

EMPLOYMENT

ALERT

DIRECTORS - WHEN ARE THEY CONSIDERED TO BE EMPLOYEES?

Are directors employees? This is a question that the Labour Court (Court) has had to consider on a number of occasions and it has traditionally responded that some are and some are not. This was once again the central issue for determination in *Protect A Partner (Pty) Ltd v Machaba-Abiodun, CCMA and others (Case no. JR2062/2010)*.

The Applicant sought to review the CCMA's ruling that Abiodun, a director and 45% shareholder of the Applicant, was an employee in terms of the Labour Relations Act, No 66 of 1995 (LRA) and that the CCMA had jurisdiction to determine the unfair dismissal dispute lodged by Abiodun.

In determining the issue before it, the Court considered the scope of the definition of 'employee' in the LRA and adopted the reality test set by the Labour Appeal Court (LAC). The LAC outlined three primary factors for the purpose of determining an employment relationship, namely:

- The employer's right of supervision and control over the employee.
- Whether or not the employee forms an integral part of the organisation of the employer.
- The extent to which the employee is economically dependent on the employer.

In casu, the Court recognised that no one factor is decisive and that it was possible to find the existence of an employment relationship despite only one of the factors being present.

When considering the control element, the Court held that much will depend on the nature of the work being performed in the context of the relationship between the parties. The Court referred to *dictum* that suggested that control can also be identified in the employer's power to terminate the employment relationship.

In determining whether an employee forms part of the organisation, the Court recognised that an employee does not form part of the organisation simply because he or she performs the same services or task as other employees in the organisation. Rather, in determining the issue, one must consider whether the employee assists the employer conduct its business.

Turning to the last factor, the Court further recognised that complete financial dependence is not necessary. A holistic and reasonable approach must therefore be adopted when determining the extent of such dependence.

On the facts before it, the Court found that Abiodun was an 'employee' as defined in the LRA. This was established by *inter alia* the fact that she was subject to the disciplinary control of the Applicant, the Applicant had provided her with office space and equipment in order to further its business and that the tasks and services rendered by her indicated a significant degree of integration into the Applicant's organisation.

This judgment reiterates that a determination of whether a director is an employee requires an investigation into the reality of the relationship between him/her and the company.

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