**National Labor Court of Israel**

Shaul Tzadka (Appellant)

v.

Galai Zahal Army Radio, State of Israel (Respondent)

**SUBJECTS**: Freelancer, individual employment relationship, contract of employment and contract for services, media industry, irregular work relationships, severance pay, notice of dismissal.

SUMMARY:The court held that an Israeli freelance journalist working in London for a newspaper and the army radio station is entitled to receive from the radio station rights granted employees by the Wage Protection Law and the Severance Pay Law. The majority’s reason (Judge Arad) was that the journalist was an employee of the radio station and the concurring opinion (Judge Adler, President) was that he was a freelancer and as such is entitled to some rights granted workers by protective labor laws.

#### RELEVANT STATUTES

 The ***Protection of Wages Law*** requires that wages be paid at the end of the month for which the wages are owed. Failure to pay on time results in a late payment fine which is very high, 5% of the late wages for the first week and 10% for every other week, until the wages are paid.

 The ***Severance Pay Law*** entitles the dismissed worker, who has worked for the employer more than a year, severance pay of one month’s wages for every year worked, calculated upon the last salary which the worker received.

## JUDGMENT

**Judge Stephen Adler (President**) handed down the concurring opinion:

1. At the heart of this appeal is the dispute regarding Mr. Tzadka’ status during the eight years he was London correspondent for the Galai Zahal army radio station and whether it is obligated to pay him severance pay and dismissal notice payment. There is also a dispute whether he was paid for the last few months he did work for the radio station. In short, is Mr. Tzadka an employee of Galai Zahal and, therefore, entitled to rights under protective labor legislation. The Respondent’s defense is that Tzadka worked as a “freelancer”, who is not entitled to labor law rights under Israeli law. Another issue in this appeal is whether to eliminate the freelancer status, which has been recognized by prior case law in the media and entertainment industry. Furthermore, if we continue to recognize the freelancer status, should they be granted all or partial labor law rights?

**The facts necessary for this appeal** -

2. Galai Zahal is the army radio station. About 90% of its’ workers are regular soldiers, the remainder are reserve soldiers, civilian army workers and freelancers. From 1983 until 1990 Tzadka was the station’s London correspondent, in addition to his main work as a journalist for the Israeli newspaper “Haaretz”. Since Galai Zahal is unable to afford a foreign correspondent in London it makes arrangements to get radio dispatches from an Israeli journalist located there. Towards the end of 1983 the parties reached such an agreement, whereby Tzadka would provide radio dispatches for Galai Zahal as a freelancer, which he did until 5.9.1991, when his services were terminated. There were hints in the evidence that Tzadka also studied at university while in London.

 When he began working for the station Tzadka did not receive an appointment as a government worker under the **Civil Service (Appointment) Law**. However, Galai Zahal gave him a “to whom it may concern” letter stating that he was it’s London correspondent. The purpose of this letter was to give Tzadka journalist status which would enable him to cover news events; it does not indicate that he was an employee of the station, but is proof that a contract for services was entered into between the parties.

 Under his agreement with Galai Zahal Tzadka was permitted to sell his dispatches to other newspapers or radio stations outside of Israel, but not to competing stations within Israel.

 In most instances Tzadka initiated and chose the subjects for the dispatches he sent to the station. Sometimes the station’s news department asked him to cover specific events or subjects, which he would do.

 Tzadka used equipment lent him by the Respondent to prepare his dispatches…

 There was not a set amount of dispatches that Tzadka was obligated to submit; sometimes, days or weeks passed between dispatches and sometimes Tzadka submitted a few on one day. The average number of dispatches prepared by Tzadka was 10 – 20 a month… We can learn how many dispatches prepared by the average monthly payments he received which, for the purposes of this suit, was agreed by the parties to be $500...

 Tzadka and the Respondent’s news department kept in contact by telephone. When Tzadka visited Israel he would visit the radio station and speak with his contacts in the news department; however, the Respondent did not finance these trips or request that he visit Israel.

 On two instances Tzadka initiated dispatches outside of the United Kingdom, did not receive expenses, but his fee was doubled from $30 to $60 a dispatch…

 Tzadka received his payments from Galai Zahal with an accounting statement from the station’s “artists department”, with deductions calculated as if he were an independent contractor… Payment was in Israeli Shekels calculated at $30 times the number of dispatches submitted.

 Tzadka did not receive labor law benefits from Galai Zahal, such as annual vacation, sick leave, overtime or national holidays. No deductions were made for union dues or pension funds. The Respondent gave Tzadka an annual accounting for income tax purposes, prepared by the “artists department”…

 Tzadka determined when and how long he would be absent for vacations, without asking the station’s permission. In Tzadka’s absence the Respondent invited another Israeli newspaper correspondent located in London to submit dispatches.

 During September 1990 Tzadka informed the head of the Respondent’s news bureau that he was leaving for a vacation in Brazil; he was gone for two months … which was longer than expected, due to reasons beyond Tzadka’s control; however, during this vacation Tzadka did not maintain contact with the station and inform them he had to extend his vacation. A month after Tzadka went to Brazil the chief of the Respondent’s news bureau wrote him complaining that he hadn’t been in contact and that an important event had not been covered. When Tzadka returned to London the Respondent informed him that it was terminating their relationship. However, Tzadka continued to submit dispatches for a number of months, until on 5.9.1991 the Respondent informed him that his services were no longer needed.

3. The Regional Labor Court denied Tzadka’s claim because he was a freelancer, who under previous cases were not entitled to labor law rights….

 Attorney for Tzadka emphasized the similarities between him and the station’s civilian employees. According to the work Tzadka did he should be considered a worker, without regard to how he was labeled or such formalities, as the manner of payment. He tried to distinguish prior cases from this one.

 Galai Zahal’s attorney supported the Regional Court’s reasoning and the precedents it relied upon…

**The issues in this case** -

4. Israeli labor law has recognized various types of people doing personal work, among them: the “employee”, [[1]](#footnote-1) the freelancer and the self-emloyed. According to case law only the worker is entitled to labor law rights. Since Tzadka sued for rights granted by law to workers, such as severance pay, dismissal notice and wages, the central issue is whether he is an “employee”. The normal discussion of this issue is to compare a worker to a self-employed person. However, since Tzadka worked in the media the comparison is between a worker and a freelancer…

 In the recent Supreme Court **Mor case**, Chief Justice Barak raised the question whether the freelancer classification still exists in Israeli law and, if it does exist, whether it is limited to the media and entertainment industry …

 Therefore, the questions this appeal must relate to are, as follows:

[1] Should we change the existing rules and eliminate the freelancer classification?

