

Is a property practitioner an employee? Part 3

Last week we discussed some of the tests applied by the Courts when determining if someone is an employee or independent contractor. Why are these tests important? Quite simply, if someone is an employee, then there would be a whole variety of labour legislation that would be applicable to the relationship between the employer and the employee.

It is important to note, that the discussion that follows in no way purports to be legal advice but is merely for information purposes. You are required to seek the advice of a labour law professional or consultant for actual legal advice.

One of the most important questions that arises, would be the application of the National Minimum Wage Act 9 of 2018. In terms of the National Minimum Wage Act 9 (NMWA), the following definitions are most interesting:

1. "worker" means any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind;
2. "wage" means the amount of money paid or payable to a worker in respect of ordinary hours of work or, if they are shorter, the hours a worker ordinarily works in a day or a week; and
3. Section 3 of the Act says, "This Act applies to all workers and their employers except members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service."

In terms of the Basic Conditions of Employment Act (BCEA), certain definitions are also illuminating:

1. "wage" means the amount of money paid or payable to an employee in respect of ordinary hours of work or, if they are shorter, the hours an employee ordinarily works in a day or week;
2. Section 35(1) of the BCEA says, "An employee's wage is calculated by reference to the number of hours the employee ordinarily works.";
3. Section 35(4) of the BCEA says, "If an employee's remuneration or wage is calculated, either wholly or in part, on a basis other than time or if an employee's remuneration or wage fluctuates significantly from period to period, any payment to that employee in terms of this Act must be calculated by reference to the employee's remuneration or wage during the preceding 13 weeks; or if the employee has been in employment for a shorter period, that period."; and
4. "remuneration" means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State

Hence, commission could very well be considered "remuneration" in terms of the BCEA. Wages are calculated with reference to the number of hours worked, whereas remuneration is payment for work that has been performed for another person. When considering the definitions mentioned, this would mean that it is possible that the national minimum wage could apply to a property practitioner.

It is therefore important, that the letter of employment is very clear that the property practitioner is an independent contractor and not an employee. It is also important, that the tests that we mentioned last week, do not apply to the property practitioner or that person may then be considered an employee.

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Next week, I will discuss the thorny and generally poorly reported issue of expropriation without compensation.