

## FACTSHEET 1.4: WHAT IS AN EMPLOYEE?

The Employment Act only applies to employees. However the Act does not define what an employee is. Sometimes people ask if they can “put their staff on contract” or “use contract workers” in order to avoid employment related costs such as severance payment, leave and VNPF.

Case law tells us that an employee is someone who works under **a contract of service**. The main alternative type of worker is an independent contractor, who works under **a contract for services**. They both are “**on contract**”. So what is the difference? The fundamental difference is that an independent contractor has his or her own business.

Peter is a builder. He works in the grounds maintenance section of the Seabreeze Hotel. He works there 5 days a week. The Seabreeze Hotel supplies all the tools that Peter uses. Peter is not allowed to employ other people to help him do the work. He gets given sick leave and annual leave. He gets paid fortnightly. **Peter is an employee.**

Grant is a builder. He sometimes works for the Seabreeze Hotel when there is maintenance to be done. He also does building work for other people. He supplies all his own tools and equipment and also sometimes employs other people to help him do the work. He is not given sick leave or annual leave by any of the people he works for. He gets paid after he submits an invoice for the work done. **Grant is an independent contractor.**

### **DOES THIS MEAN THAT IF I GET MY WORKERS THEIR OWN BUSINESS LICENSES, THEY HAVE THEIR OWN BUSINESSES AND THE EMPLOYMENT ACT DOES NOT APPLY?**

**No** - it is not that simple. Case law makes it clear that employers and employees cannot avoid their obligations by saying that the relationship is a business engaging an independent contractor if the true nature of the relationship is that of employment. Being a **good employer** means that you should not try to use legal loopholes to try to avoid obligations. Instead, you should respect the true nature of the relationship.

In the Vanuatu case of *Lowen v Public Prosecutor* [2003] VUSC 31 the Supreme Court accepted what it called the “multi-factor test” to help determine the true nature of the relationship:

This test prescribes that no one test is fully indicative of the nature of the relationship... the ‘multi-factor’ test is not a formalised test which allows for the definition of employer-employee or independent contractor to be positively determined by the application of any one factor alone. Instead... all the indicia present in the case must be balanced in order to arrive at a final conclusion.

On the next page is a checklist with some facts that the courts will consider. These are examples only – for instance, it is possible to have a contract which requires the independent contractor to personally deliver work rather than sub-contracting it out. The court will consider all the facts and circumstances in deciding whether a worker is an employee or an independent contractor.

If both you and your worker intend to have an independent contract relationship then you should be very clear about this intention, particularly if you have helped the worker to get his or her business license. If you and the worker have a long term relationship then having a written contract which includes information on things like whether the worker is permitted to sub-contract, how and when payment is to be made (on invoice, usually), responsibilities in respect of leave and insurance, how work is to be done et cetera will help to establish your intention to engage the worker as an independent contractor.

**CHECKLIST: EMPLOYEE OR INDEPENDENT CONTRACTOR**

	Employee	Independent contractor
Does the employer set the hours of work?	Yes	No
Does the employer set the place of work?	Yes	No
Does the worker need to report his or her comings and goings to the employer or a supervisor?	Yes	No
Can the employer tell the worker how to go about the tasks?	Yes	No
Does the employer prevent the worker from delegating his or her tasks to another without permission?	Yes	No
Does the employer provide training to the worker?	Yes	No
Does the employer provide equipment for the job ?	Yes	No
Does the employer maintain the equipment?	Yes	No
Does the worker have to wear a uniform that is provided by the employer?	Yes	No
Does the employer pay the worker a regular periodic payment, rather than paying on invoice or in lump-sum?	Yes	No
Is the worker's job is part of the central activities of the employer?	Yes	No
Does the employer provide the worker with sick leave, annual leave, et cetera?	Yes	No
Does the employer pay overtime to the worker?	Yes	No
Does the employer pay VNPF for the worker?	Yes	No
Is the work full time and/or long term?	Yes	No
Are other workers who do the same job for the employer recognised as employees?	Yes	No
Does or can the worker supply his or her services to more than one person?	No	Yes
Does the worker have his or her own business name and business license?	No	Yes
Can the worker employ someone else to do the work?	No	Yes
Has the worker invested in his or her business (for instance through buying plant and equipment, investing in training, employing staff, borrowing money to establish the business)?	No	Yes
Does the worker assume the risk of loss if the business does poorly?	No	Yes
Can the worker sell his or her business to someone else?	No	Yes
If work is sub-standard must the worker bear the cost of fixing it?	No	Yes
Does the worker advertise his or her business services?	No	Yes
Does the worker maintain his or her own insurance for work accidents?	No	Yes