WERKSMANS
ATTORNEYS

EMPLOYMENT

Non-standard forms of work and the gig economy

6 August 2018 *5 min read*

By Bradley Workman-Davies, Director and Megan Livingstone, Candidate Attorney

South African labour law creates extensive rights and protections for employees, but it is sometimes difficult to determine when a person is an employee. There has always been a recognised distinction between employees and independent contractors, and the Labour Courts and CCMA have developed mechanisms for determining whether a person is one or the other. However, the new "gig economy" that is emerging globally presents novel challenges to the existing structures, not least to the fundamental question of who is an employee?

The gig economy is widely referred to as the engagement of a worker for a one-off job, or "gig". A specific work or end-result is contracted for, the person performs the work to produce the result, and the relationship between the parties ends. However, this overly simplistic definition can be further enhanced, into at least two broad sub-categories. For example, the International Labour Organisation in 2018 released a paper through its Conditions of Work and Employment Series, which distinguished between "crowdwork" and "work on-demand via apps", in which it defined these as follows:

- Crowdworkers operate online through platforms that connect vast numbers of clients, organisations, and businesses, often across borders. Because crowdwork is performed online, an infinite number of workers and clients are often spread over large geographic distances.
- "Work on-demand via apps" is platform-facilitated, yet place-based and geographically limited work. This includes delivery driving, transportation, domestic work, home repair, and more; all requiring direct interface between gig workers and those requesting gig services.

An example of "crowdwork" would be fiverr.com, whereas Uber or Taxify would be examples of a "work on-demand app." The question remains, are persons who perform services to end users recognised as employees?

The Labour Relations Act, 66 of 1995 ("**LRA**"), contains a basic definition as to who is an employee. The LRA says that an employee is "*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*".

The LRA also contains rebuttable presumptions of employment, which provide that a person is rebuttable presumed to be employed if:

- the manner in which the person works is subject to the control or 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 that 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 person is economically dependant on the other person for whom he or she works or renders services;
- the person is provided with tools of trade or work equipment by the other person; or
- the person only works for or renders services to one person.

The above rebuttable presumptions apply in respect of persons who earn less than R205 443.30 per annum. Where a person earns above R205 433.30 per annum, the Labour Courts and the CCMA apply what is known as the dominant impression/reality test, which applies (essentially) the same factors set out above to determine whether the substance of the relationship is that of employment, rather than the contractual form, which would describe it as independent contracting.

The above rebuttable presumptions and the dominant impression/reality test provides a structure within which persons working in the gig economy can be categorised either as employees or independent (non-employee) contractors. The distinction is critical, since although being defined as an employee brings rights and protections (such as the right to not be unfairly dismissed, and the right to annual leave), it also brings restrictions, such as limitations on working hours, which cannot be exceeded even if desired by the employee.

In South Africa, the Labour Court has considered in principle whether persons who perform work in a "gig economy" are employees. In the case of Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others 2018, the court ultimately did not have to pronounce on whether Uber drivers are employees of Uber (due to the wrong party being cited as the respondent in the matter), but the court did indicate in principle that the above tests would be applied to determine this question.

In the European Union, workers who engage through crowdwork or work on demand apps, are generally regarded as freelancers or non-employee independent contractors, but individual countries also allow for the possibility that this classification may hide a disguised employment relationship and allow their courts to test the true relationship. SA courts could take guidance from European approaches, and may be influenced by EU law.

At present, the approach seems to be that "gig economy" workers of these kinds fall somewhere in between traditional employees and arms-length contractors, and are best thought of as performing "non-standard forms of work". As such, they are not recognised as employees and fall outside of the scope of labour legislation in South Africa.

Bradley Workman-Davies

Director

View Profile

Keep us close