



## LABOUR LAW AS A GREY ENGINE FOR LABOUR QUALITY AND COMPETITIVENESS IN ORGANIZATIONS TODAY

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### Abstract

Employee law is particularly a controversial issue as to whether or not an individual is an employee covered under the employment law or not since once someone is deemed to be a “worker,” that individual has legal protection, while, on the other hand, if a decision is rendered that the individual does not qualify as an “employee,” then he/she has no rights. (Barnett, 2002). To date the courts have resolved many disputes regarding various types of workers; e.g. directors who perform the same work assigned to employees, drivers who use their own trucks to transport goods a customer has consigned through a transport agency, independent contractors such as carpenters, entertainers, canvassers, workers who perform a highly specialized job like a systems engineer, teleworkers, since the term employee is a grey area of labour law, as its difficult to make a distinction between the concept of who is and who is not an “employee.” To date, the courts have ruled on a case-by-case basis, and consequently judgments depend on the merits of individual cases. (Barnett, 2002). However, judges tend to rely on certain characteristics when determining whether someone qualifies as an “employee.” While the factors that are taken into account have become clear, it is by no means certain scholars who have analyzed case laws note that according to prevailing academic opinion, the main characteristic of an employee covered under the law is the existence of a subordinate relationship with an employer. The concept of who is an employee in labour law is grey and was created to protect the “subordinate” employee. Therefore, in labor protective regulations, the protection for independent employee does not exist. But even this is ambiguous. Obviously, normal employees blue-collar or white-collar who perform their service in a factory or office are protected as a “employee” under labor legislation. But working styles have become greatly diversified, and accordingly so has the accompanying level of subordination. For instance, employees in a sales section are usually engaged in activity outside the office to deal with customers, rendering their work less susceptible to supervision. Moreover, employees in research departments section have usually wide discretion to undertake research, and their wages are closely related to their results and achievements. Therefore, it’s difficult to view these employees as being in a subordinate position vis-à-vis their employers. In short as working styles become more diversified, the more difficult it becomes to determine whether a relationship of subordination exists between the worker and the firm which utilizes his/her labor power. It may be true that the case-by-case approach adopted by the courts makes it possible to attain a more appropriate resolution of the litigation in question. But it is extremely difficult for both the parties to predict whether or not an individual who performs the service is deemed to be a worker under the labor laws. Hence, it may be the lack of legal stability and transparency that can cause problems. For example, an independent contractor may decide to suddenly take action against a firm with which it has a relationship, asserting that it is an employee and can claim overtime payments recognized under the law (Barnett, 2002). Of course, case law stipulates that the characteristics of a “worker” should be based upon real circumstances, regardless of the name the parties give to their contract. In this sense, from the theoretical viewpoint, a so-called “fake” worker is not allowed to exist, so that any individual can enjoy the status of worker as long as he/she meets the conditions mentioned above. But, as it is impossible in advance to determine the outcome of legal action, most people do not go this route because of the possibility they may lose (Groove, 2007).

### Introduction

In almost all industrialized countries, labor laws were originally intended to protect workers in the manufacturing sector. Therefore, the prototypical person covered under labor protective laws has been a blue-collar employee. However, the transformation of the industrial structure, which has placed more importance on the service sector, combined with the growing number of white-collar employees, have made obsolete the centrality of blue-collar employees in labor protective regulations. As a result, how labor law coverage is determined and how the concept of employee is defined have become highly controversial issues. (Groove, 2007).

First, concerning the definition of “employee,” or, as stipulated in employee law, “worker,” it should be noted that in contrast to most other countries labor law contains statutory provisions. Both individual labor relations law and collective labor relations law the main substance of labor law contain their own definition of “worker,” and their coverage is limited only to the “employee” (Neil, 2012)

In the area of individual labor relations law, the Labour Standards Law, the basic law in this area, prescribes that “worker” shall mean one who is employed at an enterprise or place of business and who receives wages there from, without regard to the type of occupation. The concept of “employee” as embodied in employment law has been understood to be the same as that in other labor protective laws, such as the Minimum Wages Law, the Industrial Safety and Health Law, In the area of collective labor relations law, or the Trade Union Law act 233 defines an “employee” as “one who lives by his/her wage, salary or other remuneration assailable thereto regardless of the kind of occupation.” consequently the concept of “worker” in both laws is not the same. Employment law guarantees workers the right to organize trade unions, to bargain with their employers and to resort to industrial actions as a measure to protect their professional interest, therefore the scope of an employee should be demarcated wisely as per the employment law cap 226.

