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EMPLOYMENT ALERT

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INTENTION IS EVERYTHING: THE ROLE OF INTENT IN EMPLOYEE DISCIPLINE FOR DISHONESTY AND/OR FRAUD

Employers tend to charge employees who have received financial gain from misconduct with dishonesty or fraud even in cases where the "benefit" can be attributed to human error or negligence.

SARS INTERPRETATION NOTE 17: WHEN WILL AN EMPLOYER BE LIABLE FOR EMPLOYEES' TAX IN RESPECT OF AN INDEPENDENT CONTRACTOR?

The South African Revenue Service (SARS) has published an updated Interpretation Note 17 (Interpretation Note) on how to determine whether a person is an independent contractor for employees' tax purposes.

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INTENTION IS EVERYTHING: THE ROLE OF INTENT IN EMPLOYEE DISCIPLINE FOR DISHONESTY AND/OR FRAUD

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Mr Ngcobo was charged with dishonesty and/or falsification of overtime claims. He was found guilty and he was dismissed on 10 April 2014.



Employers tend to charge employees who have received financial gain from misconduct with dishonesty or fraud even in cases where the "benefit" can be attributed to human error or negligence.

In the case of *Drs Dietrich, Voigt and MIA v Bennet CM N.O CA 14/2016*, the Labour Appeal Court confirmed that not all conduct that leads to financial benefit is nefarious. Sometimes, employees may have a reasonable explanation, and in such cases, a dismissal is not the appropriate sanction.

In December 2012, Mr Ngcobo was assigned to work on a project with the Head of Basic Haematology Research Group and he was expected to work overtime. He agreed to be paid at a rate of 1.0 per hour (his normal hourly rate).

After concerns from Mr Ngcobo's line manager regarding his overtime claims, the employer audited his claims forms and the investigation revealed the following:

- Mr Ngcobo claimed overtime at an incorrect rate for a period of three months in July, November and December 2013 - he had submitted claims at the rate of 1.5 per hour which was higher than his normal hourly rate.
- In addition, he had claimed payment for time that he was not at the workplace in that there were 13 instances where he had failed to "clock out" during lunch break thus representing an incorrect reflection of his actual hours worked.

- The employer suffered a loss of R8,647.60 as a result of the employees' conduct.

Mr Ngcobo was charged with dishonesty and/or falsification of overtime claims. He was found guilty and he was dismissed on 10 April 2014.

At the CCMA, Mr Ngcobo challenged the substantive fairness of his dismissal. During arbitration, he admitted to claiming overtime for time spent outside the workplace during his lunch hour however he explained that his actions were not dishonest and intentional and had apologised for the transgressions.

In relation to the second charge, Mr Ngcobo also explained that the claims submitted at the rate of 1.5 per hour were made in error. He explained that they were not submitted with an intention to deceive the employer because they were supported by time sheets which were approved by his manager.

The commissioner considered the evidence and held that the employer failed to prove that Mr Ngcobo had acted dishonestly and/or deliberately falsified his claims. He found Mr Ngcobo guilty of negligence, sanctioned him with a written warning valid for 12 months and ordered retrospective reinstatement.

INTENTION IS EVERYTHING: THE ROLE OF INTENT IN EMPLOYEE DISCIPLINE FOR DISHONESTY AND/OR FRAUD

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The court assessed the evidence that was before the commissioner and held that the commissioner's findings were reasonable.



On review, the Labour Court upheld the decision of the commissioner. Rabkin-Naicker J also observed that the Mr Ngcobo's claims were approved by his line manager who had also recorded on email that she and Mr Ngcobo had learned a lesson from their mishaps.

On appeal, the employer argued that the employee was guilty of dishonesty and not negligence because during the arbitration proceedings, the employer had shown that the employee had deliberately submitted false claims. The Labour Appeal Court held that the main issue to be determined was whether the employee acted intentionally or negligently.

