

EMPLOYEE v INDEPENDENT CONTRACTOR

EMPLOYEES AND OTHER WORKERS

The protection provided by our employment law legislation extends to 'employees'. There are exceptions to this as will be discussed below. A distinction is drawn between employees and so-called independent contractors. In general terms the independent contractor is paid to render a particular result; is not subject to the control or direction of the client; may get someone else to do some of the work and is not part of the client's organisation. In essence, the independent contractor is doing the work as part of his or her own business.

The contract of employment is usually the starting point in the employment relationship. However, judgments indicate that the focus in determining whether a person is an employee or not, is more on the nature of the relationship rather than the wording of a contract. The written contract is one of the factors to consider and has more significance for those who earn above the threshold as set out in section 6 of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

Job applicants

Job applicants who believe they have been subjected to unfair discrimination by their prospective employers, have the same rights as employees under the prohibition of unfair discrimination provisions of the Employment Equity Act 55 of 1998

"Workers"

The National Minimum Wage Act, 2018, defines a "worker" to be "Any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind" (excludes a volunteer). These workers (and employees who earn below the BCEA threshold) are entitled to be paid a wage that is no less than the national minimum wage and to a daily wage payment whereby if they work for less than four hours a day on any day, they must be paid for four hours work on that day.

CATEGORIES OF EMPLOYEES

Not all employees are the same. For example, an employment relationship may be on a casual, temporary or permanent basis. These terms mean nothing when it comes to determining whether a person is

an employee for the purposes of labour legislation, but rather illustrate that employment comes in many different forms.

A **fixed-term** contract 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. Such contracts must be in writing and are subject to certain conditions as per section 198B of the Labour Relations Act 66 of 1995.

A **part-time employee** is an employee who is remunerated wholly or partly by reference to the time that the employee works and who works fewer hours than a comparable full-time employee

A **full-time 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. Some full-time employees do not work the same amount of hours as their colleagues (e.g. half-day contracts) and are remunerated wholly or partly by reference to the hours that they work.

PROTECTION OF VULNERABLE EMPLOYEES

Section 200A of the LRA (and section 83A of the BCEA) includes a rebuttable presumption relating to the existence of an employment relationship for employees earning below the BCEA threshold. The LRA, as amended, states "[U]ntil the contrary is proved, for the purposes of *this Act*, any *employment law* and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present"

- 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.

It is important to remember that the presence of the above-mentioned criteria means that employment is presumed, unless the contrary is proved. The obligation to prove that the relationship was not one of employment then falls on the employer. Persons earning above the threshold will need to prove that there is an employment relationship.

Regardless of who has to prove whether there is or is not an employment relationship, it will be done with reference to the criteria set out in the presumption or any other relevant factors. The courts have recently indicated that the most important factors are –

- Whether the person forms part of the organisation where he or she renders services: that would be indicated by things such as whether the person has an office or uses the organisation's resources or is a member of the pension or provident fund or wears the organisation's uniform, etc.
- Whether the person is economically dependent on the other person that would be indicated by the extent to which the person does work for other people or is allowed to do work for other people, etc.
- Whether the person is subject to the direction and control of the other person: that would be indicated by the other person having the right (whether they actually do so or not) to dictate to the person how, when, where and for how long to work.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995, as amended
- Basic Conditions of Employment Act 75 of 1997, as amended
- Code of Good Practice: Who is an Employee? GN 1774 of 2006
- Insolvency Act 24 of 1936, as amended
- National Minimum Wage Act, 2018