

Significance of the distinction between an employee and independent contractor

[Business](#), [Employee](#)



It is in the best interests of legal systems to draw a clear distinction between an employee and an independent contractor so as to be in a better position to determine the way to deal with workplace conflicts (Davies 2010). Every employer has some form of control over all the people and parties whose services he uses in one way or another. These include both those people that he has employed as well as those he only contracts to perform some duties for a limited time but whom he does not necessarily hire as his own employees.

Over time, however, there have emerged issues to do with the rights that an independent contractor ought to have in relation to those that an employee needs (Swarb. co. uk. 2010). This has particularly arisen whenever there has been cases requiring that an employer accounts for loss of or damage to property occasioned by either an independent contractor or an employee. Quite often, the law would not hold an employee liable for damages when he was discharging duties on behalf of an employer. However, an employer will hardly ever accept liability for damages caused by an independent contractor.

In view of these, there has always been a need for courts to distinguish between employees and independent contractors (Swarb. co. uk. 2010). This paper discusses the significance of drawing such a distinction; and explores some of the methods that courts have been using to make the distinction. The Significance of the Distinction There are several reasons why it is important to distinguish between an employee and an independent

contractor. They include the following: Corporate Criminal Liability and Vicarious Liability

There are two kinds of liability that are applicable to either the employee or the independent contractor depending on act that has been committed. These are criminal liability and vicarious liability (Gennard 2002). Usually, a court will hold an independent contractor liable for negligence if he does commit offences or cause damage while undertaking duties on behalf of a second party. However, the same employer will not hold an employee liable for negligence when the employee causes damage to or loss of property or life in the course of duty.

This is because an employee is protected under the vicarious liability law from being sued if indeed he is legally employed. Instead, it is up to the employer to bear the liability as the employee is regarded as having the consent to do discharge services on behalf of the employer. Under common law, vicarious liability is a doctrine that places the responsibility for negligent acts committed to superiors as opposed to the actual parties committing the violation (respondeat superior) (Steele 2007).

However, the law will only do this if the second party or agency is an employee and not an independent contractor as it is commonly held that an independent contractor is a separate legal entity from an employer and should account for his own actions. Whenever there is an act of negligence, therefore, the doctrine of vicarious liability and respondeat superior do not apply as long as there is no employee-employer relationship. In this case, an

independent contractor, who is only contracted for a specified period of time, does not qualify (Dransfield 2005).

Therefore, such a distinction is necessary as it helps prevent cases where independent contractors engage in negligent conduct and require that the liability is placed on the party that had contracted them to do the work. Only a rightful employee qualifies for such protection (Davies 2010). For instance, a road contractor working for the government to construct roads in an urban center will be held liable of negligent conduct if he causes an accident and is sued for damages.

However, an employee of the government, for instance a government minister, who causes a similar accident while inspecting the progress of work, will not be held liable for negligence but the liability will be transferred to the government that is his employer. Usually, there are certain specific duties that are set by statute law, common law, and institutional policies which an organization or corporation owes to the people (Davies 2010). Corporate negligence occurs in the event that such a corporation is liable for failure to exercise or uphold these duties.

A corporation, although comprising many people, will be held liable as a separate legal entity from its employees for such damages. In essence, although such negligent acts will be committed by employees, it is the corporation that is held liable. However, corporate negligence does not apply to contractors working for the corporation as it does for the employees (Duddington 2007). Instead, independent contractors will be liable if they

engage in negligent acts even though they are carrying out work on behalf of the corporation.

Again, having a distinction between an employee and an independent contractor helps corporations to ascertain the extent of their liability, if any, in cases of negligent conduct (Swarb. co. uk. 2010). The Doctrine of Apparent Agency It is possible for third parties to act based on information they receive from agents. In some cases, however, third parties can act on wrong information or information that has not come from the principal – when an agent acts beyond his powers (apparent agency).

Under apparent agency, a third party may do something from authority derived from an agent under the belief that this act has been authorized by the principal. For instance, a third party can allow the use of his premises by an agent under the belief that the agent, owing to the relationship that he has with the principal, is actually acting on behalf of the principal. However, the principle might not have authorized any such a deal. In such circumstances, it is important to know whether or not that agent was an independent contractor or an employee.

