choose between employment as an "employee" and employment as "self-employed" at higher pay and he chose the latter. As clarified above, these are secondary tests - which are intended to assist in determining the existence of extreme bad faith -**

which cannot jeopardize the Labor Court's discretion to arrive at the conclusion regarding extreme bad faith under other circumstances."

(*Ibid*, para. 68, and see also my colleague Justice Leah Glicksman's opinion in **Anat Amir**).

According to this approach, for proving extreme lack of good faith by the worker, the employer would be required to prove that the "contractual" consideration stood at least at 150% of the alternative wages, however it is possible to deviate from this rate given reasons for this (see LabA 14122-07-10 **The Ramat Gan College - Uri Price** (13.12.2012), hereinafter - the **Uri Price Case**). My colleague Justice Glicksman deliberated upon this extensively in her opinion in **Anat Amir**, stating as follows:

"The percentage gap at the rate of 50% is one of the secondary tests according to which it is required to rule whether it is required to offset part of the contractual consideration from the rights payable to the employee. This rule was set based on the assessment of the value of the customary social rights and a certain addition for occupational and organizational protection. However, as it was ruled in the Rofeh case, this secondary test is not all, and there is a possibility to rule that it is justified to "settle accounts in retrospect" even when the secondary tests are not met, however the overall circumstances justify ruling that the worker was acting in extreme lack of good faith. And indeed, in the Price case, in which this Court guided itself pursuant to the rules that were set in the Rofeh case, it was ruled that although the gap between the sums that were paid to the worker as "self-employed" and the payments he would have been paid as a "hired employee" stood at 39.2% during part of the period, in light of the fact that extreme lack of good faith of

the worker was proven, it is required to order settling accounts in retrospect and offsetting payments he was over paid as "self-employed" relative to his alternative wages. In any event, as clarified above, these are secondary tests - which are intended to assist in determining the existence of extreme bad faith - which cannot jeopardize the Labor Court's discretion to arrive at the conclusion regarding extreme bad faith under other circumstances."

(See the opinion there, para. 41).

To the aforementioned rule should be added the principle as expressed over the years in case law, that even if the exceptional terms for offsetting are met - the worker should not be obligated to return sums exceeding those he was awarded.

18. In **Anat Amir**, President (ret.) Flitman specified his approach, he refers to as the "calculative approach," the main points of which are as follows:

"The right to restitution is established, when settling accounts between the social rights payable to the employee and claimed by him, in light of the applicability of labor law that protects the relations between the parties, should be performed based on reduced monthly wages compared to the sum he was paid at the time the parties believed that there are no employer-employee relations between them. The rate of restitution per the aforementioned should be ruled, not according to the difference between the monthly consideration the employee was paid at the time the parties believed that there were no employer-employee relations between them compared to the monthly wages he would have obtained as an employee, but rather the rate of restitution, in cases where there are data proving

that the worker, the claimant would be paid had he been acknowledged as an employee to begin with, depends on the difference between the reduced wages adding all payable rights compared to the overall payment sum imposed on the employer in practice at the time the parties believed that there are no employer-employee relations between them. Should there be a gap in costs in favor of the employee - he would be entitled to the difference up to the sum of his eligibility in his claim based on its grounds"

(*ibid*, para. 24).

President Flitman emphasizes in the judgment **"that never would an employer in a restitution claim be allowed to obtain payment from the employee of any sum from the full consideration he paid him. Hence, a restitution claim by the employer against the employee is necessarily reduced to the sums from the full consideration he paid, which may be attributed to covering protective labor law rights, in light of changing the relations among the parties to employer-employee relations"**

(*ibid*, para. 25).

19. Thus these are the two main approaches expressed in the rulings of this Court in recent years - the "deterrent approach" and the "calculative approach."

At the same time, we should note that over the years other approaches were also expressed in case law: In this manner, Justice (ret.) Amiram Rabinovich expressed a position according to which, in cases where it is clear that the worker is an "employee" and the worker was not given the right to choose between being employed as an "employee" and his being employed as "self-employed" it is required to pay the social rights

based on the higher contractual consideration (LabA 133/99 **Margia Elias Rafik - Sedom Metal Industries (1989) Ltd.**, IsrLC 38 223 (2003)). He repeated this position also in LabA **Globus Group Ltd. - Yoel Malka** (7.3.2010) (hereinafter - the **Globus Group Case**)). On the other hand, according to Justice (ret.) Rabinovich's approach, had the worker been given, even only in retrospect, the right to choose between employment as a "hired employee" and employment as "self-employed", and the contractual consideration he was paid was significantly higher than his wages as an "employee", it is possible to offset the excessive consideration he was paid from the cogent rights payable to him as an employee (LabA 31997-09-10 **Amnon Rabezin - Bank Leumi Le'Israel Ltd.** (29.3.2012) (hereinafter - the **Rabezin Case**)).

Another approach is expressed primarily in the rulings of Justice (ret.) Shmuel Tzur, according to which a worker who was retroactively acknowledged as an employee is required to return the "excessive" payments he obtained as "self-employed" (LabA 99/6 **Golan Regional Council - Hannah Yifhar** (24.6.2007) (hereinafter - the **Yifhar Case**); LabA 231/05 **Haim Keren - Hadasim Agricultural Development Co. Ltd.** (26.12.2006); as well as Justice Tzur's dissenting opinion in the **Rofeh** case; on analysis of the approaches regarding restitution see Mordehai (Motti) Mironi, "Developments and Trends in Collective and individual labor law 2010-2011" **Din VeDevarim** 8 (5774) (hereinafter - **Mironi**), pp. 169 onwards; as to the reasons underlying the approach that in essence denies the principle of restitution, see, for example: Yuval Procaccia, "On Erroneous Employment Classifications, Efficient Deterrence and the Cogent Status of Labor Law", **Iyunei Mishpat** 43 (5779) (hereinafter - **Procaccia**), pp. 15-16; David Lupo and Moran Savorai, "Is it Really the Duty of Restitution? On the Appropriate Law

When Acknowledging Employee - Employer Relations in Retrospect," **The Steve Adler Book**, 543 (hereinafter - **Lupo and Savorai**)).

(For a comprehensive review of the various approaches see also: LabA 3859-10-15 Yosef **Ilan - The Israel Local Authorities Data Processing Center Ltd.** (24.9.19) and the references there; **Procaccia**, pp. 6-11).

20. **<u>In Conclusion of this Part:</u> We opened with the importance and legitimacy acknowledgment of employer-employee relations has. We went on and specified the various tests that were developed in case law for determining employer-employee relations, including a brief review of the tests that are customary in additional countries. We concluded with presenting the main approaches currently in case law as to the manner the rights of one who was acknowledged in retrospect as an employee should be calculated when settling accounts retroactively. Now we shall turn to discussing the question of whether that which currently exists is also the desirable one.**

<u>"Where are We Headed?"</u>

"The need for reexamination of these traditional judiciary tests in order to adapt them to reality should not be ignored. Changes in legislation and case law rulings are an integral part of our legal system. The responsibility for adapting law to the social reality is imposed both on the legislator as well as the Courts. A stagnate law detaches itself from reality and no more constitutes a tool for serving society, the State and in the life of commerce.

(**Adler from Subordination to Purpose**, p. 39)

"The Labor Courts' trend was and still is to ensure that definition of the boundaries of an employee would integrate into the changes that took place in the labor market and encourage social justice."

(**Adler from Subordination to Purpose**, p. 20)

Justifications of Labor Laws

21. In order to examine what is the desired trend at this time, it is first required to discuss the guiding principles and justifications under labor laws, based on which it will be possible to track the interpretation that should be given to the issue we are required to rule on (regarding the issue that interpretation of legislation should be purposive interpretation, see: **Davidov Purposive Interpretation**, p. 263).

22. In general, it is possible to outline two principled concepts acceptable in respect of the purpose of labor law: One, is that labor laws are intended to prevent exploitation of the employee by the employer, who at times has advantages over the employee, such as: Power, information and control. Additionally, the laws are intended to protect the well-being of the employee and ensure it would not be less than a minimal sum. (**Procaccia**, p. 4). The other view is that the purpose of labor law is to prevent negotiations on the employee's basic rights, as commercialization of these rights impairs the status of the employee and his dignity. (**Procaccia**, p. 25 and the references there; and also see: Hanna Ghendker-Ofek, "Basic Rights, Protective Legislation and Good Faith - Constitutional Reflections on Labor Law", **Mishpatim 37** (2007) (hereinafter - **Ghendker-Ofek**), pp. 72-78)).

23. As aforementioned, in tracking the main purposes underlying labor laws, the traditional approach is that labor laws are intended to cope with the inequality in the bargaining power between the parties. For example, in the Amit case (LCH (National) 55/4-30 **"Amit" - Maccabi Employees Union - Ha'histadrut- General Organization of Workers**, 29(1) 61, 98 (1995) it was stated that: **"Labor law is the area of law relating to the rights that vest power in the employers and employees, and determines vested rights according to which**

the State would enact its laws, while making appropriate balance between the individual employee's weak power and the employer's strong power (and see also **HCJ Moore** cited above, and in Dr. Tal Golan's research works it is stated that: **"... The main objective of labor law - to serve as a balancing and corrective power vis-à-vis the gaps at the base of labor relations"** (Tal Golan, "Weak Employees Strong Employees - Dimensions of Power in the Rulings of the Labor Courts in Israel" Research **Work towards a PhD in Law Degree**, Tel Aviv University (2010) (hereinafter - **Tal Golan**), p.13).

24. Literature further discusses this issue (see: **Davidov Purposive Interpretation**, p. 267 and the references there) that the purpose of labor law is to bring about redistribution - of resources, power and risks to achieve distributive justice.

(For further discussion on the characterization of labor relations as such that include subordination and dependency on the employer, see **Davidov Purposive Interpretation**, p. 268; and the statements of President (ret.) Flitman in the judgment in the **Karni** case, p. 249).

25. The aforementioned purpose so far refers to labor law as a solution for the issue that the relations between employee and employer are characterized by structured power in bargaining power as well as subordination and dependency relations. The objective of labor law is thus coping with the inequality in power, to cope with the market failures as well as with the subordination and dependency relations in the labor market, and as Justice Tsevi E. Tal's statements in **HCJ Moore** (p. 637):

"Discussing employer-employee relations is a discussion on a legal category, which society imposes on a factual system to achieve its goals. Usually, the power relations between employees and

employers are not balanced, and social justice requires intervention to protect the employee. Thus, labor laws are intended to prevent exploitation of employees and protect their status, since if this is left to the "market forces" and contract laws, the employees' status could be impaired. The tests that are intended to define an employee should attempt to reach and grasp those types of "employees" who, due to their dependence on the employer, society seeks to deploy labor law protection over them, rather than grasp types of workers who per social perception do not need this type of protection, which constitutes a burden on the public"

(see E. Zamir "Employee or Contractor" Mishpatim 22 (5753-5754) 113)".

And these are Justice E. Goldberg's statements in **HCJ Moore** (p. 648):

"The changes in time require adaptation of the legal systems in general, and labor laws in particular, to the changing reality. The degree of expansion of the definition "employee" is the result of the social objective of protecting one who due to his relative inferiority and his dependence on the employer requires protection (as my colleague, Justice Tal stated). This relative inferiority of the employee is mainly due to the limited bargaining power has in determining the terms of employment, and due to his need for stability and financial certainty over time, which limits his mobility from one workplace to another and establishes his dependence on the employer."

26. Additionally, labor law may be viewed as promoting many additional purposes such as workplace democracy, equality, human dignity, autonomy, stability and security, self-fulfillment and distributive justice. (See:

BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK (Guy Davidov & Brian Langille eds., 2006); Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time Has Now Come? IN THE IDEA OF LABOUR LAW, Guy Davidov, Brian Langille, eds., OUP, 2011).

27. We discussed above that commercialization of the employee's rights impairs the employee's status and dignity. This perception views labor law as intended to protect the employee in two main senses: A. To ensure the employee's financial being by granting him financial dignity. B. That his financial being would be in human dignity. These two senses establish social dignity, and this is the meaning of the issues when discussing protective law (see Ruth Ben Israel, Labor Law I, p. 35).

The Principle of Cogency

28. It should be further noted that labor laws are an exception of contracts laws. Contracts laws, in essence, are based on the person's freedom to manage his life autonomously, on equality between the parties, the freedom to negotiate the contents of the contract, and their ability to terminate the contract by choice. These assumptions are generally not true in labor laws, the employer has greater power than an employee does and therefore the parties are not equal. A primary principle in labor law is derived from this, the principle of cogency. According to this principle, law prescribes minimum norms in employment contracts the parties cannot stipulate upon, meaning, engaging in contracts that do not follow these norms (see: Sharon Rabin-Margaliot "What Remained of Protective Labor Law?" Menachem Goldberg Book (2001) 461 (hereinafter - Rabin-Margaliot What Remained), 467-469. As to the

Halachic validity this has pursuant to Hebrew law, see: Mishpetei Eretz, p. 78 and the references there; Rabbi Yeshua Ratbi, "the Halachic Status of a Cogent Law", published on the 'Kiryat Moshe' website - /http://www.kiryatmoshe.co.il 19.08.2018).

There are two reasons for the principle of cogency - the first is that law refuses to believe that employees would agree, of their own free will, to work at terms that deviate from the protective laws. The assumption is that if they gave their consent, it is only since they acted under pressure rather than free choice. The second reason is consequential justification - even if an employee agreed to stipulate upon the protective laws, law refuses to acknowledge this as a norm, due to concern of creating pressure on additional employees to agree to such a waiver, against their will, in order to keep their place of work.

29. In the judgment on the Chibotero case (LCH 33/12-3 **Ilya Chibotero - Atelka Avraham,** IsrLC 4 173, 177) the Court ruled that an employee may not waive his protective rights secured by virtue of labor laws, and that these are binding rights, meaning cannot be waived, not in advance nor in retrospect:

"A right that was granted to an employee by virtue of a law intended to protect him cannot be waived, not an explicit waiver and certainly not an implied waiver. The concept, that also labor law should place at the top of the values ladder the sanctity of the parties' engagement wishes, is no longer acceptable. In the previous era indeed an employment contract was deemed to express the employer's and the employee's "free" will, despite the lack of financial, social or status equality between the parties. However, as the regulating labor law net expanded, labor relations and terms of work no longer depend on the "parties' wishes", and became more

intertwined and supported by the provisions of law and agreements that contributed to public policy, as these provisions were also for the benefit of the employers, who viewed exercising them as a guarantee for fair competition among themselves, and the State's economy also benefits from maintaining improved and more orderly terms of work. It should be further noted that the provisions of these laws, which grant employees' rights are supervised by the Governmental supervision mechanism, and one violating them may be brought to justice under criminal law. Thus, an employee's waiver of such a right constitutes a violation of public order and has no binding validity. And as he was not involved in establishing the right, maintaining it and protecting it, the employee cannot erase it offhand. A waiver made in advance, while maintaining labor relations or after they were severed are all deemed the same."

(And see also: LCH 38/3-59 **Azriel Silshi - Architect Aaron Doron & Co.**, IsrLC, 10, 32 (hereinafter - the **Silshi Case**); LCH 32/3-10 **Friedman - Talperi Ltd.**, IsrLC 4 237; LCH 35/2-12 **The Estate of the Late Shmuel Natan of Blessed Memory - Atti Rosenhuiser**, IsrLC 6 299; LCH 31/3-22 **Liput - Kestner**, IsrLC 3 215; LCH 47/3-140 **Kitan Ltd.- Hayut,** IsrLC 19 489; LCH 51/3-29 **Tnuva - Lusky**, IsrLC 33, 241; LabA 49974-09-12 **Chevrat Meonot Horim NPO - Isabella Falkowitz** (19.07.2017)).

At the same time, it should be emphasized that the Supreme Court permitted a waiver in retrospect when it comes to a financial settlement carried out after the employee already performed the work, and this type of settlement is allowed (HCJ 760/79 D**r. Lili Dayan v. The National Labor Court**, IsrSC 34(3) 820, hereinafter - **HCJ Dr. Lili Dayan**).

(And see also: Elisheva Barak-Ussoskin, "Forever Cogent? The Court's Path on the Flexibility Lane in View of the Principle of Good Faith," **Elika Barak-Ussoskin Book** (hereinafter - **Barak Forever Cogent**), pp. 92 onwards - on various situations that justify divergence from cogent rules).

30. The main reasons not to permit waiver of rights that are secured in labor law legislation are these: The first, is that such a waiver **contradicts the purpose of labor law.** The perception is that labor laws are protective laws, and acknowledgment of a waiver is deemed negation of labor law (see Ruth Ben Israel, **Labor Law II,** p. 385). The compelling nature of labor laws is in light of the fact that a democratic society considers the rights under the protective laws to be fundamental values that should be protected due to the need to protect humanitarian values, and for the need to protect the employee, as the basic assumption is that he is at lower bargaining position vis-à-vis the employer (see also: LCH 52/3-145 **The State of Israel, Ministry of Housing - Ya'akov Buchris**, 36(2001) 1 (1997), hereinafter - the **Buchris Judgment**). An additional reason is that acknowledgment of the waiver **contradicts public policy.** And this is for two reasons: One - since protective labor law ensures fair competition for employers who grant the rights to their employees, the possibility of waiving the rights would lead employers to exert pressure on their employees to waive the rights, and thus competition would not be fair. Competition in this situation would be at the expense of the employees' rights and in so impair public policy (see that cited above in the **Chibotero** case). The second reason - is that waiver of the rights constitutes evidence of lack of good faith on the employer's part upon conducting negotiations - a waiver born in sin, and since this is a product of the employer's bad faith - it contradicts

public policy (the **Buchris Judgment** above). A third reason is that waiver of protective rights impairs public order, as the legislator determined that violation of protected rights could constitute a criminal offense. And a fourth reason is that such a waiver impairs public interest, as the public interest is ensuring that the rights would not remain on the shelf, but rather that the employees would benefit from the rights in practice. The statements of Justice (as his title at the time) Barak in **HCJ Lili Dayan** are relevant to our case:

"... This public-cogent nature of the protective provisions - which at times involves criminal sanction on violation thereof - leads to the situation where they may no longer serve as an issue to be agreed upon by the parties. The parties did not establish the right, and the parties may not agree on it and modify it. The right is the product of the law, which expresses a social policy the entire public has an interest in implementation thereof (32/3-32 Marlene Froimowitz v. Israel Bar-Adon, Dan Bar-Adon, IsrLC 4 39). "As if not, what did the Sages accomplish with their ordinance when coming to protect an employee against exploitation" (Justice Witkon in CA 309/63 The Israel Agricultural Engineering Company Ltd. v. Binyamin Gaji, IsrSC 18 290, 294)."

(*Ibid*, section 3, and see also the **Silshi** case, section 35).

31. **Interim Summary:** Labor law grew on the background of the liberal era that advocated the "free market", freedom of contracts, however in the traditional labor market there are market failures, as we specified above, which result from the fact that employees are weaker and their ability to weigh "the balance of their benefit" is limited. These market failures prevent a situation where employees would be employed at fair terms. Additionally, there is the uniqueness of the employment contract

- the employment contract on its visible side is an economic contract for exchange of consideration. The employer provides “money,” and the employee provides his labor force. However, “labor force” is not an ordinary commodity, labor force embodies the employee’s personality as well, his “me.” Work is part of man's self-determination, his dignity. Therefore, it is not possible to refer to “labor force” in separate from its moral aspect. All of this led to the determination that "work is not a commodity.” “**The utilitarian consideration**,” meaning overcoming the market failures along with the “**moral consideration**,” meaning the uniqueness of the employment subject - justify establishment of protection of the employee. The protection may be obtained by overstepping the power of the individual to deviate from the framework. Overstepping is carried out by way of establishing cogency - both regarding the inability to stipulate upon status as well as inability to stipulate upon minimal terms. Thus there is a need for a legal policy that provides a negative incentive to bypass the arrangements by way of presenting the relations in a manner that is other than the true situation, and this in order to prevent exploitation of the employee, which is expressed by denying him various financial rights and protective legislation.

32. Parenthetically it should be stated again that our discussion here regards the question of acknowledgment of employer-employee relations in respect of rights by virtue of labor law, however the question of who is an employee may be asked in various contexts, as the answer to it would not be identical in respect of each of the areas due to which it is raised. This is since classification is derived from the purpose for which it is conducted, and as stated by Justice Barak in the Yeruham case (CA 502/78 **The State of Israel v. Yeruham Nissim**, IsrSC 35(4), 748, 758):

“The terms "employer" and "employee" appear in a long list of laws. The principled point of origin, which must guide us, is that these expressions have no universal meaning, unless the meaning they have is closely related to the context in which these expressions appear. In other words: There is no single definition that serves as a criterion for determining employer-employee relations, there are many diverse definitions, all depending on the context where the question is raised. Thus, it would be a natural phenomenon that John Doe would be considered an employee for the purposes of one law, however would not be considered an employee for the purposes of another law. The Tort Ordinance [New Version] defines “employer” and “employee” pursuant to the absolute control test (see: CA 426/63 [8], p. 302). The Ordinance does not examine neither the integration test, nor the organizational test, nor any other test, unless these may be considered part of the principle of absolute control (see: CA 582/71 599 (LA 191/71, 192) [9], p. 654). Hence, it is possible that a person is an employee for the purposes of the Tort Ordinance [New version], as we would not consider him an employee for other purposes, in which additional tests are exercised. Similarly, a person could be considered an employee for some purposes, without being an employee for the purposes of vicarious liability in torts.”

(And see also: HCJFH 4601/95 **Sarussi v. The National Labor Court et al**, IsrSC 52(4) 817) (hereinafter - the **Sarussi Case**); Menachem Goldberg, "? Who is an Employee and Who is His Employer - the Age of Uncertainty", **Kiryat Ha’mispat I**, 259; **Davidov Purposive Interpretation,** pp. 263-264 and the references to the judgments there, **Yanisky-Ravid**, pp. 394-396).

33. **<u>Conclusion of this part:</u> In order to adequately track the appropriate solution at this time to the issue before us, we opened with a review of the customary purposes in labor law. In so, we discussed the basic principle of inequality in bargaining power on which labor laws were established, and other principles underlying labor laws. Afterwards, we discussed an additional main principle in labor laws, it being the principle of cogency.**

<u>Forever Cogent?</u>

34. So far we discussed the importance of the rights by virtue of protective labor law being cogent rights that cannot be waived. Is this concept carved in stone, and impossible to divert from, or is it required to trace the fundamental purposes underlying it and accordingly interpret it in an appropriate and reasonable manner considering the change of times and the changes occurring in the labor market, and enable under certain circumstances a deviation from cogency (regarding the issue that the purpose may change from time to time, and that purposive interpretation requires an examination once every few years for adapting the tests that were developed in case law in respect of the updated purposes - see: **Davidov Purposive Interpretation** , pp. 266-267). And more specifically - has the time come for setting tests so that at times there would be a deviation from the supreme principle in which an employee is a sort of status and cannot be deviated from, or perhaps and maybe there are situations in which we would acknowledge that the issue does not concern an employee notwithstanding the principle of status, almost unquestionably. It is also important to consider the question of whether the paternalistic intensity should be reduced a bit in respect of employment relations, including providing weight, if only minimal, to the employee's wish during the period of his relations with

the employer (for example see our discussion on the LabA **Zeev Levy - Zeraim Gedera Ltd.** case).

Upon ruling on this it is required to consider the changes that have occurred in recent years in the labor market, which underly the need to adapt the tests for acknowledging employment relations at this time.

The Labor Market in this Era - what Changed?

35. Upon examining the issue before us we cannot turn a blind eye from the fact that we are living in times of changes and fluctuations that affect the labor market. Three major change engines may be pointed out: Innovations in technology and science, demographic changes and social changes. For example, in the report that was published in June 2017 by the Israeli Democracy Institute concerning preparation for the future labor market ("The Future Labor Market - will there be Room for all of Us?", Eli Hurvitz Conference on Economics and Society 2017, on the website: The Israeli Democracy Institute, hereinafter the - **Future Labor Market Report)** It was stated that: **"Experts in the field predict far-reaching changes in the structure and characteristics of the labor market over the next decade; initial changes we are witnessing already now. These changes originate, *inter alia*, from technological developments; demographic changes; deepening the globalization process and conceptual changes regarding the labor world. Poor preparation for anticipated changes could form significant difficulties; including severe shortage of professional human resources; high unemployment rates among certain populations and shaky employment relations. However; informed preparation for the future labor market's challenges could significantly reduce these dangers; contribute to the expansion of employment possibilities; enable greater**

employment flexibility for the employee and the employer; and improve the competitive capabilities of the Israeli economy."

(And see also: Yossi Rahamim, "The Modern Labor Market in the age of Globalization and its Impact on Labor Law", Hamishpat 24, 5778 (hereinafter - Yossi Rahamim); Global Challenge Insight Report,'The Future of Jobs Employment, Skills and Workforce "Future; Strategy for the Fourth Industrial Revolution" January 2016 Work Skills 2020", Institute for the Future for the University of Phoenix Research Institute on the website: http://www.iftf.org)

As to technological developments - in recent years' experts in the labor domain identify those rapid technological developments are expected to affect the structure of the labor market, and that some already affect it. Already presently it is seen that technology is a significant part of many employment industries, and that use of digital technology is an integral part of employment of most employees. It would not be absurd to say that we are heading towards a new era of employment relations, in light of the technological developments, and introduction of automation and digitization in the labor market. (See also: the **Future** Labor Market Report, p. 23; Nirit Toshav-Eichner, "Changing the Game Rules in the Labor World - Literature Review", the Research and Economics Administration - the Ministry of Industry, Trade, & Labor, 2009 (hereinafter: Toshav-Eichner); Tal Soffer and Yoel Raban, "Social and Technology Trends and their Impact on: **Future** Labor Market Report, p. 23; Nirit Toshav-Eichner, "Changing the Game Rules in the Labor World - Literature Review", the Research and Economics Administration - the Ministry of Industry, Trade, & Labor, 2009 (hereinafter: Toshav-Eichner); Tal Soffer and Yoel Raban, "Social and Technology Trends and their Impact on: the Future of the

labor market and the Required Skills", Israel Project 2048: Innovation, Science and Technology Staff (April 2018) (hereinafter - **Soffer and Raban**), pp. 6-19; Smadar Somekh, Khaled Kadri, "The Future of the Labor World Review of Central Trends" Myers JDC Brookdale (August 2017), pp. 111-123 (hereinafter: **Somekh and Kadri**)).

Additionally, the technological developments, and particularly the Internet enable working remotely and collaborative work between deployed staff have a significant impact on the use of unconventional employment configurations. These possibilities contribute to the expansion of phenomena such as outsourcing and freelance work, use of contracting work arrangements and transition to hourly employment and limited time contracts (The **Future Labor Market Report,** p. 31; Soffer **and Raban** pp. 19-19)). Thus, adaptation to these challenges of the labor market requires new thinking regarding the manner in which it is required to define and regulate the nature of these employment relations and examine the various aspects of the new employment formats.

It should be emphasized that as part of this judgment we are not expressing any position in respect of these employment formats. (Concerning reciprocity relations between technology, law and social norms, see, for example: Oren Bracha, "Hale and Foucault in Cyberspace: Power, Technology and the Law in the Information Society", **Mishpat, Hevra VeTarbut**, 5771, 117 (hereinafter - **Oren Bracha**); Yuval Dror, "Social Structuring of Technology: On the Way in which Values, Law and Enforcement Are Embedded in Technology", **Reshet Mishpatit**: **Mishpat VeTechnologiat Meida**, the Tel Aviv University (2011), pp. 79-116).

Demographic and social changes in the composition of the population include aging of the population, entry of immigrants and new

populations into the labor market, who too are expected to affect the labor market (**Soffer and Raban**, pp. 5-6; **Somekh and Kadri** pp. 113-115).

Old and familiar professions are disappearing and instead new professions are introduced **(Yossi Rahamim**, p. 4; **Soffer and Raban**, pp. 20-20; **Somekh and Kadri**, pp. -115-117);

New employees require new skills (**Soffer and Raban**, pp. 25-27; **The Future Labor Market Report**, pp. 26-27);

And a blur occurred between working hours and leisure hours. Hani Ofek- Ghendler, "Weisure Time - Between Work and Leisure in the Digital Era", **Iyunei Mishpat** 40, 2017; Yotam Margalit, Ayelet Hillel, Lior Gro, Rachel Zaken, "Reforming the "Hours of Work and Rest Law": New Mechanisms for Flexible Working Arrangements", **Draft for Discussion toward the Eli Hurvitz Conference 2018**, The Israeli Democracy Institute (June 2018); Matan Szatmary, "The Worker is Unavailable Right Now - On Employees' Rights to Log Out of Work", **Mishpat VeAsakim**; online edition, published on February 22, 2018; Tal Golan, "Scrutinizing and Observing: Regulation and Regimentation of Employees' Conduct at the Workplace", **Mishpat Hevra VeTarbut** (2016), pp. 519-522).

We discussed all this for good reason.

<u>Legitimate and Authentic Impact of the Employment Format, the Question of Good Faith and the Parties' Agreement on Acknowledgment of employment relations - Guiding Principles</u>

36. The Labor Courts are aware at all times of what takes place on site and were never afraid of the changing reality. Labor law does not stand still.

In the changing world of employment, we are required to find the paths for enabling self-employed persons or persons employed through

various forms of employment to be part of the social security network, on the one hand. And on the other hand, there is an awareness that the change of times indeed requires re-examination of case law rulings, in order to adapt the law to the renewed reality. This, along with the strict adherence to legal certainty and stability. Development of the Israeli labor law was always made alongside the desire to establish rules that fit the social realities and reality in the economy and the labor market. (See: **Barak Forever Cogent**, pp. 59-61).

(On the importance of legal indeterminacy, see **Oren Bracha** above, pp. 135-136, who believes that the presumption in this regard is that a legal rules system is always in a state of relative instability. The intention is not only that rules may be changed by the competent institution, but rather that at any given time the meaning of a substantial part of the rules and the manner of implementation thereof are in dispute and subject to interpretation and development; and see *ibid*, p. 137, also on the importance of designing conduct by law).

37. The statements of President (ret.) Adler are relevant to our issue:

"The purpose of labor law as protecting employees gains secondary importance in this age as the modern Western economy is in the process of transitioning from the Industrial Revolution period to the information age. In this new age, the importance of work increases and includes all its suppliers. As it is known, the economy consists of capital, products and work (as "work" includes both employees' and administrators' work as well as provision of services by self-employed people). During the Industrial Revolution period the importance of capital was crucial since construction of an industrial plant involved a high capital investment. Additionally, at an industrial plant the employee was less

important since most employees were unprofessional and could be replaced relatively easily. On the other hand, in the information age the importance of the employee - as a central work element that is more important than capital. <u>This most important development of the labor market does not allow for continuing acting according to the same legal rules and tests that served the Courts in the past and requires adaptation of the legal tools available to the Courts in this new age."</u>

Adler from Subordination to Purpose. P. 40; emphases added - V.V.L)

38. In the current era, we are witnessing a major phenomenon of transition from the traditional hired employee employment model to models of commercial agreements for obtaining services - either through an independent contractor or through a free participant. The reasons for this may be found in the global reality that requires businesses to allow business flexibility and therefore requires also development of more diverse employment forms; as well as the technological revolution that on the one hand allows employees to preform work remotely, and even from home, and on the other hand provides the employer with tools for remote supervision via cellphones, the Internet, surveillance software, electronic supervision, and the like (see: **Yossi Rahamim**, p. 39).

39. The flexibility required by both parties, both the employee as well as the employer, for defining the relations between them in this era, requires enabling, in the appropriate cases, broad contractual freedom as to the definition of the employment format by the parties. Furthermore, and in addition to providing a broader contractual space in defining the relations.

40. To this should be added the access to information and rights that are currently given to employees, which greatly improves, in certain cases, the information in respect of possible forms of employment, the considerations that are at stake, and mainly the relevant market forces in the field of the specific employment such as supply and demand, legitimate wage requirements for the specific employment format, etc. (see: Haim Berenson, "Judicial radicalism and New Trends at the National Labor Court", **The Menachem Goldberg Book** (hereinafter - **Haim Berenson**) pp. 179-181, who believes that there is no room for absolute judicial paternalism in labor law, in cases where the employee is not inferior).

41. Moreover, currently there are professions where the information the employee brings with him in labor law is infinitely greater than that of the employer. For example, under certain circumstances, and without setting a precedent in the matter, there is the possibility of an account manager who engages in an agreement for providing services within the wage industry with a franchises of a small grocery store. More broadly, the information held by the employee vis-à-vis the employer could be viewed as an individual case of "bargaining power" of the parties. So, there are cases in which certain employees would have an advantage vis-à-vis the employer, although he would not necessarily be "unsophisticated" due to the dependence the employer has on this employee. For example: An inventor or director of research and development at hi-tech companies, who at times dependence on him is critical, the legal advisor, accountant and director of human resources at every corporation, and so on.

42. It should be remembered that the protections of labor law, in respect of which it was determined that they prevail over contractual freedom were made due to the "contractual justice" - meaning, the need to

protect the weak, and as President Menachem Goldberg stated (Menachem Goldberg, "Contractual Freedom and Limitation thereof by a Collective Employment Agreement and Personal Employment Contract", **HaMishpat**, Vol. II, p. 177 (January 1994) (hereinafter - **Goldberg**): **"The legislator's approach, which limits contractual freedom, is accepted by the legal system: And it is consistent with our social perception of protecting the weak and the sense of justice and integrity, for example, in those cases where one party to the contract is inferior in his mental skills or in his economic status to a degree where there is concern that he would be exploited, and the legislator reached the conclusion that it is proper and just to spread the wings of the law over him and set requirements and presumptions under law, which could cure these flaws and inferiority"** (*ibid*, p. 181).

Thus, when the case does not concern a weak employee, also the need for providing a shell of protections - decreases (and see also: CA 6601/96 **AES Systems v. Moshe Sa'ar**, IsrSC LV (3) 850, 864, which indicates that the principle of the employee's weakness is a dynamic and varying principle that could be contradicted from time to time, and from case to case).

43. Echoes of this approach in fact appeared in previous rulings of this Court in the **Revzin case**, in Justice (ret.) Tzur's opinion (paras. 15-16, stating;

"... We find the Regional Court's approach to be correct. The status of a person as an "employee" was acknowledged in case law as a "status" that cannot be stipulated upon. In view of this, it was ruled that the status of a person as an "employee" would not be determined according to the definition or name the parties give the

hiring format but rather by objective tests that were developed in case law and reached a maximal refinement and detail level. All this is done in order to extend over the employee a net of protection against the employer's "power" vis-à-vis the weakness of the employee. All this is done in order to prevent the employer from utilizing his power and dictate an employee's status and conditions that do not suit his true status or are depriving or unfair under the circumstances of the matter.

This protection net is not absolute and does apply automatically in every situation. It is certainly possible there would be unusual and extreme cases where the employer does not have the advantage of power over the employee, he acts fairly and in an orderly manner while it is rather the employee who fails to act in this manner. Under such circumstances - as an examined and sufficient factual foundation stands in the background - there may be borderline situations in which the employee, the plaintiff, would be viewed as a hired employee under any condition, as one who acts unreasonably and in bad faith. In such a borderline situation, the Court may reach the conclusion that the employee's approach crossed the lines of protection of the status, and that under these circumstances, it is inappropriate to acknowledge his status as an employee, even if such or other characteristics were met as his being an employee. It should be emphasized that such a ruling would be exceptional rather than routine and apply only in the exceptional cases appropriate to do so, based on a sufficient factual basis, and wisely balancing between the employee and the employer's issues."

And in the Gutman case (LabA 55425-09-11 Michael **Gutman - Shikun & Binui Holdings Ltd.** (5.9.17) it was stated as follows:

“The case law ruling that acknowledges an independent contractor as an “employee” is originally intended to protect an employee against exploitation by the employer and ensure that the rights of disadvantaged employees would not be violated. We should cautiously state that many applications to the Court based on this ruling are not those of weakened employees but rather by strong employees who earn significantly higher wages than ordinary hired employees. This is not to determine that the ruling is erroneous, but rather that the Courts are required to act for implementation thereof carefully and in the appropriate cases, as an integral part of the computation examination that is conducted it is required to examine the parties’ good faith and the profitability of the engagement as well as the customary wages in the economy and the specific employer regarding a hired employee in a position corresponding to the plaintiff's position”.

44. While in the past there was some controversy regarding the definition of "employee” - whether this is an interpretation that includes all industries and laws, or whether it is required to dedicate to each industry an independent interpretation according to the purpose test (**Adler From Subordination to Purpose**, pp. 30-35; and see our comment above in section 55), and therefore it is certainly possible that a situation would occur in which someone would be defined as an employee for one matter however not for another matter, and as President Barak stated in the **Sarussi case** (p. 829);

“The normative load of the words “employee” and “employer” is not determined according to the jurisprudence meaning of these terms. The meaning of these terms is functional. This is the same in comparative law (see: I. Christie, G. England and B. Cottier

Employment Law in Canada [44]; Wedderburn, The 45] Worker and the Law]). The same is true in Israeli law. The meaning of the words "employee" and "employer" changes according to its context, and its context is determined according to its purpose. Prof. E Zamir rightfully noted that: "Before presenting the question of how to distinguish between an employee and a contractor it is required to examine the purpose for which classification is made" (E. Zamir "Employee or Contractor", p. 117)".

(And see also: **Barak Forever Cogent**, p. 117 and the references there).

As a result, and once we see that the prism through which it is required to examine an employee's status is the purpose test, in this issue too, it is required to give weight to the purposes underlying labor law, in order to rule on the question of what is the weight given to the principle of good faith and the parties' agreement upon ruling on the question of acknowledging the employee's status.

As we discussed above, there are many changes in the labor law world, and the purposes of labor law should be implemented in a manner that befits the changing labor world.

In HCJ Moore (section 3 of Justice Goldberg's opinion) the following statements were made, part of which we cited above; however, we shall repeat them due to their importance for our case:

"The tests for determining the existence of employer-employee relations do not stand still. As my colleague the President noted, upon the change of times the social perceptions change, the social trends change, and the work patterns change. The technological developments, mainly within the computers and communications domain, established a new perception regarding the workplace, as the employee is not required to be near the employer's place of

business; flexibility is possible in employment times; there is no close and monitoring by the employer over the manner of performance; there is no ability to impose on the employee varying tasks; subordination relations are weaker, etc. The said developments require flexibility of the tests for determining employer-employee relations. Thus, in positions that require expertise and independence, there is a great degree of trust relations rather than subordination, supervision and control relations. These latter elements lost their power as necessary characteristics for the worker's being considered to be an "employee." Similarly, the new conditions allow working outside the regular place of the business' activities, without derogating from the degree of commitment and dependence between the employee and the business' owner. This method of employment requires flexibility in the time and place of performing the work. The changes in time require adaptation of the legal systems in general, and labor laws in particular, to the changing reality. The degree of expansion of the definition "employee" is the result of the social objective of protecting one who due to his relative inferiority and his dependence on the employer requires protection (as my colleague, Justice Tal stated). This relative inferiority of the employee is mainly due to the limited bargaining power has in determining the terms of employment, and due to his need for stability and financial certainty over time, which limits his mobility from one workplace to another and establishes his dependence on the employer. While the new reality extended the degree of the employee's independence, granted him flexibility and freedom of action and weakened the power of subordination relations between him and the employer. The employee's welfare increased, and not

in every case - or in the same degree - he should be deemed as needing protection, as it was previously. Hence, upon our making the traditional tests more flexible, we are required to take into account these considerations as well, so as not to impose a pointless economic burden on the employer, and indirectly - on the public as well."

We shall refine and be exact.

According to the statements of Justice Goldberg, the relative inferiority of the employee is largely due to the limited bargaining power he has in determining the terms of employment, and due to his need for financial stability and certainty over time, which restrict his mobility from one workplace to another and establishes his dependence on the employer, as currently, there would be cases where the bargaining power is rather given to the employee; additionally, the need for stability is no longer a factor due to the employment characteristics customary in this era (see **Lilach Lurie**, pp. 51-66 and pp. 115-118), so that dependence on the employer is reduced anyway.

45. An additional datum that should be considered is that contrary to the opinion in the past that self-employed people necessarily have high earning ability, a fact that served as justification for not granting social rights to self-employed people, studies indicate that self-employed people are not a uniform earning group. Self-employed persons as well as hired employees are not one group. A considerable part of the self-employed persons are small business owners, with a low annual profit turnover, and most self-employed persons do not employ employees (**Lilach Lurie**, p. 219).

46. This is the place to note that deviation from the principle of cogency was made in other cases, as the method due to which the principle of

cogency was established, and the time has come for deviation. For example, a need arose to deviate from the cogent requirement of a written statement in a real estate transaction, during the period in which there was inflation in the country, and sellers daily signed memorandums with potential buyers, and as prices increased those sellers retracted claiming that the memorandum does not meet the requirement of a written statement. So at the time the supreme Court deviated from the principle of cogency and ruled that the requirement of good faith may prevail over the requirement of cogency (**Barak Forever Cogent**, pp. 126-127 and the references there).

The same ruling could also be indicated in the case before us, after years during which the concept was rooted according to which the status of employee could not be stipulated upon, currently, as this perception was established, it is possible to turn over to the behavioral perception that enables, in certain cases (although not many) that would justify this, a deviation from this principle, meaning cases in which we would acknowledge the employee's waiver of his status by virtue of the requirement of good faith.

47. We should add that non-acknowledgment of a worker as an employee, has also advantages that should be given weight - including the issue that independent work is the employees' manner of obtaining flexibility, control and autonomy - these employees would be of high human capital at times, and independent work would constitute for them a possibility for creative and challenging work (**Lilach Lurie**, p. 216).

48. It should be further noted that also one who was not defined as an "employee" according to the customary tests, is given certain rights and protections. For example, the legislator acknowledged the

responsibility imposed on the employer in the safety at work issue also towards one who is not necessarily an “employee”; the provisions of the Hours of Work and Rest Law that prohibit work on weekly rest says apply to “self-employed” persons as well; protections by virtue of the Prevention of Sexual Harassment Law; certain sectors under the National Insurance Law, which apply to self-employed persons and to one who is not an “employee” (for further discussion of this issue, as well as comparative law overview on this matter see: **Adler From Subordination to Purpose**, pp. 25-30).

Therefore, in our matter too it is required to balance the fact that removal of one from the definition “employee” - does not deny his rights altogether.

