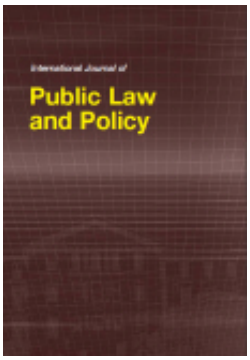

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Consultancy agreements as a mechanism to defraud employees under Jordanian law

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Abstract: In various recent cases, numerous employees have sued their employers before the Jordanian courts to pay their unpaid labour rights. Yet, such employers sought to disavow such claims by alleging that what bind them is a consultancy agreement rather than an employment agreement. Accordingly, such paper seeks to critically inspect the abovementioned courts' decisions, to illustrate whether such courts have been successful in what they have found, and the extent to which it facilitated deceiving employees by unscrupulous employers under the pretext of consultancy agreements. This work suggests that whilst the eminent Jordanian courts' decisions have mostly been elegant and do comply with law, yet the Jordanian legislator has to intervene and regulate such a matter to stop defrauding overwhelmed employees. As far as the author is aware, this is the first scholarly work that addresses this important matter from a legal standpoint, at least from a Jordanian law perspective.

Keywords: consultancy agreements; employment agreements; Jordanian Labour Law; employees' rights; defrauding employees; employment crime.

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1 Introduction

It is well understood that various ordinary employees might not be able to handle all of the tasks that their employers would request them to do and that different exceptional tasks might need professional individuals who can carry out it (Alahmad, 2004).

Therefore, different employers would usually resort to conclude consultancy agreements rather than employment agreements with such professional individuals to facilitate their needs and whereas the latter would not accept becoming an employee of such employers for a reason or another (Thorn and Jonsson, 2013).

Whilst such a consultant may reap many advantages as a result of concluding a consultancy agreement with these employers (Ramadan, 2004), a consultant under these consultancy agreements would not be eligible to the different and valuable rewards that an employment agreement would provide to an employee (Alahawani, 1991). For example, a consultant would not be eligible neither to different paid holidays and vacations nor overtime allowance, amongst many other advantages that pertain to an employment agreement (Almoghrabi, 2010).

Yet, and in contrary to what many would expect, different Jordanian employers have contracted with different employees under consultancy agreements in order to prevent the latter from the different rights that the Jordanian Labour Law for the year 1996 has stipulated for.[1] When such employees have sued their employers before the different Jordanian courts, the eminent courts have resorted to the different relative provisions that the Jordanian Labour Law for the year 1996 contains in this regard, and in order to decide whether the agreement in dispute is an employment or a consultancy agreement. As a result, it is submitted that the outcomes of the Jordanian courts' decisions are interesting and shall be reviewed accordingly.

Therefore, this work seeks to review and critically inspects the abovementioned decisions and legal rules in order to illustrate the extent to which the Jordanian courts were successful in what they have found and the extent to which it has facilitated deceiving employees' rights by unscrupulous employers under the pretext of consultancy agreements. In doing so, such paper will illustrate and critically investigate the various and most pertinent existing secondary data and this shall comprise the various relevant applicable law rules, judicial precedents and jurisprudence. Whilst this work suggests that the Jordanian eminent judiciary has pursued to a great extent an acceptable tactic in this field of law, yet it is suggested that the relevant various judgements and law provisions have involved vital questions and have neglected imperative principles that should have been illustrated and dealt with.

In view of this, this work will be divided into three main sections. Section 2 and Section 3 of this paper will consecutively offer the person who reads it a brief background pertaining consultancy agreements, the Jordanian Labour Law, employment agreements and the elements that shall be existent in such agreements and which distinguish it from other agreements. In its turn, Section 4 will shed the light on the Jordanian courts' different decisions and its exceptional consequences into this particular field of law. The different relative dictums found in these decisions will be accordingly inspected. Throughout such inspection, the authors will demonstrate the extent to which the Jordanian judiciary and legislator have been successful to date and the extent to which it has facilitated deceiving employees' rights by unscrupulous employers under the pretext of consultancy agreements. Finally, Section 5 concludes the paper.