The court examined the test for "reasonable person" in the context of the workplace and held that the employee

failed to act with the degree of care and standard expected of a person in his position. It assessed the evidence that was before the commissioner and held that the commissioner's findings were reasonable.

This case cautions employers against charging employees with dishonesty simply because the employee has enjoyed some financial gain as a result of his or her misconduct. Although benefiting from a misconduct financially aggravates the misconduct, it does not always result in a finding of dishonesty or fraud. An employer must be prepared to look beyond the conduct and consider the explanation provided by the employee during the investigation or at the disciplinary enquiry.

Thabang Rapuleng and Tamsanqa Mila



SARS INTERPRETATION NOTE 17: WHEN WILL AN EMPLOYER BE LIABLE FOR EMPLOYEES' TAX IN RESPECT OF AN INDEPENDENT CONTRACTOR?

The Interpretation Note provides that an independent business can, in general terms, be described as one that is an entrepreneurial enterprise, enjoying such a degree of independence that "it can survive the termination of the relationship with the client".

In evaluating whether a person is an independent contractor for employee's tax purposes, SARS make use of two "tools" consisting of two statutory tests and the common law test.



The South African Revenue Service (SARS) has published an updated Interpretation Note 17 (Interpretation Note) on how to determine whether a person is an independent contractor for employees' tax purposes. The Fourth Schedule to the Income Tax Act, No 58 of 1962 (Act), requires there to be three elements before employees' tax can be levied, namely an *employer paying remuneration to an employee*. As such, determining whether a person is receiving remuneration, as defined in the Act, and whether they are an employee, are important considerations.

In terms of the definition of remuneration in the Fourth Schedule, if amounts are paid to a person who carries on a trade independently of the person from whom the amounts are received and for whom the services are rendered, then the amounts are not considered remuneration for the purposes of employees' tax and the employer will not be liable to deduct and pay over employees' tax to SARS.

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In evaluating whether a person is an independent contractor for employee's tax purposes, SARS make use of two "tools" consisting of two statutory tests and the common law test. There are two statutory tests, where the first is met, the person is deemed not to be carrying on an independent trade, and if the second is met, the person will be deemed to be carrying on an independent trade.

The statutory tests

The first statutory test involves two parts, the first being an evaluation of whether the services being procured are rendered mainly (i.e. more than 50% of the time) at the premises of either the person paying the worker or the person to whom the services are being rendered. The second part of the first test evaluates the level of control or supervision exerted over the worker in carrying out his/her duties. Where both the first and second parts of the first statutory test are met, the worker will not be considered to be independent.

The second statutory test considers whether or not a person employs three or more full-time employees, who are not connected persons related to him or her and are engaged in his or her business throughout the particular year of assessment. Where the person employs such other people as aforementioned, the person is deemed to be carrying on a trade independently. This test overrides the first statutory test and the common law test and is therefore decisive on the question of whether the monies paid to such a person are remuneration for employee's tax purposes.

SARS INTERPRETATION NOTE 17: WHEN WILL AN EMPLOYER BE LIABLE FOR EMPLOYEES' TAX IN RESPECT OF AN INDEPENDENT CONTRACTOR?

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It is the responsibility of the employer to determine whether the monies paid by it for services rendered are remuneration for purposes of employees' tax, or whether the exclusions in the Fourth Schedule apply.



The common law test

The common law test, as applied by SARS, involves making use of an overall or dominant impression of the employment relationship. In making this evaluation a number of indicators are used. These indicators are grouped into three categories, namely:

- Near-conclusive indicators, such as the manner of control, the payment regime, the person who can render the service etc;
- Persuasive indicators, such as whether or not the worker is receiving instructions or supervision, the reporting regime and training methods; and
- Resonant indicators (those creating an immediate impression of independence) such as, who provides the tools of the trade, whether one operates from their own premises, integration into the employer's workplace etc.

The list of indicators in the Interpretation Note is not exhaustive and can be supplemented over time and due to changing circumstances.

