Employees and independent contractors

Anton Roskam and Doris Tshepe *discuss the problems that arise when employees are changed into independent contractors. They consider in particular the problems facing owner-drivers in the transport industry.*

One of the many challenges facing workers and trade unions is the attempt by some employers to change their employees into independent contractors. This has serious consequences for employees.

What is happening?

There seem to be two trends in South Africa. The first trend is a crude attempt by employers to rename their employees as independent contractors and to reconstruct their terms and conditions of employment as if they were the terms and conditions of an independent contractor. This is widespread in the clothing and textile, motor, engineering and transport industries. The main protagonist is the Confederation of Employers' Organisation (COFESA), which advises its members to do this. Although COFESA's programme is unsophisticated, it has serious implications for employees.

The second trend is more complicated. A good example, which is prevalent in the transport sector, is the owner-driver scheme. The company retrenches its drivers. It makes them buy their trucks. It arranges a loan from a bank for the driver and stands as surety. The owner-driver then transports the company's goods at a standard rate. Usually all the work is provided by the one business. Often the owner-driver must employ the truck assistants if he or she wants to have them help out. There is therefore a tendency for owner-drivers not to employ assistants, which leads to job losses.

Employers claim that the main reason for this scheme is that it promotes productivity. The owner-driver, who is no longer an employee but an independent contractor, does not take as much leave; he or she works overtime, without the limitations of the BCEA. The owner-driver determines his or her hours of work. The implications are ominous.

The implications

If you are an independent contractor then the labour laws do not protect you. You are not covered by:

Column contributed by Cheadle, Thompson and Haysom

- the LRA, which means that in effect you do not have the right to join a trade union and engage in collective bargaining and to challenge an unfair labour practice including your dismissal (ie the termination of your contract) in the Labour Court, CCMA or bargaining council;
- the BCEA, which means you do not have the right to various basic conditions of employment such as annual leave, sick leave, maternity leave, limitations on working time, overtime, etc;
- the Compensation for Occupational Diseases Act, which means you do not have the right to claim for workplace injuries, etc;
- the Unemployment Insurance Act, which means that you do not have the right to payment for several months after you may have been dismissed or to compensation while on maternity leave;
- the Insolvency Act, which means you do not have a preferential claim for your salary if the employer's business is declared insolvent.

There are many other implications, including not being covered by the Employment Equity Act and the Skills Development Act.

In essence, the owner-driver and the COFESA-type independent contractor do not have the protections afforded to them by labour legislation. The term 'independent' is misleading. The contractors are utterly dependent on the business with which they contract. They must accept the terms upon which that work is provided to them because they are unable to use collective bargaining as a means of redressing the power imbalance between them and the business with which they contract. They are 'dependent contractors'.

In many instances these workers are vulnerable to extreme exploitation. They are not skilled or educated. They do not read or write and do not understand the contents or implications of their contracts of work. They discover when they are dismissed that they are not employees at which point it is too late.

Even if they are employees, because their contract says otherwise, when they get to the CCMA, bargaining council or Labour Court they bear the burden of proving that they are employees. This is difficult to do and involves complex issues of law.

There are also implications for safety when it comes to owner-drivers. Owner-drivers who are not employees often push themselves to work more over time – they do not take regular breaks or leave. This adversely affects the risk of accidents.

Where the owner-driver employs truck assistants it is difficult to organise them and bargain on their behalf because there are a myriad of employers. Effectively, truck assistants cannot be unionised. These dependent contractors deserve the protections of labour legislation.

The Constitution

Interestingly, the language of the South African Constitution seems to support the view that dependent contractors should be protected. Section 23(1) of the Constitution states that 'everyone has the right to fair labour practices'. It does not limit the right to fair labour practices to employees only, but rather uses the broader term 'everyone'.

Section 23(2) gives every 'worker' the right to form and join a trade union, to participate in its activities and programme and to strike. Arguably the concept of worker is broader than that of employee and includes employees and dependent contractors.

