

BACKGROUND

Recent trends in the employment of farm workers have revealed that farmers are steadily decreasing their on farm permanent labour force and increasing their employment of off farm temporary labour. But who are these temporary labourers, how does the law apply to them and what can we do to identify and protect their rights?

DEFINITIONS

The law distinguishes between two types of workers. Independent contractors and employees.

An employee is a worker who is not an independent contractor and is defined in the BCEA as

“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 any other person who in any manner assists in carrying on or conducting the business of an employer”¹.

Our case law and proposed amendments to labour legislation are even more specific saying that a worker is an employee when

- the manner in which the person works is subject to the control of another person;
- the person's hours of work are subject to the control or direction of another person;
- in case of a person who works for an organisation, the person forms part of that organisation;
- the person has worked for that person for an average of at least 40 hours per month over the last 3 months;
- the person is economically dependant on the person for whom he or she works or provides services;
- the person is provided with his or her tools of work equipment by another person;
- the person only works or supplies services to one person;

An independent contractor is someone who works for a client not an employer.

The client pays the independent contractor to perform a specific task normally within a specific time. The client does not control the details of how this job is performed, how many people do it, the tools they use etc. The independent contractor decides the best way to complete the task and gets on with it. A good example is that of a building contractor. The client asks the builder to build a house. The client will give

the builder the plans and timeframes etc. but the client will not tell the builder how to lay the foundation, how many workers to use to do the work, what to pay them, when he/she must start and stop during the day, what tools to use etc.

NOTE: an independent contractor may employ people to do some of the work but they are then employees of the independent contractor not the client.

With respect to legal definitions a worker must fall into one of these categories. Either one is an independent contractor or an employee. In summary the main difference between the two is control. An independent contractor has control over the way in which he/she completes the task for the client. The way in which an employee does their work is controlled by the employer, and not simply up to them.

The important effect of this distinction is that employees are protected by all labour legislation and independent contractors are not.

DISCUSSION

It is easy to see that the vast majority of farm workers are employees. Definitely permanent on farm workers are employees of the farmer. Temporary and seasonal workers who are employed directly by the farmer are also employees, entitled to pro rata employment benefits for the time in which they are employed and covered by labour legislation.

LABOUR BROKERAGE, THE TES AND CONTRACTING

But what happens if there is a third party in the employment relationship? The worker does not decide how, where and when to work, so he/she is definitely not an independent contractor. But how, when and where he/she works is not controlled by the farmer entirely, but by a third party. This third party can take up various roles in the employee's contract.

THE LABOUR ONLY BROKER

He/she may be a labour-only broker. This is someone who the farmer contacts when he/she needs a number of workers for a certain task or time period. The broker will contact you as a worker and

inform you that farmer X needs workers and you will report for work to farmer X. There you will enter into an arrangement with farmer X concerning wages, working time etc and farmer X will then tell you what to do and how.

Farmer X will pay the labour-only broker a fee for finding the workers but that will be the end of the broker's involvement. The broker will not pay you, grant or refuse leave, or direct your work, this will be done by the farmer or his staff and the farmer will then be your employer whilst you work there. The broker is called a labour only broker because he/she does not interfere in the employment relationship between the worker and the farmer but only finds the labourers for the farmer.

LIABILITY: The farmer as employer is liable under the labour laws in the same way as any employer despite the fact that the broker sourced the workers.

THE TES (TEMPORARY EMPLOYMENT SERVICE)

A TES is an organisation, big or small, which finds work for workers from time to time. A TES may have big offices and find work for thousands of workers or it may be a one man show. The BCEA says a TES is “any person who, for reward, procures for or provides to a client other persons –

- who render services to, or perform work for, the client; and
- who are remunerated by the temporary employment service”.

The main difference between a labour only broker and a TES is that the TES, not the farmer, pays the wages. Often the TES will administer UIF, sick leave etc. but this is not always the case.