[2] Since we conclude that the freelancer classification should not be eliminated, the next issue is whether the freelancer is entitled to all or part of labor law rights and protections?

[3] In order to answer the above question we must also relate to the difference between a “worker”, a self-employed and a freelancer. We must also differenciate between the person who is a freelancer in name only and an “authentic freelancer”.

[4] The next issue we shall relate to how to apply the law to this case, ie, whether Tzadka is a freelancer, independent or worker?

[5] Finally, we shall apply the “purpose test” to determine which protective labor laws apply to a freelancer.

 We shall discuss each question in the above order.

**Should we cancel the freelancer classification**?

**The freelancer** -

5. The term freelancer includes several aspects of work; first, that the person is not an integral part of the workplace and, second, that his or her working framework is more “free” than regular workers to set the extent and hours he or she work. The freelancer is less a part of the workplace and less subordinate to its’ organization framework. He/she has only part of the characteristics of a regular worker. The freelancer classification in the communication industry was introduced into Israeli law by National Labor Court judgments in 1973, based on German law.

 There are a number of reasons why we need a separate classification of freelancer, in addition to the classification of worker and self-employed:

[1] Such a type of worker exists in the media and entertainment industry and reflects the industrial reality;

[2] The freelancer classification is useful for instances where the standard integration test, used to determine who is an “employee”, cannot be implemented;

[3] The freelancer classification enables courts to grant labor law rights and protections to those who would normally not receive them;

 We shall discuss each justification, with regard to the media and entertainment industry; even though, they are not necessarily limited to that industry.

**The Industrial Reality** -

6. It is not a coincidence that previous cases concerning freelancers were in the media and entertainment industry. This industry has special characteristics, which resulted in the employment of many freelancers… It has undergone far-reaching changes in recent years. It is a large industry whose annual world income is about 500 billion US dollars. [[2]](#footnote-2) New technology has radically changes journalist’s working patterns. As the ILO Symposium report said:

“For journalists in general, particularly freelancers and employees of smaller publications, technology has changed the way of working. Most changes are for the better, although technology sometimes has unfortunate side effects…”

The new technology also reduces the possibility of union organization and increased greatly the number of workers employed thru irregular employment relationships. As the ILO Symposium report said:

“The new technologies, in conjunction with the reduction in importance of the state-owned or subsidized entertainment sector, the development of independent production companies and the growing importance of multi-industry conglomerates in the film and broadcasting business, have tended to fragment the working environment and curtail the possibilities for effective collective bargaining or agreements for performers. Furthermore, the contractual classification of performers and their relationship with employers are often more unclear than in the past, with subcontracting and the creation of shell companies to produce a film or other product being more common now….

… Working full time (or part time) at home for an employer while being entitled to the same benefits provided to on-site workers; working full time for the employer but only teleworking for a specified number of days per week or month; or being an independent contractor and not receiving benefits from the employer”.

 Employment of freelancers in the media and entertainment industry is widespread, according to the ILO Symposium report, which relates some of the problems these workers face:

“Varied, broken and changing career histories are the norm for media freelance workers … and they have histories of redundancy and considerable dependence on single client organizations including former employers”.

 Many workers in the media and entertainment industry are employed for short periods or by contracts, which can be terminated at will. Such workers’ bargaining power is weak compared to the media and entertainment companies. This being the situation these workers are in need of labor law protection and rights. As the ILO Symposium report said:

“The information revolution has shaken the foundations of the economic structure of the media and entertainment industries, shattered many assumptions and given rise to new hopes and expectations. The survival mechanisms developed in past decades, such as relatively stable employment relations, collective agreements, worker representation, employer-provided job training, and jointly funded social security schemes… have been weakened by a combination of factors including globalization, casualization and multimedia convergence…

Collective bargaining cannot keep pace with technological and other developments in the industry and society at large. The workforce is much more fragmented than in the past; companies are contracting out some of what used to be integral parts of their business; and new forms of social dialogue are needed”.

 However, together with the concern for media workers we should emphasize that the media and entertainment industry is dynamic and requires flexibility for management, so that it can cope with the rapid changes of programs and public demand. This industry is characterized by frequent worker turnover, which is made easier by the employment of many freelancers.

7. In the media and entertainment industry there are many people doing work who are neither “workers” nor “self-employed” and the most accurate definition of their status is “freelancers”.

 Newspapers and radio and television stations received services from a wide range of people who are considered freelancers, such as performers, journalists, foreign correspondents, commentators, “experts”, etc. These freelancers contribute to the business being carried on by the workplace (newspaper, radio station, etc), but are not part of its’ core group of workers; they are the chaff and not the grain-core of the business. Freelancers are not generally required to contribute regularly or exclusively to the business and they are free to set how and when they work and when they do not work, ie their vacation period. Moreover, in many instances the freelancer’s work for the media is not his regular work. For example, we should not classify as a “employee” the expert jurist, such as a judge or academic, who writes a monthly book review for a newspaper. Such people are “guest” writers, who contribute their ideas to the forum for the exchange of ideas, which is the media. Thousands of people appear on a radio or television station or submit articles to a newspaper; submitting an article for publication does not create the basis for an employee-employer relationship. It is unreasonable to turn all of these “guests” and freelancers into employees of the newspapers or radio and television stations. This was stated in the **Sivan decision**, as follows:

“When we talk of a “factory” like the Israel Broadcasting Authority, or other “factories” which employ performers and journalists, we cannot ignore reality, that the media and entertainment industry recognize “freelancers” and “guests”. It would not occur to someone to define Alterman [well-known Israeli poet] as an “employee” of Davar [Israeli newspaper where Alterman published his poetry], simply because he has a weekly column….”

