



Employee or Independent Contractor

Showing the way

1. Introduction

This publication discusses the criteria adopted by Courts distinguishing independent contractors from employees. This distinction establishes the parties' rights and obligations. There are instances individuals are classified as independent consultants when in reality they are employees exposing organisations to sanctions for non-compliance.

The protection accorded by Uganda's Employment Act only applies to an employment relationship. Related legislation such as the Income Tax Act and the National Social Security Fund Act also impose obligations but only where an employment relationship exists. Whether someone is an employee or independent contractor depends on the legal distinction between a contract of services and contract for services. Individuals under a contract of services are ordinarily employees while those under a contract for services are independent consultants.

2. The control test

This is the earliest test that the Courts adopted. The more control an organisation exercises on an individual providing services, the more likely the existence of an employment relationship.

Under this traditional test, the position of Courts is that an employer has a right to tell the employee what to do, when and where to do the job. The control test typically involves 4 elements namely: employers' right to determine employee remuneration, the selection of the employee, the employers' right to control how the employee does his job and the right to terminate the employee's services.

In the 1968 case of Roche versus Kelly, the defendant sub-contracted the plaintiff to execute part of the construction contract they had with a client. Though the defendants monitored the progress of the plaintiff's work, they did not instruct him on how to do his job. Following an injury to the plaintiff, the Court had to decide whether the plaintiff was

an employee or independent contractor. Court found that the plaintiff was not an employee as the defendant did not exercise any control over him.

In the current times however, the control test is not a conclusive determinant of the employment relationship. Skilled workers do not necessarily need to be supervised nor directed by their employer on how to do their job. Courts today now recognise that while the control test will always have to be considered, it is no longer the sole determining factor for the existence of an employment relationship.

3. Independent test

The more independent an individual is in providing services to an organisation, the more likely the vendor is an independent contractor. Independent contractors are free from control and direction over the performance of their work and have greater control over how they carry out their work. Independent contractors are at liberty to provide services at any location they desire, use own equipment and can subcontract any parts of their work if contractually permitted. All these are indications of an independent contractor relationship though not entirely conclusive.

4. Integration or organisation test

This pragmatic test was first introduced in the 1952 case of *Stevenson, Jordan & Harrison Ltd. Macdonald & Evans Ltd.* Denning LJ was emphatic that an employee is a person who is integrated with others in the work place or business even though the employer does not necessarily exercise detailed control over what the employee does. The Courts, in applying the integration or organisational test, consider whether the worker in question was a vital part of the operation of the workplace or is merely an accessory to it.

This test however falls short of plainly explaining what integration with a work place is. It is also oblivious of current market trends. It is the norm presently for organisations to keep only basic core staff but supported by outsourced workers. The outsourced workers can be a vital part of the operations of the business but may not be employees in the strict understanding of the term. The use of the organisational test in deducing the existence of an employment relationship has therefore become less relevant.

5. The multiple/ mixed test

This is also known as the economic reality test where several factors are taken into account in the examination of an

employment relationship. The multiple test which was first laid down in the 1968 case of *Ready Mixed Concrete v. Minister for Pensions* has received wide recognition and acceptance. In this case, the plaintiff hired a lorry driver who was employed on the assumption that he was self-employed. He owned, insured and maintained his own lorry, but the plaintiffs had helped finance its purchase. He wore a uniform, and the lorry was painted with the company's colours. He could delegate the driving and was paid per mile driven. The issue arose as to whether he was an employee and whether the plaintiffs should have been making pension contributions for him to the defendants.

The Court laid out three conditions that had to be satisfied to establish a contract of service:

- a) there must be an obligation of the person to provide his own skill and work in return for a wage or other remuneration,
- b) there must be a sufficient degree of control by the employer,
- c) the other provisions of the contract must not be inconsistent with its being a contract of service

The court considered the economic reality of the situation in arriving at its decision. Having regard to all of the factors, the court concluded that the lorry driver was an independent contractor.

In *Kirwan v. Dart Industries and Leahy* (1980), the Employment Appeals Tribunal applied the mixed test and set out a number of criteria to consider including the extent of control over the task, the manner in which it is carried out, the means used to carry it out and where it is to be carried out; whether the person was in business of his own account or whether he was an integral part of the business; whether the person was required to provide personal service or whether he could delegate the job and finally whether the person was free to work for other employers.

Courts also look at other factors such as the payment of wages or salary, membership to company pension scheme, holiday pay, and payment when absent illness, prohibition on working for competitors, control by employer's disciplinary code and work done on employer's premises rather than at home. These are strong indications for the existence of an employment relationship.

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At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

Denis is widely published and a regular commentator in the local, regional and international media and speaker at various forums regarding the taxation and financing of energy projects as well as the protection of large capital projects within the framework of international investment law.

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Bill is a Senior Advisor with Cristal Advocates. He has concentrated on working with energy companies with a particular focus on cross border transactions and M&A since 1989 and is a leading global energy and tax practitioner with wide international experience. Between 1986 and 1998, he worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan working across the Caspian region with Deloitte. He was in the region at the time it was developing its infrastructure for crude oil production with international investment following the collapse of the Soviet Union.

From 2004 to 2008, he worked in Russia where he led Deloitte's oil and gas industry group and established Deloitte's office in Sakhalin. He moved to East Africa in 2009 leading Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia and Mozambique. He was initially based in Kampala, Uganda later relocating to Dar es Salaam, Tanzania. Bill returned to the UK in 2014 supporting Deloitte UK teams working on outbound projects investing in Africa and was a key member of Deloitte UK's energy and resource practice until his retirement from the firm in September, 2018.

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Prior to joining Cristal Advocates, he had worked as a Private Secretary to the President of the Republic of Uganda. During this time, he participated in several public and private sector engagements that included advising and coordinating activities relating to oil and gas as well as infrastructural projects of national significance. John had earlier worked with the Post Bank Uganda Limited and Shonubi Musoke and Co. Advocates.

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Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

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