CASE STUDY 1

Oom Jan is called by farmer Y who needs extra workers for pruning this year. Oom Jan has a team of 20 people who he has work with before who are currently unemployed and he brings them to the farm. He negotiates a daily or piece rate with farmer Y and his 20 workers join the others employees of farmer Y in the field. Farmer Y's foreman calculates the piece rate of Oom Jan's workers every day and Farmer Y pays Oom Jan the total fee at the end of each week. After taking his cut of the profits Oom Jan pays out his workers.

CASE STUDY 2

OutSource is a national organisation employing thousands of workers. They contact workers when a job is available and transport them to the farmer Y to do the work. At week end the pay packages are distributed for their head office. The deduct UIF and pay sick leave when a worker is sick during the period of the contract. However the farmer Y controls the manner in which the workers work and the conditions under which they work.

DISCUSSION

The workers are economically dependent on Oom Jan and OutSource, they cannot get this work without their help. Oom Jan/OutSource negotiate their piece rate and hours of work. And pay their wages. They are thus controlled by Oom Jan/OutSource to an extent.

They are not part of farmer Y's business but his foreman supervises them, tells them when they can take meal breaks and clock off and provides them with tools. So they are not only controlled by Oom Jan/OutSource but also by Farmer Y. Thus Oom Jan like OutSource is a TES supplying employees to Farmer Y as a temporary employer.

LIABILITY: The TES (Oom Jan/Outsource) and the temporary employer (farmer) are jointly and severally liable for the terms and conditions under which the workers are employed. This means that if the farmer or TES violates the BCEA, and the TES does not remedy the breach within a set period of time (e.g. wages are not paid within one month of them becoming due), then the worker may request a labour inspector to issue a compliance order against the farmer to remedy the breach.

THE CONTRACTOR

The third party may be an independent contractor, as defined by the law, who employs workers. The distinction between this employer and the broker or TES is that the farmer has nothing to do with the workers contracts of employment with the contractor. Control over their work, wages, UIF, leave, tools etc. is in the hands of the contractor.

CASE STUDY 3

Mr. Van Rensburg is a farmers son who has started a business with 10 of his fathers retrenched workers. The business offers specialist pruning, trellising and irrigation system services. He has trained the workers to perform these skills to a high quality. They are supplied with hydraulic pruning shears and all the tools needed for the work. Mr. van Rensburg supervises the work himself. He insists on a high standard and pays a set rate of R50.00 per day to each worker.

He negotiates his fee with the farmer separately but this does not effect the conditions or manner in which his workers complete their task. The workers regard Mr. van Rensburg as their employer. They expect to take instructions from him and no-one else and depend on him for on-going work.

LIABILITY: Mr. Van Rensburg is the employer of these workers and as such is liable for any infringements of the labour legislation himself. The client farmers have no obligations, in terms of labour law, to the workers as the farmers have no control over their work.

CONCLUSION

From the summary above it is clear that not many farm workers can be classified as **independent contractors**, although some may work for independent contractors. This does not change their status as agricultural workers and they are entitled to the same rights under the BCEA and LRA as workers who are employed directly by a farmer.

NOTE: It is important to note that even if your written contract states that you are a contract worker or contractor this does not mean that the law will recognise you as such. If the features of your employment relationship are more like that of an employee or TES employee then the law applying to those types of worker (i.e. employees) applies to you regardless of the wording of your contract.

Increasingly some farm workers fall into the category of a **TES employee**. They are not employed by one farmer but work is arranged for them, via a third party, with a number of different farmers. Their wages, and sometimes other administrative details like UIF etc., are administered by that third party but they may be supervised or instructed by the farmer as well. Whilst they are working for the farmer the farmer and the third party are responsible for any irregularities arising in the terms and conditions under which they work. The TES and the farmer must ensure that the BCEA is applied to these workers and that no worker experiences unfair discrimination as described by the EEA.

Most farm workers are employees, whether they work for an independent contractor, a farmer or a TES/ temporary employer and thus all labour legislation applies to them.



Working for contractors