49. Indeed, the provisions of the protective laws are intended to prevent the employee’s waiver of a right that was given to him by virtue of that law (**Goldberg**, p. 192), however the purpose of cogency is to protect an employee against exploitation, and at times to protect the employee from himself ("**at times it is possible that an imagined immediate interest of the individual would lead to the situation where the individual would not stand on the right or even waive it, and it is the public's interest to insist on enforcement of the law**” (**Goldberg**, *ibid*)), however this purpose is dimmed and weakened where “protection” is not necessarily required, not against exploitation by the employer, or from himself (and see also: **Rabin-Margaliot What Remained**, p. 472 and p. 477: **"... The manner of exercising the principle of good faith within this framework, is intended to retrieve, by tweezers, those cases where the employee’s wishes are what led to the violation of the protective labor law, rather than one-sided dictation by the employer").**

Why should an employer who did not know and should not have known - for example in the case where the worker arrived as a contractor and continued as a contractor, and the worker well understands labor laws and chooses for his own reasons to engage in the format of a self-employed worker - "be punished"? As the employer in such a case acted in complete good faith, while it is the employee who shows lack of good faith by retroactively choosing to claim his rights as an employee, although to begin with he chose in an informed and intended manner the form of engagement,

In respect of these it may be stated that **"it appears that it is required to repel attempts in bad faith to "hitch a ride" on these protections in cases that do not justify the protections of protective labor law" (Lupo and Savorai** p. 569**), and that: "The judicial rhetoric regarding the normative superiority of the principle of good faith over the coercive side of protective legislation and the collective labor law, are intended to close the door to improper use of the subordinative characteristics of protective labor law by employees, a phenomenon that has intensified in recent years"** (**Rabin-Margaliot What Remained**, p. 477).

And it should be emphasized that our statements here do not intend to examine the question of good faith in respect of the protective laws and cogent rights after acknowledgment of employer-employee relations, but we are rather discussing the implications of the question of good faith at the stage of acknowledgment or non-acknowledgment of the hired person's status as an employee (as at this stage since the employed person was not acknowledged to be an employee, in any event he was not yet included under the umbrella of the protective laws and cogent rights that are granted only to one who was acknowledged as being an employee).

50. The tool by which the principles of justice and fairness are enforced is the principle of good faith. It is precisely within employment relations, which are special and ongoing relations, the principle of good faith increases in its intensity vis-à-vis its place in ordinary commercial relations (**Barak Forever Cogent**, p. 132). Alas, since insisting on cogency principles as part of employment relations could lead to injustice, it is required to make use of the principle of good faith in order to serve as a balance between interests and bring to justice. In cases where an employee cannot be deemed as something close to status, the tool that could be used for acknowledging the employee's waiver of the status is the principle of good faith (regarding the position that criticizes the theory that subordinates the protective legislation to the principle of good faith, see **Ofek Ghendler**, pp. 108-129).

51. The use of the principle of good faith specifically for flexing the principle of cogency is due to the supreme position of this principle in Israeli law, and since this principle enables objective examination of the conduct between parties and legal relations, and intervention due to the reliance interest or performance interest, although these are cogent principles. In fact, this is a principle outside of the contractual relations between parties and is applied where the legal system believes these are relations that do not suit society's values (see: **Barak Forever Cogent**, p. 64 and the references there).

52. Once the principle of good faith was adopted in Israeli law it became a supreme principle, as many titles and crowns were associated with it. Like in Germany, the principle of good faith spread throughout Israel and covered the entire legal system, so that it was said about it that it is a "royal" principle (A. Barak, **Interpretation in Law - Interpretation of Contracts**, Volume IV (5761) 213, 226; Gabriela Shalev, "The

Erosion of the Principle of Freedom of Contract", **Kiryat Hamishpat, V** (5765), 177; **Ofek Ghendler**, pp. 68-72).

The principle of good faith appears in the context of labor law on several levels - one is **the general duty to act in good faith**; the other is **regulation of areas of labor law that are lacking (lacuna)**; and the third is the **ratio between the principle of good faith and the principle of cogency**. (On the use made so far in applying the principle of good faith in Courts' ruling see also: **Haim Berenson**, pp. 190-198).

As to the general duty to act in good faith case law rulings applied the principle of good faith enshrined in the Contracts Law in respect of employee-employer relations, for the reason that employment relations are in essence based on a contract, and as stated by President Shamgar in HCJ Elco (HCJ 566/76 **Elco Ltd. v. the National Labor Court**, IsrSC 31(2), 197, 212): **"The relations between the employee and the employer should not be exempt from the duty to state things as they are and their intention, and act in good faith and fairness. An employment contract too should be implemented in good faith, as provided by section 39 of the Contracts Law (General Part), 5733-1973."** (And see also: LCH 42/3-74 **Gil Vardi - The Municipality of Natanya**, 14(1) 059 (1982); **Rabin-Margaliot What Remained**, p. 469; Kobi Vardi, "Good Faith in employment relations", **Shnaton Mishpat HaAvoda** II (1991), 107).

At the same time, there is a distinction in case law regarding an employment contract for two main reasons: One, an employment contract is a long-term contract that establishes ongoing relations. The second, the balance made in favor of the employee within the framework of protective labor law, in order to balance the inherent inequality between the employee and the employer (see: Elisheva

Barak, **The Principle of Good Faith in Labor Law**, Berenson Book, Nevo Publishing - 5760, 499 (hereinafter - **Elisheva Barak, The Principle of Good Faith**) pp. 505-507).

(For further discussion on the legal sources for acting in good faith within the framework of employment relations - the Contracts Law and duties of trusts - see: Sharon Rabin Margaliot, "The Impact of the Principle of Good Faith on Personal Labor Law: From Essential Supervision to Procedural Supervision," **Avoda Hevra VeMishpat** 13, 139 (hereinafter - **Rabin Margaliot, "The Impact of the Principle of Good Faith**), pp. 144-146).

The duty of good faith is imposed both on the employee as well as on the employer, and this throughout the duration of the employment and ending upon the stage of dismissal or resignation from work.

(See: LabA 164/99 **Froomer and Checkpoint - Rad-Guard Ltd.**, IsrLC 34 294; the **Buchris Judgment** above; NLC 17-17/53 **Tony Toameh - Techno Rubber Lisitsky et al**, IsrLC 25 227; HCJ 1683/93 **Yavin Plast Ltd. v. The National Labor Court**, IsrSC 47(4) 702; HCJ 59/80 **Beer-Sheba Public Transport Services Ltd v. The National Labor Court** IsrSC 35(1) 828; CDA 400024/98 **Histadrut New General Federation of Labor - Zim Israel Navigation Co. Ltd.**, IsrLC 36 97; CDA 31504-01-31504 **The State of Israel - The Israel Medical Association** (16.06.2019); for further discussion, see also: Menachem Goldberg, "Good faith in Labor Law", **Bar Niv Book,** Ramot Publishing (1987), pp. 139-151).

Regulation of Areas of Labor Law that are Lacking (Lacuna) - it may be seen that case law made use of the principle of good faith for regulating areas that are not regulated. For example, in the Isakov judgment (LabA 8/90 **Tali Isakov Inbar v. The State of Israel -** LabA

15868-04-18; LabA 12372-04-18; LabA 7338-10-17; LabA 34665-10-17 **Commissioner of Women's Labor Law et al** (8.2.11) this Court settled the question of an employer's right to review an employee's e-mail. Indeed, the arrangement itself is based more on other legal principles such as the employer's proprietary right and the employee's right to privacy, however the principle of good faith serves as the anchor for judicial regulation (for further discussion on the impact of regulation of employment relations due to the principle of good faith, see: **Rabin Margaliot, The Impact of the Principle of Good Faith).**

The third and most significant aspect in the case before us is **the relationship between the principle of good faith and the principle of cogency** - this aspect arises mainly in discussing a claim for acknowledgment of employer-employee relations in retrospect, as the question arising is double: First, are we looking at lack of good faith (factually), and should the answer be yes, what is the meaning and the result in legal terms.

Where the waiver of cogent rights results from waiver of the status of employee and agreement to work as a contractor, it was ruled in the **Buchris case judgment**, that there may be rare cases in which an employee knowingly, and of distinct interest waived cogent rights - **"such cases could lead to a situation where upon his wish, upon termination of the relations, to rely on his status as employee, or upon termination of the relations, to claim social rights in addition to the "inclusive" payment he obtained, and this in dreadful bad faith, the employee's lack of good faith would prevail over the requirement of cogency or the status resulting from it. Examination of the employee's good faith would be conducted per objective criteria."**

It is important to note that in respect of this approach, which was presented in the Buchris judgment, there was no consensus among the Justices of this Court in the past and presently (see for this matter also: The **Izaak case** above; the **Yifmar case** above; the **Karni case** above; LabA 300267/98 **Twito - Mashav Refrigeration & Air Conditioning Eng. (1965) Ltd.**, IsrLC 37 345; LabA 300275/98 **Visler Avraham - Moked (1973) Private investigations Corporation** (18.12.2000); LabA 308-08 **Amos Evron - Enoch Management Systems and Engineering Limited Company** (20.01.2011)).

The justification for not giving normative priority to the principle of good faith in questions of classification of workers were that this would allow the parties to stipulate upon labor laws indirectly, and this result is undesirable since there is a public interest beyond the concrete dispute that these classifications would be made according to a uniform foundation of factual markers, and that the cogent status of the classifications would not be impaired; additionally, since the classification question is ruled upon in retrospect, usually upon termination of the employment relations - there is some uncertainty, and should the question of contributory fault of any of the parties in the erroneous classification be added, the uncertainty aspect would be intensified and this is an undesirable result; in addition, it would be a pointless move for ruling that the one performing the work passes the factual test for establishing employer-employee relations - only for ruling that he is not entitled to benefit from the protective rights in light of his conduct in bad faith (**Rabin Margaliot, "The Impact of the Principle of Good Faith**, p. 148).

On the other hand, those who favor the normative superiority of the principle of good faith would say that subordinating enforcement of the protective laws to the principle of good faith does not undermine the

public interest in respect of full enforcement of the standards provided under the protective laws, since the protective laws are designed to serve as a shield for workers who need it, and workers who waive it knowingly and of a personal interest - are not deemed exploited. Additionally, refraining from enforcement of the protective laws is performed only in extreme cases of conduct in bad faith, and where the worker is the one who initiated the violation of the law, therefore it would not constitute an incentive for the employer to violate the laws, since violation initiated by the employer does not grant an exemption from enforcement (*ibid*, pp. 150-151).

53. In the Buchris judgment it was first ruled that extreme bad faith would overrule status. However, since the Buchris judgment was handed down, the National Court has not ruled in any case that lack of good faith overrules status, however expressed this only for calculating rights (see for example: the **Uri Price case**; LabA 20005-11-16 **Doe - Roe** (9.1.19); the **Guttman case**).

Over the year's cases were brought before us in which the lack of good faith of one claiming employee-employer relations cries out load, and yet the Courts granted him the status of employee and settled the score only at the stage of calculating the rights.

We believe that in cases of the employee's distinct bad faith, to be proven by the employer, the distinct bad faith would overrule the employee's status, and in these cases the employed person's consent would tip the scale and it would be ruled that he is not an employee already at the first stage, and there is no need to proceed to the second stage of calculation of the rights. (See our discussion in the judgment in the Zeev Levy - Zeraim Gedera Ltd. case).

54. **Conclusion of this part: We have discussed the changes and alterations that occur in the labor market, and we clarified why we believe that in order to provide the content appropriate for the purposes of labor law, it is required to grant weight to the principle of good faith (and the weight that should be given to the parties' agreement in this examination) already at the stage of examining the question of acknowledgment of employer-employee relations in retrospect.**

We shall thus turn over to designing the rules that would assist and complement the manner of examination of the status of employer-employee relations in retrospect.

Designing Rules in Light of which the Issue Shall Be Examined

55. **Already at the outset it was stated that we are not deviating from the ordinary tests that apply to determining employer-employee relations, as were set out in vast case law rulings of the Labor Courts over the years, and they still exist and hold true, while in implementation thereof weight is given to the required adjustments to the changes in the labor market and change of time.**

A modern economy lives in the surroundings of competition and dynamic change of the business environment. This type of market needs flexibility on the one hand, and certainty on the other hand. However, also within a modern economy, employees require implementation of labor law purposes: *Inter alia*, and mainly, to ensure the employee's dignity as a person (both on the financial level as well as on the social level).

In such economy there may be authentic and legitimate financial engagements that do not deviate from the purposes of labor law (bypassing protective laws, collective agreements, financial deprivation

and preventing other protections). As a result, not everyone who is employed/operates on the employer's premises or vis-à-vis the employer (not on his premises) is necessarily an employee.

The legislator did not define who is an employee for the purposes of labor law, and this definition was set in case law, as a flexible and dynamic definition. We believe that it is required to examine the authenticity and legitimacy (in view of the purposes of labor law) of the manner of engagement. This is in the same manner as examination of complex employment formats (indirect employment) where emphasis is placed on the authenticity and the legitimacy of the employment format.

The test for identifying labor relations that are deemed legal status is the combined test that includes several secondary tests, the main one being the integration test, in both its aspects - the positive and the negative. Implementation thereof is not technical but should rather be conducted considering the timeline, in view of the complete picture and the purposes of labor law.

First it is required to examine the essence of the relations in accordance with the integration test in both its aspects:

The positive - has the plaintiff/employee integrated into the defendant's organizational layout? In this sense it is required to examine, *inter alia*, the degree of regularity of the relations, the degree of commitment to perform the work and the affinity of the work to the core activities at the plant - as the assumption is that the core activities are usually performed by a team of employees, subordination;

The negative - was the integration made as an outside party as part of a <u>real</u> business of his own.

<u>And here it is required to refine several highlights:</u>

A business - also as its meaning in labor law, includes a variety of patterns, from clear self-employment (for example, an owner of a business who employs employees), through - under the appropriate circumstances - an individual worker whose work embodies the entire business.

In order to examine the existence of a real business, it is required to examine, *inter alia*, the probability of profit and loss; ownership of production elements and nature thereof; the existence of a personal commitment to perform the work; the existence of additional activities, whether similar or different, towards other entities, as the weight of the existence of additional activities depends on the entire circumstances, including the degree of similarity between them, the relative volume of activities, etc.; the form of consideration - per work time or per result; the type of activity and its affinity to the core of activities; the sectoral context.

There are indications that in themselves do not necessarily rule out the existence of a real business, such as: Providing instructions, supervision, timetables for performance. All needs to be examined considering the entirety of circumstances. In the event where an individual worker whose work embodies the entire business, it is required to examine his relations with the defendant not only in view of his activities vis-à-vis the defendant, but rather also in view of his overall activities. Following, it is required to examine the legitimacy in the sense of the engagement's being part of an "independent business" settles with the purposes of labor law (for example, bypassing arrangements under labor law both of non-financial rights as well as on the level of financial rights, and all noting, *inter alia*, the type of activities, the duration of employment and the financial dependency.

As part of the overall considerations of the combined test, the employer would be able to prove that there are circumstances justifying considering the employee's conduct in bad faith that would give certain weight, in the borderline cases, to the employee's wish to be self-employed.

56. In order to establish rules that would facilitate the Court's work upon ruling on the question of acknowledgment, as the principle of the worker's good faith is on the table, we believe that one should ask, inter alia, and not as a closed list, the following questions, according to which it would be ruled on the question of whether the purpose leading to denying acknowledgment of a worker as an "employee" holds true, as the burden to prove so would be imposed on the employer:

a. **The worker's waiver of cogent rights** - in order to acknowledge waiver of status it is required that two preliminary conditions are met: First, that the waiver would be as the person is informed, meaning that the worker would be aware of his rights before considering waiving them (see: The **Chibotero** case, p. 177). Secondly, that the waiver be made of the worker's own free will, not as a result of the unbalanced powers between him and the employer (Ruth Ben Israel, **Labor Law II**, p. 387). So long as this is a waiver that is the result of the employer's interest (reducing costs of work, managerial flexibility, etc.) it should not be acknowledged. Also in a situation where the employee's interest is added to this (such as a worker who wishes to be paid a higher sum while waiving ancillary social rights) the point of origin would be that it should not be acknowledged. <u>However, the situation is different when additional data are added to the equation such as: It is a worker who is aware of his rights, who of his own clear interest chose to engage in a contracting format despite the employer's offer to be employed as an</u>

employee. In such a situation weight would be given to the lack of good faith that would overcome acknowledgment of his status as an employee, however as we shall see below, each case according to its circumstances.

b. **Each case should be examined per its circumstances, as the Court is given discretion -**

- It is required to examine the question also in the relevant industrial/sectoral context. Meaning, examination of the customary formats in the industry/profession subject matter of the examination. Additionally, it is required to consider sectors in which "weakened workers" are prominent.
- Examination of the employee's "interests" vis-à-vis those of the employer –

For example, cases in which it is possible to prove that the employer has a financial interest not to employ the "services provider" as an employee in order to achieve one or more of the following objectives (a partial list and for example only): Reducing expenses; bypassing a formal restriction on the number of positions in the organization; increasing managerial flexibility; increasing the company's value by increasing the value of "sales to an employee"; reducing the wage expenses section in the company's financial statements, since expenses in respect of the "services provider" is presented in the financial statements as an operational expenses, and rather not as wage expenses, etc.

This way, an employer who makes a worker sign an agreement he is self-employed knowing that there are employer-employee relations - this choice of the employer constitutes bad faith, which could constitute a consideration for imposing payment to the worker (which we shall discuss below).

On the other hand, it is possible to point out cases in which the "service provider" has an interest in not being employed as an "employee" and the format of employment as a "service provider" was requested by him, in order to achieve one or more of the following objectives (a partial list and for example only): Financial interest - wallet companies (characterizes senior employees earning high wages), other tax benefits (deduction of expenses, combining tax planning with a spouse, etc.); occupational flexibility - the ability to work at several places per the "service provider's" choice, absence of ongoing reporting to the organization as required of an "employee", absence of regulatory restrictions - relevant mainly in cases of budgeted bodies, the scope of work and dates thereof, and more.

Of course there may be cases in which both the employer as well as the "service provider" have a common interest that the service provider would not be employed as an employee (each for his own reasons), and this is not bad faith on the part of any of the parties - in these cases the "employee's agreement" should not be taken into account, and it is required to consider him to be an employee.

57. After the Court examines all relevant parameters - is this an employee requiring protection? Is it possible to indicate clear lack of good faith on the part of the employee? - The court would have the discretion to determine whether this is an employee, as the tendency would be that the greater the lack of good faith on the part of the employee - so would greater weight be given to the parties' agreement, as the burden of proof in this matter would be imposed on the employer.

58. In weighing the issues in this manner (individual examination of the employee and the power relations vis-à-vis the employer; examination of good faith of each of the parties; providing the Court with broad

discretion to rule on the issue; and primary burden of proof imposed on the employer) there is appropriate balance of the issues, so that one who would be ultimately be defined as an employee is indeed one labor law, including all its objectives, intended to grant him the overall rights (and obligations) given to one who meets this term. At that time, it would be required to apply the status case law aimed at over the years.

59. We should emphasize, our statements do not negate that customary so far in respect of cogency and protective labor laws, which apply to an employee, and these statements do not modify the ordinary tests of employer-employee relations. Additionally, our statements somewhat reduce the hall of entry to this status. Meaning, not every engagement between two parties for provision of services would automatically be classified as being employer-employee relations, and weight would be given to the question of the individual power relations among the parties, as well as the question of good faith or lack of good faith on the part of the parties, and to what extent and by which party, as ultimately certain space of discretion would be given to the Court to rule on this issue already at the stage of examination of employer-employee relations. Of course the aforesaid does not impair the possibility of examining good faith "at the second stage" of examining the financial remedies in cases where it was determined at the first stage that employer-employee relations did exist.

For the avoidance of doubt, we should clarify that we do not intend to say that merely filing a claim for acknowledgment of employer-employee relations constitutes in itself lack of good faith, and lack of good faith is the overall circumstances of the matter, as the burden to prove so is as aforementioned imposed on the employer.

60. **Conclusion:** The definition of an employee was, and still is, a derivative of the purposes for which labor laws were enacted. Hence, noting the changes occurring in the labor world, it is required to examine who is included in the term "employee," and this in light of the required interpretation of the purposes at this time. As part of this, it is required to consider who is an employee that requires protection, and who is one that does not "pass the gate." When it comes to one who clearly does not require protection under the circumstances, it is required to give greater weight to the question of the agreement between the parties and the principle of good faith or lack of good faith as expressed by all agreements between the parties and the duration of employment. Should it be learned in retrospect that this is a case in which there is clear lack of good faith on the part of the employee (as the burden to prove so is still imposed on the employer), it would be possible, in the appropriate cases, to take back a bit the historical "status" principle that applies to employees, and rule that this is a case where lack of good faith would overcome status.

61. Thus we see, while over the years a person's being an "employee" was, in respect of the rights and obligations that the law grants and cannot be waived or stipulated upon, something close to "status", and "status" is not established by an agreement or nullified by an agreement, in the present era, where there is clear lack of good faith on the part of the employee, greater weight is given to the principle of consent.

62. We should note again, buds that lack of good faith may lead to non-acknowledgment of an employee's status already sprouted in the Labor Courts' case law rulings, although ultimately it was not required to set a precedent on the matter, under the circumstances of each case. For example, in the **Karni** case Justice (ret.) Rabinovich states that:

“Indeed, status cannot be changed offhandedly or stroke of a pen of consent, however in LCH 52/3-145 The State of Israel, The Ministry of Housing - Buchris (hereinafter - the Buchris Case Law Ruling), p. 9, it was ruled that there may be very unusual circumstances: “...And under these it is absolutely clear that the employed person was aware of the agreement he made and preferred it over a labor contract.

There may be rare cases in which a worker consciously and for a clear interest of his waived cogent rights. Such cases may lead to the result that when he would wish, upon termination of the relations, to rely on his being of the status of employee, or upon his wish, upon termination of the relations, to claim additional social rights... in utter bad faith, the employee’s lack of good faith would overcome the requirement of cogency or the status resulting from it. This may be deemed promissory estoppel...” The Buchris case law ruling was handed down unanimously, as Deputy President, Adler, as his title at the time, agreed only to the result. I believe that the appeal should be denied if only for the reason presented in the Buchris case law ruling.

The case, subject matter of the appeal before us, is a classic case of a worker who is aware of the agreement he executed and prefers it over a labor contract while consciously waiving cogent rights. The Appellant is an attorney as law is his profession. The Appellant’s employment with the Respondent was, *inter alia*, within the taxation domain: Income tax, national insurance and value added tax. These issues have a direct impact on labor relations, what more so, the Appellant was involved himself in decisions on the matters of certain employees of the Respondent. For twenty years the Appellant declared towards any relevant tax official and towards

the National Insurance Institute that he is self-employed. For twenty years the Appellant provided services to the Respondent under an agreement, that *prima facie* appears to be a contract for providing services by a self-employed person rather than an employee, and never requested any of the rights a hired employee is entitled to. Only when the relations with him were terminated, he remembered to raise these demands. As a jurist the Appellant certainly knew what the rights of an employee are, however for "his own considerations" (those are the exact words he used in his testimony) to refrain from claiming these rights from the Respondent. This conduct calls for further investigation. For twenty years the Appellant allegedly chose not to be on his own, and only after he was "served with final divorce papers" from the Respondent he chose to appear as an employee. Had the Appellant believed that he is an employee, he had more than enough time to raise his claims on this issue, as expected of one who should act in good faith (LCH 54/3-77 Rothberg - Tadiran Ltd. [3], p. 468 - across footnote 4). The conclusion is that even if it was determined that there were employee-employer relations between the Appellant and the Respondent, his claim, subject matter of this appeal should be denied on the grounds of clear lack of good faith, which overcomes the requirement of cogency."

In LabA **Meir Yair Hayun Moore - The State of Israel, Ministry of Justice** (30.05.2006) Justice (ret.) Rabinovich stated that:

"Although the State agreed that the Appellant is of the status of "employee," this determination had the State not agreed to it, would raise questions to deliberate upon. These statements are

made since they, in themselves, support the result my colleague arrived at. 2. The Appellant, whose profession is law, knew or had to know the essence and nature of the agreement he entered. He was aware that in this type of engagement there are no social rights on the one hand, however, on the other hand the pay is much higher than the wages of a hired employee including all associated terms. He did not protest this, and not requested to change his status from "independent contractor" to "employee" (see as a comparison LabA (National) 300064/96 Pelley Karni - The Israel National Trade Union, IsrLC 36 241). Under these circumstances the deduction that was made - is justified."

In LabA 20005- 11-16 **John Doe - John Roe** (9.1.19), which discussed a claim of attorneys from the labor law field, my colleague, Justice Roy Poliak stated as follows:

"I agree... that the Appellant is not entitled, under the unusual and extreme circumstances outlined extensively in my colleague the Deputy President's judgment, to additional payments for social rights that are established under protective labor law.

In my view, this result could have been reached whether by way of ruling that we have before us one of those most extreme cases where the principle of good faith would overcome status notwithstanding the cogency of labor relations (see: Elisheva Barak-Ussoskin, "Forever Cogent? The Court's Path on the Flexibility Lane in View of the Principle of Good Faith," Elika Barak-Ussoskin Book 59, 129 (2012)), or in the manner my colleague the Deputy President chose, according to which the principle of good faith overcomes, under the circumstances of the matter, the rights granted to an employee by virtue of protective labor laws, as specified in para. 49 of his opinion and the references mentioned there".

Hence we see, although up to now there was some willingness among the Court's justices to acknowledge that clear lack of good faith, in certain cases would overcome the principle of cogency in determining status, this was not implemented in practice to date, however, as aforementioned, we believe that the time has come to do so, for all of the reasons we noted above.

We should further note, in conclusion of this part, that this Court has ruled in the past, in LabA 521/08 **Yitzhak Dieg - Regional Council Be'er Tuvia** (6.7.09) agreed by all members on the panel, including President (ret.) Steve Adler and Justice (ret.) Shmuel Tzur, that the clear intention of the parties regarding the nature of the engagement between them could have weight, and this weight may tip the scales when the traditional tests for determining employer-employee relations do not provide a conclusive result in respect of status. It was further stated in that case that:

"There is a great degree of pretending innocence and lack of good faith on the part of the Appellant, who exploited his status as a contractor for obtaining the position, and after expiration thereof he claims of the status of employee, and as such he would not have obtained that position. Hence, this is not a situation in which an employer "coerces" an employee to engage as a contractor or abuse his weakness. This is an informed engagement between two parties, as each party benefits from it. This too should be given weight under the circumstances of the matter."

Rethinking "Calculative," "Deterrent" and "Traditional"

63. So far we discussed the question of how broad should be the gate for a person's being of the status of "employee" including all that derived from it. However now, we are required to examine the outcome in

respect of one who is indeed included in the definition "employee," and upon the termination of the labor relations raises the question of settling accounts in retrospect. If - and when - is it possible to offset from the rights of an employee, who was acknowledged in retrospect as such, sums he was paid in "excess" from his employer. An additional question is whether the "excessive" sums establish a duty of restitution, which could exceed the rights that are awarded to the employee. Or, perhaps, it is required to examine another way that could provide a solution for this issue.

64. We outlined above the various approaches that were exercised up to date in case law to the question of how the rights of a worker who was acknowledge in retrospect as an "employee" should be calculated. According to all of the approaches "**the desirable normative situation is that workers who are "employees", according to the rules set out for this in case law, would be defined as such to begin with, would be paid in kind and regularly the rights they are entitled to by virtue of the protective laws and relevant collective agreements, and be entitled to vote and be elected to a labor union and benefit representing it".** Additionally, there is agreement that **"we are not interested in a situation where a worker would bring about his erroneous definition as "self-employed" for his own reasons - such as tax benefits, or agree to it knowingly and notwithstanding the absence of power and information gaps between him and the employer, while obtaining monetary consideration that takes into account all monetary and other rights he would be entitled to had he been defined as "employee" to begin with - and after termination of the engagement demand in retrospect once more the monetary value of the rights, in lack of good faith and while abusing labor laws** (section 42 of the Rofeh judgment).

And yet, so far there was no uniform ruling on this issue, which included many opinions and names ("calculative," "percentage," "traditional," "deterrent") and details, and there are various voices at the Regional Courts and the National Court on the issue, both in principle, as well as in the manner of implantation of the rulings.

In this regard Justice Rubinstein stated (yet prior to the judgments on the **Rofeh, Amir, Zarfati** and other cases), that "**this situation of various voices among one instance, certainly after the question was ruled upon more than once (even if by majority), is problematic. Even if a case law ruling was set by the National Court - and in our case, this is a long-time case law ruling that was set by a majority - does not bind its Justices in other cases, there are also legal policy considerations. The need for legal stability was discussed not once in the rulings of this Court...; and even if a Justice does not believe in a certain legal position, he is required to give weight also to these policy considerations "since between truth and truth - stability is preferable."** (HCJ 671/10 **Mekorot Water Company Ltd. v. Philip Tiberman** (10.10.2011).

In light of the above, there is no dispute over the need for a clear and final ruling for the stability and uniformity of the case law ruling.

For this reason, I believe that it is required to examine a new and additional alternative as a solution for the issue, which was not found so far, and perhaps could be a remedy - **so that it would be binding case law ruling from now on.**

The proposed alternative is the addition of "non-monetary compensation".

65. The rule in respect of these issues is that upon determining the rights one who was retroactively acknowledged as an employee is entitled to,

there are two layers: **The first layer - monetary compensation**, which is based on a remedy rationale for the claiming employee, and this rationale requires determining the monetary damage the employee incurred (based on a comparison between the monetary rights he should have been paid as the alternative wages and the contractor consideration he was paid in practice), **the second layer - is non-monetary compensation** in which the Court is given discretion to rule under the appropriate circumstances consideration that embodies all considerations that are to be taken into account, including the concrete circumstances of each and every case, as well as transverse considerations.

Following we shall further discuss each of the stages.

66. The manner to examine the calculative issue is comprised of the following stages:

The First Stage is the "Monetary Compensation" Stage

At this stage **comparison is conducted between the employer's costs and the contractual consideration** - for examining the question of whether the employee incurred monetary damages, it is required to examine the gap (which shall be referred to also as "**Delta**") between the employer's costs according to the alternative wages (should such wages be proven as aforementioned) and the contractual consideration, and this for the relevant time unit (hourly/daily/monthly wages). The employer's cost includes the social rights granted under the protective laws and general expansion orders; additional social rights granted at that workplace (in general or in respect of employees of the kind as the claiming employee); as well as the insurance fees that are required to be paid for a hired employee to the National Insurance Institute.

The calculation is required to be performed according to the characteristics of each employee and each workplace, however as a rule the social rights by virtue of the protective laws and general expansion orders include severance pay; pension deposits; vacation; sick days; convalescence pay, travel expenses. Additionally, at many workplaces it is customary to make deposits to an advanced education fund as well. As to the NII fees, it is required to adapt them to the characteristics of the specific employee. For the sake of convenience and in order to maintain uniform common grounds if possible - calculation may be performed in respect of the last work month (unless there is justification for calculating otherwise under the circumstances of the matter), and if necessary - to multiply it by the number of work months, however no more than the period of statute of limitations (seven years prior to filing of the claim).

We should emphasize that the burden to prove this is imposed on the employer. This means that in the cases where the employer proves alternative wages, meaning, convinces the Court of the wages that would be paid to the plaintiff had he been classified as an employee in the first place - the employee's rights would be calculated according to the alternative wages that would be ruled. The evidence of alternative wages could be, and not as a closed list, the wages of a corresponding employee who performed similar work; the wages' charts in relevant collective agreements; wages that are appropriate for a hired employee at the same status as indicated by external sources, for example by an expert opinion in cases where there are no other employees in similar positions; or evidence regarding alternative wages that were offered or were bona fide determined by the parties themselves, had there been such, all depending on the specific circumstances of the case and the Trial Court.

In the event where alternative wages were not proven - had the employer failed to meet the burden imposed on him in this regard - the rights would be calculated according to the contractual consideration the worker obtained as "self-employed." Meaning, the monetary social rights should be ruled upon according to the contractual consideration that was paid in practice, and there is no Delta at all. At the same time, it is possible that even in such a case it would be justified to rule on non-monetary compensation, pursuant to the guidelines outlined below and all circumstances of the matter.

However, in the event where the employer proves the wages and there is a gap between the wages that were paid in practice to the employee during the work period (the "contractual consideration") and the employer's cost according to the alternate wages - **it would be possible, as part of settling accounts, to offset from the employee the sums he would be entitled to as a result of retroactively acknowledging his status as an employee, and this up to the sum of the gap between the "contractual" consideration and the employer's cost according to the alternative wages as determined.**

In other words: In the event of settling accounts in retrospect - the consideration would be calculated according to hired employees' wages (should it be proved) **and offset would be made** (as the default that was so far in the "calculative" approach).

(For this matter see also Prof. Guy Davidov's position in his essay: "Stipulation Upon the Status of "Employee" and its Consequences", **Mishpatim 50** 5780 (hereinafter: **Davidov Stipulation Upon Status**), p. 92 and p. 107, according to which since money is exchangeable, it is possible to take into account payments paid in excess as part of the contractual consideration, as if such were paid on account of the

monetary rights by virtue of labor laws, so long as such are monetary rights).

We should further note that an employer would not be entitled to restitution of part of the sums he paid the employee by virtue of the contractual agreement between them only since the employee asked for such acknowledgment, and at the most an employer may petition for offsetting the gap (between the alternative wages he proves and the contractual consideration) vis-à-vis rights that would be ruled in favor of the employee as part of his claim, and no more than that (on the reasons for this see, for example, **Procaccia**, pp. 15-16).

So far the guideline, and we are not expressing a position on the question of what should be ruled in unique cases such an employer to whom section 29 of the Budgetary Principles Law, 5745-1985, or when a collective agreement applies to the parties, preventing the possibility to draft a beneficent personal agreement ((Labor (National) 54/3-85 **Goldfarb Ya'acob - Israel Aerospace Industries Ltd**., 27(1) 287 (1994)).

Finally, we should note that our statements' meaning at this stage address only monetary social rights that were payable to the employee during the work period and expiration thereof and paid to him now as part of repairing the erroneous classification, and does not refer to other rights the employee may claim as part of the same statement of claim, for example - compensation due to sexual harassment.

67. **The Second Stage is the "Non-Monetary" Compensation" Stage**

First it is required to examine <u>whether compensation would indeed be imposed</u>, which is at the Court's discretion <u>The starting point is, that it required to rule on such compensation and that the burden to convince that such should not be imposed, is imposed on the employer</u>.

The first aspect that may be taken into account for this purpose is derived from the fact according to which in the ordinary case acknowledgment of a worker as an employee embodies rights of monetary value that cannot be quantified, such as restriction on dismissal and additional rights that are not monetary (the possibility the possibility of promotion, occupational security, social integration in the workplace, etc.) as well as the rights that are derived from the purposes labor laws seek to promote. We discussed the various purposes above, in the part that discussed defining the status of employee. In short, we should state that among those purposes, and without exhausting such, are listed the protection of the employees' well-being, their rights and ensuring that they would not be exploited by the employer, as well as deterrence from erroneous classification in general. In order to do, effective deterrence of employers from erroneous classification is required, in the form of compensation.

Additional considerations that may be taken into account in order to determine whether or not such or other compensation should be imposed, such as: Who dictated the format of engagement between the parties; the degree of lack of good faith on the part of the employer or on the part of the worker; the employer's being aware that he is employing the worker as self-employed despite his being an employee pursuant to the case law tests; all the circumstances that indicate exploitation of the employee's weakness by the employer in order to deny him his rights; the ratio between the contracting wages that was paid and the wages of a "hired" employee; the existence of a collective relations system at the workplace that benefits the workers; the industrial context - for example: Is this a type of occupation in which it is customary to work as self-employed; the duration of employment; the degree in which all terms of employment deviated from that

required pursuant to labor laws and protective laws; matching the severity of the violation to the rate of compensation that would be ruled; weighting "non-monetary" rights that the employee had not obtained due to the erroneous classification. For example, there are cases in which as a result of an erroneous classification, the worker was excluded from activities and promotion routes were closed to him; considerations relevant to a public employer. So for example, it is possible to examine the existence of unique non-financial rights existing mainly in the public sector and in workplaces at which labor relations are regulated by collective relations; broad legal policy - such as the need to establish deterrence from erroneous classifications in general.

Hence this is the part in which it is determined, per various relevant considerations - whether it is required to deviate from the point of origin regarding the imposition of "non-monetary compensation".

68. Regarding non-monetary compensation, we should note that compensation for damage that is "non-monetary damage," could be ruled upon per the Court's discretion by virtue of sections 10 and 13 of the Contracts Law (Remedies for Breach of Contract), 5731-1970. For this purpose, the employer is deemed as one who violated the work contract, since "**cogent provisions, by definition, are part of a contract regardless of the parties' consent**" (Procaccia, footnote 90 and the references there).

69. As to the deterrence considerations we mentioned, the following should be noted:

Where a party to labor relations was acknowledged as a contractor over the years and is now acknowledged as an employee (according to the tests we listed in the first part), there are two results: One, that over the

years the employee's rights, by virtue of labor laws - were violated, and the other that the wages he was paid were usually higher than that he would have been paid as an employee. In order to avoid this situation, case law discussed the question of what measures should be taken against the employer in order to deter him from conducting erroneous classification in the first place. The main sanction is - to refrain from acknowledging the employer's right to offset the excessive wages he paid due to the contractual classification, and it is clear that there would be no return of funds from the employee to the employer. These sanctions are established of course from the point of origin where the power relations between the employee and the employer clearly tend to the employer's side. In such a situation, it is clear that deterring the employer is required, so as he would not exploit his power and position compared to the employee, for creating false representation in classifying the relations between them.

Alas, since this sanction could lead to over-deterrence (as the difference between the employee's wages and the contractual wages is very high) and under-deterrence (as the difference between the employee's wages and the contractual wages is low); to incentivize employers who already decided to violate the law and inflict damage on the worker more severely relative to the employee (meaning failure in establishment of "marginal deterrence" = incentivizing one who already chose to violate the law so as he would prefer a slight violation rather than a sever violation - since the sanction increases upon raising the contractual wages, it incentivizes a violating employer to pay his worker lower contractual wages to the extent possible); and also contradicts the principle of proportionality - meaning where there is imposition of a light sanction for a severe violation, and severe sanction for a slight violation (since where the contractual wages are low it imposes on the

employer low or very marginal costs and where the contractual wages are high it imposes on him heavy costs) (**Procaccia**, pp. 12-15).

We believe that granting weight to all of the above as part of the compensation given to the Court's discretion, enables providing compensation as part of which deterrence considerations are taken into account, however in a manner that provides a more correct, appropriate and comprehensive solution, while taking into account additional relevant considerations.

This model enables matching the degree of the sanction to the severity of the violation, so that the rate of compensation may be higher the more severe the violation. When there would proportionality in ruling on the compensation to the required deterrence level, deterrence would not be too low or excessive. Maintaining a proportionate ratio between the rate of compensation and the severity of the violation would enable establishing the desirable marginal deterrence. This would also include giving weight to the question of good faith, meaning, an employer who made an error in good faith in classifying the employee would bear compensation at a reduced rate compared to an employer who in lack of good faith and of his own interests chose to attempt bypassing the protective laws, and thus would bear a higher compensation rate.

In this manner there would be an adequate solution for the overall considerations, in a manner that would deter from erroneous classification and assist in implementing the purposes of labor law, without compromising the desire to achieve individual justice in a given case.

70. **The rate of compensation** - <u>after it was ruled that it is required to impose compensation on the employer, it is required to determine its rate</u>.

Also regarding the compensation rate - there are relevant considerations that the Court may take into account, *inter alia*, and not necessarily in their order of importance, such as: Are these collective relations that embody non-financial rights of high significance (compared to labor relations with an employer that does not have an employees' union); the degree of bad faith on the part of the employer or on the part of the employee; had the employer knowingly attempted to bypass the labor laws, or whether he erred in good faith in classifying the engagement; who dictated the model of engagement between the parties - so, for example true consent of the employee or clear initiation on his part for classifying him as a "contractor" of his own interests, relevance for reducing the sum of compensation, and in the appropriate cases (particularly where the employer was forced to agree and therefore should not be considered as liable even for the absence of examination) - up to cancellation thereof; the degree of exploitation of the employee's weakness and dependency on the employer (if any); was erroneous classification made also towards additional employees; the employee's part in the decision to adopt the contractor's employment format; the degree at which the terms of engagement deviated in practice from that required pursuant to the labor laws; the rate of the contractual consideration that was paid compared to the alternative wages, and this as an indication of both the degree of the employee's free will, as well as the extent of the financial benefit gained by the employer or employee from the erroneous classification; was the employee offered to correct the erroneous classification and obtain the status of "employee" during the work period, as in order to do so it is required to take into account the timing of the offer as well as the degree of its reasonableness and fairness. Additional relevant data are whether alternative wages were proven or whether the social rights were

calculated according to the contractual consideration (as in such a case, to the extent possible to assume that the hired-employee's wages were in fact lower - however it was not proven - merely ruling on the rights according to the contractual consideration may be taken into account); the sectoral context - for example: Is this a type of occupation in which it is customary to work as self-employed; the duration of employment; as well as the overall prevalence of erroneous classifications in the relevant industry and the need for deterrence of many. Weighing "non-monetary" rights the employee had not obtained due to the erroneous classification may also be taken into account. For example, cases in which as a result from erroneous classification the employee was excluded from activities and promotion routes were closed to him; the financial benefit of the parties - meaning, where the employer did not save costs however the employee "benefited" from the classification, this would have an impact so as the compensation would be low, or under certain circumstances would not be ruled on at all.

The rule in this regard is that it is required to suit the compensation and manner of ruling on the case to the circumstances of each case.

71. **As to the practical aspects of the new arrangement** - since this is a precedent-setting ruling, more accurate criteria as to the manner of calculation of compensation shall be established in future rulings, step-by-step, along with the development of the practice in this regard.

We are aware that the multiple considerations for determining the rate of compensation makes it difficult to establish uniform and clear criteria, however the overall picture, in light of the advantages inherent in this mechanism, and in view of the long-standing controversy over the alternatives that were customary so far, we believe that the advantage outweighs the disadvantage, and this mechanism we set

should be adopted. It should be emphasized - it is possible that in additional cases that would be filed in the future on this issue, the Court would continue and develop additional rules and secondary rules in order to increase the uniformity of the law and expectations.

72. We are further aware of the difficulty that a significant part of the rights granted to employees are "non-monetary" rights, as their monetary value is difficult to assess, *inter alia*, since they include a subjective personal component (for example, social interaction at the workplace), as well as speculative components (for example the possibility of promotion at work), however the difficulty is also the advantage of use of the "non-monetary compensation" mechanism, so that in order to determine the rate, all relevant considerations, including the non-monetary damages, are taken into account, although their financial value cannot be determined precisely.

73. In conclusion of this chapter we should note that **"this is an issue that is not only consistently present at the Labor Courts' halls and has significant financial implications, but rather also engages in a multidimensional and complex legal issue, in which various social and legal concepts conflict. Thus, time will tell if the rocking ship of case law ruling regarding good faith, cogency, offset and restitution could be brought to a safe haven"** (**Mironi**, p. 175).