 Furthermore, there is a difference between the journalist who is an “employee” of a newspaper and one who is a freelancer. Journalists who are “employees” are covered by collective agreements, if they exist; en employee’s employment contract is different than that of freelancers; often the “employees” receive monthly salaries while others are paid according to their dispatches, appearances, performances, etc; “employees” are subject to the newspapers’ disciplinary rules and cannot compete without its’ approval; the “employee” is required to submit his articles or dispatches regularly; often, the “employee” has a desk in the newspaper’s office; and, most important, the subjects of the “employees” articles or dispatches are part of the core integral subject which the newspaper reports on.

 We must also give some weight to the parties’ agreement that the person will work as a freelancer. Tzadka’s conditions of work and manner of performance were set as a freelancer. The contract for performing the freelancers work is different than that of the “employee”, especially regarding their mutual commitment; loyalty to the newspaper; the degree of supervision by the newspaper; the newspaper’s responsibility for the contents of the article or dispatch, etc.

 The importance of industrial practices is highlighted by Justice Cardozo’s famous the law:

“My analysis of the judicial process comes then to this, and little more: logic and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law”. [[3]](#footnote-3)

 When deciding whether there should be a freelancer classification we should consider the accumulated experience in the media and entertainment industry, where it is a widespread practice to employ freelancers. This practice reflects the industries’ particular characteristics.

 In this context we should note that German law specifically contains the freelancer classification in the media and entertainment industry, in a statute which grants “persons similar to employees” the right to organize into a union. [[4]](#footnote-4)

 My conclusion is, therefore, that the freelancer classification suits the industrial reality of the media and television industry.

**The traditional tests to determine who is an “employee” are not applicable** -

8. The test [in Israel] to determine who is an “employee” is the integration test or the “combined test”. [[5]](#footnote-5) These tests were unrealistic in the media and entertainment industry and, therefore, in 1973 this court adopted the German law’s “freelancer” status… Why were these tests unrealistic? The freelancer’s work is often an integral part of the newspaper’s business of reporting news and ideas and, very often, the freelance journalist does not run his own business. However, it is unrealistic to define him as an “employee” under the integration test because his dispatches are not a core subject of the station’s broadcasting or the newspapers reporting, [[6]](#footnote-6) he is free to arrange his hours, extent and manner of working, and his connection to the station is too remote.

 In light of what we have said till now the existing classification of freelancer should not be dropped from Israeli law since it suits the industrial context and provides a realistic definition of a work relationship for instances when the traditional integration and “combined” tests are inapplicable.

**Should the freelancer be entitled to rights and protections given to “employees**”?

**Re-examination of the freelancer classification** –

9. Since we concluded that the freelancer status should be retained we must relate to the next question which is, whether the freelancer should be entitled to rights and protections granted by labor law.

 As mentioned above, until now the cases held that freelancers were not entitled to labor law rights. In my opinion this rule should be changed. Today, there are “freelancers” who should be brought within the protective circle of labor law.

 However, in the same way that it is not a good policy to exclude freelancers entirely from labor law rights it is also not good policy to grant them all such rights. On the one hand, the freelancer does not have enough characteristics of an employee to be considered an employee; to a certain extent he operates his own minute business. On the other hand, in many instances the freelancer cannot be characterized to be self-employed; he or she is often economically dependent on the receiver of his or her work and has other characteristics of an “employee”. Moreover, the existing rule resulted in undesirable consequences and contradicts the social policy and values of Israeli society; these can be corrected by adopting the “purpose rule”, which will grant freelancers partial labor law rights. Adopting the “purpose rule” requires the court to determine the purpose of labor laws and whether this purpose is to grant rights to the freelancers. Let us enumerate the reasons for granting freelancers partial labor law rights:

**9[a]. The first reason for adopting the “purpose rule”** – Labor Courts have often had difficulty applying the traditional integration and combined tests in the media and entertainment industry. ... Adopting the “purpose rule” will enable us to grant some labor law rights in instances where that is fair, especially regarding irregular work patterns, which have greatly increased in recent years, such as telework, outsourcing, part time work, part-time work, casual work, flextime, functionable flexibility, contractor/manpower labor, foreign workers, one-man companies, etc.

**9[b]. The second reason for adopting the purpose rule** – Undesirable social phenomenon have occurred in the media and entertainment industry, just as they have in the entire labor market. Some of these are:

[1] Unjust work relationships, in which employers take advantage of workers, particularly weak groups, such as foreign workers, women, unskilled, immigrants, minorities, disabled, etc. Moreover, such unjust work relationships are widespread in certain industries, such as the media and entertainment industry. This court’s experience is that many workers in the media and entertainments industry earn the minimum wage; also, many employers in this industry take advantage of many peoples’ desire to do this kind of work by giving them working conditions which are incompatible with their profession, education and contribution to the workplace and society. Furthermore, there is a widespread practice in this industry of labeling “freelancers” workers who, according to the integration test, are clearly “employees”. Professor Amira Galin’s description of “payrolling” is relevant to the freelancer:

“This model developed in the last ten years in the Western economies, including Israel, in order to lower the economic cost of labor for the employers by circumventing employers’ undertakings in collective agreements and extension orders. In the payrolling model the third parties’ role is limited to signing the formal employment contract with the workers and paying their monthly salary. The actual employer recruits the workers, interviews them and decides who to hire, but refers them to the third party in order to sign the employment contract. The third party does not have to be a temporary employment agency but can be any company or individual who is interested in increasing his income thru signing employment contracts prepared by the ‘authentic employer’ with people who are not working for him. Since the third party is not obligated to employ the workers according to the collective agreements or extension order applying at the workplace, he can pay them the minimum wage and working conditions set by law…

In this model the authentic employer gains the advantage of inexpensive labor and the third party receives his fees, both at the expense of the worker”.

The above is also applicable to the freelancer status in the media and entertainment industry. The phenomenon which Professor Galin describes results in groups most in need of labor law protections not receiving it.