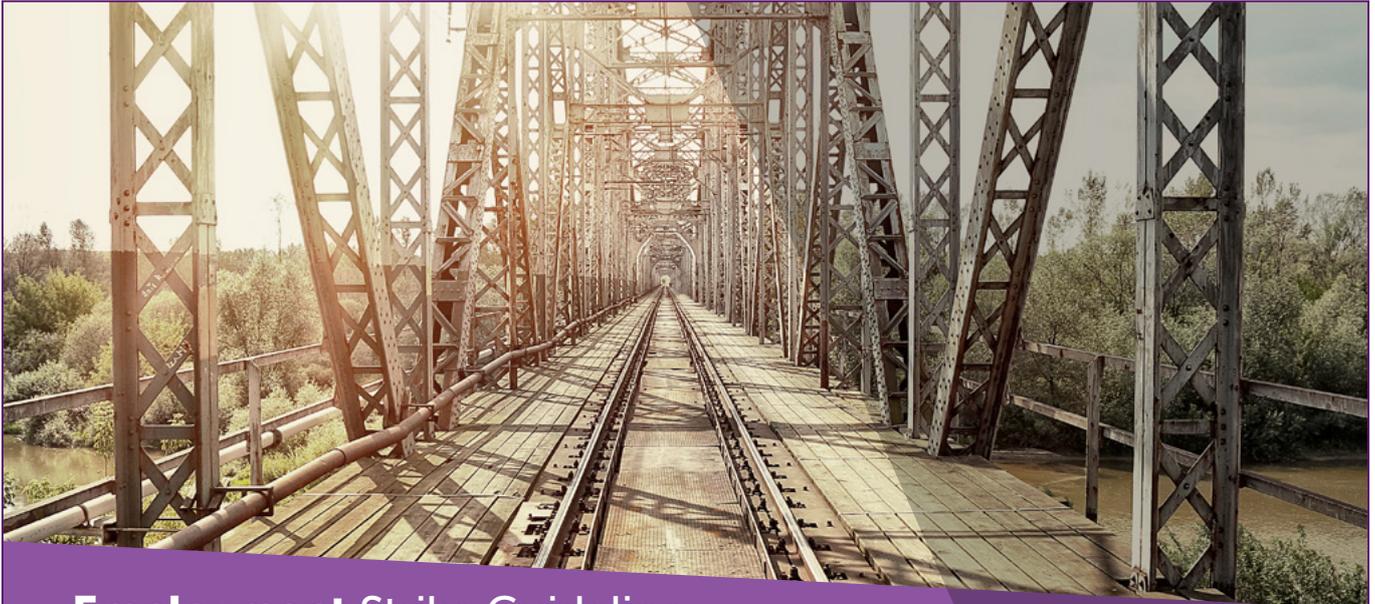
The common law test applied by SARS is similar to the tests applied to determine whether an independent contractor is an employee in terms to read of our Labour Law. Section 200A of the Labour Relations Act creates a presumption that a person is an employee where one or more of the factors listed therein are present. These

factors include the manner of control the employer exerts on a person, the economic dependence of that person on the employer and whether the person is provided with the tools to do the work. The difference however is that for the purposes of the Labour Relations Act, this presumption only applies to those earning below R205,433.30 per annum. SARS however, does not make any distinction based on the amount of remuneration being received by the contractor.

It is the responsibility of the employer to determine whether the monies paid by it for services rendered are remuneration for purposes of employees' tax, or whether the exclusions in the Fourth Schedule apply. An employer who has incorrectly classified a worker as an independent contractor is liable for employees' tax that should have been deducted, as well as the accompanying interest and penalties. The employer, however, has the right to recover the tax from the worker.

It is therefore important for employers, especially those who make use of independent contractors, to evaluate those relationships and ascertain whether or not a particular worker or contractor, could be regarded as an employee for the purposes of employees' tax, and if so, the employer must deduct employees' tax from the remuneration paid to them.

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