<u>The Legal Ruling, Doing Justice and What Lies Between Them</u>

74. After all that has been said so far, it is important to clarify that upon the justice's ruling on these issues, as any issue he is to rule on, the justice's basic duty is to do justice.

    If we reduce all laws to "one law" - we may talk about doing "justice." When discussing "justice" in law - we usually focus on justice among the litigants. However, also broad considerations exceeding the narrow

framework of the litigants are taken into account - and then we use terms of legality, morality and “public policy.” Law attempts to balance the justice between individuals - “individual justice” and external objectives - general or group justice.

There is no dispute that in labor law exists, and usually intensely, a structured gap and tension between the sense of individual justice - between the two parties to the concrete conflict - and the “group/general justice” regarding the overall employees’ status.

This tension, which is not unique only to labor law, may be illustrated by the following example: An employee who initiated work at less than minimum wage, at a *bona fide* employer, his claim in retrospect for minimum wage would not be rejected only due to the individual sense of justice between the two current individuals, and this since it is not possible to examine the concrete relations detached from the “overall picture”, it being the impact of the act on the employees’ status.

The issue that arises in our case on determining status in retrospect, refines the said gap and tension, especially in cases where the employee was not financially abused. Why is this?

Since if we previously reduced “law” to the attempt to do justice, the history of law is an attempt to “formalize” justice to known rules so justice can be presented as objective. However, these rules and formulas will never be able to cover all the intermediate nuances reality establishes, and therefore many times law is required to make use of “valves", which are the way to bridge over the tension between "individual justice" and "group justice” and the lack of ability to set rues in advance. The principle of “good faith” is primarily relevant to our case.

The use of valves such as good faith is made where literal implementation of the legal rule is inconsistent with values that the

Court believes require protection (**Omri Yadlin**, p. 867), including the sense of justice. An expression of this trend of use of good faith for suiting the result to the individual sense of justice may be found in the derivatives of determining status in retrospect:

First, the principled willingness to acknowledge denial of status due to class due to clear lack of good faith, which we discussed in the first part of the judgment; and finally in the willingness to rule on compensation that would take into account, as one of the considerations, the question of the parties' good faith.

Conclusion so far - the Practical Level

75. When the Court is required to discuss the issue of acknowledgment of employer-employee relations, **it is first required to use the known tests** for determining classification, including a more thorough examination of the negative aspect. As part of these tests it is required to take into account additional considerations to those that were customary until now, including the issue of good faith, the parties' status, the parties agreement and others, as specified extensively above in **sections 55-62.** So far as it does not concern an "employee" - it is not required to turn over and examine the question of retroactively settling accounts (not even alternatively!).

So far as it is ruled that we are indeed discussing an "employee", it is required to examine the claimed rights based on the estimated wages he would have obtained had he been defined as an "employee" to begin with, as the sums he is entitled to would be first offset from the gap (should there be a gap) between the employer's cost according to the hired-employee wages and the contractual consideration, and pursuant to the principles we specified above in **section 66.**

When it is required, and the contractual wages that were paid are not sufficient for including the wages that should have been paid including the social rights (based on the reduced wages) the gap between the contractual consideration and what should have been paid would be supplemented.

Following, the question of whether it is required to impose on the employer compensation at the discretion of the Court should be examined, as the starting point is that it is required to rule on the "non-monetary" compensation and the burden of convincing that such compensation should not be ruled is imposed on the employer.

At this stage the Court reviews various considerations (described above in **sections 67-69**), and finally rules on whether the compensation should be imposed.

Where it is ruled that compensation is to be imposed, the Court is required to determine the compensation rate. In the aspect of the issue of good faith, which is one of the considerations for ruling on "non-monetary" compensation, it may be considered as follows:

That the employee would not obtain additional compensation or that such would be compensation at a reduced rate - in cases where the employee lacks good faith;

When discussing two parties who both acted in good faith or acted in lack of good faith - this would be a "midway result" in respect of the "non-monetary" compensation;

And when discussing an employer who acted in clear lack of good faith - the rate of compensation would be high (and the fact that calculation of the social rights was made based on reduced wages would be taken into account, and therefore the compensation should be increased in order to maintain the required deterrence of employers to refrain from erroneous classification).

76. In order to simplify the issues and for concluding the issue, we shall present a "flowchart" according to which it is required to examine the question of retroactive acknowledgment of employer-employee relations:

a. **At the first stage (the acknowledgment stage)** - the employee is required to prove that notwithstanding the agreement with the employer according to which he works as self-employed, the tests of employer-employee relations apply to him, including careful examination of the negative aspect of the integration test. As part of the overall considerations of the combined test, the employer would be able to prove that there are circumstances justifying considering the employee's conduct in bad faith that would give certain weight, in the borderline cases, to the employee's wish to be self-employed.

b. Should it be ruled that the "employee" acted in lack of good faith that strengthens the meaning of consent or agreement to refrain from working in the format of a hired employee, at this stage (rather than at the stage of calculating the rights) this would have significance, and it would be ruled that no employer-employee relations exist, and therefore he is not entitled to any rights.

c. Should lack of good faith and the meaning of consent or desire not be proven, it would be ruled that employer-employee relations did exist. And it should be emphasized - only where it is ruled that labor relations did exist; we would go on and examine the question of calculating the rights.

d. **At the second stage (the stage of calculation of the rights)** - should it be ruled that employer-employee relations exist, calculation of the rights would be calculated in the following manner:

a. Calculation of the value of the alternative wages (which the employer must prove), including the value of the social rights, which are derived from those alternative wages, as customary at that workplace for employees in similar positions.
b. Offset of the sum specified in section 4a from the total contractual consideration the employee obtained; up to the sum of the gap between the employer's cost according to the alternative wages and the contractual consideration that was paid in practice.
c. Should there be a gap between the contractual consideration the employee obtained and the calculation that was performed pursuant to section 4b, this gap would remain with the employee and would not be returned to the employer.

e. In addition to payment of the social rights themselves as set forth in subsection 4, and should the employer fail to convince that such should not be imposed, "non-monetary" compensation would be ruled on based on a wide range of considerations and, inter alia, noting the non-monetary rights of one who was acknowledged as an employee in retrospect, and noting deterrence considerations and the circumstances of each case.

77. Based on these principles, we shall turn to examining the individual cases we are to rule on.

From the General to the Particular

LabA 15868-04-18 (Gabriel Kotta - the Ra'anana Municipality)

Factual Background

78. The Appellant (hereinafter - **Mr. Kotta)** has filed a claim to acknowledge him as the Respondent's employee (hereinafter - the

Ra'anana Municipality or the **Municipality**) with the Regional Labor Court in Tel Aviv (LDJ 614-07-14; Justice Sharon Elkayam and Public Representative, Mr. Zeev Birenboim). As part of the claim, Mr. Kotta requested to charge the Municipality with payment of his rights as a hired employee. Additionally, he requested charging it with payment of severance pay, compensation for wrongful dismissal and payment for lack of prior notification.

79. The Municipality, on the other hand, claimed that there were no employer-employee relations between the parties and therefore the claim should be dismissed. Additionally, the Municipality filed a countersuit, in which it requested the return of payments made to Mr. Kotta beyond the wages payable to him pursuant to the approved collective agreements and contrary to the provisions of the Budgetary Principles Law.

80. Following are the relevant facts as specified by the Regional Court:

a. Mr. Kotta is a "folk dancing" instructor, who engaged with the Municipality in an agreement according to which he would teach "folk dancing" lessons at various schools in the city of Ra'anana, as part of the "Dancing School" Project of the Complementary Education Department. The first engagement agreement between the parties commenced on 1.9.1991.

b. Pursuant to the engagement agreements, the engagement was renewed annually, so that one of the parties would contact the other party to coordinate the engagement for the following year not long before commencement thereof. The engagement agreements, were titled differently over the years, were signed around the end of each calendar year, prescribing, *inter alia*, the engagement period, the consideration for the work and terms for terminating the work.

c. Mr. Kotta taught folk dancing at elementary schools within the Municipality's territory (and mainly at three schools - Hedekel, Magad and Ha'Yovel) as the studies' objectives were two major events conducted by the Municipality and funded by it (one, the "Dance Festival," which was held on Independence Day, and the other, the "Children's Songs Festival." Additionally, Mr. Kotta taught at summer camps the Municipality operated on its behalf during the summer vacation.
d. The teaching employees at the schools, including the school principal, are employed by the Ministry of Education and only the administration employees at the schools (secretaries, building caretakers, etc.) are Municipality employees.
e. Upon the commencement of the agreement period Mr. Kotta's pay was paid with paychecks, and during the remainder of the period the consideration was paid vis-à-vis tax invoices where Mr. Kotta is listed as an authorized dealer.
f. Mr. Kotta's hourly wages, commencing around 2008, stood at NIS 90 with added VAT.
g. Mr. Kotta used to submit monthly reports of his work hours, which were examined and approved by the principal of the school he taught at.
h. Mr. Kotta ran an independent business and did so vis-à-vis the Tax Authorities and the National Insurance Institute.
i. Mr. Kotta filed with the Tax Authorities (along with his spouse) income tax reports. As part of the reports he deducted expenses (depreciation, purchase of materials, car maintenance work clothes, phone, communications, and more) in the scope of thousands of shekels. Additionally, he set aside provisions for an advanced education fund - as self- employed.

j. During the engagement period between Mr. Kotta and the Municipality, Mr. Kotta provided services to other entities, in addition to the Ra'anana Municipality, and as part of his business he provided dancing instruction services as well as pest control services.

k. In April 2011, due to dissatisfaction with the service provided by Mr. Kotta, he stopped teaching at the Meged school and the Ha'Yovel school.

l. During the school year 2012/2013 (which commenced on 1.9.2012) the engagement was not renewed, and on 12.11.12 Mr. Kotta was summoned for a conversation at the Municipality.

The Parties' Arguments and Judgment of the Regional Court

81. **Mr. Kotta argued** in essence that he was employed by the Municipality as a folk dancing instructor commencing 1.9.1991 and for approximately 22 years, and he was paid wages similar to those of hired employees' wages in his position and seniority, however he was not granted social rights he was entitled to, including pension, convalescence, vacation days and more. According to him, in his matter the positive aspect of the integration test held true. Meaning, the Municipality paid his wages and determined the scope of his employment; he acted per the Municipality's guidelines issued by Ms. Ester Sela, director of the Complementary Education Department (hereinafter - **Ms. Sela**); his work constituted an integral part of the Municipality's ordinary activities in general and that of the Complementary Education Department in particular. In examining the negative aspect of the integration test, he did indeed run an independent business, however there was no connection between his work at the Municipality and his private business; he did not invest in

manufacturing means and did not take upon himself any financial risk; the Municipality provided him with the necessary equipment. What more so, his income from the Municipality was his primary income. Therefore, he is entitled to social rights as an employee. Mr. Kotta added that he was not given a letter of termination of employment during the last years of his work, and his employment continued in an ongoing manner. Upon the expiration of his last work year he was not contacted in order to set out the work format for the upcoming school year, as was done over the years, and when he looked into the issue the school principal notified him that his employment was terminated. Thus he is entitled to severance pay, compensation for wrongful dismissal and payment for lack of prior notification. It was further argued that the Municipality failed to prove that the consideration he was paid as an independent contractor exceeded the cost of employing him as an employee, and hence its claims for offset and/or restitution should be denied.

82. **The Municipality argued on the other hand** that implementation of the tests set out in case law and examination of the complete picture lead to the conclusion that Mr. Kotta was not a Municipality employee and therefore the claim should be dismissed. According to it, Mr. Kotta obtained the contractual consideration for his services vis-à-vis invoices; the engagement between the parties was significantly different than the Municipality's engagement with its employees in many and diverse senses; Mr. Kotta chose the manner of employment as an independent contractor for his own considerations. Meaning, the significant amount of the monthly consideration, the low scope of hours in providing the service, lack of subordination to collective agreements, lack of a restriction on additional work, non-subordination to the disciplinary rules and many others; what more, as a result of this

employment format he did not undergo the screening processes set out under law for hiring employees by way of a public tender. The Municipality further added that it is presumed that the format of Mr. Kotta's employment as an independent contractor was made per his request, and that the claim was filed unreasonably and in extreme lack of good faith as it was his request and over years of representing otherwise. Furthermore, the claim constitutes a blatant violation of the contractual engagement agreements, which explicitly prescribe that the contractual consideration he was given is final and that he is not entitled to any additional sums besides it. The Municipality further argued that Mr. Kotta ran an independent business and filed with the Tax Authorities, along with his spouse, reports that clearly indicate that he would be permitted to deduct from his taxable income expenses such as depreciation, maintenance and office, car maintenance - a benefit that is not payable to a hired employee. Additionally, he purchased equipment that served him in providing services to other parties. It was further argued that should it be ruled that employer-employee relations did exist, it is required to offset from any sum Mr. Kotta may be awarded as an employee the sums that reflect the costs of his alternative employment, had he been employed by the Municipality, in accordance with the collective agreements that apply to it. According to the Municipality, the terms of wages at which it was allowed to employ him, pursuant to section 29(a) of the Budgetary Principles Law, are per youth and community society rank. Finally the Municipality argued that termination of the engagement was conducted at Mr. Kotta's initiative; that he was not employed as an employee thus he was not dismissed; the terms of engagement were agreed upon annually, and one cannot ignore the format of the engagement between the parties, according to which the last engagement agreement expired on 30.6.12; over the last

year of the engagement year, the scope of engagement was reduced to only one school, in light of dissatisfaction with the service provided by Mr. Kotta and his conduct, and a clarification conversation was also held on 28.3.11. Notwithstanding, he was offered several alternatives for continuing the engagement, however Mr. Kotta refused all of the Municipality's offers.

83. **In its judgment the Regional Court ruled that employee-employer relations did exist between Mr. Kotta and the Municipality.** The Court reasoned its ruling as follows: The fact that for over a long period Mr. Kotta was employed as an independent contractor does not constitute the "presumption" that this was done per his wishes, and the Municipality failed to prove that he was given the right of true and free choice in choosing the format of his employment; the engagement between the parties took place for a significant period of approximately 22 years, and as indicated by the engagement contracts these were ongoing contractual relations that at times did not require renewal of the original agreement but rather "an addition of an appendix" that extends the original engagement agreement, which testifies to continued employment; in examination of the positive aspect of the integration test, there is no dispute that Mr. Kotta gave folk dancing lessons at three different schools under the responsibility of the Municipality, acted per the instructions of the Complementary Education Department., was subordinated to Mr. Simantov , whose instructions were coordinated with Ms. Sela; it is obvious that the hired employees and the employees who were employed as "independent contractors" in practice executed the same work and the difference between them concerns the manner of payment of their wages. All instructors were given holiday gifts from the Municipality and participated in toast events of the Complementary Education

Department attended by the mayor and the Municipality's CEO, so that Mr. Kotta served as an integral part of the Complementary Education Department's activities; in examining the negative aspect of the integration test, there is no dispute that Mr. Kotta ran an independent business, however it was not proven that he employed additional employees. Additionally, the business served for additional purposes such as pest control, not necessarily for conducting folk dance lessons specifically, Mr. Kotta's home served as an office and his main income was obtained from the Municipality, as it appears that the business was established in order for him to able to provide the Municipality with tax invoices. So, the business does not meet the negative aspect of the integration test as an independent business; the Municipality supervised Mr. Kotta's work who was subordinated to Ms. Sela, director of the Complementary Education Department, the party who approved the requested hours is the Complementary Education Department at the Ra'anana Municipality, and it was good reason that the agreements were signed around opening the next budgetary year. There is not much in the Municipality's claim that he was subordinated to the school principal who is employed by the Ministry of Education; the testimonies indicate that the personal relations test is met, so that over the years Mr. Kotta needed replacement only a few times, where he contacted Mr. Simantov so he could assist him in finding a replacement. Mr. Kotta did not provide substitute teachers when he was unable to arrive due to illness; had Mr. Kotta been employed other than the through the customary tender procedures, it does not mean that he is not entitled to wages, pursuant to the rules relating to Municipality employees at his rank; Mr. Kotta's conduct amounts to lack of good faith, however does not amount to extreme lack of good faith that denies the ruling that employee-employer relations existed among the parties,

what more, it was not proven that he was given true choice as to the format of his employment.

84. **As to Mr. Kotta's entitlement to social rights by virtue of the protective laws**, the Regional Court ruled that the Municipality failed to prove its claim that Mr. Kotta's wages should be calculated according to the "youth and community society", but it is rather required to calculate the wages according to the wages that were paid to teachers "under a special contract," meaning according to NIS 60 per work hour. Thus, since the Municipality argued that it is required to add 50% to the wages paid to a hired employee for the paid social rights, and since the Municipality paid Mr. Kotta consideration in the sum of NIS 90 while the hourly wages he would have been paid as an employee stood at NIS 60 - hence he was paid the full social rights at the rate of 50%, as part of the hourly consideration he was paid.

85. Additionally, the Regional Court denied the claim for redemption of sick days, payment of compensation due to wrongful dismissal, severance pay and consideration for prior notice.

The Parties' Arguments in the Appeal

86. Mr. Kotta claimed that the Regional Court erred in its ruling that he is not entitled to monetary rights as an employee of the Municipality, as the consideration he was paid included the social rights he would have been paid had he been defined as a hired employee to begin with. According to him, pursuant to case law the burden to prove alternative wages is imposed on the Municipality, and as this burden was not met, the wages he was paid in practice should be the basis for calculating his social rights, rather than as the Regional Court ruled. It was further argued that the Regional Court erred in denying his claim for payment of severance pay, prior notice fees and compensation for wrongful

dismissal, and charging him with court expenses to be paid to the Municipality despite the fact that his claim for acknowledgment of employer-employee relations was accepted and the counterclaim was denied.

87. The Municipality, on the other hand, argued that Mr. Kotta's claim is in lack of good faith, since for decades he benefited from the format of contractual engagement, after he asked and obtained a higher contractual consideration. In any event, no additional payment should be made to Mr. Kotta, since this is payment tainted with illegality under the Budgetary Principles Law. It was further argued that the Municipality is entitled to offset all Mr. Kotta claimed from the surplus payment it paid him, pursuant to the "calculative approach" that was ruled upon in the **Anat Amir** case and in the **Shahar Zarfati** case. The Municipality added that it met the burden of proof in respect of the alternative wages. The Municipality further argued that the claim for redemption of sick days was duly denied. Finally, it was argued that the Regional Court was right in its ruling that termination of the engagement between the parties was initiated by Mr. Kotta.

LabA 12372-04-18 (The Municipality of Ra'anana - Gabriel Kotta

The Parties' Arguments in the Appeal

88. The Municipality argued in the appeal it filed that the Regional Court erred in the mere determination that employer-employee relations existed between the parties. It also erred in so that after it acknowledged employer-employee relations, it denied the countersuit the Municipality filed, as it claims that this contrary to section 29 of the Budgetary Principles Law, which does not permit payment of contractual consideration that exceeds the costs of wages as an employee. Alternatively, it was argued that the regional court erred in being too

easy with Mr. Kotta, although the latter acted in extreme lack of good faith, and therefore the claim of offset and/or the counterclaim the Municipality filed should be accepted. As an additional alternative, it was argued that the Regional Court erred in is ruling that Mr. Kotta is not to be deemed self-employed.

89. On the other hand, Mr. Kotta argued that the Regional Court was right in its ruling that employer-employee relations existed among the parties pursuant to the various tests set forth in case law. At the same time, the Regional Court erred in its ruling that he is not entitled to the monetary rights for this, as specified in the statement of claim. According to him the Court should have ruled that his social rights are to be calculated according to the "deterrent approach", since the Municipality was aware that he is its employee, and at the beginning of his employment he was even given a paycheck. Alternatively, it was argued that even if the deterrent approach is not to be exercised, the Court should have ruled that the basis for calculation of his rights was the pay he was paid by the Municipality. As to the Municipality's argument in respect of the Budgetary Principles Law - it should be rejected outright, since the Municipality itself claims that additional employees it employs in positions such as his were paid high wages.

The Position of the Wage and Labor Agreements Department

90. Pursuant to the ruling of this Court dated 19.8.18, the position of the Wage and Labor Agreements Department at the Ministry of Finance was required (hereinafter - also the **Commissioner**) on the issues discussed in the proceedings. The Commissioner's position was provided in respect of the three proceeding together. Following shall be presented the Commissioner's position in essence, and the parties to

these proceedings' approach (Mr. Kotta and the Ra'anana municipality) towards its position.

91. According to the Commissioner, the guiding rulings that were handed down on the matter of balance of rights and duties between parties to employer-employee relations in retrospect, discussed private employers and did not address special considerations to be considered regarding employment in the public sector, including terms of hiring, employment and wages that are subjected to the rules in State and budgeted entities. It is also required to grant the appropriate weight to the public's interests, including protecting the public treasury and maintaining the value of equality in hiring for public services and the terms of the services themselves. Further, according to the Commissioner, since the State operates for the abolition of non-authentic contractual agreements, it is not justified to impose a monetary sanction on the State intended to deter from such an engagement. Therefore, in cases of acknowledgment of employee relations, it is required to ensure the payment rules in State services, including by way of offsetting, in situations where the contractual consideration that was paid embodies the costs of the social rights granted to a corresponding State employee. Additionally, the Commissioner pointed out the unique arrangement set out in section 29 of the Budgetary Principles Law, which includes the Commissioner's enforcement activities, in order to maintain budget restraint, uniform and proper use of public funds. According to the Commissioner, contractual engagements at supervised entities are many times intended to establish a "bypassing route" around the wage restrictions at these entities, and thus the Commissioner's activities are of utter importance, including instructing on the duty to return excessive wages. The Commissioner argues that impairment of the Commissioner's power in

this regard, could establish loopholes in the wage frames at the supervised entities, and set an incentive to non-authentic contractual employment, rather than deter employers from such employment. As part of the position, the Commissioner specified the State's activities for reducing non-authentic contractual engagements, as well as listed the advantages of ordinary self-employed persons at the State and the supervised entities, which, according to the Commissioner affects the approach that should be taken in cases where the State was acknowledged as an employer in retrospect. According to the Commissioner, these advantages are added to the additional considerations, in view of which justification for taking a deterrent approach towards the State and the supervised entities is reduced, on the one hand, and on the other hand strengthen the justification for applying the law to all State employees, including the possibility to offset the social rights against the contractual consideration that was paid to an employee who was acknowledged in retrospect. The Commissioner argues that only under exceptional circumstances, in which it would be proven that the worker incurred damage as a result of non-authentic employment, and that the State acted in lack of good faith in refusing to acknowledge employee relations, the Labor Courts are empowered to compensate the employee by a one-time reasonable compensation for non-monetary damages he incurred due to non-acknowledged of him as a State employee. As to the entities that are supported and budgeted to whom section 29 of the Budgetary Principles Law applies, the Commissioner argued that other considerations are added, including the many deviations from wages spread among these entities, due to which it is required to ensure compliance with the provisions of section 29 of the Law, also when it comes to acknowledgment of employee relations retroactively. Thus, also in

these cases the Commissioner is empowered and required to determine the agreement that would apply to the parties instead of an agreement that is contrary to section 29 of the Law, including the duty of restitution that would apply to the excessive funds that were paid to the employee. The Commissioner added that section 29 is a specific law that overcomes a general law, hence there is no room to apply the deterrent approach in cases where the power by virtue of section 29 is exercised. According to the Commissioner's approach, maintaining the principles of section 29 along with the Court's power to rule on a one-time compensation under the appropriate circumstances, establish a balanced, reasonable and appropriate arrangement, and this approach would establish maximum deterrence - both from attempting to bypass the budgetary constraints as well as from contractual engagement that could harm the weak employee.

Regarding the case itself, the Commissioner attached a calculation of the wages of Mr. Kotta, performed by the professional echelon at the Ministry of Finance's Enforcement Unit.

92. Mr. Kotta argued, as part of the summary response he filed, that even if the Commissioner's principled position would be accepted, it should not be applied in his matter, since the calculation the Commissioner performed is based on erroneous factual data and lacks reference to various rights to which he is entitled.

93. The Municipality argued that the Commissioner's position settles with and reinforces its arguments that under the circumstances of this case, beyond case law rulings on offset and restitution, payment of excessive contractual consideration is illegal, as it contradicts the provisions of section 29 of the Budgetary Principles Law. According to the Municipality, indeed, as a rule, the deterrent approach should not be

applied to budgeted entities such as the Municipality, which establishes an incentive contrary to the trend of protecting public funds. Additionally, and for reasons of caution, it was argued that even if the Commissioner's principled argument be accepted that under the circumstances it is possible to rule on a reasonable one-time compensation, in our case, according to the Regional Court's factual determinations, it is Mr. Kotta's conduct, which was in lack of good faith, there is certainly no room for awarding him any compensation. The Municipality added that it believes it is required to consider also the tax aspects applying in cases of acknowledgment of an employee in retrospect. According to it, since retroactive acknowledgment changes the employee's tax liabilities towards the public treasury, it is required to amend the tax liabilities retroactively, in the same manner as the employee's rights are amended in retrospect.

94. To complete the picture, it should be noted that regarding the issue of tax liabilities in cases of acknowledgment of employer-employee relations in retrospect, which was not raised as part of the hearing at the Regional Court, on 19.2.19 the State filed a notification according to which the State is acting for establishing an orderly position on this issue, including all the authorities relevant to the matter at the State services. At this time, the State is willing, until completing the principled examination of the issue, to enable those who were acknowledged as employees in retrospect to prove that they did not offset the VAT they were paid through the State or budgeted entities. Should an employee prove that the VAT sums were delivered to the Tax Authority, the VAT shall be omitted from the calculation of the State performs for calculating the balance of rights and duties between the employee and the relevant entity

95. Following the State's notification, the Municipality notified that as a local authority, it does not charge VAT on the payments for the services it provides, it pays VAT on transactions for the services it purchases and is not allowed to offset tax returns vis-à-vis the transaction VAT it pays, including in respect of services providers such as Mr. Kotta. Therefore, payment of VAT to Mr. Kotta was an additional expense the Municipality incurred, and should be taken into account in the calculation performed in light of the acknowledgment in retrospect of employee relations.

Discussion and Ruling

96. **As to the determination on whether employer-employee relations exist** - we should first state that we believe that in examining the "familiar" case law tests, the result obtained is that in our case employer-employee relations do exist between Mr. Kotta and the Municipality, not as the Regional Court ruled, this mainly in light of examining the "negative aspect" of the tests.

Indeed, when examining the positive aspect of the integration test, there is no dispute that Mr. Kotta gave folk dancing lessons at three different schools under the Municipality's responsibility; acted in accordance with the guidelines of the Complementary Education Department, was subordinated to Mr. Simantov whose instructions were coordinated with Ms. Sela - director of the Complementary Education Department at the Municipality; and served as an integral part of the Complementary Education Department's activities.

However, things are different in examining the negative aspect: In examining the negative aspect of the integration test, we are discussing the case where Mr. Kotta ran an independent business, as he purchased the equipment required to do so (even if this is only a single item that

served him - a laptop computer). We believe that although Mr. Kotta did not employ any other employees, and the "business" served for additional purposes such as pest-control, and not necessarily providing folk dance lessons specifically, this does not exclude him from being a business, so that in his case the negative aspect is not met, meaning he does not have his own independent business. A business such as Mr. Kotta's business does not necessarily require a separate office, and thus it is reasonable that Mr. Kotta's home would serve as his office. In this regard, we do not accept the Regional Court's ruling that Mr. Kotta's business was established only in order for him to provide the Municipality with tax invoices. As, since we have learned, Mr. Kotta used the platform of the business he established not only for dance classes, but rather also for pest control. So this is a business for all intents and purposes. Given that in our case the negative aspect of the integration test is not met, and Mr. Kotta did in fact run an independent business - the result is thus that employer-employee relations between Mr. Kotta and the Municipality should not be acknowledged.

As the negative aspect of the integration test is not met, the existence of additional secondary tests indicating that there are employer-employee relations are not sufficient to tip the scales in favor of this, including the Regional Court's ruling that the Municipality supervised Mr. Kotta's work and the contents provided as part of so to the students attending the dance classes, and the fact that for performing his duties, Mr. Kotta was required to arrive personally and therefore, the personal relations test is met.

97. We have also seen it fit to give weight to the fact that the engagement between the parties lasted for a significant time - 22 years, and throughout all these years Mr. Kotta reported to the Tax Authorities of

his income as self-employed, offset his expenses, paid social security and so on. Furthermore, he testified that over his 22 years of work he also worked regularly at the Histadrut Country Club in Rishon Letzion in the same manner as he was employed at the Municipality, and when he was asked whether he filed a claim against the Rishon Letzion Municipality, he responded that he does not intend to file a claim so long as he is working there, and he has not decided as of yet what to do in this regard. Additionally, Mr. Kotta testified that he was a hired employee at the Givatayim Municipality during part of the relevant period, and that he is aware of the difference between a hired employee and a worker who is employed as an "independent contractor." Mr. Kotta's awareness of his rights and the meaning of defining the status, alongside the fact that during his long-time employment he did not request changing the employment format, should be deemed agreement of the parties as to the format of the engagement, which reinforces the conclusion of non-existence of employer-employee relations in our case.

98. **As to the monetary rights** - once we ruled that in our case, employer-employee relations did not exist, there is no room for the claims of the monetary rights resulting of so, and this is not a case that requires considering the issue of "non-monetary" compensation, and Mr. Kotta's appeal is hereby denied.

99. The result is that the Municipality's claim in its appeal that there was no room for ruling that employer-employee relations exist in our matter, is accepted.

100. As we denied the claim for acknowledgment of employer-employee relations, Mr. Kotta's claims in the appeal **regarding**

wrongful dismissal, severance pay, advanced notification fees and redemption of sick pay are of course denied.

101. **Conclusion - in light of all the aforementioned, Mr. Kotta's appeal is denied in full, and the Municipality's appeal is accepted in the aspect of non-acknowledgment of employer-employee relations. Noting the circumstances of the matter - there is no order for expenses.**

LabA 7338-10-17 (Dan Rabin - The State of Israel - The Ministry of Justice)

Factual Background

102. The Appellant, Mr. Dan Rabin (hereinafter - **Mr. Rabin**) filed a claim against the State of Israel - the Ministry of Justice (hereinafter - the **State**) with the Regional Labor Court in Tel Aviv (LDJ 21239-10-13); Justice Idit Itzcovich and public representatives Ms. Levana Nir and Mr. Yechiel Narkis) for payment of various rights he claims stem from employer-employee relations that existed between the parties and by virtue of the provisions of the State Service Regulations. Mr. Rabin also requested to order the State to compensate him for libel, wrongful dismissal and aggravation. The total amount of the claim stands at NIS 2,001,058.92 with added linkage and interest differentials.

103. Following are the main facts as specified by the Regional Court:

a. Mr. Rabin is an accountant by profession, who worked for the Ministry of Justice and was defined as an "internal contractor."
b. The parties were conflicted as to the date of commencement of the engagement: 20.1.2005 according to Mr. Rabin or 6.2.2005 according to the State. There is no dispute that the engagement was terminated on 16.11.2012.

c. In 2005 Mr. Rabin was interviewed by the Registrar of Associations at the time, Adv. Yaron Kedar and by Ms. Avital Shrieber Deputy Director of the Israel Corporations Authority (Nonprofits), for the position of external consultant to the Registrar of Association Unit.

d. In February 2005, an agreement was signed between Mr. Rabin and the Ministry of Justice CEO and the Ministry of Justice Accountant at the time (hereinafter - the **Agreement**). The agreement defined Mr. Rabin's position as follows: "**Obtaining accounting, supervision, application and review of associations' files services at the Registrar of Associations offices."** According to the agreement this is an engagement on a contractual basis. And so it stated:

> **"Whereas both parties decided to execute the services for the State other than as part of labor relations customary between an employee and an employer, but rather as the accountant acts as an independent professional who provides his services to the Government on a contractual basis, and obtains the consideration for his service as required of this position, pursuant to the special rates for providing services on a contractual basis, and whereas the Government agrees to engage with the accountant on a contractual basis specifically rather than as part of the service with all that entails and required, both in respect of the payment rates as well as in respect of the mutual rights and duties, and this considering the nature of the services to be provided pursuant to this agreement and the other terms involved in providing the service pursuant to this agreement that suit employment under an engagement for providing services and do not suit employment under employee-employer relations."**

Section 11(c) of the agreement prescribes as follows:

> **"If for any reason it would be ruled on acknowledgment, on any date following commencement of this agreement, that despite the parties' intention, expressed in this agreement, employment of the accountant or any of his employees and/or consultants employed by him, as employment of an employee, and that the terms and laws applying to an employee apply to him, it is hereby stipulated upon and agreed among the parties that the wages of the aforementioned as an employee, for his employment per this agreement would be calculated according to that set out in respect of State employees at an identical or very similar position and rank as aforesaid, the wages would be calculated in accordance with that set in this respect in the collective labor agreements that apply to employees of this type, or in lack of agreement as aforementioned, pursuant to the collective agreement closest to the issue as the Civil Service Commissioner may see fit.**
>
> **Calculation of the wages would be performed in retrospect from the date of commencement of this agreement, and all charges and credits pursuant to this agreement on the one hand, and on the other hand, the said new calculation would be mutually offset.**
>
> **In any event the total wages of the accountant and those of anyone who may be acknowledged as being an "employee" as noted, would not be higher than the consideration stated in section 10."**

e. At first, it was agreed that Mr. Rabin would perform 1,800 hours annually, at an hourly rate of NIS 100. However, already on 3.5.2005 the Survey Committee approved increasing the scope of engagement (protocol no. 96/2005), so that the total sum of monthly

hours would stand at 180 hours rather than 150, and in total 2,160 hours annually. During 2007 the engagement's scope stood at 2,300 hours annually, and so it was until termination of engagement. Mr. Rabin's hourly rate gradually increased, as follows: Upon commencement of the agreement the hourly rate stood at NIS 100; commencing 1.10.2006 the hourly rate stood at NIS 115; commencing 1.8.2007 the hourly rate increased to NIS 120; commencing 1.1.2008 the hourly rate increased to NIS 130; commencing 1.1.2011 the hourly rate increased to NIS 135. All rates were with added VAT as legally required.

f. Mr. Rabin served as the "Director of Proper Management Department," so at least between 2005 through 2008. As part of this position, several employees who were Ministry of Justice employees were subordinated to him. In 2008 organizational changes were made in the Proper Management Department, as part of which an attorney was appointed to Director of the Proper Management Department (commencing 2009), and Mr. Rabin's position was defined as Director of the Accounting Department at the Proper Management Division". In 2012 a reorganization process began at the unit, which included modification of the organizational structure and changes in the definitions of the employees' positions and work procedures, including those of Mr. Rabin. As part of the reorganization, in 2012 he was offered to be taken in as a State employee.

g. Mr. Rabin did not hide his discontent with the implications regarding him from the organizational modification. Between him and the Corporations Authority Director at the time, Adv. Alon Bachar (hereinafter - **Mr. Bachar**) correspondences were

exchanged in which he argued that in his case the modification constitutes impairment of his status.

h. As aforementioned, the engagement between the parties terminated on 16.11.2012, and Mr. Rabin was paid prior notification fees, which were calculated according to 191 hours - the maximum approved quota and in accordance with the agreed rate - NIS 135 per hour plus VAT.

104. Mr. Rabin argued in his claim that he was employed for nearly 8 years as Director of the Proper Management Department at the Registrar of Associations' Unit at the Corporations Authority (hereinafter also - the **Unit**), and although he was made to sign an agreement for provision of services and reported on his income by tax invoices, in practice he was a State employee for all intents and purposes. Mr. Rabin claimed that he was dismissed, and alternatively that he had to resign due to real impairment of the terms of work. The workplace also continued to harass him even after termination of his employment, while inflicting on him financial and image damages.

105. The State petitioned for rejecting the claim outright due to statute of limitations, lack of grounds and lack of rivalry. On the claim itself the State argued that there were no employer-employee relations between the parties at all; the agreements that were signed on a contractual basis as such were signed at the initiative of Mr. Rabin, who also refused the offer to be taken in as a State employee; the claim was filed in extreme lack of good faith. Alternatively, the State raised a claim for offset and restitution. As to Mr. Rabin's claims relating to the period after termination of the contractual relations, the State clarified, that there is no intention to harass him, and that he is treated practically and professionally. In fact, the only instruction given to the Ministry of

Justice employees in touch with Mr. Rabin is to refrain from discrimination against him.

Judgment of the Regional Court

106. At first the Regional Court ruled that according to the overall evidence in Mr. Rabin's case there are distinct characteristics of an "employee", while the indications testifying to the engagement's being contractual relations in essence are technical and minor, and do not change the conclusion that Mr. Rabin was an "employee" of the Ministry of Justice throughout the engagement, and that employee-employer relations existed between the parties.

107. As to the question of Mr. Rabin's good faith, the Regional Court denied the State's claim that Mr. Rabin acted in extreme lack of good faith in filing the claim while he refused the possibility to be taken in as a State employee, in his attempt to hold the rope at both ends: Enjoy the advantages of his status as an internal contractor, led by his high wages, freedom of action and the employment's flexibility - on the one hand, and enjoy the advantages involved in the status of State employee - on the other hand. The Regional Court reasoned its ruling, that pursuant to case law lack of good faith would never overcome cogency of the relations, and that the State failed to contradict Mr. Rabin's version according to which he was not offered at the beginning of the engagement to be taken in as a State employee, and that there is no evidence that he was indeed given the possibility to choose between the status of an employee and that of a service provider. Thus the Regional Court ruled that it was not proven that Mr. Rabin acted in lack of good faith, and noted that even if it would believe otherwise - this does not affect his true status as an employee. At the same time, the Regional Court added that "**we have no doubt that in light of the plaintiff's**

profession and education the plaintiff was aware of the format of the engagement - including its advantages and shortcomings - at the time he signed the contract, during the period of engagement and upon termination thereof. Additionally, one cannot ignore the fact that eventually the plaintiff was offered to be taken in as a State employee, however he refused. Hence, we are required to examine the plaintiff's entitlement to the claimed remedies stemming from our conclusion in respect of employer-employee relations, and what should be the appropriate wages according to which these would be calculated."

108. As to the wages based on which the social rights should be calculated, the Regional Court noted that Mr. Rabin's last wages stood at NIS 135 per hour, not including VAT. Mr. Rabin referred to the instructions of the Ministry of Justice's Accountant General regarding "rates of engagement with external service providers" dated 9.1.2012, according to which an accountant's work hour reaches NIS 241 with added VAT, and argued that although this rate is the maximum, the consideration he obtained amounts to one half of it and therefore there is no prevention to consider it as "appropriate wages". The State argued on the other hand, that the wages that were agreed upon, defined and paid to Mr. Rabin were much higher than the wages paid to a State employee, and thus it is required to offset the sum's differences. As to the claim that an accountant's work hour amounts up to NIS 241, the State replied that it was not proven that he meets the definition under the relevant State of Israel Finances and Economy Regulations, which regulates payment to external consultants. The parties were also in dispute regarding the question of implementing the deterrent approach in our case. Mr. Rabin petitioned for implementation of the deterrent approach and calculation of his rights according to the contractual

consideration, and the State petitioned for calculating the rights according to the wages' simulator it submitted, and in fact for offset and restitution.

109. The Regional Court ruled that this case is not included in the cases where the deterrent approach is justified, for the following reasons: It is not clear whether the State was aware at the time of the engagement that the one it chose to employ as a contractor is actually an employee, and yet decided to cover the relations between them by the format of customer-contractor, and it is possible that as of the date of engagement, in 2005, the State believed it is legitimate to outsource the accounting services at the Unit; Mr. Rabin is an accountant by profession and education. Who would better know than an employee of his kind the advantages and shortcomings inherent in the format of his employment; Mr. Rabin obtained pursuant to the agreement NIS 135 per hour with added VAT, and these are extremely high wages compared to State employees; there is no dispute that ultimately Mr. Rabin was offered to be taken in as a State employee however he refused.

110. In view of this conclusion the Regional Court continued on to examine whether data were proven that could base Mr. Rabin's appropriate alternative wages. The Court noted that pursuant to the rulings on the **Shahar Zarfati** case and on the **Anat Amir** case, in cases where there is no justification for implementing the deterrent approach and calculation of the rights of one who was found to be an employee in retrospect based on his overall wages - the calculation should be performed on the basis of reduced wages only should there be data proving so.

111. The State attached two wages simulations it prepared as well as the paycheck of an employee at the identical rank, seniority, experience and scope of position as that of Mr. Rabin, however Mr. Rabin

petitioned for calculating his rights other than according to the simulations, nor according to the employee's paycheck. According to him, the terms of his wages should be compared with the terms of wages of the legal counsel at the Corporations Authority, who is employed under a seniors' contract, with whom he shared the position. The Court denied the arguments of both parties and chose to rely on evidence in the form of the paycheck of an employee, in respect of whom there is no dispute that she is a State employee and employed at the same unit, she too is an accountant in profession, and is ranked as an economist, and rank 42b. Accordingly, the Regional Court performed a calculation, which eventually led to the conclusion that there is still a significant gap in favor of the consideration Mr. Rabin obtained. The gap between the consideration he obtained per month: NIS 25,110 (for 186 hours) or NIS 24,861 according to 184.16 hours, compared to the cost of his employment as a State employee that includes his rights, and ruled that the gap does not justify ruling on sums beyond those he was paid, as the consideration he obtained covers the payments he would have obtained for his rights had he been acknowledged as an employee to begin with.

112. Additionally, the Regional Court denied Mr. Rabin's arguments that he is entitled to severance pay, compensation for wrongful dismissal, as well as his claims for compensation due to unjust enrichment and libel.

113. The Regional Court further ruled that restitution is not to be ruled for the following reasons: <u>According to:</u>

<u>The Honorable President (ret.) Flitman's opinion</u>, in any event one should not reach into the pocket of an employee who obtained the consideration the parties agreed on, as there is no dispute that the work

for which his services were hired - was executed. **Pursuant to the Rafi Rofeh** case restitution should not be order since Mr. Rabin did not act in extreme lack of good faith, and the State has not convinced it that his wages as a State employee would be as low as that displayed in the wages simulations it filed. Addressing the Honorable Justice Engelberg-Shoham's opinion in the **Anat Amir** case, the Regional Court ruled that in the case before us no one acted in lack of good faith - neither Mr. Rabin nor the State. However, the parties' positions are not free of difficulty, each in its own way. In any event the State should not be charged with costs that exceed that agreed upon.

114. Finally, the Regional Court addressed the fact that the result of the judgment is different than the judgment handed down in Ms. Durani's case (LDJ 45291-12-13 **Nira Durani - The State of Israel - the Ministry of Justice** (13.10.2016)), an attorney who served for 5 years as director of the Charitable Trusts Department at the Corporations Authority, and she too was defined as "self-employed", and this since there are differences between the two cases. For example, Mr. Rabin is an accountant; the contractual consideration was not the same consideration; these are two different positions; in Ms. Durani's case her managerial position - whether in title or in practice - was not in dispute; the circumstance of termination of the engagements are different, and apparently also the circumstance of commencement of the engagement; the State did not dispute Ms. Durani's right to severance pay, etc. "**Each case and its circumstances, each panel and its rulings**," the Regional Court concluded.

