

# Employee vs Independent Contractor vs TES

The test for determining who is an employee and who is an independent contractor differs with reference to persons who earns above or below the threshold in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). An independent contractor, unlike TES employees, is not an employee either of the client or the TES. Independent contractors render services for a fee, whereas a TES provides labour to a client for reward. Ultimately the test is always substance over form and the nature of the agreement is not definitive.

## TES

"Any person who, for reward, procures for or provides to a client other persons who perform work for the client; and who are remunerated by the temporary employment service."

### ABOVE THRESHOLD (NEDLAC CODE OF GOOD PRACTICE)

Factors contained in section 200A (1) of the LRA are merely a guideline to determine whether a person is an employee.

The determination for persons who earn above the threshold is subject to the following tests:

#### CONTROL TEST

1. Person<sup>2</sup> formed integral part of organisation.
2. Extent to which the person was economically dependent on the company.

#### DOMINANT CONTROL TEST

The courts will consider the dominant impression created having regard to all relevant factors upon examining the reality of the relationship between the parties.

In *Goliath v SA Broadcasting Corporation SOC Ltd and Others (2023) 44 ILJ 185 (LC) ZALCCT 10 (20 September 2022)*, the court held that the regularity of the work and the fact that the applicant sought no other avenues of income did not render the relationship an employment one. All factors must be considered to determine the true legal relationship between the parties.

#### REALITY TEST

The courts will have regard to all relevant factors which indicate the factual relationship between the parties.

### BELOW THRESHOLD (PRESUMPTIONS IN TERMS OF SECTION 200A (1) OF THE LABOUR RELATIONS ACT 66 OF 1995 (LRA))

In terms of section 200A (1) of the LRA, persons who earn below the threshold are rebuttably presumed to be employees where one or more of the following factors are present. The courts will however determine the relationship on the whole:

#### SINGLE EMPLOYER

The person in question only renders service/works for one person.

#### TOOLS OF TRADE

The person in question is provided with tools/equipment by the other party.

#### ECONOMIC DEPENDENCE

The person in question is economically dependent on the other party.

#### CONTROL

- The person's hours of work are subject to the control or direction of the other party.
- The manner in which the person works is subject to the control or direction of the other party.

#### TIME WORKED

The person in question has worked for at least 40 hours per month, over the last three months.

#### INTEGRAL TO COMPANY

In the case of a person who works for a company, the person forms part of the company.

#### NB:

The abovementioned factors will ordinarily not apply to independent contractors. However, the courts have adopted the "reality approach", in terms of which they consider the holistic relationship between the parties. The facts of the case rather than the nature of the agreement is the determining factor.

### GENERAL GUIDELINES FOR TES RELATIONSHIP

"Temporary services" is defined in the LRA as (i) services limited to a fixed time period of not more than three months, (ii) where the TES employee is a substitute for a temporarily absent employee of the client, or (iii) where a collective agreement or sectoral determination designated a particular work category as a temporary service or designated the maximum temporary period. Determining whether service providers are TES is determined with reference to the following (*Victor and others v Chep South Africa (Pty) Ltd [2021] 1 BLLR 53 (LAC)*) ("Chep"):

Has the company provided persons to a client or procured persons to perform work for a client? Do the persons operate from the client's premises and the client retains overarching control over the work process and continuity of the delivery of the services by the TES employees?

Does the company procure the employees for the client for reward – which may be calculated with reference to tasks or products?

In the *Chep* judgment, the LAC held as follows: "Questions of control and integration, including the manner in which the workers work; the authority to which they are subjected; the degree they are integrated into the functioning of the organisation; and the provision of the tools of the trade and work equipment are relevant (possibly the only) factors in deciding if procured persons 'perform work for the client'. The more the client has control over the employees of the company or service provider, the degree to which the employees use the client's tools of the trade, and where the degree of integration in the organisation is greater than that of a general service provider, the more likely the relationship is one of a TES and not that of an independent contractor.

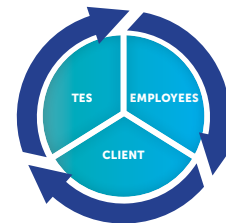
### BELOW THE THRESHOLD (Deeming provision section 198A (3) of the LRA)

In instances where TES employees earn below the threshold; do not perform temporary services as defined in the LRA and where the TES employee is assigned to the client for longer than three-months; not as a substitute for a temporarily absent employee of the client; nor assigned to a particular work category designated by a collective agreement or sectoral determination as a temporary service; then the TES employee is deemed to be the employee of the client and the client is deemed to be the employer of the TES employee. *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others (2018) 39 ILJ 1911 (CC)*.

The effect of the deeming provision is therefore as follows:

- The TES is considered to be the employer of the placed employee until the employee is deemed to be the employee of the client. At that point the TES ceases to be considered as the employer of the placed employee.
- Once the deeming provision kicks in the client becomes the sole employer of the employee.
- The employee is deemed, subject to the provisions of the LRA relating to fixed-term contracts for employees earning below the threshold, to be the permanent employee of the client.

*Food and Allied Workers Union obo Mkhalihi and others/Kempston Employment Solutions and another [2020] 3 BALR 240 (CCMA)*



SERVICE PROVIDER

CLIENT

<sup>1</sup> The earnings threshold as at 1 March 2023, was R241 110.59 per annum. This is subject to change every year on 1 March. Where an individual earns below the earnings threshold, they are more likely to be found to be an employee notwithstanding what their contract states, as these persons are considered vulnerable and in need of further protection by the law.

<sup>2</sup> The deeming provision of section 198A(3) in respect of TES employees of the LRA does not apply to independent contractors even after the 3 month period.