

WHO ARE REALLY INDEPENDENT CONTRACTORS?

In a previous article, the differences between an independent contractor and an employee were discussed on the basis of principles and factors pointed out in case law. A pertinent question that arises is whether a person who delivers services to another, is in fact an employee or an independent contractor. There is a trend among employers, particularly in smaller businesses, to make use of contracts that strive to structure the working relationship as a relationship between a client and an independent contractor rather than between an employer and employee. In most cases, the underlying reason for the employer is the evasion of the provisions of our labour legislation, among which the right of employees to belong to trade unions and not to be unfairly dismissed, in an effort to create a simple labour dispensation. This would, so they argue, for example make it easier for the “employer” to terminate his relationship with the service provider.

Due to the complexity of our modern business environment and the several ways in which persons may regulate their business relationships, the question whether a person is an independent contractor or an employee regularly receives the attention of our courts and arbitrators. This is a sure sign that there is no easy test that can be applied to gain clarity on this issue.

The “dominant impression” test is widely accepted as norm according to which the actual status of a service provided is determined. The following practical illustration shows how the test is applied to determine the actual contractual relationship:

1. X, who was a former employee of Y, closes a new contract with Y according to which X will deliver certain services to Y every month.
2. Y pays X a monthly fee, calculated according to work performed, in other words he is remunerated for results.
3. Should X perform any other work to Y as that for which he was contracted, such work is regulated in a separate contract.
4. X is not restricted to working only for Y, but in reality he delivers work only to Y during the term of the contract.
5. X is not a member of Y’s pension fund and/or medical fund and is not subject to Y’s disciplinary code and procedures.
6. X is not entitled to sick leave and does not receive any payment if he does not perform the work himself.
7. An office, desk, telephone, stationery, computer and other office facilities are supplied to X, similar to any other employee.
8. X is invited to attend staff meetings, receives monthly payment and qualifies for annual remuneration increases.
9. X works normal office hours, on a similar basis as other permanent employees and performs all his functions under the supervision and control of a manager.

Is X an employee or an independent contractor?

After considering all the facts and undertaking a thorough investigation of the background and circumstances surrounding the various factors, it was found that, although there are characteristics of both types of relationships, the overriding impression is that the contract between X and Y is that of independent contractor.

The fact that X was formerly in Y's employ, that this relationship was altered with the consent of both parties and that the underlying relationship between the parties was one in which X contracted with Y to deliver a certain end result for which he would be paid, was decisive in determining that X was an independent contractor.

That Y provided X with equipment and his office facilities and the fact that X worked under the supervision and control of a manager of Y, was regarded under the circumstances to have been an arrangement that operationally suited both parties.

This set of facts illustrates how difficult it is to distinguish between an employee and an independent contractor. The same set of facts was finally judged in the Labour Appeal Court, where it was confirmed that X was an independent contractor and not an employee.

No easy formula exists to determine the type of contractual relationship in specific circumstances. The crux of the matter thus remains that all relevant facts and the underlying circumstances need to be thoroughly investigated. Certain properties of the relationship will come to the fore that would be indicative of the actual relationship, in spite of the designation of the contract. As in the abovementioned set of facts, there will often be properties of both contractual relationships, but there will be a feature or features that will be defining or indicative. Viewed this way, the nature and purpose of the contract is crucial.

Because this matter is still the cause of so many interpretation problems, particularly because the employment relationship is often construed in an attempt to evade the prescripts of labour legislation, the legislator deemed it necessary to propose an amendment to the Labour Relations Act and the Basic Conditions of Employment Act under which, unless the contrary can be proved, a person who is in the employ of another or who delivers services to another, would be deemed an employee if one or more of the following factors are present:

1. The way in which the person works is subject to the supervision and control of another person.
2. The person's working hours is subject to the supervision, control or guidance of another person.
3. In the case of a person who works for an organisation, that person is part of the organisation.
4. A person has worked for the other person for an average of 40 hours per month for the preceding three months.
5. That person is economically dependent on the person for whom he works or to whom he delivers his services.
6. The equipment/infrastructure required by the person to deliver his services is provided by the other person.

7. The person delivers his services or works for the other person only.

The amendment creates an incontrovertible suspicion that if one of the listed factors are present, the person is an employee for the purposes of the legislation. Thus, in the given set of facts, X would be regarded as an employee, unless Y can prove that X is indeed an independent contractor. (According to existing legislation, X must prove that he is an employee.)

What are the practical consequences of the proposed amendments?

Other than placing the onus on the employer, the factual question whether a person is an employee or an independent contractor remains the same. To determine this, a thorough investigation and consideration of all relevant factors need to be undertaken to determine the real relationship.