



# Managing Employee Remuneration and Deductions - *A Labour Law Perspective*

August - September 2010

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Setting the Scene

Who is an employee

# Increasingly Important Debate For Employers

## Why ?

- Many organisations make use of the services of individuals who provide their services to the organisation through a company, a CC, a trust or a so-called “independent contractor, consultant or sub-contractor”.
- Employers are also making greater use of labour brokers (temporary employment services) to source their workforce.
- This trend has largely arisen because employers are attempting to avoid the onerous legal obligations that come with formal employment.
- Individuals are seeking to avoid onerous employee tax obligations.

## Common Mistake

**To contract out of employment law provisions and regard the relationship as a legitimate exclusion of employment law and employee tax provisions.**

### **Denel (Pty) Ltd v JEF Gerber - LAC**

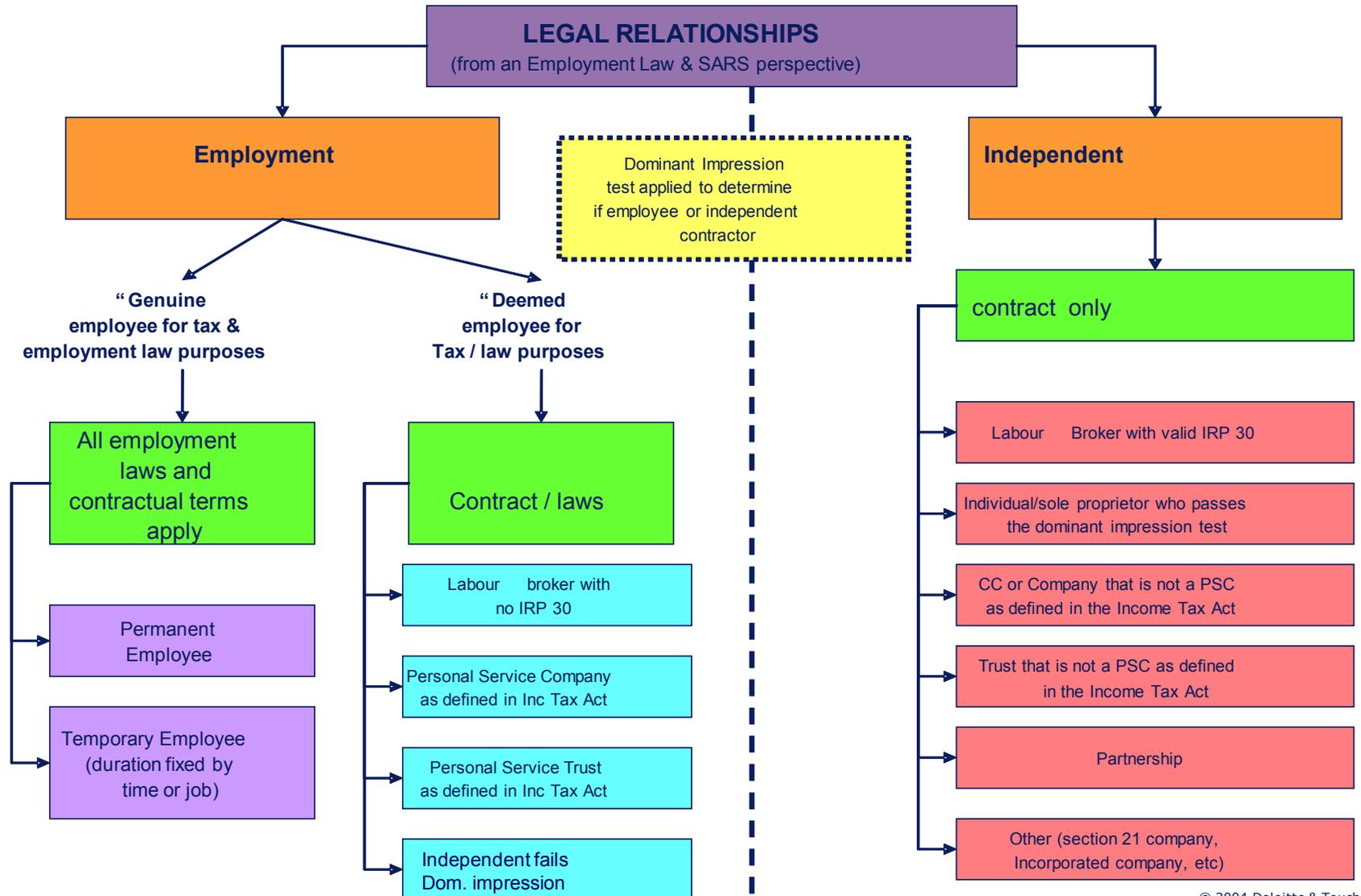
- Denel concluded agreement with Multicare Holdings (Pty) Ltd which would provide HR services to Denel
- HR services to be provided by Ms Gerber
- Denel terminates contract with Multicare – Gerber claims unfair dismissal
- Denel argued it had written independent contract agreement with Multicare and Gerber was person providing services on behalf of Multicare. Rely on parol evidence rule – she can not lead evidence to establish she is an employee, contract is sole record of relationship