2 Consultancy agreements

In general, a consultancy agreement is an agreement for services that is concluded between an independent contractor, who is a self-employed individual, from one side,

and a client, who is usually a company, from another side, for consultancy services which the former will provide to the latter.[2] This kind of contracts is usually used by such clients in order to engage consultants in providing professional services to them whereas the latter shall not at anyhow be considered as employees (Almoghrabi, 2016). By and large, such clients do resort to these consultants to supply their professional services whereas ordinary employees cannot provide such a distinctive kind of services (Thorn and Jonsson, 2013). By doing so, the consultant would not be considered as an employee and would not benefit from the different entitlements and advantages that an employee would benefit from by the virtue of the applicable labour laws (Alahawani, 1991; Svensson, 2011).

From a Jordanian law perspective, Article 780 of the Jordanian Civil Code for the year 1976 has defined a contractor agreement as "An agreement whereby one of the parties undertakes to make something or to perform a work in exchange for a consideration that the other party undertakes."[3] The former does so as an independent person who is not affiliated to the latter at any how and this is what distinguishes such kind of agreements from employment agreements.[4] Whilst a definition for the term consultancy agreement has no place at the different Jordanian legislations, the Jordanian different courts and jurisprudence have stated in different occasions that a consultancy agreement is in fact a contractor agreement (Alfar, 2020).[5]

3 The Jordanian Labour Law, employment agreements and its distinct elements

The foremost Labour Law in Jordan was enunciated as early as the year 1960.[6] However, and as referred to above, the Labour Law for the year 1996, 'The Labour Law', is the law that does regulate the relationship between employees and employers in Jordan at the moment (Alawamleh, 2021). It would not be surprising to say that such a piece of law has undergone many amendments during the last years in order to address the different needs and developments that this area of law has witnessed (Abo Shanab, 2001).[7] It is also worth to mention that this law has been established at the first place to maintain the employees' different rights and merits before their employers who used to exploit such poor employees previously (Bashayreh, 2009; Kira, 1979). Such a shielding reason has been present at the legislator's mind when drafted such a piece of law and as a result it has become a very distinguished law (Almoghrabi, 2016).[8]

Yet, as to employment agreements, and as per the Jordanian Labour Law, Article 2 of such a law has defined this agreement as "An explicit or implicit, verbal or written agreement under which the employee undertakes to work for the employer under his supervision and management against wages whereas the work agreement can be for a limited or unlimited period, particular or unparticular work."[9] The elements that shall be involved in employment agreements and which would summon the application of the Labour Law to these agreements can be inferred from the abovementioned definition itself (Ismail et al., 2020). These three elements dictates that the work that shall be provided by the employee has to be private, paid and that he does provide it as a dependent and under the supervision and administration of his employer (Almoghrabi, 2016; Abo Shanab, 2001).

As to the first element, which dictates that the work shall be private, whilst Article 2 of the Jordanian Labour Law has defined an employer as "Any natural or legal person who does employ an employee or more in return of wages", such work if shall be provided for a legal person, then this shall not include the state and its organs. This has been stipulated for expressly in Para. a. of Article 3 of the Labour Law which stated that: "…the provisions of this law shall be applied on all employees and employers with the exception of the following: a. Public and municipalities employees…" The latter type of employees is usually called public servants and is subject to the administrative law provisions in general and the Municipalities Law and Civil Service Bylaw in particular (Almoghrabi, 2016; Bashayreh, 2009).

The second element, which can be well-perceived from the abovementioned definition, necessitates that an employee shall be paid for the work that he does provide to his employer (Faraj, 1988). Hence, the work that any person affords to another for free shall not be considered as an employment and thus the Labour Law provisions will not apply to it (Abdelrahman, 2005). It is worth to mention herein that an agreement to the wages can be verbal or written, and if both the employee and the employer do not agree on it at the time whereas they conclude the agreement, then Article 45 of the Jordanian Labour Law shall apply in such a case.[10] In this relation, such an article does provide that:

> "The wage shall be specified at the work agreement. Yet, if the wage is not stated in such an agreement, then the employee shall deserve the estimated wage which is given for a work of the same kind, if any, and if inapplicable, such a wage shall be estimated in compliance with the applicable custom; otherwise and if inapplicable, the courts shall decide it in line with the provisions of this law and as a labor dispute regarding wages."