### **Labour law as a grey engine for labour quality**

- 1.1 Control test and employee
- 1.2 Integration test and employee
- 1.3 Multiple/Economic reality test and employee
- 1.4 Business/Entrepreneurial test and employee
- 1.5 Mutuality of obligation test and employee

### **Who is an employee?**

The employment Act Cap 226 Kenyan law defines an employee as an individual employed for wages or salary and includes an apprentice and an indentured learner. Though problems arise in differentiating between employees and self-employed workers. Employees usually work under a contract of employment or a contract of services. While a self-employed worker on the other hand works under a contract for services. It's important in law to determine who is an employee because certain rights and privileges accrue only to employees e.g. leave and leave allowance may only accrue to an employee. In real life the difference between the two is occasionally blurred and the courts have had to determine when one is an employee or an independent contractor. This paper therefore tries to unfold using the Kenyan law and the theory of natural justice to dissect scholarly as to who is an employee. Since the courts have over the years developed several tests for determining who is an employee.

These tests are:

#### **Control test and an employee**

It is the what? When? and how? Test. The court asks who is in control of what the worker did and who controls when and how he did it. The more control the employer has over the employee or worker the more likely it was the worker was an employee.

#### **Case law one.**

##### **Walker verses crystal palace football club (1910)**

In this case the issue was whether a professional footballer playing for a football club was an employee. The court held that: he was an employee because he was subject to the overall control of his club with regard to his training schedule; discipline and method of play.

#### **Case law two**

##### **Hitch colic verses Post - Office (1980)**

Hitch colic served the post office, exercised some control over his activities regarding the sale of stamps but he could delegate his work to others and took the risk of profit or loss. He controlled his hours of work and determined the amount of stamps to keep in stock. The court held that he was an independent contractor as he had immense control over, the activities of the sub Post Office.

#### **Integration test and employee**

Test examining how far the worker was integrated into the daily running of the business. It assesses whether the workers work was an integral part of the business if so then the worker was an employee, but where the workers work was an accessory to the business if so then the worker was an employee, but where the workers work was an accessory to the success of the business then the worker was an independent contractor. This test was found to be problematic as it called for a value judgment by the court without explaining the steps necessary in arriving at the judgment. This test therefore, was not used for long.

#### **Multiple or economic reality test and employee**

##### **Case law**

It was set in the case of ready mixed concrete (South East) limited verses minister of pension and national insurance (1968). In these cases, the company ready mixed concrete dismissed its drivers and then contracted the drivers and their Lorries under a contract which stated that the drivers had to:

- Wear company uniform.

- Allow the company to use the Lorries when required.
- Have the company logo on the Lorries.
- Only use the Lorries for company business.
- Obey orders from the foreman and it also stated that at some point in the future the drivers had to sell the Lorries back to the company at market value.
- The contract also provided that the drivers had to maintain the lorries at their own expense, pay all running expenses and had to be able to provide substitute drivers when they were unable to work.
- The drivers paid their own tax and national insurance contributions; they had no set hours of work or set meal rates.
- They were responsible for planning routes and schedules of work.

#### **The court held:**

That the drivers were independent contractors whereas some parts of the contract such as them having to follow orders made them appear to be employees, the court was swayed by the fact that they could use substitute drivers and the fact that they paid their own truces to make the funding. The court found that those were things that are and could only do if they were self-employed. The court set the test against three questions.

- Did the servant agree to provide his work in consideration for wage or other remuneration?
- Did he agree expressly or impliedly to be under the other persons control to a sufficient degree as to make the other person his master?
- Are all parts of the contract consistent with it being a contract of service?

If all these questions are yes, then he/she is an employee, if the answer is No, then the person is an independent contractor.

#### **Business/Entrepreneurial test and an employee**

It looks at whether the worker is running his own business rather than working on behalf of the employer. The court will normally ask the following questions:

- Who runs the risk of losing money if the business is not successful?
- Has the worker put \_any capital into the business?
- Is the worker likely to make any profit?
- Did the worker provide his own helper?
- Was the worker able to profit from the successful management of the business?

If the answer to these questions panted towards the worker being in business for himself, he is classed as being an independent contractor. The likelihood of self-employed person usually depends on his business making a profit and this is the basis of the business test.

#### **Case law one**

##### **Lee verses Chung (1990)**

In this case Mr. Lee a stonemason was seriously injured when working on Mr. Chung construction. He claimed that as an employee he was entitled to damages suffered and sick pay. Chung stated that he was not an employee but a casual worker. Chung provided the tools and equipment and directed Lee on which areas of the site he should complete the work. Mr. Lee was not supervised but was paid according to the work that he did and was expected to be on site every day when work was available. He was allowed to work for other people and although he always did this and gave priority to Mr. Chung. The court balanced the facts and taking into account all the foregoing considerations a picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own account as an independent contractor with all his attendant risks. The court confirmed that Mr. Lee was an employee.