The Parties' Arguments in the Appeal

115. Mr. Rabin argued in the appeal that in this case the deterrent approach should be applied, and rule that the contractual consideration

he was paid is the one that would underly the calculation of the social rights. According to him, it was proven by sufficient evidence that his alternative wages should be much higher than the consideration he was paid in practice. It was further argued that the Regional Court should have ruled on consideration for overtime, redemption of vacation days, as well as rule that he was dismissed from his work and alternatively that he resigned as one being dismissed and for this he is entitled to severance pay.

116. On the other hand, the State argued that the rulings of the Regional Court should remain intact in all regarding Mr. Rabin's financial claims, as it was unequivocally proven that his claims should be denied. According to the State, the Regional Court was right in ruling that the deterrent approach should not be exercised, since the engagement with Mr. Rabin was in good faith, and Mr. Rabin’s wages were much higher than the wages of a State employee at a corresponding position. It was further argued that the Regional Court was right in ruling that Mr. Rabin was not dismissed, and the case should not be deemed resignation as one who was dismissed, and therefore Mr. Rabin is not entitled to severance pay. The State added that the claim for overtime and vacation days was rightfully rejected, and that the Regional Court was right in the distinction it made between the case at hand and the judgment on the Durani case.

117. In the summery response on his behalf, Mr. Rabin repeatedly argued in respect of implementation of the deterrent approach, alternative wages, payment for overtime and distinction between dismissal and resignation.

Discussion and Ruling

118. In fact, there is no dispute between the parties in this case, and there is no dispute that pursuant to the case law tests, employer-employee relations existed between them. We believe that also pursuant to the principles we elaborated upon in the general part, this ruling should not be deviated from. The overall evidence that was presented to the Regional Court do in fact indicate that Mr. Rabin does have distinct characteristics of an "employee" and indeed there were employee-employer relations between the parties.

The factual foundation and the parties' claims detailed above indicate that Mr. Rabin, an accountant in education, was employed for almost eight years as Director of the Proper Management Department (later the name of the position was changed to Director of the Accounting Department at the Proper Management Division (at the Registrar of Associations (a unit within the Corporations Authority at the Ministry of Justice), and was responsible for supervision, monitoring and examination of associations' files (meaning issuance of "proper management" certificates to associations after conducting the required examinations). This is a clear position of an employee, and was carried out accordingly in practice, as Mr. Rabin - who did not have any business during the relevant period - worked full-time at the Respondent's offices; performed a central and significant position, which is an integral part of the Ministry's activities; while being responsible for other workers who are State employees; as well as a supervisor on behalf of the State over the work of external accounting firms' work. In fact, there is not even one significant indicator indicating Mr. Rabin's being a "contractor," and it is for good reason that the State refrained in its response to the appeal to object to the

Regional Court's ruling, according to which employee-employer relations existed between the parties throughout the engagement period. However, the Regional Court further examined the parties' conduct throughout the employment period and their good faith in this regard, and ruled that the State failed to contradict Mr. Rabin's version according to which he was not offered at the beginning of the engagement to be taken in as a State employee, and that there is no evidence that he was indeed given the possibility to choose between the status of an employee and that of a service provider. Moreover, Ms. Shrieber, Deputy Director of the Corporations Authority, explicitly stated that there was a "problem of approved positions" and a policy of "reducing intake of State employees and make use of outsourcing." Hence, signing a contractual agreement was made for reasons of the State rather than those of Mr. Rabin, and the offer that he would be taken in as a State employee was raised only in 2012. As to the argument that Mr. Rabin chose to refrain from participating in the two public tenders published for the position of "Senior Coordinator of Proper Management," the Regional Court ruled that Mr. Rabin's explanations are satisfactory. In view of this it was ruled that it was not proven that Mr. Rabin acted in lack of good faith.

119. In light of these rulings of the Regional Court, we did not find that there are considerations in the aspect of the principle of good faith, which could challenge the ruling that these are employer-employee relations, and we shall thus turn over to examine the rights to be paid under the circumstances of the case.

120. **As to the monetary rights** - the contractual consideration that was paid to Mr. Rabin ranged between NIS 100 per hour with added VAT upon commencement of the engagement (multiplied by 1,800

annual hours), to the sum of NIS 135 per hour with added VAT (multiplied by 2,300 annual hours), as he submitted an hourly report every month (based on a time clock he signed) and accordingly he was paid the monthly consideration. Given the approved available economists' positions (184.16 monthly hours), the monthly consideration upon terminations of the engagement (not including hours beyond the approved available position) stood at NIS 24,861 with added VAT. The Regional Court ruled on the alternative wages in accordance with the paycheck of another accountant who was employed at Mr. Rabin's department (according to him subordinated to him) at rank 42b of the economists' ranking, whose integrated basic wages stood at NIS 15,779, although it noted that it is possible that Mr. Rabin was "**a bit more senior**" (and indeed the State noted while attaching the paycheck, that no paycheck was located identical to Mr. Rabin's data and the paycheck that was filed was "**as close as possible**"). Although this ruling on the alternative wages is not free of doubts (as *prima facie* this is a less senior employee and worked there for a shorter time), we were convinced that there was no sufficient justification to intervene in it, since it regards a factual ruling. As to Mr. Rabin's claim, which is based on section 11(c) of the engagement agreement ("calculation section") we should clarify that it does not prescribe that the alternative wages according to which his rights would be calculated would stand at NIS 135 per hour, but rather that the wages payable to him pursuant to the collective agreements applicable to State employees of his status, "and in any event would not exceed" the contractual hourly consideration agreed upon with him. Hence, this section cannot be of any help to him. In light of this, and based on the Regional Court's factual rulings, since the contractual consideration is higher than the employer's costs pursuant to the alternative wages, the

meaning is that all the monetary rights were "swallowed" into it, and hence, it is not required for us to examine the monetary rights payable to Mr. Rabin on their merits.

121. Beyond the necessary, and since the parties elaborated in this regard, we shall briefly address below two of the main rights that were claimed:

a. Severance pay - we believe it was required to intervene in the Regional Court's ruling according to which Mr. Rabin is not entitled to severance pay. As part of his affidavit, Mr. Rabin extensively detailed the circumstances under which his employment was terminated as a result of the State's decision to carry out re-organization that would include a significant change in his position; attached letters that were written in real time as part of which objected over several months to the impairment of his status, powers and position; and repeated these statements also in his cross examination (without being contradicted). Adv. Avital Shrieber's affidavit, who testified in this regard on behalf of the State, indicates that indeed a significant change was carried out, as part of which the department Mr. Rabin managed was canceled, and he was supposed to be taken in as a regular accountant (at the status of employee) as part of one of the new divisions, with no employees subordinated to him. Mr. Rabin also testified that in a meeting dated 31.7.12 with Adv. Alon Bachar (the Corporations Authority Director at the time) he was given an explicit dismissal notification (which was also noted in his letter dated 9.10.12), as the State did not attempt to contradict this (not even by a response letter written in real time or in the affidavits on its behalf) and did not even summon Adv. Bachar to testify. Under these circumstances, we believe that Mr. Rabin has

proven his right to severance pay, whether as being dismissed, or at least as one who was entitled to resign due to circumstances under which he may not be required to continue his work (as stated in section 11 of the Severance Pay Law, 5723-1963). This ruling is not to imply that the State did not act properly or failed to act in good faith and material considerations upon conducting the re-organization, and yet a change has an impact that impairs an employee's status and scope of powers, including the possibility to resign as being dismissed as a result. At the same time, the severance pay was "swallowed" in full within the gap between the alternative wages and the contractual consideration, and therefore our ruling does not have any practical meaning.

b. **Remuneration for overtime** - the Regional Court denied this component for the reason that there is no entitlement to remuneration when the employee was not required by his employer to perform overtime (based on LabA 508/08 **The State of Israel - Oshrat Arfi** (30.6.10)). This ruling is significantly problematic under the circumstance where there is no dispute that Mr. Rabin executed many overtime hours; clocked in every day; Adv. Shreiber approved the hours he worked (as she admitted in her testimony); and the State paid the monthly consideration according to this scope. Notwithstanding, we were convinced that it is possible to approve, and under the special circumstances of the case, to adopt the Regional Court's ruling, and this considering the certain flexibility given to Mr. Rabin - considering his formal status as a "contractor" - to set his hours of work himself. Considering this conclusion of ours, it is not required to examine the question of how we would refer to remuneration for overtime, had the Appellant been entitled to it.

122. **Now it is required to discuss the "non-monetary" compensation.**

At the first stage, we should consider whether no compensation should be ruled upon. We should first note, that although these sums were not claimed by him explicitly as part of the statement of claim, payment of the social rights was claimed pursuant to the contractual consideration, as the new compensation we ruled upon above is in fact a replacement of the remedies pursuant to prior case law rulings, and we were convinced, as we shall specify below, that compensation should be paid to him, so long as the sum would not exceed the total sum he argued for in the claim and the appeal.

123. The relevant considerations we took into account in merely ruling on compensation for Mr. Rabin are as follows: First and foremost, the fact that this is someone who to begin with there was no doubt he is an employee. It is for good reason that the State refrained from insisting on this argument against this ruling as part of the proceedings at the Regional Court. We further took into account that in our case the State is the employer - an employer with high bargaining capabilities as to determining the format of the engagement, and in fact it was the one who exclusively dictated the engagement format. Additionally, and although we have ruled that Mr. Rabin was not deprived of his monetary rights, it cannot be ignored that in fact he was deprived of rights such as non-applicability of a collective agreement, no possibility to participate in tenders, and the like. All these mean that the circumstances of this case are even more severe and even extreme as the State is involved, which it is the largest employer in Israel, with high bargaining capacity in view of its status, and yet classifies knowingly and intentionally Mr. Rabin as not being an employee, in

order to bypass internal constraints, it set itself (approved available position, etc.), and as a result deprives him of many rights, including the right to organizational representation. Under these circumstances, we have enough to rule on Mr. Rabin's mere entitlement to compensation, and thus we shall turn to ruling on the compensation rate

124. **As to the compensation rate that should be ruled under the circumstances of the matter,** we took into account the following considerations:

Relevant considerations regarding **non-monetary rights:** On the one hand, it appears from the testimonies that Mr. Rabin was treated over the work period as part of the staff of employees in all concerning daily work relations (including seminars, participation in events, obtaining gifts and eventually even payment in lieu of prior notice). On the other hand, the evidence indicates that Mr. Rabin lost the rights of an employee at a large public body, and this even if taking into account that the alternative wages were set per a personal contract without tenure. In so, and *inter alia*, Mr. Rabin could not use sick , elective and declarative days without his wages being reduced, and thus he was required to choose between the financial interest in obtaining the consideration and the interest inherent in his absence (such as health); lost the right to take actual vacations without impairing his monthly wages (so that even if he took vacations - he did so at a relatively low scope, and at his expense, and in any event, the monetary compensation does not compensate for impairment of quality of life in real time); could not participate in internal tenders; could not benefit from organizational representation that is given also to those employed through a personal contract and certainly when significant disputes arose towards the expiration of the work period) and was not even given

an orderly hearing; as he also lost significant ancillary rights as a State employee - rights that are indeed monetary rights in essence, however he was denied of a real possibility to claim them as such (and a good example of this is the loss of the possibility to turn to the committee for financing 90% of two academic degrees he studied for while working). On the other hand, it may be taken into account that Mr. Rabin also generated certain benefits from the classification, such as non-subordination to disciplinary action; certain flexibility in the time of performing the work hours; and the lack of need to request permission for an additional job.

We further took into account the work period, as well as the fact that the State is an organized workplace, the regional court attributed Mr. Rabin to the sector of employees employed by personal contracts with no tenure (and in this regard there is no claim on his behalf), as well as the existence of a certain "delta" in favor of the State (as the contractual consideration that was paid to the Appellant exceeded the rate of the alternative wages adding the social rights).

In addition to all these, we took into account also various considerations in the **deterrent** aspect: First we should note that under the circumstances it is difficult to view the case as an error in good faith on the part of the State in classifying Mr. Rabin. Mr. Rabin was not hired to provide external "accounting services" but was rather appointed from day one of his employment as department director who performs regulatory governmental supervision, who is responsible for employees and outside consultants, as the work was performed over years from the Authority's offices five days a week full-time (this is explicitly indicated by Adv. Shrieber's affidavit). For this purpose, Mr. Rabin also replaced a former department director, who retired, and was in the position of a hired employee. Thus this is not a borderline case, and also

not a case where the engagement characteristics changed over time. The State also performed at least one additional erroneous classification of an employee in a position corresponding to that of Mr. Rabin (she too at the Corporations Authority) during a corresponding period, as this employee filed a similar claim and was awarded her social rights according to the contractual consideration, a fund in the sum of NIS 459,222 (LDJ (Regional Jerusalem) 45291-12-13 **Nira Durani - The State of Israel** (13.10.16); no appeal was filed by the State).

We should add that among the deterrence considerations it is required to take into account also the possibility where the State might bypass regulation and manners of acceptance to tenders by employment of independent contractors. In order to prevent such a situation, these circumstances should be taken into account as part of the deterrence considerations, particularly when it happens many times, in a position that was previously a permitted available position and it was not explained why it is no longer that, as in the case before us.

We should further add that Mr. Rabin had no part in the decision on the manner of classification, and it was conducted this way for the State's reasons in light of what it defined to be "a problem in permitted available positions." Indeed Mr. Rabin was offered at the end of the road (only, not during it) to switch to the status of State employee, however he was not offered a concrete proposal, and in any event, it did not mature in light of the dispute on defining his position and powers, which led to termination of his work (and not due to refusal on his part to switch to the status of State employee). To this should be added, on the other hand, that Mr. Rabin is not among a weakened population in view of his education and skills. Furthermore, it was not proven that Mr. Rabin gained any benefit by not being required to go through a tender's procedure or orderly intake as an employee. Also the

consideration he obtained - although higher than the alternative wages ruled for him - is very far from the consideration paid by the State to "real" external consultants (as Mr. Rabin proved and was not contradicted - up to NIS 241 with added VAT per an accountant's work hour, as the highest consideration he was paid stood at NIS 135 with added VAT). As to the argument that he could have engaged in additional occupations - the evidence indicates that he performed one small-scale job (less than 40 annual hours), on Fridays and for a short period. Considering the scope of the additional hours he worked (and it may be assumed that they were required by his position, otherwise the State would not have been willing to pay for them) - it is clear that he had no real possibility to perform any other work.

As to the State's claim that it acts "for reducing non-authentic engagements" and therefore it is not necessary deter it - we believe that this argument is difficult. The State in it other capacities ensures the enforcement of labor laws, including by way of financial sanctions, administrative fines and criminal indictments, and we expect a public body to carefully ensure correct classification of workers and compliance with the provisions under law and the procedures that bind it, so that it is not sufficient to note voluntary future actions for reducing those violations. Considering the distinct engagement characteristics, the relevant officials at the State certainly knew - or were supposed to know that had they conducted a minimal examination - that Mr. Rabin is an "employee" and accordingly they should have employed him as such even if they encountered a "problem in approved available positions" or any other bureaucratic difficulty.

When weighting all data - we rule on the compensation under the circumstances of the matter at the sum of **NIS 120,000.** As aforementioned, the "non-monetary" compensation replaces the

remedies according to previous case law rulings, and the sums awarded in favor of Mr. Rabin are significantly lower than the amount he claims for based on the contractual consideration (and stood at over NIS 2,000,000).

125. **Conclusion** - Mr. Rabin is entitled to compensation in the sum of NIS 120,000 based on the above considerations. This sum is to be paid within 30 days from today as if not, linkage and interest differentials shall be added from today until full payment in practice.

Additionally, Mr. Rabin is entitled to the expenses at both tribunals, in the sum of NIS 30,000. For ruling on the sum of expenses we took into account the gap between the sum that was claimed and the sum that was ruled upon, however also the fact that throughout the proceedings at the Regional Court the State denied the existence of employee-employer relations. We also took into account Mr. Rabin's contribution to renewing the case law ruling on the issue.

LabA 34665-10-17 Zeev Levy - Zeraim Gedera Ltd.

Factual Background

126. The Appellant, Mr. Zeev Levy (hereinafter - **Mr. Levy**) filed a claim with the Regional Court in Tel Aviv (LDJ 2322-11-13; Justice Sara Meiri and public representatives Ms. Dvora Finkelstein and Mr. Zohar Eckstein) for acknowledgment of his status as employee and for various rights he is entitled to as a result: Severance pay (NIS 372,773), overtime (NIS 728,574), in lieu of provisions to funds (NIS 123,144) and in total the sum of the claim stood at NIS 1,224,491.

127. According to Mr. Levy, he was employed by the Respondent, Zeraim Gedera Ltd., which is a company that engages in the development of vegetable species as well as production and marketing

of seeds, for over 12 years, commencing 1.7.2000 through 13.3.2013, on which he was dismissed.

128. It should be noted that until November 2011, Mr. Levy was at the status of an authorized dealer, at which time he changed his formal status from authorized dealer to a company limited in shares, and commencing November 2011 Mr. Levy was paid vis-à-vis issuance of tax invoices as legally required through "Levy Sadot Ltd.", a company owned by Mr. Levy.

129. According to Mr. Levy, an agreement for provision of management services was signed between the parties for one year, which was automatically extended to an additional year each time, and its wording makes it clear and understood that such is an employment agreement between an employee and employer and the provisions that prescribed that there are no employee-employer relations or that the Hours of Work and Rest Law does not apply - are meaningless, with no factual and legal significance.

130. On 30.12.12 Mr. Levy was summoned for a hearing prior to deciding on dismissal, as the Respondent's claim is that his position became redundant in view of organizational changes at the Respondent.

131. On 7.1.13, a hearing prior to dismissal was held for Mr. Levy, where he complained that no alternative position was found for him, however he claims that his words were not heard and he was dismissed in practice on 13.1.13, dismissal that took effect on 13.3.13.

132. Mr. Levy argues that the Respondent viewed the relations between the parties as employee-employer relations, however sought to fictitiously cover them under the definition of contractor-customer relations. In December 2012, a paycheck was even issued to him for redeeming shares he purchased and accumulated as part of the benefits

given to the Respondent's employees, and all indications point at employee-employer relations between the parties.

133. The Respondent argued on its part that indeed the tests by virtue of which it could have been ruled that labor relations existed between the parties throughout the engagement period are met, however it was Mr. Levy who initiated and established the format of engagement between the parties, and switching over from employment as an "employee" to engagement as an "independent contractor", and this for his own financial reasons - offsetting his farm's expenses. In light of the aforementioned, his claim is tainted with extreme lack of good faith, and all his claims for rights and additional payments should be rejected, while charging him with significant expenses.

The Judgment of the Regional Court

134. In its judgment the Regional Court denied the claim in full. The Regional Court ruled that indeed labor relations existed between the parties, however it was Mr. Levy who asked to engage with the Respondent as an external service provider rather than a hired employee, and per his request he was paid the agreed upon consideration vis-à-vis an invoice. In this regard the Regional Court rejected Mr. Levy's version that the engagement at the status of an independent contractor was forced upon him by the Respondent; it was ruled that Mr. Levy benefited from his status as an independent contractor, and exploited this for savings in tax payments; it was not proven that Mr. Levy was exploited in any manner in the rate of the monthly payment; Mr. Levy was paid as part of the monthly payments ancillary provisions and social rights that are payable to an employee, and was even paid an incentive as was paid to the Respondent's employees, and he was added to a share befits plan for employees only,

however as aforementioned, his wages were paid to him vis-à-vis invoices. Based on the above, the Regional Court Ruled that Mr. Levy acted in extreme lack of good faith, in light of the fact that he asked, and in fact demanded, the format of the engagement between the parties, while the Respondent did not benefit from it in any manner, and on the other hand he benefited from this status. The Regional Court added that it is not required to discuss the question of what are the appropriate wages for calculating Mr. Levy's social rights, meaning the wages of an employee working in a position corresponding to his, since the consideration Mr. Levy was paid and determined per the parties' agreement, is the appropriate consideration as the parties agreed upon, whether higher (somewhat) or lower (somewhat). Indeed, the Respondent was aware since the commencement of the engagement that Mr. Levy is considered to be an "employee," however in this case the "deterrent approach" should not be applied pursuant to the judgment in the Anat Amir case, since agreement was explicitly expressed by Mr. Levy's request, and it was not proven that his wages were impaired or that the Respondent benefited from the format of the engagement.

135. The Regional Court rejected the claim for overtime, since it was not proven that Mr. Levy worked at a certain scope of position (basic); that he worked in a specific format; that he worked overtime; or due to his stay abroad (30% of the scope of his work) worked overtime and was not employed or asked to work overtime.

136. In conclusion the Regional Court ruled that Mr. Levy acted in "significant lack of good faith," and even if the Respondent erred in its agreement to his request in respect of the engagement format, there is no room for any of his petitions since his rights as a hired employee were not impaired, and his claim is to be denied including all of its components. As to expenses, thee Regional Court ruled that "**the claim**

was born in sin and as 'many pens were broken' in unnecessarily proceedings' the Respondent is entitled to its expenses, and charged Mr. Levy with payment of court expenses in the sum of NIS 15,000 and payment of attorney's fees in the sum of NIS 35,000.

The Parties' Arguments in the Appeal

137. Mr. Levy argued in essence that in lack of dispute among the parties on the existence of labor relations, the Court should have examined whether payments are payable to him as an employee, after comparing the contractual consideration he obtained to the alternative wages of a corresponding employee; both per this Court's approach in the **Rofeh case** as well as this Court's approach in the **Anat Amir case,** the Regional Court should have examined the wages of a corresponding employee; had the Court conducted the required test pursuant to case law, it would have been found that the overall consideration he was paid is lower than the cost of employing a corresponding employee, and therefore his claim for payment of his rights as an employee - should be accepted; there was no room for rejecting the claim based on the ruling that he acted in lack of good faith, a ruling that is contrary to case law according to which merely filing a claim for rights as an employee does not constitute lack of good faith, and lack of good faith is expressed when it is ruled retroactively that the worker had control in determining the format of employment and that he obtained consideration that is significantly higher than the wages a corresponding employee obtained, which is not true in this case. It was further argued that the Regional Court erred in its ruling that Mr. Levy is not entitled to payment for overtime. It was further argued that the sum of expenses Mr. Levy was charged with is high and extreme.

138. The Respondent argued on the other hand, that the judgment is duly reasoned and detailed, and relies, *inter alia*, on clear factual rulings, including the ruling according to which it was Mr. Levy who chose and maintained the format of engagement with the Respondent, and that he benefited from this, including by way of offsetting expenses vis-à-vis additional financial/commercial activities he operated (an agricultural farm); according to the Regional Court's ruling, which is based on the direct impression of the evidence, Mr. Levy was not at a lower status vis-à-vis the Respondent, and he is not a weakened employee. Additionally, Mr. Levy obtained monetary consideration that weighs all the rights he would have been entitled to had he been defined as an employee to begin with, and after termination of the engagement claimed the monetary value of the rights again, in lack of good faith and while exploiting labor laws, and thus the appeal should be rejected. The Respondent further added that the appeal should be denied also in respect of overtime and legal expenses that were imposed on Mr. Levy, and in view of the lack of good faith in his conduct, it is required to again charge Mr. Levy with heavy expenses also for holding these proceedings.

Discussion and Ruling

139. **We believe that this case is an example for implementing the tests described above, regarding the meaning of clear lack of good faith on the part of a worker on failure to rule on his status as an employee.**

140. We believe that this is the case in which weighting the circumstances of the case including Mr. Levy's extreme lack of good faith, **is of the type of cases where it is required to rule already at the first stage that no employer-employee relations existed between**

the parties, although according to the "ordinary" case law tests it was *prima facie* required to rule that employer-employee relations do exist since the negative aspect and the positive aspect of the integration test hold true.

In the case before us the employer met the burden to prove that the 'employee' clearly lacked good faith in a manner that amounts to ruling that he is not an employee, and as we specified above in **sections 55-62.**

141. Our ruling is that this a case where the employee's lack of good faith amounts to denial of acknowledgment of his status as an employee based on the fact that this is one who chose of his own initiative and acted for being acknowledged as a contractor for his own reasons and only for his financial benefit, while the employer had no benefit from the format of this engagement, and what more so - had it been up to it, it would have employed him as a hired employee. Not only this, his rights were not deprived of him at all, and were paid to him including all of the social rights, all as we shall specify below:

a. In the case before us, the Regional Court, throughout the proceedings, repeats again and again, in an uncompromising manner, that this is one who is well aware of his rights, which he initiated, maintained and benefited from the engagement as a service provider throughout the engagement period, and in fact acted in extreme lack of good faith. As to his not being a "weakened employee," the Regional Court ruled that he is not a weakened employee at all, on whom the format of engagement was forced, but rather him being a senior employee. As to the manner of Mr. Levy's conduct during the engagement - it was ruled that issuance of invoices by him was "only" for the purposes of his employment by

the Respondent, and that during his entire time of his work he had not requested the Respondent, not even once, to change the format of the engagement between them, so that it would be like the other hired employees at the Respondent. The Regional Court further ruled, beyond all doubt, that Mr. Levy is the one who requested to engage with the Respondent as an external service provider rather than as a hired employee, and in fact chose to continue in the same format of engagement as he worked at his previous workplace, and he is the one who opened the company of his own initiative. Vis-à-vis this, on the Respondent's part there was willingness to employ him as an employee for all intents and purposes, and it was only per Mr. Levy's request the terms of his employment were set as they were set, while on its part there was full willingness for him to work as a hired employee. It was additionally ruled that the Respondent did not gain any financial or other benefit by employing him in this format. On the other hand, the Regional Court pointed out the financial advantage Mr. Levy generated by this format of employment.

b. And indeed review of the evidence that was presented to the Regional Court shows us that it was Mr. Levy who chose, initiated and pushed for engaging with the Respondent as a contractor, for reasons of financial benefit and for his purposes, meaning, the possibility to offset losses in the financial statements considering his being an owner of an agricultural farm. The Respondent, on its part, was dragged into this format of engagement, and if it had been up to it, it would have employed Mr. Levy as a hired employee. In this regard the Respondent's CEO at the time, who is no longer employed at it for several years, testified that at the time Mr. Levy was accepted to work at the Respondent, the intention was to accept

him as an employee like all the other employees, however Mr. Levy contacted him (through the Vice President of Marketing and Sales) and requested that the engagement would be in the format of an external service consultant vis-à-vis invoices, and this for his financial reasons and in light of his additional activities as a farm owner. In a meeting held by the CEO with Mr. Levy he repeated this request, and even added that this was the format of his engagement at his previous workplace (a fact that was verified by the CEO vis-à-vis that workplace prior to giving his consent to do so). The CEO further emphasized that the Respondent itself did not gain any benefit by the format of engagement that was set. The VP of Marketing and Sales at the time, who too is no longer employed at the Respondent for several years, testified to similar issues and added and detailed that Mr. Levy noted that the format of engagement as "self-employed" would enable him to exercise various offsets vis-à-vis the revenues of the agricultural farm; and defining Mr. Levy as a "contractor" served only him; and that it was explicitly agreed that the monthly consideration Mr. Levy would obtain would include the entire consideration he would have obtained as an employee (and so it was). This version was not contradicted in the cross-examination of the witnesses; to the contrary, Mr. Levy in his cross-examination confirmed that he owns an agricultural farm; that he was employed vis-à-vis invoices at the workplace prior to the Respondent; that in his contacts vis-à-vis the Respondent's managers - **"I offered my services to the company, and they offered me the wages, and since I previously worked with invoices under the same agreement... I offered them my services in the same format as was at the previous company**" (p. 12); and also confirmed that the format of engagement decided upon

is the format of engagement he expected (p. 13). These statements contradict his testimony in his affidavit, in which he claimed of offensive employment and the Respondent's attempts **to take funds into its pocket unlawfully by depriving me of social rights**."

c. Hence we see, the total evidence indicates that Mr. Levy was the one who chose the format of engagement as an independent contractor for his own good only, while the Respondent gained no benefit from it. Moreover, had it been only up to it, it would have chosen to employ him in the format of an employee as its other employees.

d. Furthermore, the evidence that was presented to the Regional Court indicates that in fact Mr. Levy obtained all his monetary rights every month, in accordance with the wages the parties agreed upon, including the social rights. Thus, according to the invoices Mr. Levy issued every month - his monthly wages were comprised of his agreed monthly wages (named "payment") and stood at (as of the expiration of the period) at NIS 23,150, as social rights were added to this, which he obtained in money every month and calculated (as expressly stated on the invoices Mr. Levy issued himself) according to the following components: 8.33% for "severance pay", 7.5% for an advanced education fund, 5% for renumeration, 5% for "social security", 2.5% for "loss of work capacity", and the sum of NIS 292.5 for "convalescence" (vacation and sick days rights were given him in practice). Hence the monthly consideration stood at NIS 35,101 (these data are relevant as of January 2013, which is the last month in respect of which Mr. Levy presented data (his work ended in mid-March 2013)).

e. All the above indicates that this is a case where the unequivocal request for implementing the engagement in the format where Mr. Levy was employed as a contractor was Mr. Levy's, only for his

own needs intended to obtain tax benefits. At the same time, Mr. Levy's well-being was not affected at all by the format of his employment, as materially he obtained his full rights.

f. As to the issue of good faith, in this case the Regional Court ruled as follows:

> **"As we were convinced that the plaintiff is the one who insisted on being a contractor providing management services, he was the one who insisted on the format of the engagement the parties' relations were conducted, he was the one who requested obtaining in addition to his wages the value of the said components, as broken down on the invoices presented to us, he is the one who never asked to change this format, he is the one who benefited from the status he chose for himself**
>
> **...**
>
> **The plaintiff's lack of good faith, we view as extreme, in his conduct is indicated also by raising his claims, for example: "To become rich at his expense," that "he was paid wages lower than his corresponding employee," "while the defendant saves the costs of employer as his employer." It is precisely since the described conduct - being "extremely exceptional" ... - indicates more than anything of its being solely per the plaintiff's request and the plaintiff did not claim, what more did not prove that the Respondent had additional service providers like himself."**

To this should be added the Regional Court's ruling that Mr. Levy was not exploited in any manner in setting the monthly payment - whether the basic payment or the additions to it. Regarding the format of employment, we shall once again note the ruling that not only was it not the employer's choice, but rather certainly this was not forced upon

Mr. Levy, and in any event the Respondent had not avoided payment of any rights to Mr. Levy as an employee.

We should further note the conclusion of the Regional Court's statements regarding its impression of the evidence and the witnesses it heard:

> **"Our impression is that the plaintiff, in significant lack of good faith, led the Respondent to a rocky road, while enjoying throughout the years the benefits in his being a "contractor" and now seeks to be an employee (as the Respondent confirms that it always viewed him and treated him as such), while obtaining sums and components he already obtained.**
>
> **Our impression is that indeed the defendant erred in agreeing to his request, however as it had not violated his rights in any way, there is no room for any of his petitions, and as none of his rights as a hired employee were violated by the format of his employment, as aforementioned - and after we considered all of the above, we have no choice but reject the claim including all components thereof.**

g. In light of the above, we have no doubt that this is a case that illustrates those cases of clear lack of good faith, and in this case even amounts to extreme lack of good faith, where it is required to rule already at "the first stage" that there were no employer-employee relations between the parties, and it is not required to artificially continue to the stage of calculating the rights and offsets, as in view of Mr. Levy's conduct the result would be the same result, meaning, Mr. Levy would not be entitled to any payment upon conclusion of the proceedings.

142. Hence we see, all the aforementioned leads to the clear conclusion that this is not a weak employee requiring protection on the one hand, and on the other hand this is a case of extreme lack of good faith in which we believe it is appropriate to rule that considering all the specified circumstances - employer-employee relations between the parties should not be acknowledged, and therefore the claim including all components thereof - is to be rejected.

We should emphasize that this ruling of ours does not mean that an employer may exploit the wish of a worker to be employed as self-employed, and in cases where the worker wishes to be self-employed with no specific and proven interest (as proven in the case before us), even if he chose to be self-employed, however pursuant to the customary tests he is an employee - he would be acknowledged as an employee. However, as specified above, this is not the situation in our case, and we believe that there was no exploitation on the employer's part in employing Mr. Levy as self-employed, but rather the opposite is true - there was clear lack of good faith on Mr. Levy's part in the format of engagement between the parties, such we believe that justifies refraining from acknowledging him as an employee.

143. **In conclusion - in light of the aforementioned, Mr. Levy's appeal is to be denied. As to expenses - in view of the ruling on court fees and attorney fees that were ruled against Mr. Levy at the Regional Court, which are higher than the rulings of the Labor Courts in this type of cases, the expenses and attorney fees that were ruled against him at the Regional Court shall be the ruling on expenses for the proceedings at both instances.**

Conclusion

144. After these statements I reviewed my colleague, Justice Sigal Davidov Motola's opinion, in her reference to my opinion, and I would like to briefly clarify as follows:

145. "**The Claim of impairment of cogency**" - my colleague disputes my approach regarding granting weight to the equation of good faith also at the stage of acknowledgment of labor relations. Her main concern is that in this way the principle of good faith collides with the principle of cogency and leads to subordination of the principle of cogency to it that may amount to true violation of cogency. To this is added the concern of possibly opening the door in a manner that would enable raising claims of "lack of good faith" not only against ruling on the status of "employee," but rather also in any claim for cogent rights that may be filed following termination of the labor relations.

The response is clear: We shall state its essence and then elaborate. **As to the claimed impairment of cogency - I believe, yet prior to acknowledging an employee as such - the cogency umbrella does not apply, and thus there is no impairment of the principle of cogency at all. And as to the concern of impairment of the cogency institution in other cases as well - the difference is clear:** Indeed, the rule is that cogent rights originating under law cannot be impaired, **and this provision id explicitly set out in each of the protective laws. However, ruling on the status of an employee and the tests for doing so, this is work the legislator left for the rulings of the Labor Courts, unlike other countries around the world where definition of an employee is set out under law (for example in the UK). As such, it must be dynamic, changing and examined from time to**

time, and it is not possible to draw an analogy from a right originating under law to a right established by case law rulings.

And how so?

146. If we turn to the basic principles of labor law we shall see that the law does not determine who is an "employee" and who is an "employer," but rather left this work to the Labor Courts. And indeed, case law has developed and perfected over the years the tests for defining employer-employee relations (I elaborated upon the developments and changes extensively at the beginning of my opinion). After it is ruled that indeed employer-employee relations exist between the parties, the system of cogent rights and duties of labor law is applied to the parties. And it is important to emphasize and clarify - the principle of cogency applies only after there is a ruling that this is an employee. Prior to such a ruling - there is no applicable system of cogent rights. Thus, the argument of nullifying the principle of cogency is no argument. As since so long as it was not ruled that a worker is an "employee" - the cogency shell has not been applied to him. This establishes the conclusion, that examination of the parties' good faith towards the system of the engagement between them - does not limit, and certainly does not nullify the principle of cogency.

147. It is also required to respond to my colleague's argument regarding subordination of the principle of cogency to the principle of good faith (section 31a of her opinion) - that this argument may be captivating but far-reaching. This argument may be raised wherever there are different principles to be balanced.

However, we believe that in this issue, providing the possibility to balance the issues, while the Labor Courts "would keep its ear to the ground" and direct and perfect the principle to correct, appropriate and

balanced implementation in the various cases - would make labor law adapted to the changing reality, and in this manner all principles of labor laws would be maintained so as they would not be emptied out of all content. The thought and attempt to hold on to the principle of cogency, not only would not preserve labor law as correct and adapted to the current era, but itself may lead to nullifying the purposes labor law is intended for.

148. Also the argument, according to which there is a discrepancy between the individual emphasis on the principle of good faith and the collective parts of labor law (section 31d of her opinion), I cannot accept - as aforementioned, labor law in origin enables authentic relations between parties that are not employer-employee relations but rather that of an independent service provider, contractor and so on. Since this is the case, although the principle according to which labor law is intended to give weight to the interests of all employees, is a correct principle in itself - it is not relevant to our case at all.

149. It should further be noted that non-acknowledgment of a worker as an employee does not necessarily deny him of other important rights, however I do not wish to set a precedent on the matter since deliberation upon the question of universality of the definition of an employee, deviates from our matter.

150. **"Claim of uncertainty"** - as to the difficulty my colleague points at (section 31 b-c of her opinion) and inter alia the criticism is for using the broad valve of "lack of good faith" or "clear lack of good faith", while leaving a broad space of uncertainty in light of the reliance on the concrete circumstances of each case - I should remind that the principle of good faith is a central legal principle in the Israeli legal system, a royal principle, which applies to the entire Israeli legal system and to

labor law in particular. As to the criticism that is raised from time to time on the use of valve terms, such as good faith, President (ret.) Aharon Barak wrote in his book "The Judge in a Democracy" (chapter nine, p. 248) that: **"Valve terms exist in all the branches of law. This phenomenon has been criticized. It was said that it severely violates the rule of law. This approach cannot be accepted. Valve terms serve an important role. They grant flexibility to the legal system. In using the valve terms, the legal system succeeds to adopt itself to the varying needs yet remain true to itself. Legislation and common law too use the valve terms in order to prevent a deadlock in law and in order to adapt the law to the varying conditions… They are intended to ensure growth, moderation and adaptation to the varying reality."**

It appears that there is no need to add to these statements.

151. My colleague further believes that there is a problem in subordinating such a significant issue - whether the issue concerns an "employee" - to such a broad valve, certainly when the manner of implementation thereof is left to the circumstances of each case. To this we should respond, that in fact this argument could be claimed against all case law tests for ruling on an employee and an employer. Subordination of concrete circumstances to broad rules is always required. This is the role the legislator left for the Labor Courts, and it is clear that the further vast case law rulings would develop in view of the method I am proposing, there would be greater certainty. At the same time, this important work cannot be relinquished, only due to the concern of uncertainty. Every change involves a certain element of uncertainty; however, the final result is what we should remember throughout the way, and I believe that the one I am proposing is

preferable for all the reasons I discussed extensively as part of my opinion above.

152. It is also important to reiterate that the "innovation" that was greatly intensified in my colleague's opinion is not one that involves a revolution in the existing case law rulings - the ruling that lack of good faith could overcome status was already set in the rulings of this Court. However, since the principle remained theoretical and was not implemented in practice to date, we believed that a precedent should be ruled on this issue, and our statements only refine and realistically internalize the principles that were set out over many years however were not implemented. It is precisely this manner, as we believe, that is the appropriate manner for developing the labor laws, so that labor law would hopefully not be a mere thing of the past - but would rather be appropriate and true to the changing realities of the labor market.

153. The cautious examination of the format of engagement between the parties, which is intended to settle the purposes of labor law (including protection of the employee against the employer and at times even against himself) - does not mean nullifying the possibility of parties to engage in a format that is not employer-employee relations. Labor law never applied the principle of status to everyone on the employer's premises. Hence, application of the category of an employee to all formats of engagement, whatever it may be, is precisely what empties labor law of any contents, and the vast case law rulings regarding the necessity for the tests for ruling on employer-employee relations. The starting points according to which the criteria for ruling on employer-employee relations is merely objective, without granting any weight to the parties' wishes, conduct and the manner they wished the relations would be acknowledged - could thwart the original purpose of labor law. Labor law does not include complete denial of

formats of engagements that are not employer-employee relations, so it was from the dawn of time, as well as now.

154. **Indeed the "proportional solution"** - as to the solution that was proposed that "a solution for unusual situations in which cynical or extortive exploitation of labor law is made, would be provided at the second stage of ruling on the rights, unlike the stage of ruling on the status" (section 31g of her opinion) - past experience indicates that this is not sufficient, and this solution, on its own, inflicted damage on employers for many years, although they too are party to the fabric of labor relations, by being forced to conduct long and tedious proceedings until the desired outcome, while the correct result could have been achieved in the suitable cases already at the first stage of the proceedings.

155. As to the concerns of the "breaking of the boundaries" (section 31g and section 32 of her opinion) the statements made by the Supreme Court *mutatis mutandis*, are true for our case as well (CA 8710/17 **Jane Doe v. Klalit Health Services** (06.08.2019):

> **"The argument in respect of the difficulty in determining boundaries requires great thought and caution, however, on the other hand it should not completely negate the possibility of looking for a proper balance point. We should not forget that the argument of the slippery slope could also be a type of slippery slope"**

And in another case, President (ret.) Barak rules as follows:

> **"... I am not willing to change the legal criteria due to the concern of what the future holds. This concern is based entirely on factual speculation. I cannot take it into consideration..."**

(HCJ 5016/96 **Lior Horev v. The minister of transportation et al,** 51(4) 1997)).

156. I shall sign off this part with the statements of the Supreme Court regarding the path Labor Court should follow in light of the changes occurring in the labor market (HCJ 6076/12 **Koach LaOvdim - Democratic Workers' Organization et al v. Ha'histadrut- General Organization of Workers** (13.12.2012)):

> **"The new winds blowing within the domain of freedom of association, like in other domains, are not new to the Court and entered also through its doors and windows, as the rulings cited above and similar ones testify to this. However, the National Court exercises a cautious system of "step by step," in order to - on the one hand - not sink old ships, however provide a new path also for new ships."**

157. `To sum up the issue - my statements here are nothing but a little reduction of the gateway for acknowledging employer-employee relations by implementing the case law rulings that existed yet prior to this judgment's inception. Since it was not implemented so far we believe that the time has come to do so in light of the changes and modifications occurring in the labor world, and in order to provide a proper solution for the changing labor world. Finally, it should be stated that providing the possibility of claiming **clear** lack of good faith is an argument that is given to the employer, and it is not everything, but rather one argument among many, however it too should be included in weighting the matters in the appropriate cases.

Justice Sigal Davidov Motola

1. My colleague, President Varda Wirth Livne's comprehensive and broad opinion includes several parts. I chose to focus on the significant

innovation that is expressed in the outline she set in respect of the manner of settling accounts upon acknowledgment of employer-employee relations in retrospect. I was convinced that this outline, should it be implemented as part of the guiding principles she noted and shall be specified also below, would enable a practical and balanced solution for the issue the Labor Courts discussed over many years, while maintaining the basic principles underlying labor laws. For these reasons I can agree to it, while changing my position That was expressed in the past (LabA 110/10 **Rafi Rofeh - Mirkam Insurance Agency Ltd**. (22.12.11) hereinafter: The **Rofeh Case**), and this for establishing a clear, agreed upon and stable case law ruling.

