

## KNOW YOUR RIGHTS

### Who is an Employee?

#### Definitions:

Section 200A of the Labour Relations Act 66 of 1995 read together with chapter 1, paragraph B of the Basic conditions of Employment Act 75 of 1997<sup>1</sup> defines an employee as;

A person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person's hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.

Chapter 1 section 1 paragraph a) and b) of the Basic Conditions of Employment Amendment Act, No 11 of 2002<sup>2</sup> further 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.

---

<sup>1</sup> Basic Conditions of Employment Act regulates minimum conditions of employment in additions to those provided by common law and the contract of employment.

<sup>2</sup> Chapter 1 section 1 paragraph a) and b) of the Basic Conditions of Employment Amendment Act, No 11 of 2002 as amended to include any other person, who in any manner assists in carrying on or conducting the business of an employer. employee is given specific meaning in section 81 (1)

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.

Chapter 4 Section 29 of The Basic Conditions of Employment Amendment Act No 11 of 2002 , 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?

### **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.”(*SA LABOUR GUIDE and The Basic Conditions of Employment Act, in section 29*)<sup>3</sup>

There are two widely used types of contracts used in cases where service is rendered i.e. the location *condictio operarum* (Contract of Employment) and the location *condictio operis* (Contract of Letting and Hiring, commonly used for independent contractors

### **Post-Doctoral Fellows**

Given the above legislative definitions, we may now begin to deduce whether Post-doctoral fellows are to be deemed as employee and whether or not they should be entitled to be recognized as employees by Wits as an employer and whether they are protected by the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act No 11 of 2002.

Determining the employment status:

#### **1. The Control Test**

---

<sup>3</sup>(SA LABOUR GUIDE and The Basic Conditions of Employment Act, in section 29): 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.

The code of good practice issued by NEDLAC<sup>4</sup> in terms of section 200A (4) read with section 203, of the Labor Relations Act 66 of 1995 (LRA), on Part 3, chapter 39 states that; an employee is subject to the employer's control and supervision the right of control by an employer includes the right to determine what work the employee will do and how the employee will perform that work.

This means the control test or indicator is seen when the employer exercises his right to instruct or direct an employee to do certain things and to supervise how those things are done.

Chapter 40 further states that the employer's right of control is likely to remain in most cases, a very significant test or indicator of an employment relationship. The greater the degree of supervision and control to be exercised, the greater the probability that the relationship is one of employment. The right to control may be present even when it is not exercised. The fact that an employer does not exercise the right to control and allows an employee to work largely unsupervised, does not alter the nature of the relationship nor does it nullify the control test/indicator.

Bringing the above definition into the space of post-docs, it will be clear that post-docs execute their duties under the control and supervision of the HOD or HOS whichever the case may be, thus an employer-employee relationship does exist. The uniqueness of the post-doc contract does not negate the employer's obligations to honor his duties to post-docs as afforded by the Labour Relations Act and the Basic Conditions of Employment Act No 11 of 2002 , and it certainly does not open the post-doc employee to exploitation by the employer due to clauses that are different to the normal contracts of employment.

## 2. The Dominant Impression Test

The Labour Appeal Court in its judgment in the case of *SABC v McKenzie* **SABC v McKenzie** [1999] 1 BLLR 1 (LAC) at 4 -7<sup>5</sup>: found that the dominant impression test is the most acceptable and adoptable over the rest of other tests it has formulated to determine an employment relationship. To do that the following important characteristics must be present in the contract of employment to reflect the dominant impression test:

- a) The object of the contract of service is the rendering of personal service by the employee to the employer.

---

<sup>4</sup> NEDLAC: National Economic Development and Labour Council in terms of section 200A (4) read with section 203, of the Labor Relations Act 66 of 1995 (LRA), on Part 3, chapter 39

<sup>5</sup> The Labour Appeal Court in its judgment in the case of *SABC v McKenzie* **SABC v McKenzie** [1999] 1 BLLR 1 (LAC) at 4 -7

- b) According to the contract of service the employee will typically be at the beck and call of the employer to render his personal service at the behest of the employer.
- c) Services to be rendered in terms of the contract of service are at the disposal of the employer who may in his own discretion subject, of course to questions of repudiation decide whether or not he wants to have them rendered.
- d) The employee is subordinate to the will of the employer.

These elements and more will help in determining the given impression that exist between post-docs and the employer (the university). If one or more of the above mentioned elements are present, the law stipulates that it is sufficient to confirming an existence of an employer-employee relationship.

### **Remuneration**

Post-docs are entitled to receive remuneration for the work/service rendered. The fact that their remuneration is referred to as a quarterly stipend, does not reduce its definition in terms of the act, remuneration may be at a determined or determinable amount depending on the agreement of the parties, but it is still remuneration. The frequency of the remuneration also has no bearing on the definition of employee. It is now clearly agreeable that Post-docs are employees in terms of legislation.

### **Business of the Employer**

The work of post-docs involves Research, Admin and/or Teaching which are the major part of the business of the employer. Their time is occupied by carrying out the business of the employer.