# Denel (Pty) Ltd v JEF Gerber (continued)

## Labour Appeal Court

- Contract not sole source – Gerber entitled to lead evidence. Other approach would disregard realities of relationships and create abuse due to avoidance of protective employment legislation.
- Analysis of facts and factors referred to in sections 200A LRA and 83A BCEA – confirmed Gerber was an employee and eligible to unfair dismissal claim.
- Gerber misrepresented her relationship to SARS – had to “come clean” with SARS before LAC would consider merits of unfair dismissal.

# Legal Relationships



# Sections 200 (A) OF LRA - 83 (A) OF BCEA

**“ Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of contract, to be an employee if any of the following factors are present:”**

- The manner in which the person works is subject to the control and direction of another person;
- The person’s hours of work are subject to the control or direction of another person;
- In the case of a person who works for an organisation, the person forms part of the organisation;
- The person has worked for that other person for an average of at least 40 hours per month over the last three months.

# The Legal Framework

## Statutory Deductions

# Labour legislation - deductions

- Labour Relations Act - Section 13 – Regulates Deductions of trade union subscriptions or levies.
- Occupational Health and Safety Act – Section 23 – Prohibits certain deductions.
- Skills Development Act - Section 3 – Deductions for skills development Levy.
- Unemployment Insurance contribution Act – Section 7 – Deductions of employee contributions.
- Pension Funds Act – Section 13 – Deduction and payment of contributions to Funds.
- Basic Conditions of Employment Act – Section 34 – Deductions from remuneration in general.

# Basic Conditions Of Employment Act

## Section 34(1) - Deductions

- Not deduct from **remuneration** unless employee consents **in writing** or the deduction is **permitted** in terms of a **law, collective agreement, court order or arbitration award**.
- A deduction to reimburse only if:
  - loss or damage occurred in the course and scope of employment and was due to the fault of the employee;
  - a fair procedure is followed (employee should be given a reasonable opportunity to state why the deduction should not be made;)
  - amount of the debt does not exceed the actual loss or damage;
  - total deductions should not exceed one-quarter of the employee's remuneration in money.

Wage and Remuneration

Difference ?

# References to Wage and Remuneration in the BCEA

## Section 18 – Pay on Public Holidays

- Pay the **wage** that the employee would ordinarily have received for work on that day.

## Section 21(1) – Pay for annual leave

- Pay equivalent of the **remuneration** that the employee would have received for working.

# The definition of remuneration

## Section 1

- Any payment in money or kind, or both in money or kind, made or owing to any person in return for that person working for any person or the state.

## Section 35 (5) Regulation

- the Minister of Labour added to section 35(5) by means of a determination that includes and excludes types of particular payments from the definition of “remuneration”
- This determination published - Government Gazette 23 May 2003, and came into effect on 1 July 2003.
- Created much concern, confusion, and further uncertainty.