#### **Case law two**

##### **Market investigations verses minister of social security (1969)**

A group of women were employed as part time market researchers. They were able to choose their hours of work. But had to work to a set pattern, and were told which questions to ask, and where to ask them. Held: They were employees as the employer had control over their work, and they were not in business on their own account.

#### **Mutuality of obligation test and an employee**

It's used to determine the status of a part time, casual or agency workers. The test is whether the employer is under obligation to provide work and whether the worker is under obligation to accept working if offered.

#### **Case law one**

##### **O 'Kelly verses Trust house Forte PLC (1983)**

In this case, a group of workers waited tables on a regular casual basis. They claimed they have been unfairly dismissed. The hotel said that they were not employed and so could not make such a claim. The court noted

amongst other things that the workers had tax and national insurance deductions made from their wages. They also earned leave allowance and this made them appear to be employees. The court was however, swayed by the fact that the workers did not receive regular wages, sick pay or pension entitlements. The court in findings that they were not employees stated that there was no single feature to be taken into account but on a balance of facts, the workers were not employees as there was no mutuality of obligation.

## Theoretical Concept

### Natural law

It is believed that the origin of the Natural Justice came from the concept of Natural Law during the Greek's period. According to the Natural Law theory, nature provides a certain order from which the human beings can set standard for their conduct with the help of the reason. Based on such a primitive theory, it was even known to people in the ancient times such as Greeks and Roman's. The standard these principles provide is that there should be the right to fair hearing and absence of biasness to the individuals in the decision making process. Later on English Jurist adopted these principles which were so much fundamental that they over ride all other laws. The concept of natural justice manifests that justice which is based on an individual's own conscience. As Lord Ever shed, Master of the Rolls in *Vionet v Barrett* remarked, that "Natural Justice is the natural sense of what is right and wrong" These principles have been explained by various jurists in a number of ways; such as unwritten laws or laws based on reason. Since their application varies according to the circumstances therefore these are principles rather than rules and are traditionally expressed in the form of two Latin maxims. *Audi alteram partem* translates as „Hear the other side“, but essentially requires that a person affected by a decision must have a proper opportunity to put his case. *Nemo iudex in sua causa potest* means literally, (Barnett, 2002).

No man shall be judge in his own cause“, but acts as a requirement that not only must there be an absence of actual bias in decision making, but there must be an absence of an appearance of bias. These two Latin maxims thus signify the standards which are to be met in the decision making process. They seek to ensure that an individual is given a proper opportunity to present his side of the case prior to a decision being reached, and that the decision itself is reached in an objective manner by an independent and impartial decision-maker. Generally it may be said that the principles apply to the exercise of a decision-making power by a public body where this may have detrimental consequences for the person or persons affected. In a sense the rules perform a similar function to the due process clause in the constitution of the United States of America. They have been described as the „principles of fair play“ by Maughan J, in *Maclean v The Workers' Union* 1929. Even the American and French revolutions increased its importance by deciding to make it an integral part of the future constitution. Hence these principles became an A Priori (Derived) principle to support legislation from being sub versed with arbitrariness, unfairness and unreasonableness by decision-makers.(Barnett, 2002).

### Relational contract theory

Relational contract theory 'It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract" (Barnett, 2002). This statement from Lord Steyn (dissenting) in *Johnson* has considerable weight. Traditional commercial contract law is "ill-equipped to deal with problems arising out of contractual relations", and the history of the classical law of contract can be seen as a "desperate attempt to incorporate doctrinal refinements which will allow it to deal with the awkward facts presented by relational contracting" (Macneil). Instead the relational theory of employment contracts provides a "remarkably powerful explanation" (Boyle, 2007) of the changes in the law of the employment relationship which have occurred. This has particularly been as a result of the development of the mutual duty of trust and confidence and implied terms. This trust duty has increasingly signified and represented the relational aspect of employment contracts and meant vast increases in duties for both employers and employees. However, the decisions of *Johnson* and *Edwards* put a break on the relational theory. Despite this, it is submitted that the relational theory is increasingly evidenced in practice and is right as a matter of principle. Indeed, "it may not be fanciful" to suggest that the obligation will come to be seen as "the core common law duty" which dictates how employees should be treated during the course of the employment relationship (Boyle, 2007). The traditional commercial contract theory is "inadequate" (Boyle, 2007) as an explanation of the law of the contract of employment. As Atiyah explained, the model of contract theory that under laid the classical law of contract was the model of the market where contracting parties bargained and negotiated by making offers, counter-offers and accepting them. The fairness of the bargain is irrelevant. Not one of these features of classical contract law is an "accurate description of the reality of the employment relationship given the unequal bargaining power of employer and employee, and the legal incidents implied into all contracts of employment" (Boyle, 2007). Instead, the main differences identified by Macneil between relational contracts and one-off discrete transactions are as follows. First, in relational contracts, the parties engage in social exchange as well as economic exchange. Second, relational contract tend towards long life. Third, in relational contacts, future co-operation is required. Fourth, relational contracts involve a great deal of exchange that cannot be or is not measured e.g. psychic satisfactions such as prestige and power. Finally, the complexities of the contractual relation will inevitably require a great deal of mutual participation in planning. It is thus clear that the employment contract is "at the very relational end of the discrete/relational spectrum" (Boyle, 2007).

