



EMPLOYEE v INDEPENDENT CONTRACTOR

THE IMPORTANCE OF AN EMPLOYMENT CONTRACT

The employment contract serves as the foundation for the relationship between an employee and that employee's employer. It is also the starting point for the entire system of labour law rules. All rules of labour law depend, at least initially, on there being a contract of employment which links the individual employee to the employer. It is only when one looks at the contract that one can determine whether there is a relationship between two parties. One factor may also be to determine what the nature of that contractually based relationship is.

By carefully evaluating a given set of contractual terms, one may be able to ascertain whether or not a certain contractual relationship is based on a contract of employment or, for example, a contract of partnership or even of agency. The essential elements of the employment contract can be summarised as being:

- A voluntary agreement;
- Between two parties (employer and employee);
- In terms of which the employee places labour potential at the disposal of and under the control of the employer; and
- In exchange for some form of remuneration by the employer.

CATEGORIES OF EMPLOYEES

Not all employees are the same. An employment relationship may be on a casual, temporary or permanent basis.

A **casual employee** is someone who is employed to do a once-off job – once the work has been completed and the employee has been paid, the employment relationship ends.

A **temporary employee** is someone who is employed for a fixed time period or for a specific task only – once that task is completed, the employment relationship ends.

A **permanent employee** is someone who is employed with the intention of there being an ongoing employment relationship, or in other words, for an indefinite period. This permanent, ongoing relationship may be full time or part time.

There are also non-standards forms of employment such as dependent contractors, piece-workers and employees of contractors. It is these

three groups of employees that are vulnerable and have been abused the most. The next section addresses their concerns.

PROTECTION OF VULNERABLE WORKERS

Attempts by employers to evade the provisions of the Labour Relations Act, 1995 and the Basic Conditions of Employment by trying to structure the relationship between themselves and the people who do work for them as something *other* than an employment relationship, has led to the expansion of the definition of an employee in both pieces of legislation (LRA and BCEA).

The definition itself has not been amended, but a new section, s200A, has been introduced which establishes a series of criteria that would form the basis for a rebuttable presumption as to whether or not an employment relationship exists. They are as follows:

- The manner in which the person works is subject to the control or direction of another person;
- The person's hours of work are subject to the control or direction of another person;
- In the case of a person who works for an organisation, the person forms part of that organisation;
- The person has worked for that other person for an average of at least 40 hours per month over the last three months;
- The person is economically dependent on the other person for whom he or she renders services;
- The person is provided with tools of trade or work equipment by the other person; or
- The person only works for or renders services to one person.

The effect of the abovementioned criteria is to provide that, where a particular factor exists, the worker is presumed to be an employee unless the contrary is proved.

HOWEVER - The above provisions do not apply to a person who earns in excess of the amount referred to in s6(3) of the BCEA (R89499)(Where the Minister can make a determination that excludes the application of that chapter or any provision of it to any category of employees earning in excess of an amount in that determination). If such a person earns below the amount referred to in the above section,

any of the parties to the relationship may approach the CCMA for an advisory award on whether or not there is an employment relationship in existence. NEDLAC must also prepare and issue a code of good practice that sets out guidelines for determining whether persons are employees or not.

THE EMPLOYEE AND CONTRACTOR DEBATE

The contract of the independent contractor on the other hand, is characterised by the fact that one person hires another person to do a specific job or a specific piece of work. The following can be said about the independent contractor:

The person letting out the work is seen as the *principal* and the person doing the work is seen as the *agent*. The contractual relationship is totally different – it is not a contract of employment, but a contract relating to the performance of a certain piece of work.

Another feature of the contract of an independent contractor is that there is *far less control* by the principal over the agent (contractor) than an employer has over the worker.

As such, the Labour Relations Act and the Basic Conditions of Employment do not cover independent contractors.

RELEVANT LEGISLATION

Labour Relations Act, 1995, as amended, s213 & 200A
Basic Conditions of Employment, 1997, as amended, ss1, 6 and 83A

ACKNOWLEDGMENTS

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Employment contract – Definition, identification and formation
The meaning of employee – The first basic concept