Therefore, I shall open, after a brief introduction, with addressing the main points of this new central innovation. Further on I shall address the additional innovation proposed in the President's opinion, which I cannot join - and concerns the possibility of use of the principle of good faith for determining that an "employee" is not that,, even if he meets the tests and secondary tests that were set out for this purpose under case law rulings (while *prima facie* extending Deputy President Elisheva Barak-Ussoskin's obiter in the **Buchris** case (LCH 52/3-145 **The State of Israel - Ya'akov Buchris**, 36(2001) 1 (1997)). I shall argue that this innovation is not necessary, and that the damage that could be caused by broad implementation thereof exceeds the benefit. In conclusion I shall address the three cases discussed in the appeals before us, in which I agree with the results the President arrived at, however for different reasons in part.

Introduction - the Basic Principles of Labor Law

The Basic Starting Points

2. All issues underlying the hearings on the cases before us - the tests for existence of employee-employer relations; the relevancy of consent or "good faith;" and the manner of settling accounts upon ruling on labor relations in retrospect - stand at the center of labor law, and as such require examination of its fundamental principles at the first stage. As was extensively detailed in the President's opinion, the need for labor law as a separate branch of contracts law is based on two main starting points that join each other. First, presumption that there are significant gaps between the employee and the employer in aspects of power, control, information, resources and dispersal of risks, which lead to the fact that the employee is, generally, at a weaker bargaining position. This leads to subordination and dependency, and justifies normative regulation that would prevent employers from exploiting their excess power.

   Second, acknowledgment that labor force is not a "commodity" but rather reflects the person's humanity as a central part of its autonomy, and therefore intervention of the legislator is required for implementing basic social rights society chose to protect. Considering the uniqueness of the labor contract, waiving these rights - as well as merely "commercialization" thereof and providing a possibility to exchange them for funds - is interpreted as violation of the employee's dignity as a person, in the same manner we would not allow waiver vis-à-vis monetary payment in respect of other basic rights such as the right to vote in the elections (this specification of the justifications for labor laws is of course only schematic and brief; for further details see: Guy Davidov, A Purposive Approach to Labor Law, Chapters 3-4 Oxford University Press (2016)).

3. As a result of the stated points of origin, the fundamental principle of labor law in Israel and worldwide, from the dawn of times, is that the mere existence of employer-employee relations cannot be stipulated upon, and the ruling whether a person is an “employee” should be ruled pursuant to objective criteria (LCH (National) 31/3-27 **The Municipality of Netanya - David Birger**, 3(1) 177 (1971); HCJ 6194/97 **Nakash - The National Labor Court**, IsrSC 53(5) 433 (1999). This leads to the situation where parties are indeed entitled to choose and set out the format of their engagement as they wish, however should objective-critical examination of the characteristics of the engagement they chose - in accordance with the criteria ruled for this purpose under case law based on the purposes of labor law - would show that we are discussing the case of an “employee”, the parties cannot determine otherwise, and should they attempt to do so, law would not validate it.

   This principle - the principle of cogency - is expressed also in the various protective laws that comprise the Israeli labor legislation, in which the legislator stressed that the minimum rights granted as part of them cannot be stipulated upon (as well as in the expansion orders and collective agreement should such apply), as it is clear that the cogency of the rights have no meaning should waiver of the “entry gate” to them be allowed (meaning, the mere definition of "employee"). It is sufficient to refer to the many references specified in the President's opinion ruling that granting a possibility to waive rights ensured under labor legislation contradicts the purposes of labor law, public policy, public order and public interest (section 30 of her opinion), and it is clear that there is no logic in ensuring the cogency of the rights on the one hand,

and on the other hand enable complete evasion of them by the fictitious definition of the person employed as not being an "employee".

The reasons underlying cogency

4. At the basis of cogency stand several layers of reasons, each standing on their own and add up to each other (for further details see Guy Davidov, Stipulation on the Status "Employee" and its Implications, **Mishpatim** 50 87 (2020), hereinafter: **Davidov**, pp. 96-107). As a rule, (and the issues are presented here very briefly), a first and central layer regards the concern of a situation where the employer, who is the strong party in the relations according to the starting point of labor law, would exert pressure or force the employee (whether as a condition for merely hiring him or later down the road) to waive his rights or part thereof, at times while presenting the issues as being the employee's initiative or his agreement. Hence the need to clarify that the employee's waiver, even if given in writing, is meaningless, as only by strictly ensuring this, employers would be prevented of trying their luck that it would be validated. Second layer regards the evidentiary difficulty, merely by the fact that a judicial system does not examine deep down one's soul, and determine when there had been coercion and when it is the employee's voluntary consent to waive his status or the rights stemming from it. Third layer emphasizes that even if we assume the consent of the employee of his own free will, there is justification for a paternalist intervention for promoting the essential liberty of the employee himself, as well as his human Dignity (*ibid*; as well as Hanna Ghendker-Ofek, "Basic Rights, Protective Legislation and Good Faith - Constitutional Reflections on Labor Law," **Mishpatim** 37 63 (2007) (hereinafter: **Ofek**).

Fourth layer draws attention to the real difficulty in validating waiver of the status of "employee" and all the rights arising from it (by virtue of laws, regulations, expansion orders, collective agreements, practice and ruling) in view of lack of information on the full scope of rights and financial and other implications involved in such a waiver. To this should be added the existence of cognitive failures - which are the basis of behavioral economics - including underestimation of future risks, excessive weight to the present and too little weight to the future, excessive security and more, for which employee may make irrational decisions. Good examples of this are too low pension savings, and the assumption of employees at the beginning of their work at the workplace that they are not expected to be arbitrary dismissed, sexual harassment, discrimination or abuse, and therefore do not need these protections. These failures lead to the need to protect employees against the irrationality of their decisions (see and compare: .Eyal Zamir, The Efficiency of Paternalism, 84 Virginia L. Rev 229 (1998); Lilach Lurie, Orly Lobel and Yuval Feldman, Labor Law, **The Economic Approach to Law** 477 (2012)).

5. Fifth layer regards the implications of the waiver on other employees of the same employer (and employees of other employers in the same sector that would be affected), as well as distributive justice among the employees. An employee's consent to waive a right granted to him under a protective law establishes pressure on other employees to agree to a corresponding waiver even against their will, in order to be hired to the same workplace or protect it (Omri Yadlin, Good Faith in Labor Law in Israel: From the General to the Particular, **Iyunei Mishpat** 22 867 (1999) (hereinafter: **Yadlin**). Thus, there is great importance to lateral strictness in protection of the minimal rights that were set out

under the protective legislation, expansion orders and collective agreements, and not enable leakage from them.

Sixth layer concerns the public as a whole, and this mainly due to impairment of the social values labor laws that are intended to promote equality, distributive justice and democracy in the workplace (Ofek; Davidov; Sharon Rabin-Margaliot, "What Remained of Protective Labor Law?" Menachem Goldberg Book 461 (2001); hereinafter: **Rabin Margaliot,** who also emphasized that "**in order to promote the social and/or economic objectives underlying the protective laws, it is required to ensure that the arrangements set out under law would be enforced literally, and not enable autonomous deviation, even where it is particularly desired both by the employer as well as the specific employee"** (*ibid*, p. 468)).

6. These reasons indicate that the waiver of an individual employee of his status as "employee" or of his cogent rights is difficult on the personal level, however does not affect only him but rather also at other employees, and the manner of passing on and implementation of the social values in general. Upon determining the legal rules we are thus required to consider not only the concrete justice between the specific employee who filed a claim and his employer, but rather also the transverse impact on all the employees, and the important social values that labor laws were established to protect.

   Parenthetically I should note that this does not necessarily mean that there may not be interim solutions, mainly under legislation, in the appropriate cases, however such solutions are supposed to start from the point of origin of cogency and as proportional-concrete arrangements in issues justifying so (regarding specific rights as opposed to the status of "employee" as a whole), and this unlike

doubting the mere need for cogency as a fundamental principle of labor law (for further information on the justifications for cogency, including examination of interim solutions, see: Guy Davidov, Non-Waivability in Labour Law, Oxford Journal of Legal Studies, vol. 40, p. 482 (2020).

Cogency in contracts law

7. I shall add in a nutshell that the need for paternalistic intervention in favor of a "weak" party in contractual relations, while setting out binding provisions that may not be stipulated upon, does not characterize only labor laws due to their dual uniqueness, but rather also additional types of contracts (for example, regarding consumer contracts, section 36 of the Consumer Protection Law, 5741-1981; CFH 5783/14 **Zemach v. EL AL Israel Airlines Ltd.** (12.9.17)). It was also emphasized that the alleged intervention in the freedom of the contracts as a result of this is justified not only for imposing "**appropriate conduct customs**" on the general business sector (CFH 5712/01 **Barzani v. Bezeq the Israel Telecommunication Company Ltd**, IsrSC 57(6) 385 (2003)), but rather also for granting meaning and contents to freedom of the contracts itself.

   Meaning, in situations where there are structured power gaps, "the judicial arrangement of these contract is what enables substantial contractual freedom, which fully reflects the wishes of both parties, not only formal contractual freedom" (Ofer Grosskopf and Yifat Naftali Ben Zion, The Goals of Contract Interpretation: Which Way We Ought to Go When We Care Where We Want to Get? **Essays on Contracts - The Shalev Book** 523 (2020, hereinafter: **Grosskopf and Ben Zion**, as the statements were made in respect of contracts between a dealer and an individual, one example of which is an employment contract; for clarifying the importance of substantial freedom of contracts unlike

the formal one see also Nili Cohen, Equality versus Freedom of Contract, **Hamishpat** 1 131 (2013)).

8. Cogency is no stranger to contracts law, and as part of which acknowledges the understanding that paternalistic intervention in the appropriate cases is not contrary to autonomy and freedom of contracts but is rather intended to promote them (Eyal Zamir& Ian Ayres, A Theory of Mandatory Rules: Typology, Policy and Design, forthcoming in Texas Law Review (2020); hereinafter: **Zamir and Ayres**). It should be further noted that the mandatory provisions under contracts law (in consumer protection laws or arrangements concerning special contracts such as a contract for purchasing an apartment from a contractor, a residential rental contract, etc.) are implemented according to the type of contract per its general characteristics, without requiring an examination in each case in itself on whether or not there is a power gap. Also the current trend in contracts laws to set various legal rules for different types of contracts (as is expressed, for example, in CA 7649/18 **Bi-Bi Roads Earthmoving & Development Ltd. v. Israel Railways Corporation Ltd.** (20.11.19)) - is implemented in a manner that is based on "**defined categories (meaning, rules), rather than one that calls for examination of each case in itself**" (Grosskopf and Ben Zion).

   Hence, even should it be ruled that not all employment contracts "are born equal" (LabA (National) 23309-10-18 T**he Israel Ballet - Berta (Ziona) Yampolsky** (6.5.20)), and even should be ruled on such and other nuances in the rules of interpretation thereof as a result - this does not impair the point of origin of gaps in power relations, which is determined according to the mere characterization of the contract as an employment contract (as the legislator did not set out in the various

labor laws different provisions for various types of employment contracts). Thus the point of origin should not be examined in each case in itself, exactly like upon implementation of the consumer protection laws no examination is conducted in every given case whether the consumer is indeed "in need of protection" in the specific relations as a condition for applying the protections under law to him, and it is clear that merely setting such a question mark would greatly weaken the protection granted to consumers.

Impact of the changing times on cogency - is it really so?

9. The reasons for the principle of cogency remain intact also in contemporary literature engaging in labor laws (as an example only: Simon Deakin and Gillian S. Morris, Labour Law (6th ed.) pp. 131-138 (2012)), and neither have they lost their vitality in other legal systems (and see for example the ruling of the European Union Court of Justice: Robinson-Steele v RD Retail Services Ltd (2006) IRLR 386; as well as the ruling of the UK Supreme Court that was handed down recently: Uber BV & Ors v Aslam & Ors [2021] UKSC 5; hereinafter: the **Uber Case**).

   There is no dispute that many changes occurred in the labor market on its various aspects in recent years and changes are expected to take place in it in the future as well, however I do not believe that any of these changes, including the social and technological changes, as there is no dispute are significant, leads to reduction of the need for labor laws or justifies doubting its basic principles, including the principle of cogency (and see in this regard also the **Uber** case). To the contrary - there is room for the belief that it is precisely these changes that are not in dispute, such as increase in the unusual formats of employment, increase of use of technology (including the development of "platform

economics") and the entry of new populations into the labor market - justify expanding the protection given to workers of various types, rather than reduction thereof, as also in respect of these workers include, *prima facie*, the two points of origin specified in the opening of my statements (power gaps and understanding that work is not a "commodity") standing at the core of labor law (see for example: Valerio De Stefano, The Rise of the Just-in-Time Workforce: On-Demand work, Crowdwork, and Labor Protection in the Gig-Economy, 37 Comparative Labor law& Policy Journal (2015)).

10. Should it be argued that these points of origin, including the basic presumption of gaps in power between employees and employers or the need for paternalistic intervention in the appropriate cases, wore down over the years or in respect of certain sectors/positions - I shall give two answers. First, this is the point of origin in labor law in all legal systems we are familiar with, including the Israeli legislation from the dawn of time. Discussion as to changing it, in general or in respect of such or other type of employees, is a complex discussion that involves moral rulings and multi-focal policy considerations, and as such I believe it should be conducted in public, based on comprehensive factual and research foundations and after hearing all relevant factors. It is certainly possible that after such a discussion, it would be possible to set out (probably under legislation) mid-way categories (as customary in certain countries such as Canada and England), and enable greater choice to the parties while maintaining the appropriate purposes of each category. So long as this is not done, I believe there is no justification for deviating from the points of origin, while possibly shaking the entire "trunk" on which labor law, including all its branches is based on.

Second, precisely during the current period, in which humanity worldwide is coping with the corona virus crisis, proved the extent to which labor law's points of origin are still relevant and important, so that there is no need to rush and waive them out of the false notion that they are anachronistic, and we have *prima facie* "advanced" so that they are no longer necessary. During this period also the cards of "strong" employees (a status that in any event could change over the work period and considering many varying data) were shuffled, and the need for basic protections became relevant more than ever (and see as an example only: Marta Fena, Employment Impact of, Covid-19 Crisis: From Short Term Effects to Long Terms Prospects Journal of Industrial and Business Economics 47.391 (2020) 391). For this reason too, I believe it is proper to well maintain the historical basic principles that were achieved with many efforts, and at the same time hold a discussion on a possible expansion of social protections also in respect of those who are not "employees" or meet only some of the characteristics of "employees" (see in this regard the International Labor Organization position letter , in collaboration with the OECD, which was published in April 2020, headed: Ensuring Better Social Protection for Self-Employed Workers: hereinafter: the **ILO Position Letter 2020**).

11. Based on the above - which are relevant to all parts of my opinion - I shall turn to examine the manner in which it is required to rule on the rights of a worker who is acknowledged as an "employee" in retrospect.

The Manner of Settling Accounts Upon Ruling on Employee-Employer Relations in Retrospect

The questions to be ruled on and the guiding principles

12. As aforementioned, the first issue I shall discuss, and in respect of which I agree with the President's opinion, for the reasons listed below,

is how should the rights of a worker who was ruled to be an "employee" in retrospect be calculated. As the President noted, this issue raises a number of sub-questions to be discussed. **First question:** What would be the basis for calculation of the employee's social rights - the consideration he obtained as "self-employed" or the wages he would have been given had he been defined as an "employee" to begin with (hereinafter - the **Alternative Wages**). **Second question:** Under what circumstances would settling accounts be conducted in retrospect, while attributing the difference between the alternative wages and the contractual consideration on account of the rights payable to the worker as an "employee." **Third question:** Are there circumstances under which this difference would establish a duty of restitution, beyond offsetting.

13. The answer to the first question was mainly agreed upon in case law, and no change is proposed in respect of this. Thus, the social rights of a worker who is defined in retrospect as an "employee" would be calculated according to the alternative wages that may be ruled that the parties would have agreed upon had the worker been defined as an "employee" to begin with, should such wages be proven based on the evidence brought before the Court, as the burden of proof in this regard is imposed on the employer (the **Rofeh** case; the possible manners for proving the alternative wages were specified in the President's opinion. In the Amir case ((LabA (National) 3575 10-11 **Anat Amir - The Israel Television News Company Ltd.** (21.1.15)) it was indeed proposed to deviate from this and calculate the rights according to the "contractual" wages in cases where the employer should have been clearly aware to begin with that this is an "employee", however this possibility was not implemented even by the justices who supported

this ruling and it appears there is no need for it (and accordingly this possibility is not presented in the President's opinion).

This means that in cases where the employer proves alternative wages, meaning convince the Court that had the parties been aware of the correct classification of the worker as an employee, as the parties been decent and acting in good faith in setting the alternative wages as the ongoing consideration - the worker's rights would be calculated according to the alternative wages to be ruled upon. Had the employer fail to meet the burden imposed on him in this regard - the rights would be calculated according to the contractual consideration the worker obtained as "self-employed."

14. Also the answer to the third question (whether there are circumstances under which the duty of restitution beyond offsetting would be established) is agreed upon and is distinctly negative (and in this regard there were also unanimous views in case law in the past, both in the **Rofeh** ruling as well as in the **Amir** ruling). These issues were elaborated upon in the President's opinion and I accept them, and thus there is no need to go deeper in this respect (and I shall settle with referring to the reasons specified for example in Yuval Procaccia, On Erroneous Employment Classifications, Efficient Deterrence and the Cogent Status of Labor Law", expected to be published in **Iyunei Mishpat** 43 (2020); hereinafter: (**Procaccia**, pp. 15-16).

15. The second sub-question - under what circumstances would it be possible to offset the gap between the alternative wages and the contractual consideration and" renewed settling of accounts" - this is what led to the disputes among the justices of this instance and the frequent changes in case law rulings, and thus I shall briefly clarify the

principles that guide me in resolving this (and were mainly detailed in the **Rofeh** case as well) -

a. The cogent duties that result from employee-employer relations and the costs involved in them could motivate some employers to attempt to extract themselves from the "splint" that was forced upon them and enable themselves greater flexibility, and more comfortable costs, in their engagement vis-à-vis workers. Since there are employers who attempt to classify "employees" as "self-employed" while being aware (in practice or by turning a blind eye) that this is an erroneous classification, while exploiting the power gaps - or information gaps - existing between them and the workers, and in this way avoid granting social rights and the other liabilities imposed on an employer (for acknowledgment of this phenomenon and importance of preventing it see also the **ILO Position Letter 2020,** p. 10).

b. There may also be situations in which employers would offer workers to be employed as "self-employed" with no change in the total cost of the engagement between them (meaning obtaining a higher consideration than that they would have obtained had they been defined as employees, which takes into account the costs of the social rights), in order to avoid non-monetary obligations that are imposed towards employees such as occupational security, duty of granting a hearing, and more. Additional possible reasons for erroneous classification (and this is not a closed list) are reduction of the number of employees who could unite and conduct organizational struggles, while impairing the power of the employees union, if any, and reducing the possibility of uniting at a non-union workplace; constraints of permitted available positions and wages restrictions at public entities; attempt to avoid the

applicability of expansion orders and collective agreements; artificial reduction of wages' expenditures in the financial statements; etc.

c. On the other hand, there are also cases in which the known erroneous classification is due to interests - taxation or others - of the employee himself, such as the wish to deduct expenses; offset losses; avoid wages' ceilings applicable at the workplace, if any; enable himself greater flexibility in the work hours or vis-à-vis additional engagements; maximize the monthly consideration in light of his waiver of social rights; and others (as it is justified to prevent classification due to its impact on other employees, other employers who ensure correct classification and legal payments resulting from this, as well as duly executing mandatory payments - see also in the **ILO Position Letter 2020,** p. 10).

d. It should be added to the aforesaid that there are also situations in which it is not a conscious erroneous classification (whether of one of the parties or both of them), but rather classification resulting from an error in understanding the legal situation. This is so particularly in borderline situations; in situations where there has been a significant change in the characteristics of the engagement over time; or following a change in case law ruling.

e. Whether it is a mutual or unilateral conscious erroneous classification or erroneous classification in good faith - it is required to prevent such, as **erroneous classifications lead to removal of the protections' umbrella - which includes protective laws, expansion orders, collective agreements and duties per case law - of a worker who requires these protections, and the legislator instructed to grant him these regardless of his consent.** Thus, erroneous classification leads to impairment of the purposes of labor law, the principle of cogency and the effectiveness of implementation of

protective legislation, and we should remind that these are rights concerning the humanity and dignity of the worker, being a person.

f. Additional implications regard provision of a possibility of manipulations regarding tax payments and social security fees; bypass of laws and guidelines regarding the manner of hiring employees (such as tenders and permitted available positions) and the wages they may be paid (including by virtue of section 29 of the Budgetary Principles Law, 5745-1985); avoidance of statutory duties that apply to public employees such as disciplinary action and the duty to avoid conflict of interest; unfairness towards other employers of the same sector who ensure correct classification in a manner that could increase their expenses; as well as a possible impact on additional laws such as vicarious liability in tort laws and precedence rights in liquidation. From these aspects to **a clear public interest in preventing erroneous classifications** is derived (as counsel for the Wage and Labor Agreements Department noted before us), and manipulations attempting to present the relations other than they are in practice.

16. In support of these statements, refer to the OECD Report for 2019, which specified the phenomenon of erroneous classification of employees as "contractors" and emphasized the need to set out rules to prevent this, while noting **that ensuring correct classification is a necessary step in ensuring the protections of the labor law and thus it is expected of the countries who are members of the organization to set out the rules to ensure this.** And so it was stated, *inter alia* (emphases added):

"Ensuring the correct classification of workers is therefore a key first step to ensure access to labor and social protection, collective bargaining and lifelong learning... The deliberate misclassification by

employers of workers in an attempt to avoid employment regulation, fiscal obligations, workers' representation, as well as to shift risks onto workers and/or gain a competitive advantage, should be cracked down on. Similarly, workers' misclassification of themselves as self-employed to avoid taxes should be addressed. As discussed above, misclassification harms individuals, but also may put firms that follow the rules at a disadvantage and risks creating a hole in public finances... In parallel to strengthening the penalties for misclassification, governments should seek to reduce any incentives to firms and workers to misclassify employment relationships as self-employment"

(OECD Employment Outlook 2019: The Future of Work, Labor Market Regulation 4.0: Protecting Workers in a Changing World of Work, pp. 136-140).

Similar and unequivocal statements were noted in the **ILO Position Letter 2020**; and also see, regarding the efforts in the United States to prevent erroneous classifications, Jenna Amato Moran, Independent Contractor or Employee: Misclassification of Workers and Its Effect on the State, 28 BUFF. PUB. INT. L.J. 105, 122 (2010); Anna Deknatel & Lauren Hoff-Downing, ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes, 18 U. Pa. Pa. J. L. & Soc. Change 53 (2015).

The appropriate legal rule given the guiding principles

17. As a result of the principles outlined above, and given that there are currently no legislative solutions in Israel in respect of erroneous classification or external enforcement in this regard (as is in the United States for example through the tax authorities, and in some of its states also civil fines; see for example Cal. Lab. Code, section 226.8) - it is our duty, as the judicial instance entrusted with the implementation of

the labor laws, upon ruling on the legal rules on the issue subject matter of the hearing that is a key question in labor law, **to direct the desired conduct of both employers and workers, using rules that would grant negative and deterrent incentive (*ex-ante*) against conscious erroneous classification of "employees" as "independent contractors".**

To this should be added a positive incentive for a comprehensive examination of the status of workers prior to engaging with them, in order to reduce as far as possible erroneous classifications in good faith (regarding the reasons for guiding behavior as justifying a deterrent rule see for example CA 8728/07 **Agrifarm International Ltd. v. Meyerson** (15.7.10); Ariel Porat, Justice Considerations and Behavior-Guiding Considerations in the Law of Contracts, **Iyunei Mishpat** 22 647 (1999)).

18. Accordingly, it is required to set legal rules that would encourage employers to define workers who are "employees" according to this status in the first place, so that they would obtain their monetary rights regularly and at the same time benefit in practice from all non-monetary rights (as well as comply with their duties as employees towards the one employing them). At the same time, it is required to prevent establishment of a chilling effect against filing claims by workers who were erroneously classified for acknowledging them as "employees," while ruling on adequate compensation that would take into account the negative social consequences caused by erroneous classification. Notwithstanding, it is required to prevent, to the extent possible, abuse of the legal rules on the part of workers.

19. As to the contents of the incentives, the point of origin is that **the responsibility for examining the legal situation is first and foremost**

imposed on the employer. The reasons for this are based both on considerations of effectiveness (one examination compared to separate examinations of each employee); as well as reasons of organizational and financial accessibility to legal advice; as well as considering that he is the strong party (per the point of origin of labor law) in the relations, with all it entails in terms of his ability to affect the terms of employment; and mainly given that most duties by virtue of labor laws are imposed on him, including criminal liability in some cases for violation thereof. Therefore, he is required to conduct the necessary examinations (which are not excessively burdensome) in order to know towards whom he is required to implement the legal duties that are imposed on him. Thus, the legal rule is required to deter (although to a different extent) not only against malicious erroneous classification made with the clear intention to deny rights, but also against erroneous classification in good faith, as well as against erroneous classification that did not inflict direct financial damage on the worker and was even done so at his request.

Upon determining the rule, it is required to remember that the weaker the worker, so he is less likely to file a claim (William Felstiner the Emergence and Transformation of Disputes: Naming, Blaming, Claiming **Malaise Mishpat** 3 (2010) 17). This means that the cases that are filed with the Courts - which pursuant to literature would be filed mainly by the stronger workers - would define the legal situation, and the incentives derived from it, also in respect of the populations of weakened workers whose access to the courts is more difficult, and this should be considered in designing the rules

20. In the **Rofeh** case, based on these principles and previous case law ruling, it was ruled that the appropriate default is not to offset any of

the funds that are payable to a worker as an “employee” for the gap between the “contractual” consideration and the alternative wages, unless proven extreme lack of good faith on the worker’s part (in accordance with the secondary tests that were specified there). This ruling was based on a number of assumptions, led by the assumption that there is difficulty in quantifying the non-monetary rights, as well as the need for lateral deterrence, and thus it is preferable to set a strict rule that would significantly reduce erroneous classifications. An additional assumption was that there is legal difficulty, based on the analysis of contracts laws and unjust enrichment laws, to determine the “delta” sum (the gap between the contractual consideration and the alternative wages) as an “excessive” sum the worker is required to return (in the same manner that offset of a virtual gap is not enabled in any other situation in which a cogent provision is added to the contractual provisions), and this so long as it would not be ruled that the worker is the one who in lack of good faith led to obtaining that addition to the wages (the “excessive sum”). Therefore, no "sanction” was set there regarding denial of offsetting, but it was rather ruled that the right to offset - which is not obvious - is established only in exceptional cases of extreme lack of good faith as aforementioned.

An academic essay that was published recently proposed a different manner for determining the legal rule in this issue, based on the need for setting a deterring rule, and the difficulty in the default that was set in the **Rofeh** case was explained by the “sanction”s being (although as aforesaid this is not a “sanction” per the analysis of that issue) is exclusively based on the gap between the contractual consideration and the alternative wages. For this reason, it could lead to excessive deterrence (in situations where the gap is large) under-deterrence (in

situations where there is no gap or the gap is small) as well non-establishment of marginal deterrence (**Procaccia**, pp. 12-15; and also see Davidov, p. 92). Similar difficulties exist in the rule that was set in the **Amir** case, to which are added additional difficulties merely by the fact that this ruling could establish a positive incentive for employers to violate the provisions of law (*ibid*; as well as Justice Glicksman's position in the **Amir** case).

21. My colleague, President Varda Wirth Livne was convinced that it is required to adopt, with certain modifications - the legal rule that was proposed in literature, and set out a new rule in essence on offsetting the "delta" vis-à-vis the value of the monetary rights (should alternative wages establishing a "delta" be proven), together with payment of a non-monetary compensation as the default in any claim of an "employee" who is acknowledged as such in retrospect (unless there is a justification to deviate from this, as the burden in this respect is imposed on the employer). I too believe that this manner - provided that it would be implemented pursuant to the principles set forth in the President's opinion and following - may enable a holistic and balanced solution for the required settling of accounts upon ruling on employee-employer relations in retrospect, in a manner that would enable expression of concrete considerations of justice as well as guiding behavior and the expansive purposes of labor law.

Parenthetically I shall add that it was not possible to be assisted by comparative law for finding a solution for the matter, as in other countries, to the best of my knowledge, calculation of the rights in a situation of erroneous classification is conducted according to the contractual consideration, so that no "delta" is established and the question of whether offsetting is required does not arise at all.

The new legal rule - offset vis-à-vis monetary rights and ruling on non-monetary compensation

22. The new legal rule, which is described in the President's opinion, and which I join, is thus comprised of the following steps:

a. **Comparison Between the Employer's Cost and the Contractual Consideration:** As with the rule set in the **Amir** case, for examining the question of whether the employee incurred monetary damage, it is required to examine the gap (known as "delta") between the employer's cost pursuant to the alternative wages (should such be proven) and the contractual consideration. The employer's cost includes the social rights granted under the protective laws and general expansion orders; additional social rights granted at that workplace (in general or in respect of employees of the kind as the claiming employee); as well as the insurance fees that are required to be paid for a hired employee to the National Insurance Institute (as specified in the President's opinion; for further information see Davidov, pp. 124-129; for an example of calculating the rights see section 45 below). The non-monetary rights are not included at this stage in the calculation.

b. **Should No Alternative Wages Be Proven:** The monetary social rights should be ruled upon according to the contractual consideration and no "delta" is established at all. At the same time, it is possible that even in such a case it would be justified to rule on non-monetary compensation, depending on all circumstances of the matter.

c. **Ruling on the Monetary Rights that are Payable to the Claiming Worker:** Should it be found that the employer's cost according to the alternative wages is higher than the contractual consideration - the employee would be entitled to obtain the monetary rights he claimed and it was ruled that he is entitled to such, so long as

they are not higher than the sum of the "delta" (which should be calculated in respect of the entire working period however not longer than the statute of limitations). In this manner we enable full offset of the gap between the alternative wages and the contractual consideration of the **monetary** rights, as the employee obtains only the balance in his favor, should there be any. This means that the monthly payment that was paid to the worker and exceeds the alternative wages, although it was not defined as payment for social rights in real-time (by the mere definition of the worker as "self-employed") - would be attributed in retrospect to payment on account of the monetary social rights (which in any event are paid monetarily), and accordingly their value would be offset.

d. **Should a Balance in Favor of the Employer Remain:** Should it be found that the employer's cost according to the alternative wages is **identical** to the contractual consideration or **lower** than it - no balance remains for payment in respect of the monetary social rights that should have been paid during the work period and expiration thereof. Additionally, in situations where the cost of the employer is lower than the contractual consideration, *prima facie* a "delta" is established in favor of the employer, as it is found that he paid during the work period an additional sum (he paid as part of the contractual consideration), beyond the alternative wages and the monetary social rights derived from it. For the avoidance of doubt it is hereby clarified that this "delta" (as far as it exists) cannot be offset vis-à-vis the non-monetary compensation, and the employer cannot even claim for restitution thereof independently. However, it may be taken into account in the appropriate cases as part of the overall considerations, upon ruling on the rate of the non-monetary compensation, as shall be detailed below.

e. **Non-Monetary Compensation:** Following, it is required to rule on the sum of the non-monetary compensation appropriate for the circumstances of the case (unless there are circumstances - the burden of proof of which is imposed on the employer - that justify not ruling on it at all contrary to the default that was set). As the President made it clear in her opinion, the compensation should take into account various aspects: Both the damage the employee incurred in practice due to non-monetary rights he was denied of throughout his time of work, as well as lateral considerations, in light of the need for deterring the specific employer as well as employers in general from erroneous classification of employees.

23. **As to the manner of ruling on and calculation of the non-monetary compensation under the circumstances of each case** - as aforementioned, and as explained in the President's opinion, it is required to take into account that an employee who is erroneously classified as "self-employed" is harmed beyond the narrow financial aspect of the value of the monetary rights he was denied of, as he may lose a broad variety of rights granted to employees by virtue of legislation, expansion orders, collective agreements and case law, including (and this is not a closed list) occupational security (including the right to a hearing and protection against dismissal by virtue of collective agreements); pension security; important protections by virtue of prohibition of discrimination laws; the right to organizational representation; prospects of promotion; and the possibility to maintain collaborative relations vis-à-vis the employer with the sense of belonging and social integration at the workplace. Thus these are rights that at least part of them are constitutional (such as, without exhausting, freedom of association and the right to equality).

Hence, when "settling of accounts in retrospect" is conducted and a sort of "turning back the clock" while placing the parties where had the path of the parties' engagement been duly selected - the overall set of these rights cannot be ignored. Therefore, the employee is entitled to compensation for his non-monetary rights, to be ruled upon by way of estimation and without requiring proof of damage, while taking into account all circumstances, led by the scope of the non-monetary rights he was denied of in practice (including the type of rights that were violated, the degree of violation thereof and the work period), and an attempt to estimate their value for him.

It should be emphasized that notwithstanding the subjective, and in part speculative nature of the rights, this is damage incurred in practice and should be compensated for, as "**even if the damage is difficult to quantify, this does not mean that it is appropriate to leave the impaired person with no remedy**" (**Procaccia**, pp. 5 and 29). This is a broad scope of significant rights that are a central part of labor law, as the possibility of exercising thereof in real time was denied of the employee, and the non-monetary compensation ruled in his favor would be the only remedy he would obtain for this (as to the proposal to distribution into a number of "heads of torts", in order to avoid under-compensation, see **Davidov**, pp. 111-113). The relevant considerations were detailed by the President in her opinion (and which I accept); at the same it should be remembered that these are rights that cannot be waived nor traded for public reasons that do not concern only the individual employee, so that the question of the employee's choice or wish - even should it proven that these are true choice and free will - are not all they appear to be. Neither is this compensation for "lack of good faith," as the mutual balance of good faith is only one of the considerations that are taken into account.

24. To this should be added that the non-monetary compensation is not comprised only of compensation for the loss of non-monetary rights that were denied of the employee, but rather its rate should take into account also deterrence and behavior-guiding considerations, which are intended to motivate employers to avoid erroneous classification of employees and conduct the tests required for this (as to the importance of ruling on the sanction, such as punitive damages, due to violation of cogent rules as it is not sufficient to declare on the nullification of stipulation upon them, see, for example **Zamir and Ayres**, p. 39). Thus, the non-monetary compensation is not given only for impairment of the specific employee's welfare nor is it conditional upon the existence of such impairment (although its existence and scope may affect the amount of compensation), but rather takes into account that the purpose of labor law is broader. Only in this manner the compensation could constitute an alternative for the default of no offset that was ruled in the **Rofeh** case, as should the employer be required to pay only what he was supposed to pay to begin with - no deterrence would be achieved (to the contrary, this could motivate employers to intentionally mis-classify, assuming that most employees would not file a claim anyway; for a similar argument see Julien M. Mundele, Note - Not Everything that Glitters is Gold, Misclassification of Employees: The Blurred Line between Independent Contractors and Employees under the Major Classification Tests, 20 Suffolk J. Trial& App. Advoc. (2015) 271-272).

An additional goal is to prevent the establishment of a chilling effect against filing claims due to attribution of the “delta” on account of the monetary rights (attribution that is not obvious and was not exercised

in case law routinely prior to the **Amir** case), in a manner that could generate lack of financial profitability in filing them.

25. Accordingly, upon ruling on the compensation sum it is required to consider also the criteria relating to deterrence needs, and the tests specified in the President's opinion, including the question of whether the circumstances of the case show that the employer knowingly attempted to bypass labor laws, or perhaps he erred in good faith in classifying the engagement (as for arriving at the conclusion of an error in good faith the employer would usually be required to present an objective component of doubt of the legal outcome, and as an example, in view of the degree of the case's being borderline, a significant change in a case law ruling, or gradual change in the nature of the engagement that objectively hindered correct classification of it); the degree of exploitation of the employee's weakness and his dependency on the employer (if any); was there erroneous classification against additional employees; the employee's part in the decision to adopt the format of contractual employment - does the evidence show true consent on his part, and for this his mere signing a contract or document setting "consent" is not sufficient; the degree of the terms of engagement deviation in practice from that required under labor law; was the employee offered to correct the erroneous classification and become of the status of "employee" during the work period, as for doing this it is required to consider also the timing of the offer as well as the degree of its reasonableness and fairness; etc. (see in regard of the relevant considerations also **Davidov**, pp. 115-122; **Procaccia**, p. 26). The sum of the compensation would be ruled upon according to all the circumstances indicated by the evidence, as the need for lateral deterrence is usually due to the mere erroneous classification so that the

employee is not expected to prove any of that listed above in order for ruling in his favor on compensation.

To this should be added the degree of difficulty in filing claims within the type of occupation in question (considering the industry in general and the specific position of the employee in particular), as "**the lower the prospects of the claim, it is expected there would be greater harm to the deterrent power of the law...**" (**Procaccia**, p. 27). In this regard it should be taken into account that most employees do not file claims, due to limitations of awareness of their rights; lack of resources; concern of persecution or negative image in the labor market; lack of desire to confront the employer in view of the personal relationship; and more. It should be remembered that certain deterrence is also required towards an employer who did not examine the classification properly, and this for motivating him to conduct a thorough examination of the legal situation and act pursuant to it. Since status is not a matter of choice, the employer is not supposed to offer the employee two alternatives (work as a hired employee or self-employed), and this unless there is a fundamental difference of the engagement's characteristics in each of the proposed options.

26. Since this is a precedent ruling, and as my colleague the President noted, more accurate criteria for the manner of calculation of the compensation would be established in future rulings. The important principle is that this is not a theoretical slogan, nor compensation for "anguish and aggravation" or "lack of good faith," but rather compensation for <u>real</u> damage (even if not monetary), which is a <u>central and integral part of the new arrangement regarding the question of settling accounts.</u>

Prior to conclusion of this chapter I shall remind that "**the power of any regulatory system to fulfill its goals depends on its ability to deter attempts to evade applicability thereof to begin with**" (**Procaccia**, p. 1), and thus it is of paramount importance that indeed non-monetary compensation would be ruled, taking into account both the non-monetary rights as well as the need for deterrence, in order for the alternative solution being formed in this judgment would indeed constitute an appropriate alternative for previous case law, and lead to fulfillment of labor law purposes. Of course the issues would be examined over time, and hopefully the change would prove itself in achieving its goals.

27. A final note regards the concern of establishing a "slippery slope", so that in any claim for a cogent social right that was not taken into account as part of the contractual agreement - it would be argued that claiming such led to a situation where the employee would obtain a benefit that exceeds the one set out in the contract, and accordingly it is required to rule on the "alternative wages" that would be paid had the parties taken into account the existence off the cogent right, and offset accordingly. Thus it is clarified for the avoidance of doubt that the construction that was built in this judgment, and enables - in the appropriate cases and in accordance with the conditions set out above - attribution of the gap between the alternative wages (proving that it was agreed between the parties from the point of origin of an employment contract) and the contractual consideration to the social rights, was established for a **specific and single** need for finding a solution for the problem subject matter of the proceedings before us, which is established only upon acknowledgment of employee-employer relations, in view of the need for "turning back the clock" due to erroneous choice of **the entire track**

of the engagement, and this when proven that had the parties classified their relations correctly they would have agreed to a different ongoing consideration.

Therefore, it is not to be used - and has no relevance - in other claims. To a great degree this is an additional development of case law that commenced yet in LCH (National) 36/3-128 **Dr. Binyamin Gidron - The State of Israel** (15.6.87) and LCH (National) 52/3-99 **Ami Yifrah - Prazot Government Municipal Co. for Housing in Jerusalem Ltd.** (11.5.92), which validated (at the time only in exceptional cases) agreement provisions (included in the contract explicitly or inferred from the negotiations prior to it) regarding the rate of the alternative wages that would have been paid had the employee been employed as such to begin with. This case law ruling underwent developments over the years (for details see the **Rofeh** case), and in any event it is clear that it was intended only for a situation of acknowledgment of employee-employer relations in retrospect and should not be expanded to other claims.

28. So far I discussed the new precedent ruling given by this Court regarding the manner of settling accounts upon ruling on employee-employer relations in retrospect. Now I shall briefly address the proposed additional innovation and concerns the first stage of examination of the existence of employee-employer relations.

The Tests for Determining Employer-Employee Relations: Is there a Need for Change?

29. I agree with the position that one should not ignore the changes and transformations that affect the labor world - both in the technological aspects, as well as the demographic and social aspects - and that labor law should not stand still. There is no dispute that the information

revolution including its implications - as well as the changes in the global economy, labor market, work relations and social perceptions - have an impact on the need to reexamine the purposes of labor law and update them, while adapting the tests for defining an “employee” to the change of times.

The objective of the tests and secondary tests for defining an “employee” and an “employer” - as developed in case law over the years - is to locate those workers that should be defined as "employees” for enabling the umbrella of labor law to cover them, from the point of origin of the purposes of labor law. In any event, these are not fixed tests but rather a flexible and dynamic definition, so that the passage of time and changes do justify examination, adaptation and perfection thereof from time to time.

However, I believe that the proceedings subject matter of the appeals before us did not require examination of the case law tests for defining an “employee” and the parties did not even argue in this regard, and thus an encompassing review of all tests was not required as part of these proceedings. Therefore, at this time the tests for determining employer-employee relations as were outlined in case law rulings over the years should remain intact, and continue to develop them in future rulings, step by step, given the significant changes that apply and will apply to the labor world.

30. **As to the possible impact of the principle of good faith on the mere existence of employee-employer relations -** first, I should note that there is no dispute over the importance of the duty of mutual good faith and fairness and its being a significant part of individual and collective labor law. At the same time, I believe that a worker who is an “employee” pursuant to the case law tests remains the same even if he

acted in lack of good faith, whether during his employment or upon his filing of the claim. Therefore, I do not believe that a separate independent test should be added on the "good faith of the one filing the claim," which could deny acknowledgment of the worker as an "employee" although it would be justified to acknowledge him as such pursuant to the criteria that were set in accordance with the purposes of labor law.

In this regard, I am not ignoring the obiter stated in the **Buchris** case, as also in the academic writings of Deputy President (ret.) Elisheva Barak-Ussoskin, who wrote the obiter, noted that "**extreme**" lack of good faith may overpower status in "**few and extreme**" and "**rare**" cases (Elisheva Barak-Ussoskin, Forever Cogent? The Court's Path on the Flexibility Lane in View of the Principle of Good Faith," **Elika Barak-Ussoskin Book** 59 (2012), pp. 128-129). Accordingly, I am willing to assume that there are especially rare cases in which the worker's lack of good faith would be so extreme as to exercising labor law in his favor would impair the purposes of labor law and would not achieve them, and in these cases it would be justified to prevent him of claiming rights based on his status of "employee" (a sort of, with the required changes of course - "defensive democracy" in extreme cases). This is by virtue of the principle of good faith or in another manner - as it is not required for me to examine its accurate legal aspects - such as prevention or estoppel.

