

Independent contractor or employee – the Uber case

When people have been contracted to provide a business with a service on an independent contracting basis, the business might feel confident that the contract may simply be terminated in terms of the contractual provisions. This can change in a moment, when the business learns that the ‘contractors’ are, in fact, all employees. Then the termination would be regarded a dismissal – with far-reaching consequences. This is what happened to Uber in South Africa when they were taken to the Commission for Conciliation, Mediation and Arbitration (CCMA) by certain drivers whose apps were de-activated.

The dividing line

The distinction between an independent contractor and an employee is critical in determining the right to protection in terms of labour legislation. The line between independent contractors and employees has always been a blurry. Amendments to legislation have brought some clarity through the introduction of certain guiding criteria that assist arbitrators in deciding one way or the other. But advances in technology in the ever-changing world of work, have tended to blur the line again. This is well illustrated by the recent CCMA case involving Uber in South Africa.

Uber taken to the CCMA

Uber BV (based in the Netherlands) provides an app through which riders can request a driver to give them a lift to a destination of their choice. The management in South Africa is by and large done through Uber SA (a subsidiary of Uber BV), who have offices in Cape Town. In the CCMA case of **Uber South Africa Technological Services (Pty) Ltd vs NUPSAW, SATAWU and others (2017)**, the Commissioner described the situation as follows: *“[It] starts with a process of being on-boarded. This process involves registration on the app, approval of the vehicle the driver will use, documentation regarding the identity and status of the driver, obtaining a Public Drivers Permit (PDP) license, a standard business plan produced by Uber; a training or information session at Uber Cape Town offices where the driver is informed how to use the app and the standards required of Uber drivers. The partner (or partner-driver) clicks to indicate acceptance of the terms of the agreement. The agreement is detailed and dense, and it identifies partners (and partner drivers) as independent contractors.”*

When Uber decided to de-active the apps of certain drivers, they challenged the termination of their services by referring the matter to the CCMA. The question arose whether they were independent contractors or employees, in which case the CCMA would have the jurisdiction to decide on the fairness of their dismissal.

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The test

Uber had been confident that the de-activation did not amount to a dismissal, as, according to Uber, the drivers were clearly independent contractors, not employees. The Commissioner applied the “*reality of the relationship test*”, which states that: “*courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering all relevant factors that emerge from an examination of the realities of the parties’ relationship.*”

In applying this test, and after considering the various factors identified in the *Code of Good Practice: Who is an Employee?* The Commissioner found –

- that the drivers rendered personal services,
- that the relationship was indefinite as long as the drivers complied with requirements,
- that drivers were subject to the control of Uber (see further discussion below),
- that, as far as their ability to drive, the drivers were economically dependent on Uber; and
- that Uber drivers were the essential part of Uber’s service.

Control

The issue of control appears to have been of particular significance in this case. The Commissioner acknowledged that the drivers chose their hours of work and they could accept, decline or ignore a lift request. However, Uber controlled the manner in which they worked by setting clear standards and performance requirements. Uber had control, in that it could suspend and deactivate access to the app, thereby depriving the drivers of the opportunity to work and earn an income. Even though there was no direct or physical supervision, control was exercised through technology.

The Commissioner concluded that the relationship was one of employment. Moreover, although Uber BV in the Netherlands provided the technology and generated the contracts, Uber SA was, for all intents and purposes, the real employer of the drivers in South Africa. The de-activation of the app essentially amounted to a dismissal. The Commissioner also rejected Uber’s argument that the owner of the vehicle was the driver’s employer, or that the rider contracts the driver directly as an independent service provider.

Conclusion

The parameters seem to be continuously shifting when it comes to the distinction between independent contracting and employment. Businesses that have any doubt about the nature of the relationship, should, at least when it comes to the termination of such relationship, treat it as one of employment. They would be well advised to conduct a hearing of sorts before deciding to terminate the relationship.

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