Possible responses

There are three possible responses to the problem:

- ❑ We could define the characteristics of employees to clarify who is an employee and who is an independent contractor.
- ❑ We could redefine the concept employee to include persons who are so-called independent contractors, but who are clearly dependent on another and who require protection.
- ❑ We could provide legislation that protects a new class of worker, namely the 'dependent contractor'.

These options are not mutually exclusive. We will consider each in turn. But before we do so we need to consider how the law presently distinguishes between employee and independent contractor.

Employee vs independent contractor

An employee usually devotes his or her full time to the employer's business under the supervision or control of the employer, although supervision or control is not an essential element.

The employee works at a set place, has regular working hours and is paid regularly. The subject matter of the contract is the supply of services, labour or the capacity to work. However, modern ways of working have significantly altered some of the features contained in the contract of employment.

On the other hand, a contract of an independent contractor involves the performance of a piece of work in a manner that is in the discretion of the contractor. The contract terminates upon the completion of the work. The subject matter of a contract is the product or the result of labour, not the labour itself.

This distinction is often artificial and difficult to maintain.

Determining an employee

The definitions contained in the LRA, BCEA and other pieces of labour legislation do not assist in determining whether a worker is an employee or an independent contractor. Therefore it is up to the Labour Court, the CCMA or the bargaining council to determine whether or not a person falls within the definition of an employee.

Over the years the courts have used several tests to determine whether a person is an employee or independent contractor. The most common tests are the control test, which considers whether the employee is subject to the control or supervision of another, the organisation test, which looks at whether the employee is integral to the organisation with which he or she has a relationship, and the dominant impression test.

Dominant impression test

The most common test is the dominant impression test. In terms of this test, the court must examine the relationship in its totality and weigh up those aspects of the relationship that indicate the existence of an employment relationship and those that indicate a relationship of an independent contractor. If the dominant impression indicates the existence of the contract of employment, then the relationship is one of employment.

This test is problematic because it gives no indication of the features that must be taken into account in determining whether a person is an employee or an independent contractor. Moreover, all the tests are complicated and obscure. They have also been applied inconsistently.

Label in contract

The courts first consider the construction of the written contract. However, they have sought to discover the true

Independent contractors are not protected by labour law

relationship of the parties and do not place too much emphasis on what parties choose to call their relationship.' The rationale behind this approach is that sometimes parties describe their relationship incorrectly, often in a deliberate attempt to escape their legal obligations.

Therefore, attempts by many employers to amend the contracts of employment by labelling employees 'independent contractors' in order to disguise the true relationship between the parties and to escape obligations in terms of the labour or tax legislation will not survive once examined by the courts.

Characteristics of an employee

This is the first option to resolve this problem. It is the one that government has proposed in its recently published amendments to the LRA and the BCEA.

The proposals introduce a rebutable presumption (ie a presumption that a person is an employee until proven otherwise) that the person who works for or provides services for another is an employee, where any 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 person for an average of at least 40 hours per month over the last three months;
- that person is economically dependent on the person for whom he or she works or provides services;
- the person is provided with his or her tools of trade or work equipment by another person;
- the person only works or supplies services to one person.'

Government's motivation for introducing

this presumption is that most employees in the vulnerable sectors of the economy are excluded from the protection of labour legislation even though they are in fact employees. Furthermore, the lack of guidance in the definition of employee and the manner of its interpretation by the courts undermine the effectiveness of protection offered to these vulnerable workers.

The government's proposal represents a progressive step. It should deal with the trend that COFESA seems to be spearheading because it defines some of the characteristics of the employment relationship and, where one of those characteristics is present, it places the burden on the employer to prove that the relationship is not one of employment.

But is it enough? Does it solve the problem facing the owner-driver in the transport sector? Possibly, but it is no guarantee that the owner-driver will be declared an employee.

If the owner-driver employs truck assistants, and is therefore himself of herself an employer, it is unlikely that the owner-driver will be declared an employee even if government's proposal was implemented. Government's proposal will clear up some of the mess that our courts have found themselves in when distinguishing between employer and independent contractor, but it will not deal with the problem of the dependent contractor who is not an employee and is also deserving of protection in the labour market.