31. However, I do not believe that there is justification for <u>expanding</u> the aforementioned narrow crack, as was established in the **Buchris** case, and was rarely implemented in the rulings of this Court over the years. Following I shall present, briefly, my main reasons for this:

a. A main reason is based on the principle of good faith's colliding with the principle of cogency, and cannot settle with it, certainly not routinely (for detailed explanations seen **Ofek; yadlin; Rabin-Margaliot**). Cogency means that an agreement deviating from the minimum set out by the legislator is of no effect. When proposing giving weight to the worker's good faith, and when "good faith" is translated into the question of whether the worker agreed or asked for his employment as a "contractor" - in any event this frontally contradicts mere cogency as one principle instructs us to ignore the consent of the parties, and another principle instructs us to give it significant weight that could even overcome the objective tests.

As I specified in the first part of my opinion, there is difficulty in validating "free will" of an employee in respect of this issue in light of the objective difficulties casting over it, and mainly given the reasons that indicate that cogency - as it did not lose its vitality as aforesaid - is not only protection of the individual employee and cannot be measured through the glasses of each case on its own. I believe that the inverse principles cannot stand side by side, and bringing the principle of good faith into the equation may result in the subordination of the principle of cogency to it, amounting to true impairment of the latter.

b. An additional central difficulty arises from granting the possibility to deny the status of a worker as an "employee" based on use of the broad valve term "lack of good faith" or "clear lack of good faith," while leaving a broad space of uncertainty in view of reliance on the concrete circumstances of each case. These statements are generally correct, and given the absence of precise criteria for use of the valve term in particular. In the introduction chapter I deliberated upon the issue that the legal rules we set out, as I believe, are not intended to

serve as an ad-hoc solution for concrete disputes per the sense of justice in that given case, but rather also for guiding behavior, establishment of certainty (which is also necessary for the modern economy), and protection of social values labor laws were established to protect. Accordingly, the definitions we rule upon directly affect not only the workers and employers litigating before us, but rather also all those workers and employers, whose extent is significantly large, who did not file and will not file claims with the Courts, as well as the manner in which the labor market would adapt itself to the new rules.

Entry of the principle of good faith onto the field could lead to a situation where it would be difficult to foresee the solution for the question of whether an “employee” is standing before us - a question that should be given a clear and certain definition to the extent possible so that both employers and employees would be able to plan their moves and act pursuant to the obligatory provision of law - as the parties would be given the answer to the question of status only in retrospect and upon conclusion of the legal proceedings. This could have an impact on the extent of the commitment employers would show for conducting the required tests and employing “employees” in their correct status, both due to the lack of certainty regarding the legal situation as well as in light of an opening to self-rationalization of *prima facie* justification to refrain from acting per the provisions of the law (for studies discussing compliance with the law while addressing “self-persuasion", see: Yuval Feldman, The Law of Good People: Challenging States' Ability to Regulate Human Behavior (Cambridge University Press 2018).

c. In another respect, flexing the legal rule and making it become completely dependent on the concrete circumstances would necessarily

affect also increasing legal expenses and reducing certainty, in a manner that would lead to a chilling effect against filing claims (as "**vagueness of the law constitutes an informal barrier against filing claims**": (**Ofek**, p. 115). The wish to deter - against individual claims of strong workers who earn high wages and were defined as "contractors" upon their request and for their own reasons, while being aware of and expecting the consequents of the status - would necessarily have an impact on the workers' public of workers at large. Cracking the principle of cogency may lead to a situation where there would no longer be automatic meaning to the worker's merely being an "employee." A worker who meets all the characteristics of an "employee" according to case law tests would no longer know for certain that his appeal to the Court would lead to acknowledgment of his status (and at least such acknowledgment would not be simple, as claims regarding "lack of good faith" would be routinely raised against him, which would require factual and legal coping). This erosion of the certainly of status would affect both the incentives established toward employers (an issue I deliberated upon in the previous chapter) as well as just claims of employees who would fear turning to the assistance of the Court.

d. An additional difficulty is expressed in a possible contradiction between the individual emphasis of the principle of good faith and the collective parts of labor law (for further reading in this regard see **Ofek; Yadlin; Sigal Davidov Motola**, Labor Law: Review and Development, **Iyunei Mishpat** 22(1) 175 (1999)). Labor law is not based only on Particular power gaps between a certain employee and a certain employer, but rather also on collective power gaps (Frances Raday, Privatizing Human Rights and the Abuse of Power, **Mishpatim** 23 21 (1994)). As a result, and among others, there are situation in which the

wellbeing of the majority of employees is preferred over the wellbeing of an individual employee (a good example of this is the provision of law that prescribes that an employee would not enjoy better terms than those set out in the collective agreement that applies to him, even if there is agreement in this regard between him and the employer, and even if he is not a member of the workers' union, where the collective agreement denies the possibility to do so: Section 22 of the Collective Agreements Law, 5717-1957; LCH (National) 54/3-85 **Ya'acob Goldfarb - Israel Aerospace Industries Ltd.,** IsrLC 27 287 (1994)).

Based on this premise, literature emphasized that use of the principle of good faith for validating an employee's waiver of his status as such "**accelerates the atomization process and reduces social solidarity**" and ignores the fact that labor laws are "**means for increasing the cumulative wellbeing of all employees in the economy" and that "the interest of all employees may differ from that of an individual employee or a particular group of employees" (Yadlin**, emphasis added). These issues relate to the broad consequences of the principle of cogency I specified above, and that the waiver of an individual employee of his status and rights, even if we assume that it was of his own free will, affects also other employees and the rule.

e. To this should be added the lack of sufficient justification for expanding the crack, in general, and at the present times in particular. As I specified in the introduction chapter, the changes that occurred within the labor world in recent years do not erode the fundamental principles and I believe they do not explain why the addition specifically the test of "good faith" is required, and this is true also in respect of developments such as increased access information and greater changes of workplaces (for reading on the changes of

workplaces as rather justifying expansion of the protection of employees and prevention of attempts to mis-classify them, not the other way around, see also the OECD report, part of which was cited in section 16 above, as well as the ILO Position Letter 2020). Also the need for flexibility does not explain the need for the principle of good faith, as when parties choose an engagement the characteristics of which are of labor relations - the point of origin of labor law (as were specified in the introduction of my opinion) are still relevant and justify implementation of the protections of labor law towards those workers. **Labor law is broad enough to provide a solution also for the changing needs of employees and employers, including the need for flexibility, while properly balancing the parties' rights.** It is not required for this purpose to exclude the relations from the applicability of labor law, and I shall remind that ruling that the worker is not an "employee" could involve significance in the material jurisdiction aspect as well.

These statements do not indicate at all that there is no need for renewed legislation and case law rulings given the change in time, and it may be appropriate for the legislator to examine the possibility to adjust the protective laws or part thereof to the varying needs of the labor market. However, I do not see a correlation between this need and the principle of good faith.

f. I should add that a ruling according to which a worker is not an "employee" **would automatically have an impact also to his non-monetary rights, which are a central part of labor law,** including the right to equality (as concretely expressed in various labor laws), the right to free organization, as well as important protections every employee is entitled to, and are expressed in a series of laws that mainly

apply to “employees” only, such as protection against sexual harassment, protection of corruption revealers and as aforementioned protection against discrimination at the various workplaces (including by virtue of specific and advanced laws such as the Male and Female Workers Equal Pay Law, 5756-1996, and the Equal Rights for People with Disabilities Law, 5758-1998).

As an example only, we shall discuss a worker who is an “employee” in essence and was defined as a “contractor” per her wish, and even obtained extra consideration due to this status. Let us assume that after such or other work period the worker is dismissed without a permit during her pregnancy and due to her pregnancy. Should the legal rule enable this, her employer would be probably relying on the principle of good faith and would claim that she should not be considered at all as an “employee,” and the meaning is her complete loss of all the protections specified in the Women’s Work Law, 5714-1954 and the Equal Opportunities in Employment Law, 5748-1988. Indeed, there is a theoretical possibility to argue that this worker is an “employee” only in respect of certain laws, however this solution is not clear of doubts as it undermines the universal principle of status, if only within the protective labor law. Furthermore, one cannot ignore the fact that most cases do not arrive at the Court all and this type of employee may fear turning to the Court for maintaining her rights, as her mere ability to obtain acknowledgment of her status is doubtful. Uncertainty may even make it difficult to provide a remedy within a short time. The example also illustrates the need for paternalistic protection also of one who chose, supposedly of his own free will to work as “self-employed”, and this in view of the individual worker (who perhaps did not believe upon commencement of the engagement she would require protection during

her pregnancy and therefore did not ascribe weight to her definition as an “employee”) as well as due to the latitude implications, including impairment of the important value of women’s equal rights.

g. Hence **the great difficulty that I see in the mere establishment of the crack in the status of “employee” based on "consent" translated into “lack of good faith.”** Such a crack, even if it is intended to be implemented in exceptional cases, could relay a message to the labor market according to which not everyone who is an “employee” would be acknowledged as such by the Court and obtain the various protections labor law grants. As a result, we reduce the likelihood that the employee who was dismissed during her pregnancy (in the example I noted above) would turn to the Court for protecting her rights, in view of the many hurdles she must go through for her claim to succeed, with no certainty that she would achieve this and putting at risk monetary inputs (attorney fees and expenses) and non-monetary (all the resources required for filing such a claim and conducting it).

Introduction of the principle of good faith into the picture in a manner that enables it to overcome the cogent status could thus assist in rejecting claims, where accepting such does not serve the individual sense of justice, however as cracks do, it may expand in a manner that may not necessarily be controlled, and a significant impact on the mere existence of a crack, which establishes by mere declaration of such impairment of the clarity of the law and certainty thereof. In my opinion, this could lead to impairment of the effectiveness in implementation of the labor laws; the ability to exercise the protections given under labor law (personal and collective); and the ability to bequeath the social values underlying labor law and the foundations of

many case law rulings that were issued by the Labor Courts, since there is no longer certainty that these rulings would be applied to any worker who is an "employee" in essence. On the other hand, there are more proportionate manners for resolving exceptional situations in which cynical or extortive exploitation of labor law is made, and this at the stage of ruling on the rights, unlike at the stage of ruling on the status.

32. An additional difficulty that may arise due to expanding the use of the principle of good faith in a manner that enables it to overpower cogency is a possible brake through the opening in a manner that would enable raising arguments regarding "consent" meaning "lack of good faith" not only against rulings on the status of "employee", but rather also in any claim for cogent rights that would be filed after termination of the labor relations (and naturally requires a change compared to the situation among the parties in practice). This is while a large part of the claims that are heard at the Labor Courts are claims that are filed in retrospect, given the employees' difficulty to file such a claim during the labor relations, and where there is no dispute - and this was also emphasized by the President - that there is no flaw or "lack of good faith" in merely filing a claim for social rights in retrospect (whether on the part of one who was formally defined as an "employee" or whether on the part of one who was not defined as such).

In this I am not ignoring case law that enables use of the principle of good faith in exceptional cases regarding the claim of cogent rights on the part of a worker who was already defined as an "employee" (as was implemented in LCH (National) 97/3-237 **Ezra Shmueli - The State of Israel, the Broadcasting Authority**, IsrLC 36 577 (2001), hereinafter: the **Shmueli Case**), however it is for good reason that this ruling emphasized that it is intended for exceptional cases and was

implemented in practice (LabA 20005-11-16 John Doe - John Roe (9.1.19)); as so it should remain, otherwise we may pull the carpet under central parts of labor law.

33. I should add that also the obiter that was stated in the **Buchris** case and addressed as aforementioned "extreme" lack of good faith in extreme cases only - was not agreed among the justices of this Court at that time, and it was emphasized that it should be saved for only rare cases if at all. Thus, President (ret.) Steve Adler clarified in his rulings that "**as a rule, rights granted to an employee under protective legislation should not be violated by virtue of the theory of good faith**", and therefore use of this possibility is to be made "**only in rare cases, if at all**" (LabA (National) 670/06 **Ya'akov Roth - Ram Structures Ltd.** (1.10.09); LabA (National) 712/07 **Shimshon Mashruf - Haim Glancer** (13.5.09); LabA (National) 300267/98 **Yosef Twito - Mashav Refrigeration & Air Conditioning Eng. (1965) Ltd.**, IsrLC 37 354 (2002)), and Justice Amiram Rabinovich emphasized that "**this ruling should be treated very cautiously, sparingly and only in most extreme cases...**" (the **Shmueli** case). Justice (as his title at the time) Yigal Flitman was more adamant in his opposition, and noted, *inter alia*, the following:

"Beyond the fundamental question of whether it is even possible to revoke in a concrete case the applicability of laws, and not just laws but rather cogent protective laws, by virtue of the principle of good faith as the Justice would see fit to exercise, one should consider that since examination of good faith is objective, meaning ruling on employee-employer relations, means subordination and dependent relations that are indicated by the parties' behavior during the period of their relations and contrary to the signed formal

agreement, such a ruling is rather consistent with the principle of good faith, and therefore is consistent with the employee's tight to exhaust his rights pursuant to protective labor law."

(LCH 300256/98 **Uri Izaak v. Tahal Israel Water Planning Ltd.** IsrLC 36 817 (2002)).

And similarly, Justice Shmuel Tzur clarified that:

"As I see it, rights of an employee that are enshrined in law are intended to provide him with a safety net for living with dignity. These rights cannot be waived, nor denied, and there is no justification to block in advance the manner to exercise them, whatever the employee's level of behavior may be. The question of an employee's level of behavior does not have the same weight as substantial rights under protective labor laws (cogent rights." The correct place for a claim of lack of good faith is not at the front of a claim for exercising cogent rights, but rather deep inside the claim, where the Court is given some space for discretion whether and to what extent a certain claim should be accepted...

I believe that blocking in advance a claim for cogent rights due to an employee's lack of good faith, even in extreme cases, is not possible and not justified and it is contrary to fundamental principles that underly the purpose of protective labor law."

(LabA (National) 99/06 **Golan Regional Council - Hannah Yifhar** (24.6.2007); and I should note that in a later case law ruling - LabA (National) 31997-09-10 **Amnon Rabezin - Bank Leumi Le'Israel Ltd.** (29.3.2012) did not retract, to the best of my understanding, this fundamental position, but rather ruled that in extreme cases and in unusual and extreme situations, the worker's conduct may tip the scales

even if some of the characteristics tend to acknowledge him as an "employee").

As aforementioned, I was not convinced that the changes that occurred over the years eroded the validity of these statements. Like President (ret.) Adler and Justice Rabinovich, and in a manner that is consistent with the unusual scope outlined by Deputy President (ret.) Barak-Ussoskin, I do not categorically object to the use of the principle of good faith in unusual cases that may require this, however in light of the many inherent difficulties involved in this, as I briefly detailed above - and concern the "nerve center" of labor law - I too believe that this should be left for especially rare cases.

34. In view of the above, I cannot agree to part of the President's opinion that adds the test of good faith to the stage of ruling on employee-employer relations. I believe the obiter stated in the **Buchris** and as was interpreted in case law over the years in a reduced manner is sufficient, and there is no need for modification or expansion thereof.

From the General to the Particular - the Appeals Before Us

LabA 15668-04-18 Gabriel Kotta - The Ra'anana Municipality

35. The circumstances of the case were detailed in the President's opinion, and thus there is no need for me to repeat them. After reading all of the raw evidence that was laid before the Regional Court, I was convinced that under the circumstances of the matter, and despite the case being borderline, Mr. Kotta (hereinafter in this chapter: The **Appellant**) indeed was not an "employee" of the Municipality of Ra'anana (hereinafter: The Municipality), and therefore I join my position to the result the President arrived at in respect of this appeal. At the same time, my reasoning for this is different, as I shall specify below.

36. The testimonies that were heard before the Regional Court indicate that the Complementary Education Department at the Municipality initiated a project called "Dancing School," as part of which fourth and fifth grade students from all schools in Ra'anana attended annually the "Dance Festival" on Independence Day, as well as the "Children's Song Festival." For doing so, the students attended a weekly "folk dance" class, as its final objective was their participation in the aforementioned festivals. Accordingly, the Complementary Education Department established a sort of "reserve" of folk dance instructors, and each of the school administrations that participated in the project - administrations that are not Municipality employees, but rather employees of the Ministry of Education - annually selected an instructor from the reserve (and to the extent required also from outside the reserve) for holding the classes at its school in respect of a defined school year and at the scope that is required according to the number of students from its school who participated in the project. In accordance with this, the engagement agreement between the Appellant and the Municipality (which is the employer of the administration's employees at the school, however not the teachers) was renewed in respect of one school year (even if signed after the beginning of the year, reflected the agreement that was arrived at prior to commencement thereof).

No orderly breakdown was submitted by any of the parties regarding the exact extent of the Appellant's work at the schools over the years, and the main data he provided is that over the last ten years he taught at three schools (Hedekel, Magad and Ha'Yovel). However, the contracts submitted by the Municipality indicate that during the last year of the engagement (1.9.11 - 30.6.12) he taught at only one school (Hedekel) in the scope of 5 hours per week, which were held on the same day (and

an additional three weekly hours for "events and ceremonies"), vis-à-vis payment of NIS 90 per hour with added VAT. During the year prior to it he taught 14 weekly hours (spread over three days a week) at three schools, although towards the end of the year the scope was reduced. Towards the school year that commenced on 1.9.12, the engagement was not renewed, as the Appellant was not selected by any of the schools' principals for holding the classes at her school. When the Appellant contacted the Municipality regarding this - he was offered to hold classes at kindergartens in the afternoon or replace an instructor who was about to go on maternity leave, however he was not interested in doing so.

37. The Regional Court started with the assumption that during the first period of the engagement (which commenced on 1.9.91) the Appellant was employed as an employee, and no difference was proven that justified changing his status to a "contractor." The witnesses called on behalf of the Municipality were not able to shed light regarding the first years of engagement, while the Appellant detailed the characteristics of the engagement in quite a laconic manner. However, in his cross-examination he confirmed that he was employed as an "employee" for only one year (meaning up to 30.6.92); and afterwards there was a one-year pause in the engagement; and when he returned to provide services to the Municipality after this pause, it was agreed on an engagement with him as a "contractor" (p. 4 of the protocol). Under these circumstances, and as the Appellant himself did not testify at all that the characteristics of the engagement during the first year were identical to its characteristics after the pause - we do not believe that commencement of the employment as an "employee" necessarily

indicates that labor relations should be acknowledged also down the road.

38. There was no dispute that the Appellant had an independent business in formal - accounting terms (named "Gabby Kotta - Folk Dance Instructor") and there was no dispute that he acted as part of it for providing folk dance lessons and dance events (as well as pest-control services, however this as a small part of the activity). Within this framework the Appellant provided regularly and over many years (commencing 1994) folk dance classes also at the Rishon Letzion Country Club. Additionally, he provided one-time folk dance instruction services also to additional customers including other schools, workplaces, Kibbutzim and more. At the same time, he served as a folk-dance instructor also at the status of a hired employee (for example at the Municipality of Givatayim), however it was noted during which years, at what scope and with what characteristics.

    The Appellant did not specify the extent of his activity vis-à-vis the Municipality compared to the scope of the additional activities, however comparison of the profit and loss statements he submitted for all his annual income from the Municipality (as specified by the witness on behalf of the Municipality) indicates that in 2009 his income from the Municipality constituted 44.6% of his business' income; in 2010 - 47.6% and in 2011 - 41.3% (since the income from the Municipality as it calculated included VAT, the percentage is even lower; most of the additional incomes were apparently from the Rishon Letzion Country Club). This indicates that the Appellant was not distinctly financially dependent on the Municipality (even if it was a central customer), and at the same time he conducted additional services for other customers and was able to plan his time and business as he wished (except for his

commitment to the hours of holding the classes that were coordinated with him in advance).

39. I believe that the tasks the Appellant performed could have been carried out both by an employee of the Municipality as well as by an external service provider, however under the circumstances of the case, the overall circumstances tend more to rule that the Appellant held the folk-dance classes for the school students as part of his independent business, not as an "employee."

40. As to the positive aspect of the integration test - I was not convinced that actual integration was proven on the part of the Appellant at the schools or the Municipality. The Appellant's services were hired for a specific purpose - holding a folk dance "class" or "lesson" as part of a specific project that was named "Dancing School." For this purpose, he held weekly lessons for students in the scope of one hour a week for each class, as over the last school year he apparently taught five classes so that he worked five hours a week (all on the same day), and within this framework (together with up to three more weekly hours) prepared the students for both festivals subject matter of the project.

    The decision on what schools he would teach at (and as a result what the scope of the engagement with him would be) was not that of the Municipality, but rather that of the school principals, who as aforementioned are the employees of the Ministry of Education, and changes occurred in this regard over the years (a good example is the last year of engagement, during which the Appellant taught only at one school). There was no commitment towards the Appellant for minimum hours, and also he was not required to agree to add more classes (beyond the classes he committed to towards each school year), additional schools or continue teaching in additional years. It was also

not possible to impose on the Appellant additional tasks whether at the school or on behalf of the Complementary Education Department (such as holding classes at summer camps, which the Appellant did at the beginning and stopped when work during the summer was not suitable for him, or other tasks as were instructors who were employed as employees), although he testified that at times (without clarifying an accurate scope) participated also in preparing holiday ceremonies, end-of school parties and “dancing recesses” (vis-à-vis obtaining additional payment according to hours; so it is indicated at least by the receipts that were attached to his affidavit and noting payment also for “events" and "ceremonies"). The Appellant was not asked to attend teachers' meetings, parent meetings, or any meetings at the Complementary Education Department (other than “a toast” on holidays and sometimes teachers' trips in which he testified he took part). During the few times he could not attend classes, a replacement was found for him from among the instructors’ reserve at the Department, however this is given that the Municipality was required to provide a solution for the students. The Appellant did not undergo any training at the Municipality (or at school), was not sent on its behalf for training and was not given significant professional instructions (except for coordination of the repertoire for the festivals). Hence, there was no real integration on the Appellant's part at school, and he was also not incorporated into the organizational layout of the Municipality’s programs regarding complementary education or after school hours.

It is needless to say that this is not sufficient to rule that in any case of holding informal classes - in general and by virtue of inclusion in a “reserve” particularly - these are relations that are not labor relations, and this certainly does not derogate from the possibility of acknowledgment of part-time labor relations.

41. To this should be added the negative aspect of the integration test. Even if the high road is that holding trainings within the informal education at schools would be within the framework of labor relations (and it is for good reasons that some of the additional dance instructors - although not all - were employed by the Municipality as employees), in this case services were hired from one who owns an independent business for exactly this type of services. Had the Appellant wished to prove that his services to the Municipality were not held as part of his business but rather as an employee - the burden of proof in this regard would be imposed on him, and I was convinced that he did not meet it and did not convince that there was a difference between the other services he provided as part of his business and the services he provided the Municipality with (for additional reading that the burden is imposed on the Appellant in such a case see LabA (National) 300064/96 **Karni Pelley - Eitan Avivi,** IsrLC 36 241 (2000), where it was emphasized that "**a self-employed person who claims activity as a hired employee in separate from his independent business engaging in an identical activities, is required to point out clear signs indicating separate employment that does not depend on his business as being self-employed"**).

It is true that this is not a large business or one that employs additional employees, but rather a small business that is embodied in the Appellant's work force and is based on his unique skills, however such businesses too could be authentic and legitimate (through the glasses of the purposes of labor law). This is not an independent business negligible in scope, artificial, or conducted in separate from the services the Appellant provided the Municipality with, but rather this is an active

independent business as part of which the Appellant provided very similar services as that he provided the Municipality with.

42. Also the additional tests do not justify considering the Appellant as being an employee. The testimony of the dance coordinator who testified on behalf of the Appellant indicated that in fact there was no actual supervision over the Appellant's work, but rather guidance of the repertoire for the project's festivals, and to this was added confirmation on the scope of the hours he taught for payment for them (as customary in respect of any service provider). The Appellant confirmed that as part of his financial statements he deducted expenses for purchase of equipment (including sound systems, car and computers, although for his work at the schools he used only a car and a laptop computer), so that the equipment that was required for holding the classes was mainly purchased by him (although this is not significant equipment given the type of activities). The Appellant did indeed provide the service personally, however this is since the engagement was based on his personal skills (like a private guitar class, which is based on the personal skills of the particular teacher, and yet this is not sufficient for establishing employee-employer relations between each student or his parent and the teacher). The Regional Court added that it "appears" that the business was established so that the Appellant would be able to provide the Municipality with tax invoices, however I did not find any evidentiary proof for this ruling and none of the witnesses testified to it (neither did the Appellant himself; and we should add that the Appellant's version according to which at first he asked to be employed as an employee and was refused - first came up in his cross-examination and its credibility was explicitly rejected by the Regional Court).

Under these borderline circumstances, there was not given any justification to intervene in the manner the parties acted in practice, according to which the services provided by the Appellant were carried out as part of his independent business as a "contractor".

43. Given the full set of circumstances, I thus join the results of the President's opinion regarding these proceedings. At the same time, I should note that I do not believe that absence of employee-employer relations should be ruled based on the negative aspect only, as it is always required to weigh the overall circumstances and tests in the concrete engagement that is examined, and the positive aspect of the integration test should be given a central part in the weighting. Therefore, I dove into the evidentiary material itself and was convinced that also the positive aspect of the integration test is not fully met (although the Regional Court believed otherwise). I should further note that I believe that the duration of the engagement could rather support the existence of employee-employer relations, and the fact that over the years the Appellant was formally considered to be a “contractor" and did all that is required in accounting terms for these purposes should not be held against him. There is also no relevance pursuant to case law that the Appellant is familiar with the differences between a hired employee and a self-employed person, or that he did not request over the years a change of the format of his employment.

Given the outcome, I am not required to express an opinion on the additional rulings of the Regional Court, or on the parties’ additional arguments. However, I believe that given the borderline situation of the case, it is justified to refrain from ruling on expenses against the Appellant.

44. The evidentiary foundation and the parties' arguments were specified as part of the President's opinion, and therefore I shall not repeat them. These indicate that Accountant Rabin (hereinafter in this chapter: the **Appellant**) was employed for nearly eight years in an internal position at the Registrar of Associations, full-time, and the Regional Court rightly ruled that there had been employee-employer relations between him and the State throughout the engagement period. The Regional Court also rightfully ruled that the Appellant did not act in lack of good faith, and in any event, I believe that the question of good faith has no significance regarding ruling on his status as an "employee".

45. As to the manner of settling accounts after ruling on the existence of labor relations in retrospect - I agree with the President's opinion, which implements for the first time the new rule set out as part of our judgment, as I also agree with her rulings regarding the rights claimed by the Appellant. I should add, for clarifying the first step of comparing the employer's cost according to the alternative wages and the contractual consideration, the alternative wages ruled for the Appellant stands at NIS 15,779, as to this should be added 8.33% for severance pay; 7.5% for provisions to funds and loss of work capacity (as the State too confirmed given the existence of active executive insurance prior to this); 6% for vacation days (as during the eighth year of his work he was entitled to 22 vacation days); 2% for sick days (average rate; see in this regard Davidov, p. 126); 1.5% for convalescence pay (considering his wages compared to the rate of convalescence pay for employees of his seniority); 6.2% for car maintenance (as considering his entitlement to car maintenance there is no need to add travel expenses); 7.5% for an advanced education fund; 5.22% social security fees; as well as a

certain percentage for the ancillary rights that were specified in the testimonies (including on behalf of the State) and include, *inter alia*, the right to parking, office cellphone, clothing, vacation seminars at a subsidized price, reimbursement of accountant license fees, elective and declarative day fees, etc. Roughly and minimally it may be estimated at an additional 3.1% (according to NIS 500 per month), so that the theoretical total costs of the employer - according to the alternative wages that he would have been paid had he been defined as an employee to begin with - stands at 47.35% in addition to the alternative wages and given the amount of the alternative wages - at the total sum of NIS 23,250.

The contractual consideration stood at the sum of NIS 24,861 and thus the "delta" stands at NIS 1,611 per month (meaning, the contractual consideration exceeded the employer's cost by the sum of NIS 1,600 per month). Parenthetically I should note that indeed changes occurred over the engagement period in the sum of the consideration, however the Appellant did not argue that it is required to perform a separate calculation in respect of each period, and therefore the calculation was performed for reasons of convenience according to the data of his last month of work. Since the contractual consideration is higher than the employer's cost according to the alternative wages, the meaning is, as also the President clarified - that all of the monetary rights "were swallowed" into it, and thus there is no need to examine them on their own (as given the President's conclusion, to which I agree, that under the circumstances of the matter the Appellant was not entitled to overtime pay - I too shall leave "for further review" the question of how this renumeration should be addressed in other cases, and whether/how it should be taken into account when performing the comparison).

46. As to the non-monetary compensation - under the circumstances of the case I agree with the sum ruled by my colleague the President, and I join, in general, her reasonings in this regard, and thus the outcome of her opinion.

LabA 34665-10-17 Zeev Levy - Zeraim Gedera Ltd.

47. In these proceedings - and in view of the reasons I elaborated upon above - I cannot agree with the outcome the President arrived at, meaning denial outright of the Appellant's claim following denial of his status as an "employee" based on the principle of good faith. At the same time, also as I see it, after analyzing the rights payable to the Appellant according to the principles outlined above and given the special and exceptional circumstances of the case, he is not entitled to any sum. Below I shall specify my reasons.

48. The factual foundation, as well as the Regional Court's judgment and the parties' arguments, were specified in the President's opinion. The evidence indicates that between Mr. Ze'ev Levy (hereinafter in this chapter: The **Appellant**) and Zeraim Gedera Ltd. (hereinafter in this chapter: The **Respondent**) existed distinct employee-employer relations throughout the entire period of the engagement between them, as the Respondent too, being honest, confirmed, and therefore there is no need to further elaborate on this. It is further clearly indicated by the evidence as well as the factual ruling of the Regional Court, that the Appellant - whose position upon commencement of the engagement was Director of Israel Territory and later was promoted to senior administrate positions, which include responsibility over the Respondent's activities in various areas worldwide - did not "agree" or "approved" the manner of the formal engagement as a "contractor" but rather, **chose, pushed and initiated** this for reasons that were solely his

and for his needs - offset of losses in the financial statements given that he owns an agricultural farm. The Respondent at most was “dragged” into this (although in cooperation), and had it been up to it, the Appellant would have been employed as an employee to begin with.

49. I should note that given the implications of this ruling, the factual rulings of the Regional Court were not sufficient for me, and I learned directly from the evidence itself, that indeed it distinctly indicates the aforementioned in this exceptional case. The evidence indicates (and in this regard see the specification of the testimonies in section 141(b) of the President's opinion) that the Respondent intended to hire the Appellant as an “employee” for all intents and purposes, however he asked, for his own reasons and in light of his taxation reasons, in view of his additional activities as a farm owner, that the engagement would be in the formal format of providing services vis-à-vis an invoice, as it was the situation also at his previous workplace.

Accordingly, the parties agreed (and this is indicated by all the evidence, including the agreement that was signed between the parties upon commencement of the engagement and the invoices the Appellant issued every month) that the monthly sum the Respondent would pay the Appellant would be comprised of his agreed monthly wages (which was referred to “payment”) and stood (as of the end of the period) at NIS 23,150, to which the social rights would be added in money monthly and were calculated (as explicitly stated on the invoices the Appellant himself issued) according to the following components: 8.33% for “severance pay”, 7.5% for an advanced education fund, 5% for, 5% for “social security", 2.5% for “loss of work capacity”, and the sum of NIS 292.5 for “convalescence” pay. Beyond this the Appellant was given in practice vacation and sick days' rights, as well additional

rights as those of an “employee” (including promotions, car, options and a pre-dismissal hearing) as shall be detailed below. In essence most of the Appellant’s rights as an “employee” were maintained also in real time, and the employment vis-à-vis an invoice was only a fiction for his own reasons

50. For the reasons I elaborated upon above, I do not believe that the principle of good faith could overcome the cogency of status. Thus, and although the circumstances of the case are particularly exceptional, I was not convinced that this is a rare case that justifies exercising the theoretical possibility raised in the **Buchris** case and rule that the Appellant is not an “employee.” Hence I should implement in respect of the Appellant the new rule we set regarding the manner of calculation of a worker's rights who is ruled upon in retrospect that he is an “employee.”

51. As to the alternative wages - in this case it is not difficult to determine these, as the parties explicitly declared of it as part of the monthly invoices, alongside the first line referred to as “payment” and from which the payment for social rights is derived. Since the evidence indicates that this “payment” is indeed the agreed contractual wages for the Appellant’s work (and not a manipulation by the employer), there is no reason not to validate it. Accordingly, the alternative wages stand at the sum of NIS 23,150. I do not see any substance in the Appellant’s argument that in fact his wages stood at NIS 35,101 and was fictitiously split for the Respondent’s reasons into various components. Beyond the testimony given on behalf of the Respondent, which were accepted by the Regional Court as being credible, additional proof is that the wages of a corresponding employee who is higher-ranking and more senior (significantly), whose monthly wages (including a global overtime

component) stood at the sum of NIS 24,885. However, it should be emphasized that this ruling is true as to the specific proceedings given the distinct evidentiary foundation that was presented and indicates that these issues were performed in this format upon the Appellant's initiative and for his reasons, and in general the wages should not be ruled only per an agreement in writing or distribution of the monthly consideration into components.

52. The first step is comparing the employer's cost according to the alternative wages and the contractual consideration, pursuant to the principles set forth above. This comparison is easy under the circumstances of the case as the manner in which the contractual consideration the Appellant was paid in practice was calculated based on the alternative wages and adding the costs of the social rights relevant to the workplace, meaning severance pay (8.33%), provisions and loss of work capacity (7.5%), advanced education fund (7.5%), convalescence pay NIS 292.5 per month according to the calculation the parties performed at that time, and it was not argued that this sum did not reflect the full rights) and national security fees (5% according to the calculation the parties performed, and it was not argued that this sum did not reflect the full rights). Vacation days, sick days and travel expenses are not to be taken into account under the special circumstances of the case, as the Appellant benefited from these rights in practice as any employee (this is indicated both by the testimonies as well as the fact that the right to vacation days and sick days, in full payment and scopes exceeding the cogent minimum, was explicitly noted in the engagement agreement between the parties; as to travel expenses - instead of those the Appellant was given a car for his own use, the expenses of which were paid by the employer). Therefore, there is definitive identity under the circumstances of the case between the

employer's cost according to the alternative wages and the contractual consideration. Therefore, no balance remains for payment in respect of the monetary social rights that were supposed to paid throughout the workplace and expiration thereof, and thus no individual examination of eligibility to them and their rates is required (as also in this matter I am leaving the overtime payment "for further review").

53. Beyond the necessary I should note that the Appellant demanded as part of his claim severance pay, renumeration and overtime pay. There is no dispute that the Appellant was dismissed, and therefore he is entitled to severance pay according to his last wages. However, the Appellant received monthly a sum equaling 8.33% of the alternative wages on account of severance pay. Since he did not argue that his wages increased over the period in a manner that leads to a gap between this monthly payment and his legal entitlement to severance pay - of course this entitlement is "reset." The same is true regarding compensation for refraining from depositing provisions, as he was monthly paid a sum equaling 5% of the alternative wages on account of "provisions", and this is also the rate he claims for in his statement of claim and affidavit.

The last component of the claim is payment for overtime (at the sum of NIS 728,524). The Regional Court rejected this claim both for the reason that the Hours of Work and Rest Law, 5711-1951 (hereinafter: The Hours **of Work and Rest Law**) does not apply to the Appellant as well as for the reason that it was not convinced that the appellant worked overtime. In this regard it is sufficient that the ruling, which I did not see justification to intervene in, according to which the Hours of Work and Rest Law does not apply to the Appellant's work, as it is included in the exception provided under section 30(a)(5) had he been employed in administrative positions or positions that require a certain

degree of personal trust (*inter alia*, in light of his stay of approximately 30% of his time abroad, this according to his testimony, without providing reports on hours during this period). It did not go unnoticed in this regard that the more senior corresponding employee obtained as part of his wages payment for global overtime, however this does not necessarily mean that the law applies to that employee, and in any event, each case is heard per its circumstances. In light of my conclusion that the Appellant is not entitled to overtime pay, there is no need for me to examine the question of how I would address the aforementioned renumeration given that it was not taken into account upon performing the calculation.

54. As to the non-monetary compensation: The evidence indicates that the Respondent acted toward the Appellant for all intents and purposes as if employee-employer relations existed between them, so that in fact his rights were not impaired also in the non-monetary aspect. Beyond the fact that the Appellant was an inseparable part of the organizational fabric of life at the Respondent including in personal and social terms, the Appellant did not argue that he was not given a vacation or right to sick days (nor did he claim compensation for these components, as his right to obtain them in kind was explicitly included in the engagement agreement, at a scope exceeding the minimums set under the law); there is no dispute that the Appellant was promoted time and again over his years of work at the Respondent (his various positions were specified in section 12 of his affidavit); the Appellant obtained all benefits as an employee (such as cellphone, meals and subsistence allowances during his stay abroad) as well as incentive grants and options for shares in the mother company; the Appellant was given a personal car belonging to the Respondent for his personal use while the Respondent paid all

expenses for it; the Appellant took part in all the well-being activities that were held for the Respondent's employees; and prior to his dismissal the Appellant was duly given a hearing, there was an attempt to find him an alternative position (as his position became redundant) and was even given two months' prior notice. Under these unusual circumstances, and in light of the unconventional factual foundation that clearly indicates that the Appellant was indeed given the rights as those of an "employee" throughout the period of his work, the Appellant's rights were not impaired also in the non-monetary aspect, and thus he is not entitled to compensation for them.

55. As to the deterrent aspect that should be considered upon ruling on the non-monetary compensation: As it is indicated by the details above, this is a particularly unusual case, in which the unequivocal request for making the erroneous classification was that of the Appellant, for his own needs for obtaining tax benefits. The Appellant's welfare was not impaired at all as a result of the format of his employment, as in material terms the Respondent treated him as an employee for all intents and purposes and he was given his social rights (whether in kind or by payment). The Appellant attempts to attribute against the Respondent the fact that the engagement agreement did not include a "calculation section" (meaning a section that prescribes the manner in which the alternative wages would be calculated should a claim for acknowledgment of employee-employer relations be filed, as well as the possibility of offsetting), however I believe that this fact rather supports the version of the witness on behalf of the Respondent, that at that time the Respondent was a relatively small company based on personal trust relations and therefore gave its consent to the Appellant's request. Also the fact the Appellant emphasized, according to which it was not noted in the agreement that his definition as "self-employed"

was made per his request - I believe rather supports the Respondent's version that these issues were carried out in good faith on its part. Under these circumstances the sense of justice rebels against a claim that exploits labor laws other than for their purposes. At the same time one cannot ignore that the Respondent was aware of the fact that it is classifying the Appellant in a manner that does not reflect his true status, and was also aware that the erroneous classification was intended for obtaining tax benefits. The Respondent's affidavits also indicate that it collaborated with the Appellant throughout the engagement period in additional aspects for maximizing his tax benefits (such as by allocation of options, and by delivering the payment to a company limited in shares commencing a certain stage), and also submitted an opinion on its behalf according to which the scope of the taxes that thee Appellant "saved" as a result of his erroneous classification stood at the sum of NIS 565,5000 only during the last seven years of the engagement. Therefore, it is appropriate to deter employers also from "collaboration" as aforementioned, which could adversely affect the entire public.

In weighting the considerations, I was convinced that the Appellant's lack of good faith overcomes under the circumstances of the case the need for deterring the Respondent (or the entire employers' public), in a manner that does not justify ruling in his favor any compensation. As to the public of employers in general - I believe that the need for lateral deterrence is relatively low under the circumstances of the case, as the Appellant's request stemmed from his own personal and specific circumstances. As to the Respondent - we should enable it to benefit from the doubt and assume that it learned its lesson and shall refrain from similar agreements again (and should it do so, it would be justified

to rule against it deterrent compensation, and even in a high rate). At the same time, it should be emphasized that these are particularly unusual factual circumstances in which the employer was able to prove that there is justification to refrain from ruling on any non-monetary compensation, although the default, as I specified in the general section, would be ruling on such compensation.

56. The result of the aforesaid is that the Appellant is not entitled to any monetary rights, nor non-monetary compensation. However, considering the cooperation on the Respondent's part in deliberate and erroneous classification of his status, it would be right that the expenses that were ruled against the Appellant at the Regional Court would be deemed expenses at both instances. Hence I join the result of the President's opinion in this case as well, however for other reasons as specified above.

Deputy President Ilan Itah

The opinion of my colleague President Varda Wirth Livne is world encompassing and scholarly. In her opinion my colleague addressed three issues: The first, concerns the question of the tests for identifying an employee and employer; the second concerns the issue of settling accounts where it was ruled in retrospect that the plaintiff's classification was erroneous and he should have been classified as an employee; and the third, concerns the outcome of the appeals. Following is my position regarding these issues, not necessarily according to their order.

Settling accounts in retrospect

1. I join my colleague the President in the innovation she set regarding the manner of settling accounts retroactively upon acknowledgment of employee- employer relations. I also join the comments of my

colleague Justice Davidov Motola in this matter as were detailed in her comprehensive and scholarly opinion. Hopefully this innovation, which is accepted by the entire panel, would provide the stability and appropriate solution for the issue due to which case law ruling moved between different approaches.

2. Without derogating from the aforementioned, I would like to add to the matter a few words, even from a bird's eye view. Once the employer was able to prove that had the parties classified correctly the engagement between them, they would set hired employees' wages that are less than the contractual consideration that was paid in practice to one who was acknowledged in retrospect as an employee, the question of settling accounts arises. Settling accounts should be performed, as my colleague the President proposed, in two layers: The monetary - which is a remedy in essence, and the non-monetary that includes two elements: A remedy element too (the non-monetary rights) and a deterrent element towards the concrete employer and employers in general. Concerning the non-monetary element on the non-monetary layer, I should emphasize that I believe that it is of great importance, as it is designed for balancing that concealed cost that at times serves the employer as an incentive for misclassification of the engagement. Knowing that upon settling accounts the employer would bear not only the costs of the financial rights, but rather also those of the non-monetary rights, reduces the incentive for erroneous classification of the engagement. However, I believe that this element is not sufficient. A method by which the employer would pay retroactively what he was supposed to pay in advance, embodies a negative incentive for engagement in advance with the correct classification. Therefore, as a matter of judicial policy that wishes to motivate the employer, which best weighs and prevents the "damage," to strive to begin with at the

correct classification of the engagement - the deterrent element on the non-monetary compensation layer is of great practical importance. Thus, I believe, in general, where an employer knows or should have known reasonably that he is engaging in erroneous classification of one who should be classified as an employee, it is required to aim at including a deterrent element in the non-monetary compensation. Given this, the employer would be aware that in retrospect he may bear a cost higher than that he would bear had the parties' relations been classified correctly to begin with.

The results of the appeals

3. As to the appeals before us - I agree with the outcome my colleague the President proposes regarding each of them, however concerning the **Levy** case - I join the outcome the President proposes only for the reasons specified in my colleague Justice Davidov Motola's opinion.

