Contracts of Employment

Employment status and contracts of employment

It is important that the status of an employee be established from the beginning of the employment relationship – permanent, fixed term, temporary, and so on.

The Basic Conditions of Employment Act, in section 29, provides for certain written particulars of employment to be provided as a minimum, and every employer is legally obliged to provide all employees with these minimum particulars in writing not later than the first day of employment.

This minimum requirement, however, is not sufficient. Employers are well advised to enter into a written contract of employment with every employee. But what is the contract of employment, and what type of contracts can be used?

1.1 Definition: contract of employment

“A contract of employment is a reciprocal contract in terms of which an employee places his services at the disposal of another person or organisation, as employer, at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of the employee’s services.”

1.2 Definition: letting and hiring of piece work

The independent contractor contract is another method used by that certain class of employers to escape their legal obligations and to defraud the employee of his/her legal entitlement. The true independent contractor’s contract is not a contract of employment at all – it is a contract of work. This contract can be defined as follows:

“The letting/hiring of piece work is a reciprocal contract between an employer and an independent contractor in terms of which the latter undertakes to build, manufacture, repair or alter a corporeal thing within a certain period and the employer undertakes to pay the contractor a reward in return therefore.”

An example of a true independent contractor is the plumber you call in when your hot water geyser bursts – he comes in, quotes you for the job – you accept his quote (thus enter into a contract of work) he replaces your old geyser, you pay his invoice and the Contract is ended.

A true independent contractor:

- will be a registered provisional taxpayer
- will work his own hours
- runs his own business
- will be free to carry out work for more than one employer at the same time
- will invoice the employer each month for his/her services and be paid accordingly
- will not be subject to usual “employment” matters such as the deduction of PAYE or UIF from his invoice, will not receive a car allowance, annual leave, sick leave, 13th Cheque and so on.
Employers who outsource their labour requirements to a Labour Broker are not in contravention of the Act, but they must realize that they are not hiring “Independent Contractors.” The benefits provided for in the BCEA must be provided to these workers by the Labour Broker. More and more employers are going the route of outsourcing labour requirements. It solves a lot of problems, and in many cases can prove to be far more economical than employing labour. For example, the employer does not have to provide pension or medical aid, can easily reduce staff requirements during “valley” periods, increase staff during peak periods and level out staff requirements for the plateau periods. The increasing or decreasing of staff can be done without the employer becoming involved in any expensive retrenchment exercises or subsequent visits to the CCMA.

What is the status of your employees? Are they employees, fixed term contractors, independent contractors, temporary employees, or indeed, even probationers in disguise?

The dilemma continues – what category do you place your employees under? And what is more, is the status of your employees fair and legal? Or are you “bucking the system?”

The employer says the working relationship is that of an independent contractor, and such persons don’t qualify for annual leave or sick leave, no 13th cheque and no pension or medical aid.

Or he says the relationship is that the employee is a ‘temp.’ The employer is the agency from whom the employee is hired and they must provide annual leave etc. Firstly, it must be understood that this dilemma applies only to those persons who earn below the threshold income of R172 000.00 per annum (BCEA section 83A (2)). There is as yet no definition of an employee or no presumption as to who is an employee in the Basic Conditions of Employment Act or the Labour Relations Act applicable to persons earning more than the threshold amount. There are, however, other tests such as the dominant impression test and other methods that can be applied to determine whether a person of that category is an employee or not.

Persons earning below the threshold amount may, if necessary, approach the CCMA for an advisory award as to whether that person is an employee or not. (see section 148 LRA) In other words, to establish whether the relationship is a contract of employment or a contract of work. (BCEA section 83A (3))

1.3 Definition: employee

Since only persons defined as “employees” are protected by legislation and have recourse to the dispute resolution provisions of the LRA, it is necessary to establish whether a person is an employee or not. The practice to describe an employee as an independent contractor was found by the courts to be not conclusive. The real “test” is whether the true relationship between the parties is that of an independent contractor or employee.

The LRA defines an employee as;

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.

Paragraph (b) of the definition was intended to prevent employers from evading the provisions of labour legislation by concluding contracts which would be considered as independent contractors contracts as opposed to employment contracts.

The contract of employment

The contract of employment is the foundation of the relationship between an employee and his employer. The contract links the employer and the employee in an employment relationship. The existence of an employment relationship is the starting point for the application of all labour law rules: if there is no employment relationship between the parties, the rules of labour law do not apply to that relationship[1].

1.1 General requirements

The parties must enter into the contract freely and voluntarily. Forced labour is prohibited – in terms of section 48 of the BCEA no one can be compelled to work for another. Likewise, no employer can be compelled to take a particular person into service, and as all contracts in our law, parties cannot enter into illegal contracts of employment.

This last requirement is illustrated in Georgieva – Deyanova / Craighall Spar [2004] 9 BALR 1143 (CCMA) where an employer addressed a letter to the employee calling on her to furnish the required proof of legal documentation or a South African identity for her to work in South Africa. A further letter was also sent to the employee for her to provide proof with a deadline. On 1 July 2003, the employer informed the applicant that it could not employ her because of her failure to provide proof of her legal status. The employee approached the CCMA, claiming that she had been unfairly dismissed. In line with three other decisions, the commissioner found the CCMA did not have jurisdiction as the contract of employment was void ab initio (to be treated as invalid from the outset).

It is also necessary for the parties to be in agreement as to the nature of the contract. The employee might for instance believe that he is offered a contract of employment, whilst the employer believes that they are concluding an agency contract. Not only the nature of the contract is important – the parties must also be in agreement as to the contents of the contract.

1.2 Formalities

By common law no formalities are required when an employment contract is concluded. The contract of employment arises when the employee accepts the employer's offer unconditionally. Although the common law does not require the contract to be in writing, section 29 of the Basic Conditions of Employment Act, requires an employer to supply the employee with written particulars of employment – this does not mean that a written contract is required, or that the contract is void. Certain contracts of employment must be in writing – this is required by other statutes. Examples are those of merchant seamen, learners under the Skills Development Act and candidate attorneys.

When the contract is concluded, the parties must agree on the work the employee is required to perform. The employee offers his/her services (labour potential) to the employer (either an individual or juristic person such as a company.) The employee is obliged to do the agreed work, as well as any unspecified task related to the main work, provided that it is not unlawful or beyond the area of expertise of the employee. This means that the employer can tell the employee what to do and how to do it.

The parties must agree on the remuneration to be paid to the employee at conclusion of the contract. Remuneration may be payable in cash and/or in kind (other benefits), and can take many forms, such as a monthly or weekly salary, weekly or daily wages, or even irregular payments.