[2] Another negative symptom is the economic and social inequality between high and low-income groups. The is marked in the media and entertainment industry, where there is a significant income gap between the high paid workers, such as the printers and senior clerical workers and the low paid workers, such as the journalists. This phenomenon has led to what Professor Richard Freeman called “the working poor”. [[7]](#footnote-7) Professor Ruth Ben-Israel has also described it in the following manner:

“Work force developments have brought many irregular work relationships of part-time, casual or flexible employment. The performing work are indeed ‘employees’; however, but their classification as employees is different. Lacking in their employment relationship is elements of exclusiveness and economic dependence. They are not employed by one employer; they may be employed by several employers at the same time. The employment exclusiveness which they have is only that they at the employer’s call while they are doing work for him. Their economic dependence also has changed. They are economically dependent from the point of their economic position, but they are not dependent on one particular employer. Their classification as “employees” has also changed from the point of their basket of rights. The fact that their work relationship is partial, not continuous and they are employed by different employers for different periods means they cannot accumulate rights, especially rights under protective labor law, which conditions many rights on a preliminary continuous work period. Also, in regular work relationships the employer often finances various social rights of its’ workers; this does not happen in irregular relationships. Therefore, the irregular work relationships has created two types of “employees”, those who receive the full basket of labor law rights and those who do not.”

[3] Another undesirable social phenomenon is that the ownership of the media and entertainment industry is concentrated in a few people, which places a great deal of bargaining power in a few hands, which can be taken advantage of when setting employment conditions.

 Also, from the beginning of the eighties the Israeli economy is undergoing a significant change, which is the transformation from a centralized economy, with most of the power in the public and Histadrut sectors, to a Western competitive economy, with a majority of workers in the private sector. This transformation is very apparent in the Israeli media and entertainment industry. For example, instead of one government television station, as was the case in the eighties, there are now a number of stations, mainly owned by a small number of private people. On the other hand, the union density in this industry has fallen greatly and most workers must stand alone when negotiating their employment conditions.

 One of labor law’s important purposes is to protect the weak individual worker and prevent his being taken advantage of by the more powerful employer. [[8]](#footnote-8) This inequality was described in the 18th century by Adam Smith and is applicable today in the media and entertainment industry:

“It is not ... difficult to see which of the two parties must, upon all occasions, have the advantage in the dispute and force the other into compliance with their terms. ... Many workmen could not subsist a week, few could subsist a month, and scarce any a year, without employment. In the long run, the workman may be as necessary to the master as his master is to him; but the necessity is not so immediate”. [[9]](#footnote-9)

 Professor Ruth Ben Israel mentioned the possibility of correcting social injustice by developing the rules determining working peoples’ status:

“The rule of who is an ‘employee’ was always a means to achieve social aims which are essential to the workers’ ability to maintain himself and his human dignity.” [[10]](#footnote-10)

 ... Adopting the “purpose rule” for granting partial labor law rights and protections to people employed in irregular work relationships, including freelancers, is a step towards correcting the injustices in their working relationships.

**9[c]. The third reason for adopting the purpose rule** –

 A change in the case law, in suitable instances, is an integral part of the development of the law and our legal system. This is not to say that the legal system does not need stability. It does. The use of precedent testifies to the importance of past experience and the wisdom of previous judges. However, re-examining existing rules and adapting them to current reality is part of the legal process and is necessary to provide answers to social problems. The responsibility to adapt the law to social reality falls on the legislature and the courts, including the Labor Courts. Law which is inflexible becomes detached from reality and ceases to be a social and economic tool. When a dispute is brought before the court, which requires it to rethink an existing legal doctrine, this must be done using caution and restraint. However, if the court concludes that the law should be developed it should make the necessary changes. Let us remember that both a positive decision (changing an existing rule) and a negative one (not making a change) are both policy judgments, which determine the courts’ policy towards a social problem.

The Different Types of Freelancers and the distinction between an “employee”, “self-employed” and “freelancer”.

10. ... To assist us in determing whether a person performing work and labeled a freelancer is really an “employee”, self-employed or freelancer I suggest we use the terms “freelancer like” and “authentic freelancer”, which were used in similar contexts by Professors Ruth Ben Israel and Amira Galin. According to this concept we distinguish between a labor contractor who does the formal employment arrangements, such as signing the employment contract and paying the worker, and the authentic labor contractor, who recruits the worker, trains him, refers him to the place of work for a limited period of time and then refers him to another place of work. Using this concept for the freelancer, the “freelancer like” worker is really an “employee”; the “authentic freelancer” is a freelancer and the person called a freelancer but running his own business is “self-employed”. [[11]](#footnote-11) This distinction is a tool to assist us to understand one problem situation relating to the freelancer, ie, when the parties agree that the person will work as a freelancer, but in reality he is an employee under the integration test. I note that the use of the term “authentic freelancer” does not create a new classification; the freelancer classification already exists in Israeli law. In German law there is also a classification “fake self-employed”, as Professor Manfred Weiss has explained:

“Whether all those who are contracting as self-employed really are self-employed in a legal sense, is of course very doubtful. There is a widespread assumption that most of them in reality are employees. Therefore, the notion of ‘fake self-employed’ has been invented to illustrate the phenomenon”. [[12]](#footnote-12)

 The use of a term, such as freelancer, will not determine a person’s status, which is set by the factual situation and not by how he is referred to in the contract. This principle was mentioned in the .------ case and is well anchored in the social policy of the law:

“Classification cannot be determined or changed by an agreement, just as the worker cannot waive or make conditional his labor law rights. Moreover, a person’s classification as an employee cannot be changed or waived by how the person is called. The latter can be taken into account as one factor in the entire relationship between the person’s performing and receiving the work”.

 Now we shall describe characteristics of the above categories.

10[a]. “**Freelancer like = employee** -

 ... This relates to people performing work who are not “free” to set their own hours, times and manner of working. They have all the characteristics of an employee according to the integration test. Labeling such a person a freelancer is, therefore, a fiction. The purpose of calling such a person a freelancer is to avoid labor law obligations, thereby reducing labor cost... A similar phenomenon was encountered in the recent **Assulin case** when workers were required to form “one man companies” as a condition of continuing to work for the Israel Broadcasting Authority...

**10[b]. Authentic freelancer = freelancer** -

 This category relates to the person performing work who is “free” and cannot be classified as a worker or self-employed. Usually, these are professionals or people with a special personal skill or knowledge. There can even be instances when this person runs a small operation, which cannot be defined as an independent business.

 In what way is the freelancer “free”? Among the characteristics of the authentic freelancer are: she sets the hours and amount of work which she performs; she decides whether to accept the assignment offered her; she can increase or decrease her income according to the amount of work she accepts and does; she does not have a set pre-determined income but is dependent on assignments offered her; she has some control over her expenses while performing the work. ...