The role of good faith in ruling on status

4. I cannot join my colleague the President's position regarding the issue of exercising the test of good faith as denying the status. In this regard I join my colleague Justice Davidov Motola's position for her reasons. Without derogating from this I would like to add some comments.
5. Both of my colleagues agree that there is no need to modify the tests that were set out in case law for identifying labor relations. Ruling on such labor relations is a conclusion arrived at from a comprehensive factual fabric that amounts to a legal mosaic. The tests in case law are sufficiently comprehensive and flexible to enable the Court, also noting the developments in the labor market and in worldwide economy, to comprise that mosaic. Indeed, it is possible that those mosaic stones in some cases would comprise a different picture. This is a problem that

is not unique to the issue of identifying labor relations and it stems from the fact that law, as many areas of life, is not an "exact science."

6. The question of consent of one who was acknowledged in retrospect as an employee to engage as a contractor could be relevant, according to the same tests and pursuant to case law long ago, however in classification of a person as an employee, after implementing all the tests has two aspects, in a manner that the scales are balanced or nearly balanced, which is called a borderline case. In such cases, and only in such cases, pursuant to traditional case law rulings there may be consent - should it be proven that it is true and reflects reality as it is - has certain weight, in a manner that joining it to the other tests and given the overall picture could rule on the status. For the avoidance of doubt, and subject to that detailed below, which is for the sake of caution, I believe that such consent on its own cannot overpower the status of a person as an employee while the objective indicators point at him as being one.
7. In general, and for the reasons specified in my colleague Justice Davidov Motola's position, the employee's lack of good faith cannot overcome status, and this except for in extreme cases (as so far such were not set in case law). This is certainly so in discussing a case that is not borderline, as the lack of good faith could be dumped also at the employer's doorstep.

   My colleague the President proposes that under certain circumstances, distinct lack of good faith of an employee who does not require protection would overcome his status as an employee. She intends to expand, if only slightly, what was proposed in this regard in the **Buchris** case (LCH 52/3-145 **The State of Israel - Ya'akov Buchris**, IsrLC 36(2001) 1 (1997)). I am concerned that use of these new criteria would increase the legal uncertainty regarding the status of one engaging as

an employee, however for reasons of good faith, whether the difference is quantified or whether it is qualitative. As aforementioned, I cannot agree with that proposed, and I shall explain:

Indeed, there are statements in case law (the **Buchris** case) according to which it is possible that "extreme lack of good faith" is the criteria that was used, would lead to the conclusion that although the tests for identifying employer-employee relations indicate John Doe to be an employee, it would be ruled that he is not an employee. As my colleague Justice Davidov Motola noted, these statements raise a considerable theoretical difficulty that might even justify taking a step back from them. The position of an employee is close to status, and therefor denial of status only due to lack of good faith on his part is almost an internal contradiction. However, for reasons of caution - as "never say never," I would not propose to nullify these statements that are intended to resolve those borderline cases in which the ordinary legal rules are not sufficient. I would be satisfied with emphasizing that these statements should be viewed as intended for extreme situations, which in fact, none were ruled to be such in case law also under difficult circumstances that did not amount to an extreme situation (for example: LabA (National) 14122-07-10 **The Ramat Gan College - Uri Price** (13.12.2012); LabA (National) 20005-11-16 J**ohn Doe - John Roe** (9.1.2019)) and mainly served as a as a basis for theoretical discussion as a promo for that difficult case which only this legal tool could solve.

8. And last but not least - use of the principle of good faith, and in fact the balance of good faith in disputes like the case before us, means estoppel. Should this balance have the power to lead to a legal result through estoppel laws, I believe, in general - and except for extreme cases as aforementioned - this power should be integrated into the settling

accounts stage rather than into the stage of ruling on status. The benefit of this is clear for two reasons: The first - practical - in any event in order to arrive at the conclusion that the classification as independent contractor rather than as an employee was not intended for exploitation or deprivation, it is required to examine the overall monetary rights and non-monetary rights as an employee; the second, the question of whether estoppel should be exercised many times involves the question of the rights subject matter of the hearing. There may be cases in which the dispute would deviate from the ordinary accounting calculation of the monetary rights and the non-monetary rights and engage in other protective rights, such as rights by virtue of the Women Employment Law, 5714-1954. Therefore, I believe it is better to leave the question of the remedies to be awarded to the plaintiff, should such be awarded, at the Labor Court and the settling accounts stage.

Justice Leah Glicksman

In the comprehensive and scholarly opinions of my colleagues President Varda Wirth Livne and Justice Sigal Davidov Motola, the question of the tests for ruling on labor relations was examined, and mainly whether an additional test should be added to the tests set out in case law - the test of good faith, and the question of settling accounts between a worker and an employer, after it was ruled in retrospect that despite the worker's definition as "self-employed", his true classification is an "employee".

Point of origin

1. At its early days, the National Labor Court ruled that:

> **"Within the domain of civil law the law regulates rights and obligations between one person and another, and it is solely their wish to stand on these rights or waive them, and the rule of law is mainly in**

providing the parties tools. The same is true regarding the section on relations between an employer and an employee, which are regulated under general civil law, however this is not the case when it comes to the "regulating laws" under labor laws such as the Hours of Work and Rest Law, Annual vacation Law and the Wage Protection Law. <u>These laws express a social policy beyond the interest of the individual involved in the case, and implementation thereof - is a public interest. Moreover, at times an imaginary immediate interest of the individual would lead to the situation where the individual would not insist on the right or even waive it, and it is the public interest to enforce the law.</u> <u>These laws are closer to public laws than to laws that regulates human relations."</u>

(Emphasis added - L.G).

LCH (National) 32/3-32 **Marlene Promovitz - Israel Bar Adon**, IsrLC 4 (1972).

2. I believe that also after almost five decades elapsed since these statements were made, the basic principle of labor law is still alive, according to which the rights granted to an employee by virtue of his status of employee cannot be waived or stipulated upon, and that maintaining this principle, the principle of cogency, is required for implementing the purposes of labor law. I believe that not only do the changes in the labor market that occurred over the last few decades not justify reducing the principle of cogency, but rather the contrary is true. In light of the dramatic decline in the number of employees hired at organized workplaces whose work conditions are regulated by collective agreements; given the fact that many employees are no longer employed through the classic format of direct employment by the employer, but rather "indirect employment" in its various formats; in view of the development of unconventional employment formats

(such as platform economics) - the need for protection of employees the principle of cogency enables has rather increased.

3. In order to avoid repeating what was already said, I join all the aforementioned in the chapter "the basic principles of labor law" (sections 2-10) in my colleague Justice Davidov Motola's opinion and her reasonings.

4. The principles that are intended to guide us in establishing the legal rules on the questions to be ruled upon in these proceedings stem from the point of origin: **One** - the parties to an engagement cannot stipulate upon the status of an "employee" and determine that he is not one, while pursuant to the criteria set out under case law he is an "employee"; **Second** - the appropriate policy for implementing the purpose of labor law requires that any worker who is actually an employee would be classified as an "employee" to begin with rather than as "self-employed", and benefit in real time throughout the duration of his work, rather than in retrospect, from all the rights he is granted as an "employee" pursuant to the law and case law.

5. I should emphasize that maintaining the principle of cogency does not mean freezing labor law in the past and fixation of the arrangements set out in the past while ignoring the changing reality. Indeed, it is required to examine from time to time the suitability of the cogent arrangements for the changing reality, correct them, modify them and also design new arrangements given the significant changes that occurred over the years, both in general (such as technological changes) as well as in the labor market in particular. There is no prevention of ruling that certain arrangements would be dispositive and permitted to be modified by the employee and employer, fully or partially within the limitations outlined for this, or subject to the regulator's approval (such as the arrangement set out under section 28 of the Severance Pay Law, 5723-

1963), and this after examining all the relevant considerations regarding that arrangement. However, these changes should be made while maintaining the basic principle - the rights granted to an employee under the protective laws and pursuant to them (such as the rights granted by virtue of a collective agreement or expansion order) cannot be waived or modified - a principle which in current times, in which the labor world too is coping with the corona virus, proved itself again to be required and relevant.

Settling Accounts in Retrospect

6. I join my colleague the President in the innovation she set regarding the manner of settling accounts retroactively upon acknowledgment of employee- employer relations, as I also join the comments of my colleagues Justices Davidov Motola and the Deputy President in this matter. This outline establishes an arrangement, as implementation thereof pursuant to the rules and principles set forth would establish incentives for employers to examine the correct classification of the employee and employ him according to the correct classification to begin with, while eliminating the specific difficulties that arose from implementation of the **Rofeh** case law ruling (LabA (National) 110/10 **Rafi Rofeh - Mirkam Insurance Agency Ltd.** (22.12.11)). Furthermore, in light of the disagreements and the fluctuations that took place in case law concerning this issue, there is great importance in establishing a case law ruling that is agreed upon by the justices of this Court, which would establish stability and certainty in respect of this matter. In view of the aforementioned, although my position in the past was that in this issue it is required to implement the ruling on the **Rofeh** case, and further to my statements in the **Ilan** case (LabA 3859-10-15 **Yosef Ilan - The Israel Local Authorities Data Processing Center**

Ltd. (24.9.19)) that there is room for examining an alternate outline to the one established in the **Rofeh** case, I can agree with the innovation proposed by the President regarding settling accounts in retrospect.

The Tests for Determining Employer-Employee Relations and Adding a Further Test - Good Faith

7. I cannot join the position of my colleague the President, according to which "it is required to grant weight to the principle of good faith (and the weight that should be given to the parties' agreement in this examination) already at the stage of examining the question of acknowledgment of employer-employee relations in retrospect" (section 54 of her opinion), and that in certain cases, even if their scope is limited, where the employer proves that the employee acted in "clear lack of good faith", it would be ruled that although the worker is of the status of "employee" according to the tests set out for this matter in case law, he is not deemed an "employee", and as a result his rights would not be examined nor settling accounts in retrospect regarding his rights.
8. As to modification of the tests that were set out in case law for examining whether labor relations were established given the change of time: Indeed, the tests set out in case law should be adapted to the changes in the labor market and in the economic world in general, and particularly to the changes that occurred in the format of employing employees, which differs from the "classic" employment format, based on which the criteria for ruling on whether the status of a worker is as that of an "employee". In this regard I should emphasize that I believe that the changes that took place do not justify granting greater weight, and certainly not decisive weight, to the question of the worker's consent to engage other than as an "employee", and such consent cannot deny the status of a worker as an "employee" while according

to the criteria set out in case law he is an "employee" (unless it involves a borderline case, and per the restrictions set out for this, as explained in section 6 of my colleague the Deputy President's opinion).

9. Beyond the necessary I should add that adaptation of the tests for identifying labor relations to the change of time is not one-way, meaning its result is not necessarily reduction of the circle of workers who would be classified as employees. It is possible, that in certain cases adaptation of the tests to the new formats of employment would require a change of the criteria so that workers who in the past were not acknowledged as "employees" due to certain markers would be acknowledged as "employees."

10. My colleague Justice Davidov Motola deliberated extensively in her opinion on the difficulties and risks inherent in exercising the principle of good faith for denying the status of a worker as an "employee," and my colleague the Deputy President added in his comments in this regard. I agree with these rulings and reasonings, and there is no need to repeat them. (On the risks involved in subordinating cogent rights to the principle of good faith see also Hanna Ghendker-Ofek, "Basic Rights, Protective Legislation and Good Faith - Constitutional Reflections on Labor Law," **Mishpatim 37** (2007) 63, p. 66). In this regard, and without derogating from that stated in my colleagues' opinions, I should emphasize that a significant shortcoming of the approach that proposes to deny the status of a worker as an "employee" due to violation of the duty of good faith is that its result is absolute and sweeping denial of all rights. Thus, while examining the worker's good faith (among all considerations) at the stage of settling accounts in retrospect enables to distinguish between the various rights due to a worker as an "employee", and in so establish congruency between violation of the duty of good faith on the part of the worker and the

rights denied of him, denial of the status of a worker as an "employee" due to lack of good faith would result in denial of **all** the rights. In this manner the worker would be denied of also rights in respect of which violation of the duty of good faith is not relevant (such as the employer's duties under the Prevention of Sexual Harassment Law, 5758-1998). Additionally, basic rights would be denied, such as the right to equality including its various sectors and the right of association, the status of which is not lower than the principle of good faith, and they should not be denied of the worker in a sweeping and absolute manner and in fact outright, without examining the full circumstances at the time the worker wishes to exercise these rights, due to his conduct upon commencement of the engagement or sometime during it, and even if he opted to be employed as "self-employed".

11. As I see it, in light of the difficulties, disadvantages and the many risks inherent in the approach according to which based on the test of good faith a worker's status as an "employee" would be denied, requires the conclusion is that there is no place to leave the crack, even the narrowest, in the status of "employee", which was proposed (however not implemented in practice) in the **Buchris** case (LCH 52/3-145 **The State of Israel, Ministry of Housing - Ya'akov Buchris**, 36 1 (1997)). Furthermore. This exception is not necessary for coping with those cases in which concrete justice requires denying a worker who was acknowledged as an "employee" in retrospect of the rights of an "employee," and it is for good reason that the statements in the **Buchris** case were not implemented in practice to date. Moreover. This exception is certainly not required currently, given the new outline of settling accounts in retrospect that was established in these proceedings. Therefore, in view of the many risks inherent in this additional test,

mainly erosion of the principle of cogency and impairment of the ability of all employees to exercise their rights, and as it is not required, I believe that there is no room at all to add the test of good faith to the case law tests at the stage of examination of the question of whether the relations between the employer and the worker were labor relations.

The Results of the Appeals

12. I agree with the outcome my colleague the President proposes in respect of each of the appeals, however in all regarding the appeals on the **Kotta** case and the **Levy** case - I join the outcome for the reasons in my colleague Justice Davidov Motola's opinion.

Justice Roy Poliak

I agree with my colleague the President, Varda Wirth Livne's comprehensive opinion, for her reasons.

As my colleagues examined in depth and comprehensively stated on the various issues before us, I shall limit my opinion to a few comments regarding only some of the issues that were examined.

"The Entry Gate"

1. I accept in full the ruling of my colleague the President, according to which should the employer prove circumstances of "clear lack of faith" on the worker's part who retroactively claims rights as an "employee," there is no room for opening the door to Court before the worker. In this regard I should note that I believe that the meaning of closing the door before one who is not fit to enter them due to his conduct is not a determination, one way or another, regarding the status pursuant to the applicable law ("employee" or "not employee"), but rather exercising the estoppel rules that constitute an integral part of the good faith laws (see *inter alia*: Gabriela Shalev . , "Promise, Estoppel and Good Faith"

(1987) 17 **Mishpatim**, 295, p. 319 and 328-329 (1987); LabA (National**) 533/09 Ofra Ilan - Klalit Health Services** (15.6.2011)).

2. I cannot agree with my colleagues Deputy President Ilan Itah's position, that subject to extreme cases "this power should be integrated into the settling accounts stage rather than into the stage of ruling on status" I believe that rarely if ever, under circumstances of a clear lack of good faith that justify blocking the doorway before a plaintiff, as I see it, that plaintiff would be awarded non-monetary compensation according to my colleague's approach. The dispute, beyond having practical aspects is thus a theoretical dispute (see my opinion in LabA (National) 20005-11-16 **John Doe - John Roe** (9.1.2019), according to which "**this result could have been reached whether by way of ruling that we have before us one of those most extreme cases where the principle of good faith would overcome status notwithstanding the cogency of labor relations... or in the manner my colleague the Deputy President chose, according to which the principle of good faith overcomes, under the circumstances of the matter, the rights granted to an employee by virtue of protective labor laws;"** this also arises from the agreed outcome in these proceedings in the appeal on LabA 34665-10-17 Levy - Zeraim Gedera Ltd.). At the same time, I believe that by merely blocking the gate the Court declares, and so it should be, that one who acted in clear lack of good faith and chose to engage with his employer as one who is not an employee, while benefiting from the fruits of his choice, should not expect that the Courts would "play the game" and enable him to renounce his choice. I should further note that I believe that it is more correct in the theoretical aspect to block the entry gate by virtue of estoppel laws prior to classifying a worker as an "employee" and refrain from hearing the details of his claim and rights as an employee at all, rather than ruling

that the plaintiff is indeed an employee who is entitled to rights from the labor and protective law domain, while denying these rights by virtue of the principle of good faith.

3. I should emphasize that I believe that the mere contractual agreement on classification of the engagement as a commercial engagement that does not involve labor relations and filing a claim in retrospect are not sufficient for meeting the requirement of clear lack of good faith due to which the doorway would be blocked before the plaintiff. Hence I agree with the various distinctions detailed in the President's opinion, while placing special emphasis on the bargaining capacity of each of the parties to the engagement, the conscious choice of the worker and the advantages - financial and other (as shall be detailed below) - each of the parties gained by engaging in a format that does not reflect the classification as it is. For example, as I see it, that had the Appellant in LabA 1568-04-17 (hereinafter - **Kotta**) been classified as an "employee" I would believe that his claim should not be blocked for the reason of "clear lack of good faith" despite his awareness of his rights and the meaning of defining the status. On the other hand, I have no doubt that there is no room for hearing the case of the Appellant in LabA 34665-10-17 (hereinafter- **Levy**), who dictated, from a position of power, the format of engaging with him, for his benefit and further to his conduct vis-à-vis his prior employer, where his case **"illustrates those cases of clear lack of good faith, and in this case even amounts to extreme lack of good faith"** as specified in the President's opinion.

A Short Note (Rather than Exhaustive) on Cogency, Paternalism and Autonomy

4. In the comprehensive opinion of my colleague, Justice Sigal Davidov Motola, my colleague details, *inter alia*, the need for labor law as a sector in separate of contracts law and the reasons underlying cogency

in respect of the worker's status and his classification (the use of the term **principle of cogency** shall serve in my opinion below in the context of the cogency of status in separate from protective labor law that is based on protective legislation). I agree with my colleague that in the ordinary case "there are significant gaps between the employee and the employer in aspects of power, control, information, resources and risk-distribution that lead to the situation where the employee is placed, as a rule, in a weaker bargaining position", and that the point of origin above and additional considerations justify normative regulation that would prevent employers from exploiting their excess power, and as a result it cannot be stipulated upon the mere existence of labor relations (the principle of cogency) so that a separate segment of law is required as at its foundation stands protective labor law. I further agree with my colleague's approach that there may be mid-way solutions that "are supposed to start from the point of origin of cogency and as proportional-concrete arrangements in issues justifying so."

5. At the same time, as I shall briefly clarify below, I disagree with some of the reasons for cogency. Although I agree with the assumption that proportional-concrete arrangements should be permitted, I completely disagree with the additional ruling according to which the proportional-concrete arrangements are possible "**unlike doubting the mere need for cogency as a fundamental principle of labor law**."

   In the context of the relationship between the cogent rights that are enshrined in protective labor law and the possibility of requiring arbitration proceedings in respect of them, Prof. Mordehai (Motty) Mironi noted, and I join his statements with all due respect, as follows:

> **"The fact that a legal policy on a particular subject, as is expressed in case law, is established and over many years - and even agreed upon by the Labor**

> **Courts and the Supreme Court, and is even repeated time and again - does not necessarily mean it is correct. This policy should be examined on its own rather than draw its strength only from the fact that became an inalienable asset of case law."**
>
> (M. Mironi "Case Law Restricting Use of Arbitration in Employee-Employer Relations: Re-examination," **Mishpatim 39** 449, 501 (5770)).

In this regard it should be noted that over forty years ago Menachem Goldberg wrote that in light of the rulings of the Labor Courts, renewed examination once every 7-8 years regarding the essence of employee-employer relations "**is a necessity**" (Menachem Goldberg "The Essence of Employee-employer relations, **Hapraklit 32** 81 (5738)).

6. I do not question the correctness of the principle of cogency also after reexamination. However, I do doubt the rigidity of implementation thereof. It should be reminded that cogency is not the purpose but rather an important and valuable means for realizing the purposes of labor law. Unlike protective labor law legislation that grants employees' rights that cannot be waived, there is no engraved legal provision that requires a particular format of engagement with one who is of the status of an employee. Thus, it could be sufficient to exercise the calculative approach while maintaining in retrospect the monetary rights in order to protect, in the ordinary case, the rights of one who was classified, whether erroneously or intentionally, as one who is not an "employee" despite the situation in practice. However, for the reasons specified in the opinions of the President and Justice Davidov Motola, to which I agree, this is not enough. I should note that should social rights be granted to free participants (freelancers) and self-employed persons in the future, I believe there would be room for reexamination of the issue of the scope of the principle of cogency and the extent of deployment

thereof (regarding the rights of free participants in Israel compared to other countries, see: Roby Nathanson, Itamar Gazala, Dafna Pizem “Social Security of Freelancers in Israel". Publications of the **Macro Center for Political Economics and the National Insurance Institute** (June 2015); and also see the comprehensive examination of the status of self-employed persons and proposals for regulation thereof: Netta Barak-Corren “Employees’ Rights, Property Rights and that Between Them: Protection of Self-Employed Persons’ Wages” **Mishpatim 42** 973 (5772)).

7. At the same time, unlike legislation that includes cogent provisions as alongside them are “escape hatches” for appropriate cases (see, *inter alia*: Sections 10, 11 and 30(a)(5) of the Hours of Work and Rest Law, 5711-1951; the opening clause of section 5 of the Wage Protection Law, 5718-1958; sections 14, 28 and 29 of the Severance Pay Law, 5723-1963), and contrary to the provisions of section 31 of the Contracts Law (General Part), 5733-1973, which applies to an illegal contract and a contract that is contrary to public policy - as an argument that is raised at times against an agreement that includes erroneous classification of the worker’s status - which enables the judicial instance exercising considerations of justice and greater flexibility, some believe that it is required to implement the principle of cogency rigidly and literally even at the cost of failing to do justice and even doing wrong in given cases. My position, with all due respect, is more moderate.

8. I believe that setting the "entry gate” and restricting it to cases of clear lack of good faith is one measure, mainly declarative as aforementioned, to soften the rigidity of the principle of cogency. Careful and wise implementation in ruling on the monetary compensation, while correctly balancing the protected values

underlying imposition of the compensation and considerations of justice and fairness in the case of erroneous classification, is an additional measure.

9. Regarding charging non-monetary compensation due to refraining from employment in the format of employee - employer, I would like to address a certain aspect, which I believe was not properly emphasized. The original presumption on which additional opinions focused was that when a person chooses to be employed as self-employed, considerations of benefits such as tax benefits arising from that format of engagement underly his choice. This point of origin is indeed widespread and is consistent with the choice of the Appellant Levy. However, at times the choice of not being employed as an employee is a choice for other considerations. **"Independent work is the employees' manner of obtaining flexibility, control and autonomy**" (Lilach Lurie, **Employment and Social Security Laws in the Twenty First Century** 216 (5774-2013)), it integrates well with the perception that attributes a different value to the appropriate balance between work and leisure, the lower commitment of the younger generation (the Y-generation in sociology literature) towards the employer and the willingness to move around occupations and workplaces as "**butterflies in the field of employment**" (Tamar Almog and Oz Almog, "**Generation Y - As if there is No Tomorrow"** 133 (2016); hereinafter - **Almog**), as well as the wish to be employed at several workplaces without a sense of dependence on one or other employer, and even personal preferences the interpreter observing them from high above is not always able to provide a rational explanation for (regarding inter-generation preferences, see *inter alia*: **Managing the new workforce: international perspectives on the millennial generation** edited by Eddy S. Ng, Sean T. Lyons, Linda Schweitzer (2012); Shay

Hershkovitz “**The Next Generation is Sleeping in the Next Room**”: **Socio-Cultural Decoding of the "Y" Generation”.** The Ministry of the Economy http://economy.gov.il/Research/Documents/X12801.pdf (2014); **Almog**).

10. My colleague, Justice Davidov Motola, notes that “the waiver of an individual employee of his status as “employee” or of his cogent rights is difficult on the personal level.” As one who entered the work circle decades ago, on the background of world perceptions that were common in the late decades of the previous century, I tend to agree with her in her ruling that so far as it is relevant to a choice that does not stem from considerations of benefits (I believe the choice of the Appellant Levy of the format of employment was a wise and correct choice). At the same time, even if I believe that an individual’s choice is not the best choice, and even an erroneous choice, I cannot accept the presumption according to which forcing the format of engagement on a person - what more so, a person who has the tools for making a wise choice - is required “for promoting material freedom of the employee himself” and it is also consistent with the autonomy of the employee. It seems to me that even the paternalistic perception should have limits and even if dictation of a certain format against a person’s will benefits him, I believe cannot be considered as exercising that person’s autonomy.

    However note: I do not dispute the normative ruling according to which the principle of freedom of contracts and autonomy of the parties to an engagement in an agreement that in essence is a labor agreement pulls back from the provisions of protective labor law and from the principle of cogency (compare: Menachem Goldberg, “Contractual Freedom and Limitation thereof by a Collective Employment Agreement and

Personal Employment Contract", **HaMishpat, II** (1994)), however I do not agree with the ruling that in forcing a format of engagement despite the worker's fierce will promotes his material freedom and fulfillment of his autonomy, even if the dictated format was chosen by scholars or wise and experiences professional who know how to ignore cognitive biases, and in an overall view protects the individual worker and the entire public of worker.

11. It should be noted in this regard, that alongside interfering in the freedom of choice in designing the format of engagement with the employer is granted to an employee, being an adult law respects his autonomy, freedom of choice in a variety of actions with a dramatic impact on his quality of life, from choosing a spouse, purchasing a residential apartment, taking out a mortgage, consuming cultural products (sometimes at the expense of ongoing living needs that a wise and experienced observer would believe to be more "correct") and similar actions through which a person exercises his nature and autonomy. Together with these actions, within the labor relations domain are listed the arrangements by which he would secure his retirement future. Law indeed requires the employer to draw a pension insurance arrangement for the employee and sets its cost, however the employee is granted full freedom of choice to design the arrangement within the dictated pension budget as part of labor relations, as also in labor relations "**there is no substitute for basic personal responsibility**" (HCJ 6925/14 **The Forum of Retirement Savers in Israel v. The Minister of Finance,** para. 2 (24.12.2017)) even at the cost of making an erroneous decision (compare: LabA (National) 7243-10-15 **Landsberg - Gal Rob Consultants Ltd.** (20.8.2018)), which despite serious injury to the claiming employee, validated the provision

of section 20(a) of the Control of Financial Services Law (Provident Funds)), 5765-2005, which grants the employee freedom of choice, and no liability was imposed on the employer).

12. Hence, the purpose of the review above and emphasizing the weight of the employee's autonomy, points out the fact according to which at times the format of engagement is dictated by the employee other than for distinct considerations of benefits but rather for personal preference considerations that should be respected. In such cases, should the claiming employee pass the "entry gate," it would be required to ensure that he was not deprived in the monetary aspect, however I believe that there would not be room, should the employer prove that the employee is the one who initiated the format of engagement whether for considerations of benefits or for personal preferences, to charge the employer with non-monetary compensation.

A Supplementary Note Regarding the Burden of Convincing

13. I believe that the ruling according to which the burden of convincing at the second stage (the stage of calculation of the rights) is imposed on the employer rather than on the employee who claims non-monetary compensation, is required due to the evidentiary difficulties in proving the parties' intent at the stage of engagement or afterwards. Under the circumstances in which the employer is the one "preventing the damage," for the reasons specified in my colleagues' opinions, it is appropriate that the burden of convincing would be imposed on him. Imposition of the burden under these circumstances would promote justice in the concrete aspect of the claim before the Court and motivate the employer to act for drawing engagements that are consistent with the principle of cogency.

14.14. Regarding the various tests, I should note, as did my colleague, that this is not a closed list and I believe that the spotlight should be directed at the questions of who was the one who initiated the engagement and who is the party that benefited from this format of engagement (material or otherwise as specified above). In this regard, there would be room for conducting a sort of "balance of good faith." Additionally, I believe that great weight should be granted - both to merely ruling on the compensation, however mainly in ruling on its rate - to the question of whether this is an employer whose employees benefit from organizational protection and the rights stemming from it such as tenure, restriction on dismissal, promotion tracks and similar rights that are not translated into nominal monetary value. I should further note that also in this regard the mere existence of an agreement for provision of services, mainly under the circumstances in which the agreement was dictated by the employer, would not have crucial impact on merely charging the employer, although there could be, under the appropriate circumstances, an impact on its rate.

The Appeals

15. **LabA 15868-04-18 (Kotta)** - I agree with accepting the appeal. I believe, as my colleague the President ruled, and I agree, Kotta's services were provided as part of his own business, so that in respect of him the negative aspect of the integration test did not hold true. Beyond the necessary I should add and note that as I see it, Kotta did not integrate into the Ra'anana Municipality, so that the also the positive aspect of the integration test did not hold true. In any event, I should note and add that merely providing services by a worker to a business could indicate of the necessity of the services for the business, however they do not necessarily indicate that the positive aspect of the

integration test is met, and it is required to conduct an individual examination pursuant to the tests specified in the President's judgment. Similarly, I should note that ignoring additional activities of a worker and ruling that it is required to view his services to a specific business in separate from his financial activities, in theory and in practice, negates the negative aspect of the integration test.

16. **LabA 7338-10-17 (Rabin)** - I agree with accepting the Appellant's (hereinafter - **Rabin**) appeal. The circumstances of Rabin's employment are unusual. There is no dispute that there were labor relations between Rabin and the State. Rabin fully integrated into the State, performed a mid-ranked administrative position, was subordinated to employees and supervised others. Rabin did not have any other business and his entire income was dependent on the State. The State, on its part, was well aware of Rabin's status of "employee" according to the customary tests, however for its own internal considerations (whether for reducing the number of employees who are entitled to the protection of labor laws and the collective system, or for reasons concerning the number of permitted positions, which is bypassed in the creative manner of employing employees as contractors), chose to refrain from employing him as a "employee" and dictated to him a format of employment that is not consistent with his status and could injure him. Payment of a high consideration does not "grant" the significant rights in many cases stemming from employment by the State, including the right to tenure, wage promotion and participating in tenders. Indeed, under certain circumstances, employment other than as an employee serves also or only the worker's interests (for example, one whose employment other than an employee prevented him from being hurt by the "public treasury" rules, and such employment as aforementioned that enables the worker to engage in

additional activities), however given the power relations between the State and Rabin, “the circumstances of this case are even more severe and even extreme” as the President ruled, due to which only one side of the equation is injured (Rabin) and they justify imposing on the State non-monetary compensation.

17. **LabA 34665-10-17 (Levy)** - as detailed in my opinion above, Levy acted in clear lack of good faith and his claim is to be denied even without examining whether he would be entitled to additional payments had he been employed as an employee. Also in Levy's case, as in Rabin's case, only one party dictated the format of employment tailored to its needs, and it is the one that benefited from it (Levy), while the other party (the employer) did not benefit from it and preferred that levy would be employed as an "employee". I should further emphasize that I believe the Regional Court was right in imposing on Levy legal expenses in a substantial sum.
18. **Conclusion and Beginning** - I join my colleague the President’s comprehensive and convincing judgment.

Justice Hanna Ghendker-Ofek

1. My colleague, President Wirth Livne paved in her comprehensive and scholarly opinion a new path for ruling on the remedy upon retroactively ruling on the existence of labor relations. As all my colleagues, I agree with the method proposed in the President's opinion and I also agree with my colleague Justice Davidov Motola’s comments on this issue. Due to the innovative nature of the method, its development was not exhausted in this judgment, however the mere bonding around uniform principles is of great value for all those engaging in the work, as it contributes to promoting the certainty of law and its clarity.

2. As all my colleagues, I too agree with the outcomes of the appeals as stated in my colleague President Wirth Livne's opinion, without needing to address all her reasons, and in the Levy case I join the outcome of my colleague Justice Davidov Motola's reasons.
3. Concerning subordination of the status of employee or the ability to claim rights by virtue of this status to the principle of good faith, I join the statements in my colleague Justice Davidov Motola's comprehensive and scholarly opinion, who spread a broad theoretical sheet regarding the risks inherent in this subordination, as well as the comments of my colleagues Deputy President Itah and Justice Glicksman. I should note that I found difficulties in this subordination in itself, which I pointed out in the past in my essay "Basic Rights, Protective Legislation and Good Faith - Constitutional Reflections on Labor Law," **Mishpatim** 37 (2007), and over time my opinion on this issue has not changed.
4. Alongside this, I would like to add several comments regarding the two stages of the analysis, meaning the stage of identifying employee-employer relations (the first stage) and the stage of settling accounts assuming that employee-employer relations do exist (the second stage) and the relations between them.

<u>As to the First Stage - Identification of Employee-Employer Relations</u>

5. The term "employee," which is the cornerstone of labor law, was not defined under legislation. Protective legislation set out the implications of acknowledgment of employee-employer relations. This is by granting rights and determining their rates, in a coercive manner that does not enable stipulation on such other than for the employee's benefit. In the absence of a legislative definition of the template "employee", the Labor Courts developed over the fifty years that

elapsed since their establishment the tests for identifying existence of employee-employer relations. I believe that the tests that were outlined over the decades in the rulings of the Labor Court for identifying the existence of employee-employer relations are appropriate and they remain vital. The combined test, as at its center stands the integration test including its positive and the negative aspects - is an appropriate test for examining the existence of employee-employer relations. As part of implementation of the negative aspect of the combined test, I agree that the possibility of providing services by a business should not be denied, so long as this conduct is authentic and legitimate, and the possibility that a person's work force would be inherent in his business should not be denied categorically. Each case should be examined per its circumstances.

6. I believe that the coercive nature of the protective legislation and the rights set out under such (except for stipulation in favor of the employee) draws its vitality from a conceptual view in respect of the cogency of the relations between the employee and the employer, where the essential tests lead to the conclusion of establishment this template. Among all protective legislation's provisions that prescribe the provisions regarding the cogency of entitlement passes a line according to which the mere relations between an employee and an employer are cogent, and the cogent provisions under legislation express this conceptual perception and are derived from it. Hence I believe, as a rule, that where the material tests lead to the conclusion that employee-employer relations exist, the parties' consent neither adds nor reduces. In other words, and to paraphrase the statement of the late Justice Heshin of blessed memory, at the first stage where the pattern of employment is set under law, consent is as light as a feather and as heavy as a feather. Consent is as light of a feather in the sense that where

the material tests for the existence of labor relations dictate the existence of labor relations, I believe that consent (or renouncement thereof) could not deny their existence or implementation thereof. As aforementioned, at the same time consent is as heavy as a feather in the sense that where the material tests lead to the scales being balanced, in the appropriate cases a feather is enough to tip the scales. Therefore, in these situations consent could tip the scales not due to its own weight but rather due to the fact that exercising the material tests led to the conclusion that it is a borderline case. Only in a borderline case in which the scales are balanced, the weight of the feather would be meaningful, as "we all knew that it is possible that one straw could break the camel's back" (from para. 11 of the judgment of the late Justice Heshin of blessed memory in LCrimA 4342/97 **The State of Israel v. Suleiman el-Abid**, 51(1) 736).

At the same time, I would like to emphasize that the mere existence of different aspects does not lead to classification of the case as borderline. Naturally, in a large part of this type of proceedings not all the secondary tests lead to the same result, and therefore this or the mere existence of uncertainty are not sufficient for classifying the case as borderline. It is my opinion that it is required, after weighting the different aspects through the looking glass of the material tests, the conclusion would be that the scales are balanced or very close to it. Additionally, it is clear that the Court is required to be convinced that this is voluntary and genuine agreement unlike exploitation of the power gaps.

7. Since I believe that upon establishment of the labor relations the parties' consent is as light and as heavy as a feather, I do not believe that in retrospect weight should be attributed to it beyond this through the

principle of good faith. I believe that adding an additional external test at the first stage such as lack of good faith due to unraveling consent - whether for identifying the existence of labor relations or as a claim of estoppel - raises many difficulties. This is since both on the theoretical level in view of the rationale underlying the coercive nature of the protective legislation as well as on the practical level in light of the erosion of certainty and clarity of the applicability of the coercive protective legislation and the chilling effect that could accompany the loss of clarity. Moreover, I believe that adding this test is not necessary for providing a solution for a legitimate need for flexibility or for making justice in a concrete case. As to the administrative flexibility, I believe that outlining the administrative flexibility through the looking glass of labor law purposes is a normative question. The integration test including both of its aspects is a suitable vessel for balancing between the interests through the looking glass of the challenges that were established with the passage of time. I should remind that the negative aspect of the combined test includes also a normative aspect as the format of provision of services through a business is not only authentic but rather also legitimate. As balancing could be performed as part of the combined test, I do not see it necessary to add to it an external test. As to making justice in the concrete case, this objective - as I shall elaborate upon further down - could be fulfilled at the second stage of settling accounts, and even better, as then the outcome is not necessarily binary (the existence/absence of employee-employer relations or estoppel from exercising the status) but it is rather part of a wide range of possibilities for granting a remedy (through the looking glass of the various compensation components and their rate).

8. I would like to refine that the logic of these statements is true also in cases where the format of employment as a service provider extended

over many years. Employment for many years cannot justify validating the agreed format of employment as a contractor. To the contrary, *prima facie*, upon implementing the integration test, the passage of time is data that could be weighed alongside the establishment of employee-employer relations (even if to begin with, depending on the circumstances of the matter, the conclusion that he is a contractor could be reached), since it may *prima facie* indicate integration in the employer's business and dependency on him. My conclusion in respect of the meaning of the passage of time is theoretical and inconclusive, as examination of all of the circumstances of the concrete case is required, and this data cannot obviate examination thereof. I should further note that as I see it, from a bird's eye view employment for many years is data that should light up a "warning sign" for the employer regarding the possibility that over time, employee-employer relations were established, the parties should be given an incentive to conduct a dynamic examination of the employment pattern. As I shall note below, an employer who saw a "warning light" and during the period of employment offered the employee, in good faith, to be employed as a hired employee, weight could be given to this dynamic examination, where it was made in good faith, upon ruling on the entitlement to compensation that is not monetary and its rate.

9. In LCH 52/3-145 **The State of Israel, Ministry of Housing - Ya'akov Buchris,** IsrLC 36 1 (1997) Justice Barak noted that "**There may be rare cases in which a worker consciously, and for a clear interest of his waived cogent rights. Such cases may lead to the result that when he would wish, upon termination of the relations, to rely on his being of the status of employee, or upon his wish, upon termination of the relations, to claim additional social rights... In utter bad faith, the employee's lack of good faith would overcome**

the requirement of cogency or the status resulting from it. This may be deemed promissory estoppel...” As aforementioned, in the past I expressed my reservations in respect of this concept, and my opinion has not changed since then. I should further note that to date this position was not implemented in case law, but rather different positions were expressed according to which claiming cogent rights by virtue of protective legislation cannot amount to lack of good faith. For example, President (ret.) Flitman noted in LabA (National) 3575 10-11 **Anat Amir - The Israel Television News Company Ltd.** (21.1.15) that (emphasis added):

> **“Law lack of good faith would never overcome cogency of the relations, since by saying lack of good faith and saying the cogency of the relations, we are in fact saying the same thing in different manners.**
>
> The cogency of the relations means - the norms of protective labor laws that cannot be stipulated upon where employer-employee relations exist. Pursuant to the principle of good faith, the objective appropriate behavior norms are set. The objective appropriate behavior norms where employer-employee relations exist are the norms of protective labor law.
>
> **There is no reason not to apply protective labor law where employer-employee relations exist. An employee's claim for his rights pursuant to this law, or in other words, his claim for implementing the cogent norms of good faith that refer to employee-employer relations, cannot, under any circumstances, be considered lack of good faith on his part.**
>
> As this is the case, the question of lack of good faith in the context of the applicability of protective labor

law as in the case before us, does not exist in fact as a question."

10. To this I should add that the question of when a voluntary choice of one who was injured shakes off the duties of a defendant under law or constitutes a barrier against exercising rights by virtue of estoppel law - is raised in additional areas of law from which inspiration may be drawn. This is not due to their direct applicability but rather due to the aspiration for unity of the legal system by way of analogy, and especially where the arrangements are enshrined in primary legislation that indicates the position of the primary legislator on the issue. In tort law, voluntary choice of one who was injured is the same as "voluntary risk-taking." This endangerment could be, upon meeting the terms set out in section 5(a) of the Torts Ordinance regarding voluntary risk-taking, may constitute full defense against tort liability. However, and this is the main thing, it was ruled that a restriction does not apply when hearing a tort of violation of statutory duty. And so it is stated in section 5(b) of the Ordinance (emphasis added):

"Voluntary risk-taking

5. (A) **In a claim that was filed due to a tort, there would be the defense that the plaintiff was aware of and estimated, or it may be assumed that he was aware of and estimated, the situation that led to the damage and he exposed himself or his property to this situation voluntarily.**

(B) **The provisions of this section shall not apply to a claim that was filed due to failure to comply with a duty imposed on the defendant by virtue of legislation.**

...".

At the basis of the restriction specified in section 5(b) of the Ordinance stands the perception that a person cannot enable another to violate the law, and therefore the consent of the one who was injured does not exempt the other from compliance with the legislator's order. We should note that in the codification, the defense of voluntary risk-taking was enshrined in section 375, while omitting the restriction set out in section 5(b) of the Ordinance, as in the explanatory notes this omission was explained as follows (Bill 15.6.11, p. 854):

> **"Section 5(b) of the Torts Ordinance, which sets out a restriction regarding failure to comply with a duty imposed on a defendant by virtue of legislation was omitted, since where the legislation cannot be stipulated upon, the consent of the one who was injured to take upon himself the risk is of no validity."**

Hence, in tort law voluntary choice of one who was injured by way of a certain action towards him does not shake off the damaging party's liability pursuant to legislation whereas a result of this he did not comply in practice with his duties under law. As an analogy, and according to the logic adopted by the primary legislator in tort law to the other liability laws, the worker's consent or choice to be employed in the format of a service provider cannot constitute absolute defense for the employer against the coercive nature of labor law. This is true whether the claimed defense is by way of directly validating consent or by way of ruling that shaking off consent constitutes lack of good faith that leads to denial of a status that would be established otherwise or preventing a possibility of exercising the entitlement by virtue of the status.

11. Thus, at the first stage, it is required to examine the establishment of the status according to the principles outlined in case law. In my

opinion, there is no room for denial of establishment of the employee's status where the tests lead to the conclusion of its establishment, and it should not be ruled that the employee is prevented from exercising his entitlement by virtue of the status due to his consent to be employed in the format of an independent contractor or a free participant.