Employees may be allowed under law to transact business on behalf of the employer (principal) and in the event of negligence their employer can be held liable. Independent contractors do not have the right to act as agents of an employer (Davies 2010). Relative Costs There is a great risk in classifying an independent contractor as an employee and/or an employee as an independent contractor. Apart from the fact that employees are usually entitled to more benefits as opposed to independent contractors who

are not entitled to any benefits, it is illegal to fail to classify the two correctly and one might face legal charges for doing this.

Therefore, proper classification helps save on certain legal and contractual expenses. The Tests for the Determination of Employees and Independent Contractors In the past, it has been a rather difficult task for courts to draw the line between an independent contractor and an employee so that a ruling could be made on whether or not one is liable for negligence (Moffatt 2007). In fact there have been cases when employers have been held liable for negligence for acts committed by independent contractors. It also depends on the evidence produced regarding one's terms of engagement with the employer.

However, as time has gone by, there has been derived from common law and statute law ways of clearly distinguishing an independent contractor from an employee. They include the following: The Level of Control The level of control that is being exerted has been a key determinant of whether one is an employee or an independent contractor. Courts have often tried to ascertain who between the employer and the independent contractor is in control or is actually exercising control. For instance, it has been a critical issue to determine whether or not the rules of engagement are set by the employer or the independent contractor (Moffatt 2007).

Behavioral Control Usually, the one who sets the rules has higher authority and directly or indirectly exercises control over the other party who is bound by the rules (Swarb. co. uk. 2010). These rules vary from one contract to another, but includes such aspects as who determines or sets the number of

hours to be worked; who is in charge of billing; how the worker gets; does the worker have to comply with specific organizational policies and procedures in performing duties; who pays for liability insurance; among others.

Regarding the number of hours worked, employees almost always get paid for their services on a rate based on the length of time they work. For instance, the employer may pay hourly rates for an employee who works for eight hours every day. On the contrary, the pay for an independent contractor hardly ever depends on the period of time worked. Instead, a net pay is made upon completion of the work. The conditions might vary slightly, though. For instance, the pay might come in installments based on the progress of the work, or a lump sum can be paid at the start of the work or after.

What is key is that the pay is not based on hours worked but on quantity of work done. The employer does not have any control over the length of time the independent contractor takes to complete the work (Moffatt 2007). If any control, then it is very limited and goes only as far as providing a tentative time schedule. Similarly, the methods that the independent contractor uses to do the work are out of the control of the employer. On the contrary, an employee is always bound by so many rules and regulations (Moffatt 2007).

For instance, the employer automatically determines how every task is to be undertaken and with every task there is a strict time-frame within which it ought to be completed. Any delays have to be explained and justified by the employee. The approach to work is also predetermined by the employer,

with the employee just taking instructions. Financial Considerations Independent contractors are usually under the legal obligation to pay their own income taxes to the relevant authorities. However, employees have the benefit of having their income tax paid by their employer (Swarb.

co. uk. 2010). Where applicable, unemployment taxes on the wages of the employee are also paid by the employer. Employers are under obligation to file forms showing the total earnings as well as the total deductions of an employee for any given period of time. However, independent contractors pay their own income tax (Moffatt 2007). This is, in essence, another way of saying that independent contractors are separated from the employer and they have no financial agreements other than the pay the employer has to offer them.

The Type of Relationship It is always a common practice for courts to require feuding parties to produce written evidence of their terms of engagement as far as the contractual obligations are concerned (Swarb. co. uk. 2010). Under the law, any form of contract between an employer and any other hired party ought to be agreed upon the two parties; and this is ascertained by a valid signature by the parties or their representatives (Duddington 2007).

Therefore, the terms of agreement, as ascertained from the terms of the contract, can be interpreted by a court on a case-by-case basis to determine whether one was an employee or an independent contractor. If the relationship is largely characterized by the receipt of benefits from the employer, then this is an employer-employee relationship (Moffatt 2007). However, if it is without any payment of benefits, then the employer is

dealing with an independent contractor. A case in question in 1999 favored a plaintiff who wanted the defendant to compensate him yet he was classified as an independent contractor and not an employee.

The Express and Echo Publications Ltd v Tanton (Times 1999) case before the Industrial Tribunal and the Employment Appeal Tribunal as well as the Court of Appeal was in favor of the defendant. The judges cited a certain clause in the defendant's contract which required him, as a driver, to arrange for another person to do his work if he was unavailable for any reason. Therefore, the contract was not a personal one. Word count: 1, 989
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