**10[c]. The self-employed** -

 Labor law does not generally relate to the question who is a self-employed person; instead, the emphasis has is determine who is an “employee” and learn from the answer who is not an employee. [How can we determine who is self-employed?] The self-employed runs his own business, generally a business offering services. Among the characteristics of the self-employed are: he can perform the work himself, or thru hired workers or outsourcing; he can run his business as an individual or a company or partnership. The self-employed determines how to manage his business, chooses which work to accept and when and how to do it. He can influence his income and expenses. Often, the self-employed risks the capital which he has invested in his business. Examples of self-employed are the building contractor, the attorney or accountant who has his own office; and the plumber who provides services to households when called.

 While the tiny “business” of the freelancer is based entirely on his personal work the self-employed person’s business is also based upon managing other workers and service providers… When the person called a freelancer has no characteristics of an “employee” he is a self-employed. In such instance he will not receive labor law rights and protections, except for those which statutes specifically grant to self-employed, such as protection against sexual harassment, workplace safety; and some branches of the social security laws.

**Is Tzadka an “employee”, freelancer or self-employed**?

# 11. We now turn to Tzadka’s status at the army radio station and the definition of the work relation between them. The status is to be found in the grey area between an “employee” and a freelancer, as indicated by the following aspects of their relationship:

11[a]. **Tzadka’s place in the radio station’s organizational structure** –

 From the evidence before us Tzadka was not an integral part of the station’s workforce.

 The Commander of the station testified that about 90% of the station’s workers are soldiers and all foreign correspondents were freelancers. None of these foreign correspondents were sent abroad by the station. When Tzadka visited Israel the station did not participate in the cost of the trip. Tzadka was not required to maintain constant contact with the station. The station did not rent an office for Tzadka in London and did not purchase a fax machine. However, Galai Zahal paid him a small sum as participation in his telephone costs. The recording equipment used by Tzadka was loaned from the station but this is a technical arrangement, not making Tzadka part of the group of permanent station employees.

 The fact that the station did not finance Tzadka’s being in London and that the station was mainly run by soldiers indicates that Tzadka was not part of the station’s core working force.

 Zadka’s terms of employment were those of a freelancer and he was paid by the “artists pay office” and not the “employees wage office”. The letter from the station to Tzadka, calling him “our correspondent in London” was to represent him as a journalist, so he could participate in media events in that capacity and did not reflect his status. The rules of conduct which applied to the station’s civilian army workers did not apply to Zadka.

 Generally, Tzadka decided what to report on, according to his journalistic discretion and how much he wanted to work.

 It is true that the dispatches submitted by Tzadka to the station were part of the news, which is an integral part of the station’s business. This is the case regarding the dispatches submitted by all news reporters. However, dispatches from London were not a core part of the army radio station’s news reports, which emphasized local news; the soldiers were most interested in what happens in Israel.

 In contrast to the station’s civilian army workers, Tzadka was free to prepare dispatches for other radio stations outside Israel. Tzadka was indeed limited in his ability to compete, but only regarding dispatches to Israeli radio stations.

11[b]. **Tzadka was more “free” than the station’s regular employees** –

 Tzadka was more “free” than the stations regular employees because he determined his own hours, time of work and manner of work. He decided that on a certain day he would prepare work only for the newspaper Haaretz or do something else, like academic study. He decided when to take his “vacation”, without coordinating it with the station. Tzadka also determined the amount of time he invested in each dispatch to the station and how he prepared the dispatch. Sometimes days or even weeks passed between dispatches sent to the station.

 Indeed, the station’s management expected that Tzadka would cover specific events, if they so requested, such as the visit to England of Israel’s Prime Minister. However, usually Tzadka was given a free hand to decide what events to report on; most of these were probably the events covered for the newspaper Haaretz. Even taking into account that all journalists have a certain amount of professional discretion to decide what is newsworthy, Tzadka was still more “free” than the general journalist employed by the station.

**11[c]. The length of the relationship between the parties** –

 Tzadka sent the army radio station dispatches for about 8 years. Parties’ attorneys agreed, for purposes of this case, that Tzadka’s average monthly payment from the station was $500. This indicates economic dependence. However, even self-employed, such as private lawyers, who have long-term relationships with clients for set fees (“retainers”) are in a dependent relationship. Moreover, Tzadka’s main income was from his work for the newspaper Haaretz.

 Indeed, Tzadka anticipated that the station would broadcast his dispatches and the station anticipated that Tzadka would continue to cover events in England. This was economic dependence for a limited period of time; the parties know that it would continue only while Tzadka remained in London. Also, the station did not undertake to employ Tzadka when he returned to Israel. In effect, Tzadka’s work for the station was “additional income”.

 This situation indicates economic dependence between Tzadka and the station. Economic dependence is an important characteristic of “employee” status. However, in Tzadka’s case the economic dependence was limited and, therefore, not that of an emloyee; it was characteristic of the economic dependence which exists in many freelancer relationships.

**11[d]. The formal arrangements** –

 The parties agreed that Tzadka would work as a freelancer. His payment was set at $30 a dispatch. This sum was not linked to the cost of living index, as is the salary of employees. Tzadka did not get the fringe benefits given government employees working outside of Israel. ... In addition, tax deductions from the sum paid Tzadka were at the rates of a freelancer and not an employee...

**11[e]. Operating his own business** –

 Tzadka was not self-employed in the sense that he employed other workers. The service Tzadka gave the station was personal and was not outsourced. Therefore, Tzadka was not self-employed in the usual sense of the term.

 However, Tzadka did operate a minute business based entirely on his personal work. He provided dispatches and articles to various media companies. He determined how much work to do, when to do it and for whom to work. Tzadka could increase his income by working more. He did not have a monthly salary, as a regular employee would have. Tzadka had some control over his expenses relating to preparing the dispatches, such as travel expenses, secondary use of materials prepared for Haaretz, and how much he used the telephone and fax. Operating a minute business, based entirely on personal service, but which is different from the usual business of a self-employed person, is characteristic of the freelancer.

**In conclusion** –

12. For the reasons mentioned above Tzadka was not self-employed in the usual sense of the term and, therefore, the question before this court is whether he was an “employee” or a freelancer.