As to the Second Stage - Ruling on the Remedies

12. As aforementioned, I agree with the methodology proposed in my colleague the President's opinion as well as with my colleague Justice Davidov Motola's comments, regarding the manner of ruling on the compensation at the second stage where it is ruled in retrospect that employee-employer relations exist, and classification of the contractual relations as relations of service provider-employer was erroneous. I would like to refine that this method does not conflict with protective laws' principle of cogency, and therefore I believe that there are complementary relations rather than contrast between the first stage and the second stage, and these are my reasons:

13. **Compensation for the monetary damage** - this compensation is due to failure to pay rights pursuant to the coercive arrangement where the Court does not have any discretion in enforcement thereof (by way of compensation or its rate). Hence, in theory the employee would be entitled, as a rule, to the full monetary compensation based on the proven wages as a hired employee, as the burden of proof is imposed on the employer. Regarding this type of compensation, there would be settling accounts between the contractual consideration that was given and the conceptual cost of an employer through the looking glass of the alternative hired employee wages that was ruled upon, as the employee would be awarded compensation only where there is a difference in his favor between the two. Theoretically this manner of settling accounts

is based on the assumption that were it not for the erroneous classification the employee would be paid the hired person's wages and adding social rights. Regarding this type of compensation, it is not required to examine the balance of the causal contribution to determining the erroneous classification, as the coercive law prescribes not only the principle of liability for payment thereof but also their rate. The balance is achieved by way of settling accounts as aforementioned, which is fully conducted and in each case.

14. **Compensation for non-monetary damage** - this compensation is given to the Court's discretion as its rate is not set out under coercive law. This compensation is intended to fulfill together a remedy purpose (compensation due to loss of benefit in the non-monetary aspect of the employee's rights) and a social purpose (concerning granting a financial incentive to the employer for refraining from erroneous classification or turning a blind eye in respect of it), as the burden of convincing that such should not be granted is imposed on the employer. The compensation embodies a vast array of considerations that should be taken into account. Without exhausting or setting a rule, I should note that I believe that from among all the relevant considerations the following considerations have special weight: The employee's type of occupation and the sectoral context; the duration of the employment period and relevant references during it to the format of engagement and in particular whether the employee was offered, in good faith, over the years to be employed as an employee, as in this regard it is required to take into account also offers, in good faith, based on the wages of a corresponding hired employee considering the duration of the plaintiff's employment by the employer, and the mere offer based on the hired employee's wages does not indicate lack of good faith on its own; the sum of consideration and the delta that remained after settling accounts

on the monetary compensation level; the employer's size and the scope of this type of violations at that workplace; as well as - and as part of the entire array of considerations - the balance of the causal contribution that led to the erroneous classification (assuming that the employee's contribution was made voluntarily and willingly that should be examined cautiously, being sensitive to the power gap between the employee and the employer). It should be emphasized that although the non-monetary compensation is ruled as one sum, it is intended to fulfill an integrated purpose, and therefore the employee's causal contribution to the erroneous classification may be given varying weight due to its dual purpose. I believe, in all concerning the remedy component in respect of the concrete employee, the worker's causal contribution to the erroneous classification could indicate the degree in which he considered the loss of benefit in the non-monetary aspect to be "damage" that requires compensation through the looking glass of other benefits he obtained by this status. However, in all concerning the broad social purpose, it is required to grant it even in cases where the employee had a causal contribution to the format of the employment, as among the other considerations, the balance of causal contributions would be given weight in ruling on its rate. Additionally, cases in which the overall circumstances of the matter would justify refraining from awarding this compensation cannot be ruled out, and the result in the Levy case is an example of this. Since underlying the non-monetary compensation is also a social purpose, it is required to make use of the possibility to refrain from awarding it cautiously and minimally, so that the social purpose would be achieved rather than missed, as the burden of convincing on the existence of circumstances that justify this avoidance is imposed on the employer.

As to the Relation Between the First and Second Stages

15. As aforementioned, I believe that the second stage is a better host for giving weight - *inter alia* - to the worker's voluntary choice, and this especially when it comes to a claim for ruling on non-monetary compensation. My position is based on several reasons:

16. **First**, and subject to the aforesaid regarding the various compensation components, at the second stage there is clash with the cogency of the relation and the coercive nature of protective legislation does not exist, or at least is not frontal. As to the monetary compensation, in respect of which the coercive nature of protective legislation is fulfilled in full, and settling accounts fully in light of the joint error does not erode the coercive nature of protective legislation. The non-monetary compensation is at the Court's discretion in any event, and thus considering the balance of causal contribution as part of the discretion given to the Court does not conflict with the coercive nature of protective legislation. I should further note that examination of this consideration as part of the default remedy exists also in the other laws of obligations. For example, I pointed out above that in tort laws the claim of voluntary risk-taking does not constitute absolute defense against the tort of violation of statutory duty, however this aspect may be given weight as a relative defense in ruling on the rate of compensation as part of the considerations of justice set out in section 68 of the Torts Ordinance.

17. **Second**, indeed there are cases in which the perception of justice in the concrete case justifies considering the worker's causal contribution as well. In my opinion, like the other obligations sectors, the appropriate geometric place for the perception of justice in a concrete case is in selecting the remedies at the second stage. This place ensures

examination that the employee was not deprived in the monetary remedy aspect, as comparison is made between the total contractual consideration and the employer's cost according to hired employee's wages. In the non-monetary remedy aspect conducting the discussion at the second stage - where there is a wide range of economic results - enables adjusting the remedy to the special circumstances of the case. In other words, while at the first stage the result of granting weight to this consideration is binary (having the status of employee or absence thereof), at the second stage - and these statements refer to non-monetary damage - the result is not necessarily binary, but rather could be placed on a broad spectrum of possibilities, and I see this to be an advantage. In this regard I should note that in contracts law case law adopted the contributory fault doctrine (see CA 3912/90 **Eximin S.A Belgian Corporation v. Itel Style Ferarri Textiles and Shoes Ltd.** IsrSC 47(4) 64, 81 (1993)), as the outcome of application thereof is distribution of bearing the injured party's damages due to the violation on the part of both parties to the contract. Adoption of this doctrine enabled denial of the principle of binary liability in contracts law, placing an emphasis on the list of solutions on a broad spectrum, as at its one end full liability is imposed on the violating party and at its other hand, he is free of all liability" (Ariel Porat, "Comparative Fault Defense in Contract Law" (1997), pp. 61-62). This relative result was among the virtues of the contributory fault doctrine in contracts laws, stating as follows:

> "The assumption underlying the contributory fault defense is that the identities of the "violator" and the "injured" are not always conclusive, since there are mid-way cases in which the behavior of both parties is to be condemned in legal terms, and the partial exemption of the violator from liability would express this

> condemnation in the most appropriate manner. The contributory fault defense as a partial defense is thus intended to fill the existing void in remedies laws, due to the special manner of implementation of the principle of good faith in situations where the injured party's conduct contributes to the violator's failure to implement the contract.

In CA 3940/94 **Ronen Shmuel Building & Development Co. Ltd. v. S.A.L.R Construction Company Ltd.**, IsrSC 52(1) 210 (1998) Justice Bainish elaborated upon the guiding considerations in implementing the doctrine regarding distribution of the damage, while addressing the possibility that there could be cases in which "**it would be required to examine whether for reasons of appropriate legal policy it would be proper to impose on one party to a contract greater liability**." And so it stated:

> "It appears that it would be desirable to avoid setting rigid tests for distribution of the damage and instead be assisted by a series of secondary tests and criteria that would assist in fair distribution of the damage in each case per its circumstances. In distribution of the damage it is required to consider the ratio between the severity of the parties' violations, it is appropriate to consider the degree of fault in the actions of each of them, and it is required to compare the causal contribution of each violation to the damage. In certain cases, it is required to distinguish between the weight given to the parties' reliance interest and that given to the expectation interest. In other cases, it is required to examine whether for reasons of a legal policy it would be appropriate to impose greater liability on one party to the contract. These considerations and others would be taken into account as the goal is fair distribution of the damage considering the characteristics of the case at hand."

And see also LabA (National) 31202-04-10 **Yitzhak Avisar - A.S Ironi Ramat Gan Established by Beitar and Maccabi Ramat Gan Ltd,** para. 38 (6.3.13).

The second stage is thus better for providing relative and partial results, and the result does not need to be binary (although it may be so in appropriate cases). This is since the consideration of relative contribution is part of a fabric of considerations and does not stand alone, and since the result of considering it could lead also to a partial result, which would be expressed per the circumstances by the rate of compensation.

18. **Third**, the second stage provides a good solution not only for the purpose of making concrete justice (in light of the possibilities inherent in this stage), but rather also for the target of implementing the purposes of labor law (in light of the possibility to rule on a remedy of compensation for non-monetary damage). This remedy constitutes an incentive to be cautious and ensure the correct classification of the employment format to begin with, and it reduces concern for a chilling effect against filing appropriate claims.

19. As aforementioned, the judgment outlines the principles of a new and agreed upon method for the second stage of the test. Naturally, due to the innovative nature of the method its development has not been exhausted as of yet, and it may be assumed that it would continue from one case to another and step by step, as upon gathering a sufficient number of cases it would be possible to establish an overall picture regarding the desired law and the principles for guiding it.

Justice Ilan Soffer

1. First, I join my opinion to the in-depth and scholarly opinion of my colleague President Varda Wirth Livne, including all parts thereof.

   However, reading my colleague Justice Sigal Davidov Motola's opinion raises the concern that the President's judgment constitutes a deviation from the fundamental principles of labor law that may impair the legal certainty. I would like to elaborate upon this.

   My opinion mainly addresses only the first chapter of the President's ruling, concerning the preliminary stage of examining the existence of employee-employer relations. And as was referred to in this opinion as entry to the hall. Regarding the concern expressed in Justice Davidov Motola's opinion, I shall first respond with two: The first, as Prof. Barak (as his title at the time) noted in his book, Judicial Discretion, p. 403 (1987) "**stability, certainty, consistency and continuity cannot be ensured without ensuring a change, insisting on that which exists does not ensure stability."** This statement reflects the adjustment of legal principles to the changing needs of society. And in this respect, fixation on known and safe models while ignoring changes is not a guarantee for making justice and ensuring legal continuity and certainty.

   The second, this is not a breakthrough or a "revolution" but rather placing emphases and shifting weight, so that implementation of the tests would not become a long-time habit, in a formalist mechanical manner, without considering the details and the overall picture, and while exercising mental flexibility, which is required due to the change of time.

   This type of implementation that acknowledges almost every independent contractor as an employee disregards the unique

characteristics of the status of an independent contractor that differs from an employee as at the end of each case there is an independent contractor wishing to be acknowledged as an employee. In this sense, the importance of refinement, clarification and emphases in the President's in-depth opinion are brought, *inter alia*, also in response to the vagueness in respect of the tests that were exercised to date in claims for acknowledgment of employee-employer relations in retrospect.

2. I agree with the ruling that examination of good faith at the preliminary stage for ruling on the status of a person as an employee or an independent contractor could deprive one whose status was forced upon him. However, the new labor world is no longer homogeneous as it has been and includes only employees who wish to work full time, five days a week. In the new world employees change workplaces, at times they decide on taking breaks of their own initiative, civilians after the age of retirement join the labor circle, there is more employment in part-time positions, employment of workers through human resources' contractors, employment of workers as independent contractors, work from home and in general work that is performed without a physical office, work in flexible hours, placing an emphasis on time with the family or time dedicated to leisure (see: Lilach Lurie, Employment and Social Security Laws in the Twenty First Century, (2013), p. 51, and see the discussion there on the approach of occupational transitions that reflects the dynamics in the modern labor market). All these indicate the free choice of every person in designing his daily routine.
3. Hence it should not be ignored that the changes in the labor market led to the siltation where in whole industries the work relations are of customer-independent contractor and almost no hired employees. This format of employment also constitutes a convenient solution for the

workers themselves as the principle of occupational security is far from them, as are stability and tenure, and also this wish should be respected. As specified in President Wirth Livne's opinion, this type of employment enables variety to one who chooses so and supplementary income to one who needs it. The Gig Economy allows making a living by use of an apartment owned by the contractor (Airbnb), use of a car (Lyft, Uber), bicycle (Wolt). These statements are especially true as some of these occupations still belong to the traditional labor relations alongside the new platforms. It is precisely due to this, that it is right to consider those who wish to leave the circle as those expressing the desire for flexibility while exercising their right to freedom of occupation. Moreover. It appears that the principle of employment security that is provided to employees lost its glamor as during a pandemic many employees in the private sector were sent to leave of absence, while in the public sector in Israel employees were forced to use vacation days. Some of the employees in the private sector did receive unemployment allowances as some of the self-employed persons obtained grants. However, one way or another, it appears that examination of the consequences of last year's employment crisis is too early for determining that they emphasized the importance of the status of employee and its being preferable, as his significant rights were taken away from him especially in a realty lacking certainty as to his future upon termination of the leave of absence.

4. And yet the question remains, is the only solution for all workers in these domains as well as the communications, all types of media, art and leisure industries, in which there is high mobility, acknowledging them as employees? In my humble opinion the answer to this is not simple, and although it is not required for this opinion, it would be appropriate that unlike the protective laws that apply to employees, a

social safety net would be established for independent contractors of all types. The true distress of independent contractors who are forced to lack legal and social protection in a reality where their share in the labor market is increasing, requires outlining new game rules that suit the unique needs of the new participants (for example, commencing the year gone by, the independent contractors within the stage arts domain are entitled to unemployment allowance under certain conditions). However, this should not be carried out by forcing the old rules on the labor market that apply to employees and are not suitable for the passing of time. In such a situation, labor law, which is paternalistic for good and justified reasons, clashes with the employment formats that are authentic, in which diversity and impermanence are of considerable importance, alongside the involved meanings such as lack of occupational security as well lack of organizational protection, which have secondary importance in such formats. In this situation it is doubtful whether the paternalistic approach suits the new players in the labor market, those who dictate the conditions from the position of power and are of desirable human capital.

5. At this stage I would like to briefly address my colleague Justice Davidov Motola's central argument according to which use of the principle of good faith undermines the cogency of the status of employee. First, this is a status that is not regulated by legislation and is rather the creation of case law that drew its inspiration from the protective legislation. However, we are not discussing rights by virtue of protective laws, but rather status.

   Second, also the principle of good faith is cogent, even if limited. As the parties cannot agree that they are exempt from the duty of good faith (FH 22/82 **Beit Jules Ltd. v. Raviv Moshe & Co. Ltd.** IsrSC 43(1)

441, 462 (1989); my colleague Justice Hanna Ghendker-Ofek's essay - Basic Rights, Protective Legislation and Good Faith - Constitutional Reflections on Labor Law, **Mishpatim** 37, 63, 70 (2007)).

Third, the cogency of the status of employee will continue to be reserved for one who is an authentic employee, however regarding an independent contractor who wishes to be an employee, and turns out not to be so, there is no room not to examine the question of good faith regarding him.

Fourth, lack of good faith is not expressed by merely filing a claim, but rather by examination of characteristics or behavior along throughout the relations between the parties. Therefore, I believe that emphasis should not be placed on the degree of clarity of the lack of good faith, but rather on its mere existence based on accumulated evidence as specified below.

6. Therefore, law, including labor law is required to adapt itself to the new labor market. Yesterday's world is led by rules that do not provide a solution for a market, part of which is driven by varying and renewing needs. Therefore, I do not share the concern that addition of the test of good faith has lateral implications, as it is precisely leaving the current situation, in which traditional tests do not provide a solution, which unnecessarily expands the sheet.
7. In this sense I agree that the test should be shifted to the first stage of conducting the tests already at the "entry gate" rather than to the second stage of examining the due monetary rights. At this stage also the parties' good faith has decisive weight. In the same manner as an employer acts in lack of good faith towards one who is an employee, however forces him to be deemed an independent contractor, so it is required to act towards an employee who acts in lack of good faith,

while benefiting from the fruits of the engagement format over many years and upon termination thereof claims his rights as an employee.

My colleague the President pointed out that only clear lack of good faith justifies denial of the status of employee from one who was an independent contractor. I believe that emphasizing the clarity of lack of good faith is not required. Lack of good faith is lack of good faith. There is no need for scales for weighing good faith as part of labor relations and outside them other than in cases where both parties acted in lack of good faith, as shall be specified below.

8. Thus it is required to ask, *inter alia*, and not as a closed list, the following questions, according to which the question of whether employee-employer relations would not be acknowledged due to lack of good faith would be ruled upon:

   a. **Is this an employee who needs protection** - for this a number of parameters may be taken into account:

   The nature of the position, type of profession and seniority of the position.

   The financial value of the employment agreement - is the contractual consideration that was agreed upon by the parties higher than the consideration as a hired employee with adding the social provisions and the value of non-monetary rights. This type of situation indicates that this is not a weak employee requiring protection.

   The parties' conduct upon executing the employment agreement - was there opportunistic conduct on the part of the employee. Meaning, had the employee, being aware of the differences request engaging as self-employed, wishing to generate a benefit. Is it possible to prove that this is a clear interest of the employee? Who initiated the engagement as a contractor? What are the motives? The overall provisions of the

contracting agreement and the circumstances of execution thereof - what were the shares of the employee and the employer in making the decision on the format of the engagement? Did the employee reject an offer by the employer to be an employee?

The parties' conduct during the period of the labor relations - and in such, weight would be given to a consistent declaration towards third parties in respect of the status (see LCH 48/3-137 **Tamar Adar - Melnik Advertising Ltd.** 20(1) 060 (1988), where it was ruled that "the way the parties viewed the relations between them or how they defined it, are of no importance while a person's classification as an "employee" or as "self-employed" is to be ruled upon" LCH (340/3-129[11], p. 260). However, A party's presentation of the relations before various external parties, consistently, would be weighed together with other indicators, and in aggregate with them, in the question of whether the claimant was indeed an "employee" or not").

b. **Can lack of good faith on the part of any of the parties be proven** - as part of this it may be examined: Was the worker at the status of self-employed prior to the engagement and wished to continue being so? Can the worker's awareness of his rights and the meaning of defining the status be proven (see LabC (Jerusalem) 1801/01 **Yoav Koren - Emuna College** (01.12.2005)) where it was ruled that "the plaintiff attempted to present himself as one who is not aware of the rights an "employee" is entitled to, and we did not view this attempt to present himself as completely "ignorant" concerning all related to employees' rights to be credible, to say the least, and this given the occupational background and extensive experience the plaintiff accumulated at previous workplaces. The Court has no doubt that the plaintiff was aware of the basic social rights an "employee" is entitled to, and ultimately this is indicated also by his testimony... Additionally,

as one who for many years was at the status of “employee” and later decided to become “self-employed,” there is no doubt that the plaintiff was aware of the differences between an “employee” and “self-employed”).”

On the part of the employer, it may be examined, *inter alia*, to what extent was he aware of the implications of classification as an independent contractor and especially the legal ones, did he do so pursuant to a legal opinion, did he do so consistently towards all the service providers of the plaintiff's type and more.

Was there direct or indirect coercion of either party to choose a certain format of employment upon executing the employment agreement.

What was the parties’ conduct during the work period? Had changes occurred in the bargaining power or employment conditions over the work period.

Weight should be given to the duration of the employment, and to the question of whether during it there were offers for changing the status by any of the parties. The longer the period of employment, in the format that was agreed upon, and it cannot be proven if either party has requested to change the employment format during the period, this should be deemed *prima facie* agreement of the parties on the format of employment, as it would be required to consider the true ability of the "service provider" to refer after some time and ask the organization for a change in the nature of the employment from "service provider" to "employee", subject to the essence of the position and his seniority. The ability of a senior executive in the organization to request such a change is not similar to the ability of a junior employee at the organization.

c. **The question of consent** - among all considerations, it is required to examine the question of consent, which of course in itself cannot change the status of the employee as being one, however it could join

all the existing considerations, particularly when discussing an employee that does not require protection who ultimately was found to be lacking good faith. Consent, as previously explained is an expression of free will, which under the appropriate circumstances should be given weight. It should be noted that in this regard consent is not only explicit, but rather also implicit.

d. **The worker's waiver of cogent rights** - in order to acknowledge waiver of status it is required that two preliminary conditions are met: First, that the waiver would be as the person is informed, meaning that the worker would be aware of his rights before considering waiving them (see: the LCH 33/12-3 **Ilya Chibotero - Atelka Avraham,** IsrLC 4 173, 177). Secondly, that the waiver be made of the worker's own free will, not as a result of the unbalanced powers between him and the employer (Ruth Ben Israel, Labor Law II, p. 387). So long as this is a waiver that is the result of the employer's interest (reducing costs of work, managerial flexibility, etc.) it should not be acknowledged. Also in a situation where the employee's interest is added to this (such as the wish to be paid a higher sum while waiving ancillary social rights) the point of origin would be that it should not be acknowledged. However, the situation is different when additional data are added to the equation such as: This a "strong employee" who is aware of his rights, who of his own clear interest chose to engage in a contracting format, and his claim in retrospect of rights by virtue of the protective laws is tainted with lack of good faith. In such a situation weight would be given to the lack of good faith that would overcome acknowledgment of his status as an employee.

9. To this should be added the characteristics the President pointed out in her opinion, including examination of the industrial context and

including the formats of employment customary in certain industries; mapping the parties' interests: The services provider who prefers this due to the tax benefits and occupational flexibility. The employer who reduces expenses, bypassing the limitation of permitted available positions, etc. Should it be a common interest, there is no room for granting the "employee's" consent and in this too there is an aspect that expresses lack of good faith. All aspects that shall be specified below may illustrate the extent to which leaving the examination only to extreme cases of clear lack of good faith, misses a broad variety of cases in which lack of good faith regardless of its degree has an impact on ruling on employee-employer relations.

10. Further, mapping of the various situations that could be established indicates the existence of three possibilities. Where it is ruled that alongside meeting the traditional tests the employee acts in good faith, there would be employee-employer relations regardless of the employer's good faith. Where he acts in lack of good faith vis-à-vis an employer acting in good faith, it would be ruled that employee-employer relations did not exist. Where both parties act in lack of good faith, it is required to examine the degree of lack of good faith. Should it be ruled that the employer's lack of good faith was greater or that it is not possible to rule on, the scales would tip towards acknowledgment of employee-employer relations. Whereas should it be possible to determine that the lack of good faith of the one claiming to be an employee is greater, the claim for acknowledgment of labor relations between the parties would be denied.

11. Thus, implementation of the principle of good faith alongside the traditional tests, in the cases of the appeals before us leads to the following result:

LabA 15868-04-18 Gabriel Kotta - the Ra'anana Municipality

Alongside examination of the traditional tests by President Wirth Livne in her opinion that the negative aspect was not met, it is required to give weight to the ruling of the Regional Court regarding Mr. Kotta's good faith as stated in section 15 of its judgment:

> "**Seventh**, upon commencement of the engagement between the parties the plaintiff worked at the employer as a hired employee. After a short time the model of the plaintiff's employment was changed. Along with the change of the model of the plaintiff's employment, his wages were changed as well, and were set at a higher sum than that he would have obtained had he been defined as a hired employee in the first place, as shall be deliberated upon below. The plaintiff reported to the tax authorities as self-employed, offset his expenses, paid social security fees, etc.
>
> The plaintiff himself testified before us that over the 22 years of employment by the defendant to date he has been working at the Rishon Letzion country club in the same manner he was employed by the defendant (p. of the protocol, lines 6-8). When the plaintiff was asked whether he filed a claim against the Rishon Letzion Municipality, the plaintiff replied that he does not intend to file a claim so long as he works there, and that he had not yet decided what to do about it (p. 4 of the protocol, lines 9-16).
>
> What more so, the plaintiff himself testified that he was a hired employee at the Givatayim Municipality during part of the relevant period (p. 4 of the protocol, lines 24-25). Additionally, the plaintiff testified that he is aware of the difference between a hired employee and a worker who is employed as an "independent contractor" (p. 5 of the protocol, lines 2-11).

> **The plaintiff's conduct described above amounts to lack of good faith, however does not amount to extreme lack of good faith that denies the ruling that between the parties there were employee-employer relations**, what more, it was not proven to us that the plaintiff was given true free choice regarding the format of his employment (emphasis added).

Thus, based on the factual assertions of the Regional Court, Mr. Kotta acted in lack of good faith, by claiming that he is an employee while all the characteristics specified there indicate otherwise, and to this should be added the characteristics of the occupation as well as the manner in which he acted toward the various entities. For this there is no need for extreme lack of good faith in order to arrive at the result according to which there were no employee-employer relations between the parties. This is alongside the other tests where use of the principle of good faith assists in correctly identifying the true interests of the parties.

LabA 7338-10-17 Dan Rabin - The State of Israel: There is no dispute that it was not determined as a factual finding that Mr. Rabin acted in lack of good faith alongside meeting the traditional tests. There is also no place to rule that the State acted in clear lack of good faith, even if its conduct cannot be deemed an error in good faith. Thus, Mr. Rabin's good faith alongside the other circumstances, together with the State's borderline good faith lead to the aggregated and correct conclusion that there were employee-employer relations between the parties. To this I should add and unlike the President's position, that I believe that the compensation that was ruled in favor of Mr. Rabin is on the upper ladder of the amplitude, as this does not concern an employer acting in lack of good faith and certainly not in clear lack of good faith and a lower sum would have been sufficient, however due to the originality of the precedent ruling and the considerations that were

specified in the President's opinion, I did not see it necessary to deviate from the sum ruled upon there.

LabA 34665-10-17 Zeev Levy - Zeraim Gedera Ltd.: Once it was ruled by the Regional Court that Mr. Levy acted in extreme lack of good faith, I agree with the President's conclusion who adopted these factual rulings and ruled that there were no employee-employer relations between the parties.

12. And back to the beginning. The President's judgment does not undermine the foundations of the system nor changes the world orders of labor law. The tests for the existence of employee-employer relations remain intact and are still valid. However, the judgment seeks to be connected to time and place and this requires, to my humble opinion, restricting the entry gate to those who wish to be acknowledged as employees.

    And after all of these statements, and in order to refrain from increasing disputes, noting those already existing and due to the importance of the issue discussed, I join my opinion to President Wirth Livne's comprehensive opinion, including all parts thereof, its reasonings and conclusions.

Public Representative (Employees) Ms. Yael Ron

I carefully read the comprehensive and scholarly opinions of President Varda Wirth Livne and Justice Sigal Davidov Motola as well as the positions and comments of the other Justices on the panel, and following I shall address the three main issues that were discussed and examined:

Addition of the test of good faith to the tests for identifying employee-employer

1. In this matter I join Justice Davidov Motola's position for her reasons and reasonings, to which I would like to add a few words.
2. I should outright say that I agree with the principled position according to which not any claim of an employee for acknowledgment (in retrospect) of employee-employer relations should be accepted and that not all relations originating from work are employee-employer relations. Additionally, I am even willing to assume that there could be rare situations in which extreme and clear lack of good faith of a worker would be taken into account **as part of the overall considerations and tests** for examining employee-employer relations under the special circumstances of any rare situation, for example, that stated in the last paragraph of section 55 of President Wirth Livne's opinion, and as shall be clarified in the ending clause of section 13 below.
3. The purpose of labor law is expressed by protecting a person's rights to dignity and liberty even as being an employee. Contrary to the general law in which the individual's autonomy is given great weight, labor law has always advocated the approach, that it is required to intervene in the individual's wish and nullify the employee's possibility to waive as part of his employment the rights protected by cogent protective legislation, even if the waiver was made through a signed contract, given the employee's full consent and the full personal wish of the employee.
4. Defining the position of a working person as something close to "status" was rooted in the case law rulings of the Labor Courts over the years, and the ruling according to which an employee's cogent rights cannot be waived or stipulated upon by consent and/or demand and/or

request of either party to the employment contract (or both), was able to deter over the years quite a few employers and employees from engaging between them in agreements that deny the status of the worker as an employee, this in cases where the case law tests provide a relatively clear picture, that there are indeed employee-employer relations.

5. Meaning, the guiding principle for fulfilling the purpose of labor law and the protective laws is that an employee would be classified to begin with as an "employee" rather than "self-employed" and benefit throughout the entire duration of his work from the rights he is entitled to as an employee. This is of course where the position to which he was appointed meets the case law tests.
6. I do not believe that consent and/or demand and/or request of an employee to engage with an employer other than as part of employee-employer relations, but rather as "self-employed" for such or other considerations that were good for the employee at the time of engagement, even if they are no longer so after time due to a change of circumstances, should be acknowledged in retrospect as extreme and clear lack of good faith on the part of the employee, as the employer is fully exempt from liability for the agreement he signed.
7. The employer, who is usually the strong party to the engagement (and when discussing employees who are assigned to senior positions - he is at least equal to the employee in terms of power), knows or should know when an employee's request or demand to be employed in a format of employment that is not employee-employer relations, is inconsistent with the provisions of law and case law. Therefore, an employer who knowingly agreed to engage with an employee in such an agreement, I believe fully shares the liability in signing the agreement and cannot rely on rejecting the claim even where he proved extreme and clear lack

of good faith on the part of the employee. Furthermore - I believe that even should the employer prove a lack of good faith on the employee's part, I doubt whether such extreme and clear lack of good faith could overcome the employer's knowingly acting contrary to the provisions of law and case law, which amounts to denial of a worker's status as an "employee," and as a result denial of his cogent rights.

8. The term "good faith" was not given a positive and concrete definition, neither under law nor in case law. In her book "Contracts Law" Gabriela Shalev addresses this, stating that: "Its content is set retroactively per the cases in which it was actually exercised" (Gabriela Shalev and Efi Zemach, **Contracts Law**, Fourth Edition, Nevo Publishing 2019, p. 75).
9. In our case the question of the existence of employee-employer relations is directly and inseparably linked to the cogent protective laws. Meaning, should it be ruled that the case law tests are met in the issue of a certain employee, there would be immediate application of the cogent provisions to that employee. This means, as I understand, that in exercising the principle of good faith in practice in those rare cases already at the first stage, meaning the stage of the tests, could draw back those cogent provisions behind the principle of good faith.
10. Moreover. Exercising the principle of good faith that is mainly dependent on the Court's impression in a concrete case, would not enable an employee or one employing people in the future to expect in advance how the Court would usually act and adjust their behavior accordingly. Furthermore, providing the possibility in some cases, even if they are exceptional, to deviate from the provisions of cogent law due to the principle of good faith, I believe could turn over time any discussion on the question of acknowledgment of employee-employer

relations in retrospect to a discussion on the question of why the Court should not deviate from the law.

11. Hence I believe that should a claim for acknowledgment in retrospect of employee-employer relations be denied already at the first stage due to extreme and clear lack of good faith on the part of the employee, the employer who did not act pursuant to the provisions of law and case law, and knowingly and/or reticently and/or by turning a blind eye signed a non-authentic agreement and due to this failed to execute his obligations pursuant to the protective laws throughout the entire employment period, would not be deterred, would not be required to pay anything at all for his conduct and it is possible that in some cases he would be entitled to expenses for denying the employee's claim. In this sense, this is an employer whose "sins are awarded."

12. Moreover, should no liability be imposed on the employer, despite sharing (actively or passively) the problematic engagement contrary to the provisions of law and case law (even if stemming from the employee's wish and/or his unequivocal demand), I believe that this would not assist in similar cases in the future in authentic engagement between employees and employers, but rather I believe that this would reduce the motivation for employers to employ employees as part of employee-employer relations, since in any event they would not be required to take responsibility and "pay" for their failures should a claim be filed in the future. Furthermore, I am concerned that employers would find the ways to make employees sign yet prior to the stage of engagement documents declaring that the format of engagement other than as part of employee-employer relations, was carried out per the employee's request / per his wish, etc. declaration documents that would assist the employer in the future in proving that

the employee was the one who acted in extreme and clear lack of good faith.

13. Thus, I believe that bringing in the principle of good faith to the layout of the relevant considerations already at the stage of the tests for acknowledgment of employee-employer relations, amounting to opening the possibility to deny an employee's status as an "employee" for this reason, could lead to deviation from the provisions of cogent law, legal uncertainty in future cases, and over time also turning every discussion on the question of acknowledgment of employee-employer relations in retrospect to a discussion on the question of why the Court should not deviate from the law. At the same time, I am willing to assume that there may be rare and unusual situations in which extreme and clear lack of good faith on the part of a worker, under the special circumstances of that case, could justify denying him in retrospect rights based on his status as an employee, as stated in the obiter in the **Buchris** case, as aforementioned in the ending clause of section 55 of President Wirth Livne's opinion and as stated in the second paragraph of section 30 of Justice Sigal Davidov Motola's opinion.

    It should be emphasized that I agree with the exclusion of those exceptional and rare cases, notwithstanding that stated in sections 6-12 above, provided that the employer did not have any possibility in those cases to prevent in prior the worker's conduct in lack of good faith, nor had he acted at any stage contrary to the provisions of law and/or case law.

Settling Accounts in Retrospect

14. I join the innovation the President set regarding the manner of settling accounts upon acknowledgment of employee-employer relations in retrospect, as well as the comments of Justice Sigal Davidov Motola

and Deputy President Justice Ilan Itah on this matter. I believe that the possibility to award non-monetary compensation would enable balancing better at this stage, *inter alia*, in cases where it was proven that the employee acted in extreme and clear lack of good faith, whether by this conduct on the part of the employee or his conduct contrary to the provisions under law and case law applying to the employer, and in the appropriate cases prevent the employee from obtaining any compensation, although pursuant to the existing tests he had been acknowledged as an employee in retrospect. I believe that ruling on non-monetary compensation for an employee, *inter alia*, due to the employer's conduct, or preventing such a compensation from the employee due to his conduct in lack of good faith, would have a significant deterrent effect both for the employer as well as the employee in future cases.

The Results of the Appeals

15. I agree with the outcome proposed in President Wirth Livne's opinion in respect of each of the three appeals. Concerning the **Kotta** case and the **Levy** case, I join the reasons and reasonings presented in Justice Davidov Motola's opinion.

Public Representative (Employers) Mr. Atzmon Lifshitz

1. First I join in full support the President's position, as specified in her opinion and in "Conclusion", also regarding the time of ruling on the question of classification (whether we are discussing an employee or one employed otherwise), as well as the manner of calculating the compensation to be awarded to the employee (should it be found that he is entitled to compensation for legal rights), and the sum of the monetary compensation that would be imposed on the employer

(should it be proven that he acted in lack of good faith in defining the employee as a contractor/self-employed).

However, I wish to add a number of insights, referring to her opinion as follows:

a. As noted in the description of the historical process of the development of labor law over the years, the normative basis existing to-date was not to apply the principles of contracts law to labor laws. The main normative argument was that “work” is not a “product” and it is required to apply to labor law, in all concerning the parties’ obligations upon entering a contract, principles that differ from those that are customary in contracts law.

In the past it was possible to accept the distinction stated above, since for many years most employees worked in positions for which no great expertise was required and generated a product that could be seen, measured, and in many cases even sensed. In such a situation, it was possible to support the assumption that there is a difference between "work" and "product.”

However, and this is a big however, over the years and as the labor market required specific expertise that are based on acquired complex know-how - relevant practical professional background the employees acquired through education and/or work and/or independently - have an increasingly significant part in the various positions in the current labor market (and certainly in the future labor market), it has completely different characteristics that distinguish it from the types of positions we knew in the past.

For many positions in the hi-tech world, science in various fields, academic research, medicine, finances, social network technologies, advanced marketing and many other positions, the applying employees

are those who are able to choose the manner and place of employment, at a higher bargaining position vis-à-vis those who wish to hire their services. In these cases, (which as stated, become more and more common as the technologies in the various fields progress), the deliverables, the employed persons are willing to offer, mainly based on personal know-how and experience, and constitute their special expertise, as we have defined them in the past as a "product."

The product of then constitutes the deliverables of today!!!

The deliverables of those workers are in many cases difficult to quantify, intangible, and therefore it is difficult to define them in a physical or quantitative manner. Hence identification of the deliverables in the present labor world, and more so in the future, with the old term "product" is problematic and inconclusive.

And therefore I believe it is required to apply the principle of good faith upon executing the contract, also to the one writing/planning/calculating the deliverables of today (and as aforementioned tomorrow as well) as they have the ability to understand the meaning of their decision regarding their preference of the manner of their employment, the employment terms, etc.

As to our case, when this type of worker who attempts to claim in retrospect that he should be acknowledged as an "employee", despite the fact that it was proven that to begin with he was the one who demanded to be employed as an independent contractor/freelance worker, rather than as an "employee" for his own reasons, it is required to deny his claim **per the duty of good faith**, rather than base the ruling on the normative principle, that duties imposed on the parties pursuant to the Contracts Law should not be imposed on the employee.

b. I agree that there is still room for applying the paternalism stemming from the cogency of some of the labor law to those workers

who need protection vis-à-vis powerful employers who may abuse the power gaps between them. However, I disagree with the assumption that this paternalism should apply to all positions, all professions and all sectors of the economy. As I argued above, there are more and more cases, in which it is possible to exercise the requirement of good faith, also on the part of the worker, rather than only on the part of the employer. The higher professional and/or administrative and/or financial skills of the workers are, so a higher degree of good faith in their conduct may be required of them.

c. I agree with the statements in the positions of Justice Poliak (section 9 of his position) and Justice Soffer (section 2 of his position) regarding the argument that not only financial considerations could lead the worker to request that no employee-employer relations would be established, but rather additional considerations as well: Occupational flexibility, balance of family-work life, etc., as this phenomenon becomes broader within the current employment world, and may even expand in the future labor world. Thus it is not possible to analyze the process of the worker's choice only on a purely financial basis, of earning the financial payments he would be entitled to, but rather also on additional considerations that guide the worker in the manner in which he wishes to engage with the financial organization he is engaging with.

2. **Excess Funds Held by the Employee -**

Section 75 of the President's opinion does not address a situation where during the legal proceedings it was found that the worker was the one who in fact requested to be employed as a service provider rather than an employee, and by calculation it could be proven that the total payments he obtained from the employer are higher than those the

employer would have paid him according to the calculation of hired employee's wages.

In this type of case, I wish to argue that the worker should be required to repay the employer the gap between the two amounts.

I believe that the principle that should lead us is that the same rule would apply to both the employer and the employee. In so, neither party would benefit from funds that are not payable to him under law, should it be proven that one of them acted contrary to the law and in lack of good faith.

The element of reimbursement of the funds by the worker is his "risk tag," and therefore it is advisable that he would consider in advance requesting the employer for fictitious employment and/or carefully consider whether there is room for suing the employer in retrospect, as it is clear that the choice of this particular format of employment was that of the worker rather than the employer's preference/demand.

3. **Concerning the Rulings on the Cases Before Us -**

a. **Mr. Kotta's case** - I agree with the President's opinion for her reasons and ruling.

b. **Mr. Rabin's case** - I agree with the President's opinion for her reasons and ruling.

c. **Mr. Levy's case** - I agree with the President's opinion for her reasons, except for her statement on refraining from imposing on Mr. Levy additional expenses due to the appeal proceedings at the National Court (section 143 of the opinion).

I wish to argue that in a case where it is clearly proven that the worker acted in lack of good faith by filing the claim against the employer, it is required to charge him with extremely high expenses.

Exactly as we wish, rightly, to deter employers from inappropriate conduct toward employees, and therefore in the appropriate cases rule on compensation and/or expenses at the high bar, it is required to act per the same criteria also in respect of workers, where it is learned upon completion of the proceedings, that they filed their claim and managed the proceedings in clear lack of good faith.

Our goal should be deterrence and prevention, to the extent possible, of conducting unjustified appeal proceedings, and prevention of unjustified exploitation of the fact that the Labor Court's open door enables anyone to argue and/or undermine the various stages of the proceedings. Thus, in view of the reasons for the ruling in Mr. Levy's case, I believe it is required to increase the total expenses that were ruled against the worker in the case, and rule that he is to pay additional expenses at the sum of NIS 15,000 for the expenses of conducting the appeal proceedings at the National Court.

4. **A Note in Conclusion –**

I would like to argue, that it is required to change the legislative definitions and in use at legal proceedings (the statement of claim onwards) the term "employee" to be the term "worker."

The use of the word "employee" in fact determines in advance the status, yet before it was proven whether we are discussing the case of an "employee," "self-employed," "freelancer," "service provider," "free participant," etc. The proposed change is not semantic at all, and I believe it correctly reflects the main reasons in the President's opinion, which I support, as aforementioned, in conclusion of this point, I should note that as it was ruled in the past, due to the circumstances of time and social perceptions, the ruling justifies changing the term

"employer" to "manager", it is proposed to change as a supplementary step to this judgment the term "employee" to the term "worker".

Conclusion

LabA 15868-04-18 (Gabriel Kotta - the Ra'anana Municipality) and LabA 12372-04-18 (The Municipality of Ra'anana - Gabriel Kotta

Agreed by all members of the panel, Mr. Kotta's appeal is rejected in full, and the Municipality's appeal is accepted in part, due to our ruling that there were no employer-employee relations between Mr. Kotta and the Municipality, however the claim for reimbursement is denied.

Noting all circumstances of the matter - there is no order for expenses.

LabA 7338-10-17 (Dan Rabin - The State of Israel - The Ministry of Justice)

All members of the panel agree that the State is required to pay Mr. Rabin non-monetary compensation in the sum of NIS 120,000, and this pursuant to the new principles as to the manner of settling accounts upon acknowledgment of Employee-employer relations in retrospect as specified in sections 63-73 as well as sections 122-125 of President Wirth Livne's opinion and sections 12-27 as well as 44-46 of Justice Davidov Motola's opinion. This sum is to be paid within 30 days from today.

Additionally, the State shall bear the expenses of the proceedings at both instances, in the sum of NIS 30,000.

LabA 34665-10-17 Zeev Levy - Zeraim Gedera Ltd.

Agreed by the majority of the members of the panel: Deputy President Ilan Itah, Justice Leah Glicksman, Justice Sigal Davidov Motola, Justice, Hanna Ghendker-Ofek and Public Representative (Employees) Ms. Yael Ron that Mr. Levy's appeal regarding the question of existence of employer-employee relations under the circumstances of his employment should be accepted. This is vis-à-vis the dissenting opinion of President Varda Wirth Livne, Justice Roy Poliak, Justice Ilan Soffer and Public Representative (Employers) Mr. Atzmon Lifshitz that the appeal should be denied, and it should be ruled that no employer-employee relations existed between Mr. Levy and the Respondent.

At the same time, all members of the panel agree that the outcome of the appeal is that Mr. Levy is not entitled to any monetary rights, nor non-monetary compensation, and therefore his monetary claims are denied.

As to ruling on expenses - the majority of the panel members believe that the expenses that were ruled against Mr. Levy at the Regional Court would be deemed expenses at both instances. Public Representative Mr. Atzmon Lifshitz, in an individual opinion, ruled that Mr. Levy is required to pay additional expenses in the sum of NIS 15,000 for conducting the appeal proceedings at the National Court.

Given today, April 7, 2021 in the absence of the parties and will be sent to them.

Signatures:

Varda Wirth Livneh, Persident.

Ilan Itah, Deputy President.

Leah Glicksman, Justice.

Sigal Davidov Motola, Justice.

Roy Poliak, Justice.

Hani Ofek Ghendler, Justice.

Ilan Soffer, Justice.

Ms. Yael Ron, Public Representative (Employees)

Mr. Atzmon Lifshitz, Public Representative (Employers)