Expand concept's scope

Another option is to broaden the scope of the concept of employee in the legislation to include dependent contractors. For example, in Sweden the following provision is included in the definition of employee: 'For the purposes of this Act a person shall be regarded as an employee even if no normal engagement exists, provided that he performs work for another person and thereby occupies in relation to that person a position of dependence essentially similar to that occupied by an employee in relation to his employer.'

In Canada the definition of employee has been expanded to include the concept of 'dependent contractor'. A dependent contractor is defined as: 'A person, whether or not employed under a contract of employment, and or not furnishing tools, vehicles, equipment machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.'

In interpreting this definition, the Canadian Labour Relations Boards dealt with individuals who were in similar circumstances as the owner-driver. The boards have found the owner-drivers to be dependent contractors and therefore part of the expanded definition of employee. In British Columbia the Labour Relations Board found that:

- the actual performance of their work or services fits into the same rotation as the employee-driver, in that they drive the same route and are subject to the same supervision and control;
- owner-drivers are paid the same standard rate as employees although the driver's rate is considerably higher because he rents his truck and his services;
- there is little room for entrepreneurial judgment or initiative that might result

in extra profits or losses.[2]

The Ontario Board in the case of Nelson Crushed Stone[3] held that the purpose of this amendment was to address the mischief created by persons who may 'manifest the trappings of independent entrepreneurs but who in an intrinsic sense are clearly in such a subservient economic position vis-à-vis the beneficiary of his services that he ought to be extended the protection intended by the collective bargaining process'.

The board has also held the word dependent must be interpreted in a manner consistent with the economic reality of the relationship with the beneficiary of the service.

The Ontario Labour Relations Board has listed 11 indicators that it considers when determining dependency.[4] These are:

- 'the right to use substitutes in method of work performance;
- ownership of tools and supply of materials;
- evidence of entrepreneurial activity;
- the selling of one's own services on the market generally;
- economic mobility or independence – the freedom to refuse a job;
- evidence of variation in fees charged;
- organisational integration;
- degree of specialisation, skill, expertise and creativity;
- control in the manner of performance of work;
- magnitude of the contract and manner of payment;
- the rendering of services under the same conditions as employees.'

Numerous other cases have considered the concept of 'dependence'. We do not intend to review all the cases except to note that there have been different opinions from the labour boards about whether owner-drivers who employ others are dependent contractors.[5]

The one way to solve this problem is for the owner-drivers and the union organising in that business to campaign for the truck assistants to be employed by the company. This would obviously be to the benefit of the truck assistants as well.

Do the Canadian and Swedish definitions of employee, which include the dependent contractor, solve the problems facing the owner-driver in South Africa? They certainly seem to be an advance on our law.

Provide protection

The German approach is to provide dependent contractors some, but not all, of the protections afforded to employees. Obviously this would go some way to protecting owner-drivers where they are deemed to be dependent contractors, although it would depend on the nature and extent of the protections provided to them.

Conclusion

It is necessary to explore all these options. We think it may be necessary to go beyond government's proposals to date. ★

Footnotes

1. *See South African Broadcasting Co-operation v McKenzie (1999) 20 ILJ 585 (LAC); Blismas v Dardagan 1951 (1) SA 140 (SR) at 146H, Goldberg v Durban City Council 1970 (3) SA 325 (N) at 331B-C; The Nature of Employment by Martin Brassey (1990) 11 ILJ 889 at 921.*
2. *Fownes Construction Co. Ltd [1974] 1 Can. L.R.B.R. 453 (B.C.) at pp 461-2.*
3. *[1997] O.L.R.B Rep Feb 104*
4. *Algoquin Tavern and CLC, Loc. 1689 (Re) [1981] 3 Can. L.R.B.R. 337 (Ont.)*
5. *Bronwin Harvey Ltd 80 C.L.L.C. 16,016 (Nfld. L.R.B.); Canada Crushed Stone [1977] O.L.R.B Rep Dec.806; Dominion Diaries Ltd [1978] O.L.R.B Rep Dec. 1085*

Anton Roskam and Doris Tshepe are both attorneys at Cheadle Thompson & Haysom Inc.