 The industrial context indicates that Tzadka was outside the circle of the station’s regular employees and functions. He was more “free” than regular workers with regard to the manner and extent of his work and was not subject to the station’s disciplinary rules. The subject of Tzadka’s dispatches was not in the main stream of the station’s news. The formal arrangements were of a freelancer. He operated a minute business of supplying news dispatches to more than one purchaser. Tzadka’s main work was for the newspaper Haaretz and it was known that his arrangement with the army radio station was for a limited period.

 This is not a clear cut case and Tzadka has characteristics of an employee, especially the limited economic dependence based upon a long term relationship. ... Nonetheless, limited economic dependence does not, by itself, determine Tzadka’s status. Self-employed and freelancers also supply services over a long period of time. .. All relevant factors should be considered when determining Tzadka’s status.

 We should also consider that, in my view, the freelancer receives certain labor law rights and protections, according to the “purpose rule”. In this case, granting Tzadka some of labor law rights is a better solution than granting him all or no labor law rights...

 Balancing the above-mentioned factors I conclude that most of the characteristics of the relationship between Tzadka and the station indicate that he was a freelancer. Therefore, as a freelancer he is entitled to rights according to the protective labor laws whose purpose is to protect people like Tzadka.

**Implementing the “purpose rule” in this case** -

**Wage claims and the Wage Protection Law** –

13. The **Wage Protection Law** has two main purposes: [a] to insure that wages are paid; and [b] to insure that they are paid on time. The protection of wages is an important element of a progressive countries’ social and economic policy. A wage earner needs his income in order to live a dignified life and, therefore, must receive his salary at the agreed time. This policy is encourages people to work since they can rely on receiving their agreed salary. To implement this policy the Wage Protection Law has a “draconic” penalty for late payment of wages, ie, a fine of 5% of the first week wages are late and 10% for every week thereafter.

 This purpose of the **Wage Protection Law** also applies to the freelancer [and many self-employed]. [[13]](#footnote-13) In most instances, the person doing work, either as an “employee” or freelancer, is economically dependent on receiving his or her wages/payment, which is the only or main source of his/her livelihood. Therefore, I propose that the freelancer will also be entitled to the applicable rights and protections of the **Wage Protection Law** and for these purposes will be considered an employee.

 Since the hearing in the Regional Court did not deal with Tzadka’s claim that he did not receive wages he was entitled to, the case is remanded to the lower court to determine the facts and decide whether Galai Zahal owes him wages.

 We note that tzadka has dropped his claim for the late payment penalty, since it was filed after the statute of limitations period.

**The Severance Pay Law** –

14. The purpose of this law is not clear and it has several purposes, sometimes self-contradictory, which we shall enumerate:

[a] Severance pay is an alternative to a pension. When the worker retires at the age of 65 the severance pay provides funds necessary for him/her to live. On the other hand, if the employer provides a pension for the worker he is not entitled to severance pay. Sections 11and 14 of the **Severance Pay Law** exempt the employer from paying severance pay if an authorized pension has been provided for the worker.

[b] Severance pay can also be income for a dismissed worker, until he/she finds another job.

[c] Severance pay can also be considered as a delayed part of the worker’s income, a method of increasing the remuneration he/she receives for his/her work, even though it is given him/her when he/she ceases to work for the employer.

[d] Severance pay is a method of strengthening the worker’s connection to his/her workplace. Since the worker does not receive severance pay if he/she resigns it is not worthwhile for him/her to resign.

 Given these different purposes of the **Severance Pay Law**, how can we determine if it should apply to the freelancer? On the one hand, when the freelancer retires or the media company ceases to give him/her work, he/she needs income, instead of a pension or to tide him/her over until he/she finds other work.

 On the other hand, so far as the law’s purpose is to increase the worker’s income, the freelancer should not be entitled to severance pay if the agreed payment for services included a specific additional sum instead of severance pay. [[14]](#footnote-14) However, if the freelancer’s regular payment for services is the same as that which a salaried worker would receive (ie. has no additional payment for severance pay) his employer is obligated to pay him severance pay, if he meets the other requirement of the **Severance Pay Law**.

 Which party has the burden of proof that the payment to a person performing work does or does not include an agreed additional sum instead of severance pay? Since the **Severance Pay Law** states that a worker’s salary does not include payment for severance pay, unless this was agreed in writing beforehand and approved by the appropriate Labor Ministry official, the burden of proof that a freelancer’s payment includes severance pay is on the employer.

 Another problem arises concerning the change in case law as a result of this judgment. When the parties entered into their agreement for services and during the period Tzadka worked the case law was that a freelancer is not entitled to severance pay. Is it fair to impose on Galai Zahal monetary obligations which did not exist according to previous case law? How should we relate to obligations imposed by changes in the case law? In my view the change in case law is not a reason to deny Tzadka severance pay, since the definition of “employee” and who is entitled to the rights granted by protective labor legislation has always undergone change. The development of case law regarding “who is an employee” is not, therefore, a surprise to the army radio station.

15. Is Tzadka entitled to severance pay? His work continued for about eight years, the station terminated the work relationship, which is similar to a discharge, and he meets the other requirements of the law. Therefore, we hold that Tzadka is entitled to severance pay for the 8 years he did work for the army radio station; according to the following calculation: 8 years x $500/month = $4,000, which will be paid in Israeli Shekels. ...

**Advanced Discharge Notice** –

16. When Tzadka did work for the station a worker was entitled to one month advanced notice of discharge, according to custom, as an implied term of the employment contract. Therefore, Tzadka is entitled to the Shekel amount of $500 for advanced discharge notice.

**About the universality of the term “employee**” –

17. Before concluding we note that the term “employee” does not have a universal definition; different tests are used in labor law, social security law and torts law. Different tests are even used within labor and social security law. Thus, an elected official, serving as deputy mayor, was held by the Supreme Court to be an employee for the purposes of unemployment pay, [[15]](#footnote-15) even though he is not an employee for most labor law purposes. The Supreme Court, in the **Sadot case,** [[16]](#footnote-16) held that a prisoner can be an employee for certain labor law purposes, even though it did not specify which purpose and only referred to the Work Safety Law, which anyway covers non-employees.

 My approach is that when a person is an employee according to the integration or combined tests he is entitled to all labor law rights and protections and there is no reason to use the “purpose rule” and, thereby, deprive him of any of these rights.