### **Quality of labour**

Human skills: Human skills can also be considered a resource. Countries with relatively abundant human skills will have a comparative advantage in products that use human skills more intensively. Certain products such as electronics require a highly skilled labour force (such as engineers, programmers, designers, and other professional personnel). Such products may gain comparative advantage in countries (such as Taiwan, Singapore, Hong Kong) that are relatively better endowed with such skilled labour. (Boyle, 2007). Government policies aimed at better education and training can create such an endowment. Quality is the idea that something is reliable in the sense that it does the job it is designed to do. When considering competitive advantage, one cannot just view quality as it relates to the product. The quality of the material going into the product and the quality of production operations should also be scrutinized. Materials quality is very important. The manufacturer that can get the best material at a given price will widen the gap between perceived quality and cost. Greater quality materials decrease the number of returns, reworks, and repairs necessary. Quality labor also reduces the costs associated with these three expenses. (Boyle, 2007).

### **Competitiveness of labour**

Many firms strive for a competitive advantage, but few truly understand what it is or how to achieve and keep it. A competitive advantage can be gained by offering the consumer a greater value than the competitors, such as by offering lower prices or providing quality services or other benefits that justify a higher price. The strongest competitive advantage is a strategy that cannot be imitated by other companies. Competitive advantage can be also viewed as any activity that creates superior value above its rivals. A company wants the gap between perceived value and cost of the product to be greater than the competition. Michael Porter defines three generic strategies that firm's may use to gain competitive advantage: cost leadership, differentiation, and focus. A firm utilizing a cost leadership strategy seeks to be the low-cost producer relative to its competitors. A differentiation strategy requires that the firm possess a "non-price" attribute that distinguishes the firm as superior to its peers. Firms following a focus approach direct their attention to narrow product lines, buyer segments, or geographic markets. "Focused" firms will use cost or differentiation to gain advantage, but only within a narrow target market. (Barnett, 2002)

### **Sustainable competitiveness of labour (SCL MODEL)**

#### **Sustainable Competitive Advantage**

Just because a company is the market leader now, doesn't mean it has a sustainable competitive advantage. A temporary price cut to gain market share might work in the short-term. But that lead will disappear when it restores those prices to a profitable level. A company must create clear goals, strategies, and operations to sustain its competitive advantage. The corporate culture and values of the employees must be in alignment with those goals, as well. It's difficult to do all those things well. That's why few companies can create a sustainable competitive advantage.

### **Research Problem**

Problems always arise in employment relationships and industries in differentiating between employees and self-employed workers yet employees usually work under a contract of employment or a contract of services. While a self-employed worker on the other hand works under a contract for services. It's important in law to determine who is an employee because certain rights and privileges accrue only to employees e.g. leave and leave allowance may only accrue to an employee. In real life the difference between the two is occasionally blurred and the courts have had to determine when one is an employee or an independent contractor. This paper therefore tries to unfold using the Kenyan law and the theory of natural justice to dissect scholarly as to who is an employee. Since the courts have over the years developed several tests for determining who is an employee. (Barnett, 2002)

Therefore this study seeks to:

To dissect the role of employee concept on quality labour in organizational competitiveness

### **Conclusion**

This paper concludes based on its guiding objective that the various tests discussed and described show that there are not heard of and fast truths to determine who is an employee but each case is determined on its particular set of facts. The control and integration tests are still used and may form part of the multiple tests. This is a grey area of law with no obvious right answers each case must therefore be determined on a particular set of facts.

### **Recommendations**

Based on the findings of this study, the following recommendations are proposed:

- (i) It is necessary to enhance the requirements of who is an employee and who is not.
- (ii) Most managers and law practitioners need to understand that the definition of who is an employee is still grey.
- (iii) That most employees and employers do not understand the concept of who is an employee thus back log of cases in court filed by both sides.

(iv) Best practices should be adopted by successful private firms or corporation to diffuse high relevant standards of labour.

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