# The extended definition of remuneration

## Applies in two situations:

- Establishing amount of remuneration payable to an employee while **on leave**; and
- Establishing amount of payments due on **termination of employment** in respect of **leave pay**, **pay in lieu of notice**, and **severance pay** if the employee has been retrenched.

## And Applies only:

- Pay for annual accumulated from the effective date of the new definition, namely 1 July 2003 – not before.
- Minimum payments /entitlements required to be made in terms of the BCEA. (**15 working days, minimum notice period, 1 week**)

## Structure

- The new definition has been structured to set out a number of inclusions, which is then followed by a list of exclusions.

# The extended definition of remuneration

## Included:

- Housing or accommodation allowance or subsidy, or housing or accommodation received as a benefit in kind.
- Car allowance or the provision of a car, except to the extent that the car is provided to enable the employee to work;
- Any cash payments made to an employee, except those listed as exclusions in terms of this schedule;
- Any other payment in kind received by an employee, except those listed as exclusions in terms of this schedule.
- Employer's contributions to medical aid, pension, provident funds or similar schemes;
- Employer's contributions to funeral or death benefit schemes

# The extended definition of remuneration

## Excluded:

- Any cash payment or payment in kind provided to enable the employee to work (for example, an equipment, tool or similar allowance or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work);
- A relocation allowance;
- Gratuities (for example, tips from received from customers) and gifts from the employer;
- Share incentive schemes;
- Discretionary payments not related to an employee's hours of work or performance (for example a discretionary profit sharing scheme);
- An entertainment allowance;
- An education or schooling allowance.

# The extended definition of remuneration

## Fluctuating Payments (Commission)

- Must be calculated at **average over a period of thirteen weeks**, or if the employee has been in employment for a **shorter period**, that period.

## No Double Payments

- Double payments to employees are **excluded**. An example: employer contributions to pension and medical aid. If these contributions have been made then they should not be included for the purposes of calculating notice or severance pay. If the contributions have not been made for such period, then they must be included into these calculations.

# The Definition of Wage

## Section 1:

- 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 a week.**

## Intention:

- To only refer to an employee's so-called “**basic salary**” as this is what they receive for “ordinary hours” of work. **Excludes additional payments** reflected in extended definition of remuneration.

# Implications

## **Public Holidays ( and other payments reflecting wage)**

- only need to pay them the **wage/salary for the ordinary hours** of work – no additional pay. (commission, employer contributions, etc. excluded)

## **Leave ( and other payments reflecting remuneration)**

- Pay the ordinary wage / salary **plus additional payments in money or in kind.**
- Leave, Notice and Severance (extended definition)

## **Amendments ?**

- Necessary - to avoid confusion and ensure consistent application.

# Leave Pay

Provision and Forfeiture

# Statutory Annual Leave

## **Statutory leave – Section 20 (2) of the BCEA**

- 21 consecutive days paid (15 working days) – 12 months annual leave cycle.
- 1 day paid for every 17 days worked.
- 1 hour paid for every 17 hours worked.
- Must **be remunerated in terms of definition of remuneration** published in terms of section 35 (5) of BCEA (extended definition)
- **Accrued Leave not included** – an oversight ?

# Statutory Annual Leave

## Statutory leave – section 20 (4) of the BCEA

- **Cannot be contracted out of** – must be granted.
- Must be granted not later than 6 months after the end of an annual leave cycle (18 months cut off)
- If not taken within 18 months statutory leave **may be forfeited** by employee if:
  - a) Employer **required employee to take leave** – either in terms of employment contract, instruction or policy.
  - b) Employee was **not prohibited from taking leave** by the employer or circumstances ( suspended, terminated, etc.).
  - c) Employee is **given an opportunity to be heard** prior to forfeiture.