As also apparent from the definition of the term employment agreement, the third element, and which is the most important element, dictates that an employee shall afford the work to the employer under the latter administration and supervision. This means that, under an employment agreement, the employee shall be dependent on the employer and shall work upon his discretion (Aldaoudi, 2016). This dependency does denote that an employee shall be subject to the employer's power during carrying out his work and so the employer can direct commands to such an employee and that the latter shall obey it (Cochrane and Mckeown, 2015). This is to say, if such an employee does not obey such commands, then the employer can impose different retaliatory penalties on him and as per the applicable provisions.[11]

However, it is submitted that such obedience is not without its conditions as per the existent law, judicial precedents and jurisprudence (Aldaoudi, 2016). In this relation, whilst an employer can direct commands to his employees whereas such commands are related to the work, an employer cannot direct commands to his employees that is unrelated to the work, e.g., whom to talk with or to visit outside working time. Moreover, such commands shall not contradict with what both, the employer and the employee, have agreed on at the first place through the employment agreement. Hence, for example, if both agreed that the employee shall work in a particular city, then a command that request the employee's relocation shall not be obeyed by the employee. In addition, an order that would expose the employee to danger shall not be abide by as well. In this regard, Article 78 of the Jordanian Labour Law does dictate that an employer shall "provide the requested precautions to guard the employees from the hazard and diseases that may emerge from his work…"

It is also worth to mention at this stage, that this third element has been held always by the Jordanian eminent courts as the distinguishing element which through it can distinguish between employment agreements and other similar agreements. This was the case in the Cassation Court Decision Number 6978 for 2018, where the eminent highest court has distinguished between a contractor agreement and an employment agreement through looking behind such an element if existent therein or not. In this relation, the court of has held that:

> "What distinguishes an employment agreement from a contractor agreement is the dependency relationship that exists in the former kind of agreements, between the employer and the employee, whereas the former does administer, monitor, instruct, and punish the latter in case he breaks the applicable provisions. It is understood from the Jordanian Civil Code that such a relationship has no place in contractor agreements."[12]

The same course has been followed by the same court whereas it distinguished between an employment agreement and a partnership agreement. In this regard, and in one of the old seminal cases that pertains to this field of law, such a court has held in its Verdict No. 123 for the year 1987 that:

> "The distinction between an employment agreement and a partnership agreement must be based mainly on the lack of the dependency element in the partnership agreement and its availability in the employment agreement. In this case, whereas the plaintiff works for the defendant, under his command and supervision, and receives a daily wage that is half the production of the barber's chair that he works on after deducting the expenses, then the plaintiff is considered a worker and not a partner".[13]

4 The Jordanian courts' attitude towards this thorny matter

Interestingly, in the Court of Cassation Case No. 879 for the year 2017, the plaintiff alleged that he is an employee and accordingly he does deserve different labour rights which the defendant employer did not pay to him. In its role, the Court of Cassation has found for the defendant employer and decided that the agreement concluded between the plaintiff and the defendant is a consultancy agreement rather than an employment agreement. In such a case, the eminent court based its decision as follows:

> "The owner of a profession, such as a doctor or a lawyer, is not considered a worker within the intended meaning, unless he is committed to the obligations of an employment agreement, his fees are paid to him in the form of a fixed salary and does not work anywhere else. Since the plaintiff has concluded legal consultancy agreements with other companies, was pleading on behalf of some other individuals, receiving fees for that and he was not working for the defendant on a full-time basis, there is no dependency affiliation between them".[14]

With all due respect, the author advocates that the abovementioned method which the eminent court has pursued in this regard is flawed and erroneous. Unfortunately, the Court of Cassation has deviated from the framework of the abovementioned elements that are necessary for any agreement to be considered as an employment agreement.[15] Whereas the three elements are existent in the agreement that it has looked through, the

Court of Cassation should have found that the agreement between its hands is an employment agreement rather than a consultancy agreement.

The plaintiff employee in this case was working for a private company, paid wage and was working under the plaintiff administration and supervision and this shall suffice for the court to announce him as an employee and to decide in his favour the different alleged labour rights. Questions as to whether such a plaintiff was working for another company or not and whether in a full-time basis or a part time basis, and whether the fees that he was paid from the defendant was in a fixed basis or not, shall not constitute part of the court's reasoning to solve such an issue. The method that the respectful court has pursued does contradict with the law, jurisprudence and the judicial precedents that the same court has brought up later and earlier.[16]

However, a better tactic can be found in the same Court Decision No. 2891 for the year 2013.[17] At this case, the plaintiff employee has sued the defendant requesting the latter to pay him different due labour rights. However, the dutiful court has confirmed what have been reached by its counterpart's courts earlier and ruled in favour of the defendant on the assumption that he was not an employer. In doing so, the courteous court has stated that:

> "The disputed agreement that is concluded between the two parties is not an employment agreement, as the plaintiff refused to be a worker for the defendant, and that his role was advisory, and that the law, in order for the agreement to be considered as an employment agreement, requires that the worker works under the supervision and management of the employer, … because the criterion for distinguishing between an employment agreement and other agreements is the element of dependency… and this is not available here."