**Jurisdiction of the Labor Court** –

18. It has been argued that the Labor Courts do not have jurisdiction over cases involving freelancers, since they are not “employees”. In my opinion, however, the Labor Courts have jurisdiction to hear cases regarding freelancers, including Tzadka, for the following reasons: [a] even though Tzadka is a freelancer, for the purposes of the **Protection of Wages Law** and the **Severance Pay Law**, Tzadka is entitled to workers’ rights and regarded as an employee; [b] we are dealing with a contract for personal work between a person doing the work and a party receiving it. Thus, disputes concerning such a contract for work should be litigated in the Labor Courts; [c] finally, the **Saruci case** was also litigated in the Labor Courts, despite him being an elected official, who is not an “employee” under the accepted labor law tests (the integration and combined tests) but was held by the Supreme Court to be an employee for purposes of unemployment compensation.

**Conclusion** –

19. If my opinion is accepted Tzadka will not be considered an “employee” or “self-employed” but a “freelancer”. This being so, we implement the “purpose test” and grant him the rights he sued for under the **Protection of Wages Law** and the **Severance Pay Law** and compel the army radio station to pay Tzadka $4,000 severance pay and $500 advanced notice payment.

 The dispute concerning Tzadka’s claim that the station did pay for all of his dispatches during his last few months of work was not litigated in the Regional Court and, therefore, will be returned for a continuation of the hearing.

**Judge Nili Arad** handed down the concurring opinion: [that Tzadka was an “employee” of Galai Zahal and as such is entitled to severance pay and advanced notice pay.

## ANNOTATION

A. The Tzadka case was one of several recent National Labor Court judgments relating to the types of working people granted rights and protections by labor law. In Israel this issue is decided by case law, generally of the National Labor Court but sometimes of the Supreme Court sitting as the High Court of Justice. Determining which working people labor law applies to raises important social issues and is particularly problematic because of labor market changes and the increase of irregular work relationships. Should labor law overcome common law doctrines and legal fictions and impose its’ standards on employers and those receiving work from weak working groups, such as those working for manpower firms, foreign workers, part time workers, women and immigrants? Recent cases raise this issue in the context of freelancers, one-person companies, self-employed lawyers and service providers.

B. The Tzadka case involved the status of freelancers working in the media and entertainment industry.

 The Hebrew term for freelancer combines two words: one (*chofahi*), meaning “free” and the other (*mishtataif*) meaning “take part”. The connotation is that the freelancer is freer than a regular worker to set his way of working, amount of work and when he will do the work; in addition he is not part of the regular or core workplace organization and staff, but merely performing a peripheral function. The English meaning of the word freelancer also reflects its’ legal meaning. The New Shorter Oxford English Dictionary (1993, Clarendon Press, p. 1024) defines “freelance” as follows:

“freelance: [1] medieval mercenary. [2] A person operating without permanent commitments in a particular sphere of activity. [3] A person who works in a specialist area for no fixed employer”.

From this we can see the development of the term; from a wandering medieval mercenary providing services for various masters, to a person doing tasks for various people without a continuing commitment to any of them, to the modern freelancer who is generally a specialist and works for various employers without a long-term commitment to any of them.

 Judge Adler’s opinion in the Tzadka case uses the traditional integration and combined tests as a starting point for his analysis of the freelancer’s status. However, Tzadka’s peripheral role in the radio station’s operation, his freedom to work as he wishes and to the extent he wishes and his operating a minute one-person business led to the conclusion that Tzadka was not an employee, but a freelancer. There is also a social approach to the definition of a working person’s status, emphasizing that many media freelancers need labor law’s social protection. However, under prior case law freelancers were denied labor law rights. Judge Adler’s held that freelancers should be granted some labor law rights, according to the “purpose test”. According to the purpose test the court determines what the purpose of each labor law is today and whether it is suitable to the freelancer. Judge Arad also granted Tzadka labor law rights, but as a worker. She concluded that Tzadka meets the integration test, worked for Galai Zahal over a long period of years and was economically dependent of the station and should, therefore, be considered a worker. All opinions in the Tzadka case granted his petition for the labor law rights of severance pay and advance notice payment.

C. The National Labor Court recently handed down several additional judgments concerning irregular work relationships. The **Assulin case**, [[17]](#footnote-17) referred to in the above reported **Tzadka case**, was filed by television cameramen, sound people and editors who did work for the Isreal Braodcasting Authority (IBA) over many years. At first they were considered “freelancers” or “stringers”, but in 1980 the IBA demanded they form corporations or registered partnerships as a condition of giving them further work. Most of these workers formed one-man corporations (“I Ltd”) but some joined together and formed corporations owned by up to twenty workers. These workers’ corporations and partnerships entered into contracts for services with the IBA. Remuneration for their work was paid by the IBA to these corporations, who paid the workers. Some of these corporations provided services for other media and entertainment companies but most worked solely for the IBA. These cameramen, sound people and editors were recruited by the IBA, whose staff interviewed them, accepted them to work and assigned them work. Their work was similar to that done by the regular IBA workers performing the same tasks. The Plaintiffs worked a full work week, often working overtime, for many years. They had IBA media identification papers, so that they could get into news events, such as press conferences. The Plaintiffs bought and used their own equipment, which was “rented” to the IBA; an agreed portion (about 35%) of the IBA’s payment to the corporations was for rental of this equipment.

 In 1980, when they were compelled to form corporations, the Appellants joined together into an organization called “The United Television and Movie Workers” (UTMW). This organization negotiated the rates paid by IBA to the Plaintiff’s corporations. Payments to the corporations and other formal arrangements regarded the Plaintiffs as workers of their corporations and not of the IBA.

 After having done work for the IBA’s television station for many years the Plaintiffs filed suit in the Regional Labor Court, claiming to be IBA employees and entitled to labor law rights. Their suit was summarily dismissal, on the grounds that they were not employees of the IBA but rather of their own corporations. This judgment was appealed to the National Labor Court...

 In the **Assulin case** the court unanimously held that the Plaintiffs were IBA employees, for the following reasons:

[a] the “real” contract was an employment contract between the individual Plaintiff and the IBA; the contracts were between the IBA and the corporation and the Plaintiffs and their corporations were a mere formality. The court said that the real contract should be enforced. The formal contracts were sham and for appearance only and do not negate the real contract. Also, the status of a person performing work is not determined by formal contract arrangements but according to the real relations between the parties.