# Additional Leave over the statutory minimum

## Additional non statutory leave:

- Is regulated by **agreement between the parties** – ( contract, policy, practice)
- May be **capped and forfeited if:**
  - a) **agreed** to ( policy, contract, practice)
  - b) employee **not prohibited by employer or circumstances** to exercise rights before forfeiture.
  - c) Employee is **given an opportunity to be heard** before forfeiture.
- May be paid prior to termination.

# Protection of Information

POPI

## History of the Bill

- ✓ In **2005 the Law Commission** recommended a new and **separate law** to deal with the protection of personal information over and above right **in Constitution**.
- ✓ The Protection of Personal Information Bill 2009 is now heading for approval by Parliament and the National Council of Provinces.
- ✓ The bill is expected to **become law during 2010**.

## Scope of application

In terms of section 3 the Bill applies to the following:



“**processing**” means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

- (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
- (b) dissemination by means of transmission, distribution or making available in any other form; or
- (c) merging, linking, as well as blocking, degradation, erasure or destruction of information;

## Scope of application

In terms of section 3 the Bill applies to the following:



**“personal information”** means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to—

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number or other particular assignment to the person;
- (d) the blood type or any other biometric information of the person;
- (e) the personal opinions, views or preferences of the person;

## Scope of application

In terms of section 3 the Bill applies to the following:



- (f)* correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g)* the views or opinions of another individual about the person; and
- (h)* the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person;

# Application of POPI

POPI  
compliance  
areas



## Employees

Collection and processing of all staff personal information are subject to the provisions of the POPI Bill

## Customers

Financial services (banking and insurance sector, etc.)

# Guiding principles with reference to personal employee information

## General Principles

- Personal data **processed** with **permission** of the employee and only for **reasons directly relevant to the employment of the worker**.
- Personal data **only** be used for the **purpose collected**.

# Guiding principles with reference to personal employee information

## Collection of personal data:

- be **obtained** from the individual **worker**.
- If necessary to collect from **third parties** - worker should be **informed**, and give **explicit consent**.
- **Not collect** personal data concerning a worker's:
  - ✓ sex life;
  - ✓ political, religious or other beliefs;
  - ✓ criminal convictions.

# Guiding principles with reference to personal employee information

## Collection of personal data (continued) :

- **exceptional circumstances**, may collect personal data concerning the above, if data are directly **relevant to an inherent requirement of the job, or in conformity with legislation.**
- **Not collect** personal data concerning the worker's **membership in a trade union** or the worker's **trade union activities**, unless obliged or allowed to do so by **law or a collective agreement.**
- **Medical data** should **not be collected** except in conformity with **legislation (EEA), medical confidentiality, occupational health and safety, and only as needed:**
  - ✓ with reference to the **inherent requirements** of the job;
  - ✓ to fulfil the **requirements of occupational health and safety;**  
and
  - ✓ to determine **entitlement** to, and to **grant, social benefits**

# Guiding principles with reference to personal employee information

## Security and storage of personal data

- **Protected** by security measures as are necessary to guard against loss and unauthorised access, use, modifications or disclosure.
- **Stored** only for as long as justified by the specific purposes for which it has been collected unless:
  - ✓ a worker **wishes to be on a list** of potential job candidates for a specific period;
  - ✓ the personal data are required to be kept by **national legislation**; or
  - ✓ the personal data are **required** by an employer or a worker for any **legal proceedings** to prove any matter to do with an existing or former employment relationship.

# Guiding principles with reference to personal employee information

## Communication of personal data

- **Not be communicated** to third parties without **the worker's explicit consent unless the communication is:**
  - ✓ necessary to **prevent serious and imminent threat to life or health;**
  - ✓ required or authorised **by law;**
  - ✓ **necessary** for the **conduct** of the **employment relationship;**
  - ✓ required for **the enforcement of criminal law.**
- Not be communicated for commercial or marketing purposes without the worker's informed and explicit consent.
- Data internally available **only** to specifically authorised users.

Questions ?