In its fairly new Decision No. 3075 for the year 2020, the humble Court of Cassation has got the chance to hear such kind of disputes again.[18] In this case, the plaintiff Mr. Riyad sued a company that he has working for; 'Jabal Tareq Company', under an agreement labelled as a consultancy agreement. Such a court, and before it, the Appeal Court and the Court of Magistrate, have all found that what ties Mr. Riyad with the defendant company is an employment agreement rather than a consultancy agreement. The defendant company alleged that a consultancy agreement is a contractor agreement and hence the Jordanian Civil Code shall be applied to such an agreement rather than the Labour Law. It alleged also that such an approach would necessarily dictates that Mr. Tareq shall not be eligible for any labour rights of whatever kind. It further suggested that the court shall not go behind the agreement label and so to look in its terms and the work circumstances that surrounded it in order to scrutinise the relationship between both the defendant and the plaintiff. Yet, in response to the defendants' different allegations, the Court of Cassation has stated that:

> "The plaintiff was receiving orders and instructions from Mr. Tareq, the defendant's signatory and director. The plaintiff was working as a project manager related to Alzaatrai, Alkarama and the Dead Sea areas, whereas he was connected to Mr. Tareq who was following up such projects. In light of what is mentioned above, the consultancy agreement is in fact an employment agreement and shall be regulated by the Labor Law."

The same has been followed by the same court two years earlier. In this regard, in its Decision No. 6978 of the year 2018, the same court has illustrated that an agreement that is labelled as a consultancy agreement but that beneath its terms includes an employment

relationship cannot be conferred anything other than an employment agreement.[19] Whilst the court has reached the righteous decision, yet the author submits that its decision was not without its own faults.

The learned judges therein have distinguished between an employment agreement and a consultancy agreement and has illustrated that the dependency relationship is one of the main elements that has to be looked for in order to carry out such a distinction. Yet, unfortunately, the court therein has added that there are other elements that shall be looked for in order to make such a distinction. On one hand, the respectful court has suggested that in an employment agreement an employee has to provide care whilst doing his job and that he is not requested to achieve a result. On the other hand, the court submitted that the contrary is true whereas a consultant shall achieve a result and nothing else. And hence, the court decision shall differ in whether the plaintiff is requested to take care or to achieve a result and this is supported neither by law nor by the jurisprudence and as mentioned earlier in Section 3.

An employee job would mainly revolve around achieving a result and he might not be able to ask for his wages unless he does achieve such a result. This can be seen, for example, in the case of a tailor who merely would deserve his wages when he sews clothes (Abdelfatah, 1998). The agreement between him and his employer might provide for this condition and this can be seen frequently in practice. In contrast, a consultant job might be mainly to provide care and nothing more than care (Alkilani, 2012). This can be seen whereas a lawyer does work as a consultant for one company. In the latter case what is required from the consultant is to provide consultations whereas he does not guarantee results at all (Almoghrabi, 2010).

5 Conclusions

On one hand, different individuals might allege that what bind them with a client is an employment agreement rather than the actual particular agreement that is concluded between them. This is well understood whereas an employment agreement, by virtue of the Labour Law which will apply to it, shall give such an individual different valuable advantages and entitlements which the actual agreement would not give to him.

On the other hand, different employers would seek to pretend in a way or another that what connects them with their employees is a consultancy agreement or any other type of agreement rather than an employment agreement in order to disavow the different rights that such employees are eligible to by the virtue of the Labour Law.

Whilst the three elements that distinguish employment agreements from other agreements are referred to in the Jordanian Labour Law in a way or another, and well-perceived by different courts and jurisprudence, yet as seen above, some of the courts have developed different interoperations and created additional elements which none of the aforementioned law sources have stipulated for at anyhow. Accordingly, such elements need to be well shaped in the next amendments that the Labour Law might undergo.