[b] the court distinguished between a company offering labor services, which is a “authentic manpower company” and a company which is merely a channel for payment of wages and signing the employment contract, ie a “sham manpower company”. The use of sham payrolling companys should not be a devise to deprive workers of their labor law rights.

[c] the fact that the Plaintiffs organized UTMW is evidence that they wanted a representative to negotiate their working conditions. While it was not called a “union” the UTMW was assisted by a Histadrut (union) representative and negotiated work (service) contracts with the IBA.

 The National Labor Court held that there was a labor contract between each Plaintiff and the IBA, except for those Plaintiffs whose corporations had also worked for other media firms. The court applied the integration test: the Plaintiffs work was an integral part of the television station’s business and those who worked only for the IBA did not have their own business. Regarding whether each Plaintiff had his own business and was self-employed the lower court had made no findings; therefore, the case was returned to the trial court so that the IBA could ring evidence that some of the Plaintiffs worked for other media and entertainment companies and employed workers to help with this work. In absence of such proof the Plaintiffs were to be considered employees of the IBA.

 The court also mentioned the recent case-law trend to broaden the scope of labor law so it would apply to more people doing personal work.

 The court also related to the IBA defense, that the plaintiffs had acted in bad faith by agreeing to be employed by their corporations and then filing suit to be recognized as employees. Both parties had acted in bad faith, the court said, the Plaintiffs as described above and the IBA for compelling them to agree to a sham contractual relationship.

D. Another recent case concerned the status of an attorney who supplied legal services to the Labor Party by himself and lawyers who worked for him in his private law office. One judge considered him an employee because of the long time intimate relationship with the political party and the economic dependence on the monthly fee he received. However, all the other judges considered him an independent lawyer on retainer, which was part of his private law practice. The majority opinion used the integration test to define his status – providing legal services was not an integral function of a political party and the attorney had a small business (law office) of his own. Moreover, much of his work was performed in his law office and not at party headquarters. Lawyers can have retainers over a long period but that does not make them workers. The lawyer was, therefore, denied labor law rights.

D. Still another recent case concerned a diver employed by the national water company. He worked for years as its’ only diver in the Sea of Galilee, providing a service which was an integral part of the company’s regular business, since checking the condition of the lake’s water was a regular and necessary part of the water company’s operations. The diver worked exclusively for the water company. In the early years of their relationship the company requested the diver to be a worker but he insisted on being an independent service provider. Afterwards, the diver requested to be in the worker status but the parties could not reach an agreement. In a unanimous decision the National Labor Court held the diver an employee, since his work was an integral part of the company’s operation and he did have his own business. However, when calculating his severance pay and other labor law benefits the court used the salary which the diver would have received as an employee. The diver was not entitled to the pension which other employees receive.

E. The Tzadka case and the others mentioned above indicate the court’s effort to apply labor law protections to people in irregular work relationships who need this protection. This involves expanding the scope of labor law and modifying traditional legal concepts. The justification for doing so is that labor law’s purpose is to protect people performing work, unless they are truly independent service providers. This purpose cannot be achieved applying traditional concepts defining who is a worker. The Court discussed social considerations to determine on people performing work should labor law protections be applied. Changing situations, such as new irregular work relationships, often compel courts to decide issues for which there is no direct case law or statute. When doing so either decision by the court – to reject the claim or accept it – is a decision. The court cannot evade the policy decision presented it. Therefore, courts must determine the social considerations underlying such policy decisions and explain them it its’ judgment.

1. The term “employee” and “worker” refer to the same classification. In Israeli law there is no difference between types of workers. [↑](#footnote-ref-1)
2. ILO Symposium on Information Technologies in the Media and Entertainment Industrial, Their Impact on Employment, Working Conditions and Labour Management Relations, 28.2.2000, hereafter referred to as the ILO Symposium.. [↑](#footnote-ref-2)
3. Benjamin Cardozo, **The Nature of the Judicial Process**, Yale Univ Press, 1921, page 112 of 22nd printing, 1964. [↑](#footnote-ref-3)
4. See section 12a, subsection 1,2,3, of the **German Collective Agreements Act** of 26.8.1969, which says that the right to organize applies to those engaged in “*artistic, literary or journalistic activities and to persons directly involved in the performance and particularly in technical aspects of such activities*...”. [↑](#footnote-ref-4)
5. The Israeli combined test relies heavily on the integration test and has been called the integration plus test. [↑](#footnote-ref-5)
6. One case concerned an astrologist who wrote about astrology and soccer. [↑](#footnote-ref-6)
7. Richard Freeman, **The New Inequality – the working poor**, Beacon Press, 1999. [↑](#footnote-ref-7)
8. To balance what has been said about labour law’s role for protection of workers we shall mention that it also determines norms at the workplace beneift both employers and employees. [↑](#footnote-ref-8)
9. Adam Smith, **Wealth of Nations**, 1776, cited in S. Deaken and G. Morris, **Labour Law**, London, Butterworths, second edition, pp. 131. [↑](#footnote-ref-9)
10. Ruth Ben Israel, **Labour law**, (Hebrew), 2002, Section one, Chapter five. [↑](#footnote-ref-10)
11. We note that even if an authentic freelancer working for the government is declared an “employee” it does not mean that he automatically becomes a tenured government employee, since the **Civil Service (Appointments) Law** sets additional requirements. [↑](#footnote-ref-11)
12. Manfred Weiss, “Employment versus Self-Employment, the Search for a Demarcation Line in Germany”, **Japanese Labour Law Journal**, 2000, p. 241, 257. [↑](#footnote-ref-12)
13. This is also true of the Minimum Wage Law, whose purpose is to guarantee every person working a minumum existence, necessary for his human dignity. This is applicable to a freelancer as it is to a worker. [↑](#footnote-ref-13)
14. The cost of the severance pay is 8 1/3% of the worker’s monthly salary. Therefore, he must receive an additional sum of at least 8 1/3% of his regular monthly payment. [↑](#footnote-ref-14)
15. **The Saruci case**. [↑](#footnote-ref-15)
16. **The Sadot case.** [↑](#footnote-ref-16)
17. LCD 300245/97 **Assulin and 96 others v. Isreal Broadcase Authority**, handed down October 10, 2001. [↑](#footnote-ref-17)