Moreover, and whereas the different Court of Cassation's cases illustrated through this paper have found that employers have tried to deceive their overwhelmed employees, none of these eminent courts have imposed any penalty on these unscrupulous employers. Such a violation, which through an employer attempts to defraud his employee, is a crime

and hence it deserves a penalty that suits with its massiveness. Whilst the Labour Law itself is full of different articles that criminalise any violation perpetrated by the employer towards the Labour Law, the current author submits that such penalties are weak and need to be tightened and at the earliest possible opportunity.

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Notes

1 The Jordanian Labor Law No. 8 of the year 1996, can be viewed at http://www.qistas.com (accessed 19 August 2021). Such piece of law can also be viewed in the English language at the International Labor Organization website [online] https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/45676/84920/F-1672011876/JOR45676%20Eng.pdf (accessed 19 August 2021).

2 A succinct definition for the term consultancy agreement can be found at the following link [online] https://uk.practicallaw.thomsonreuters.com/2-200-2143?transitionType=Default&contextData=(sc.Default)&firstPage=true (accessed 19 August 2021).

3 The Jordanian Civil Code No. 43 for the year 1976, which can be viewed at http://www.qistas.com (accessed 19 August 2021).

4 See Section 3.

5 This can be viewed at the Court of Cassation's Decision No. 6978 for the year 2018, 3075 of the year 2020 and 7987 of the year 2020 amongst many other decisions, and this can be viewed at http://www.qistas.com (accessed 19 August 2021).

6 The Labor Law No. 21 for the year 1960, can be viewed at http://www.qistas.com (accessed 19 August 2021).

7 The latest amendment to this piece of law has been made on the year 2019, can be seen at http://www.qistas.com (accessed 19 August 2021).

8 See for example, Article 4 of the Jordanian Labor Law No. 8 of the year 1996 [online] http://www.qistas.com (accessed 19 August 2021).

9 The Jordanian Civil Code for the year 1976, which is the mother law of the Labor Law, in its Article No. 805, has also defined the term employment agreement as "an agreement whereas an employee is obligated to work for another person and under his supervision and against a wage", this can be viewed at http://www.qistas.com (accessed 19 August 2021).

10 It is worth to mention that the term 'wages' was explained under Article 2 of the Jordanian Labor Law for the year 1996 as: "All the cash or in-kind entitlements of the employee which he deserves in return of his work, in addition to all of other entitlements of so whatever kind and as stipulated for by this law, work agreement or bylaws or which it has become a practice to pay except the wages that are payable in return of overtime work", The Court of Cassation different decisions do affirm such a fact, see for example: Decision No. 2600 of the year 2001 which has been decided on 30/9/2001, and this can be viewed at http://www.qistas.com (accessed 19 August 2021).

11 See, for example, Article 48 of the Jordanian Labor Law no. 8 of the year 1996 [online] http://www.qistas.com (accessed 19 August 2021).

12 The Court of Cassation Case No. 6978/2018, decided on 19/12/2018 [online] http://www.qistas.com (accessed 19 August 2021). This can be also seen in Case No. 689 of the year 2002, which has been published on 25/3/2002, and in the Case No. 3075 of the year 2020, amongst many other cases, all can be viewed at http://www.qistas.com (accessed 19 August 2021).

13 The Court of Cassation decision no. 123 of the year 1987, published on 18/8/1988, available at www.qistas.com, last accessed on 19/8/2021.

14 The Court of Cassation Decision No. 879 of the year 2017, decided on 5/6/2017 [online] http://www.qistas.com (accessed 19 August 2021).

15 See Section 3.

16 The same line of reasoning has been unfortunately pursued by the Court of Cassation's Decision No. 60 for the year 2018, decided on 29/1/2018, which can be viewed at http://www.qistas.com (accessed 19 August 2021).

17 The Court of Cassation's Decision No. 2891 for the year 2013, decided on 1/12/2013, the same been followed by the same court in its Decision No. 1627 for the year 2004, 1681 for the year 2003, 1853 for the year 2003, 3605 for the year 2016, 2517 for the year 2013, 1121 for the year 2018 and 7987 for the year 2019, which can be viewed at http://www.qistas.com (accessed 19 August 2021).

18 The Court of Cassation Decision No. 3075 for the year 2020, decided on 10/9/2020, which can be viewed at http://www.qistas.com (accessed 19 August 2021).

19 The Court of Cassation Decision No. 6978/2018, decided on 19/12/2018, and this can be viewed at http://www.qistas.com (accessed 19 August 2021).