

**National Employment Council for
Zimbabwe Energy Industry
Training Manual**

Manual 2 & 3

**Contract of Employment
and Establishment of
Employment Relationship**

ESTABLISHMENT OF EMPLOYMENT RELATIONSHIP

THE LABOUR LAW deal with the relationship between employees and employers. The foundation of the employment relationship is the contract of employment. This sets out the terms and conditions of employment such as the salary and benefits, working hours, rights and duties of the parties, dispute settlement and the procedure for termination of the employment relationship.

The contract of employment has its origins in Roman – Dutch common law, where it was known as the **locatio conductio operarum**, or contract of service, meaning the contract of the letting and hiring of personal services in exchange for remuneration. It is different from the contract of letting and hiring of another to do specific work, the contract of the independent contractor or the contract for service.

In terms of s 6 of the Collective Bargaining Agreement for the Zimbabwe Electricity and Energy Supply Industry, S.I. 1 of 2008 every employee must have a contract of employment:

“No person shall become an employee or commence duties with a company unless he and a Company have executed a contract of employment in the form prescribed in section 54.”

FORMATION OF THE CONTRACT OF EMPLOYMENT

A contract of employment comes into existence when one person, the employee, enters into an agreement with another, the employer, to render personal services to, and under the control of the employer, in return for remuneration. Section 12 (1) of the Labour Act provides that: “Every person who is employed by or working for any other person and receiving or entitled to receive any remuneration in respect of such employment or work shall be deemed to be under a contract of employment with that other person, whether such contract is reduced to writing or not.”

The requirements for a contract of employment under the common law were set out in **Southampton Assurance Co. of Zimbabwe Ltd. v Mutuma** 1990 (1) ZLR 12. These are:

- There must be a voluntary agreement between the parties. A contract derived from duress or force is invalid. Slavery or forced labour is prohibited under sections 54 and 55 of the Constitution and s 4A of the Labour Act. But in **Mbisva v Rainbow Tourism Group Ltd** 2009 (2) ZLR 33 (S) the court rejected the employee's argument that he had agreed to the cancellation of the contract due to financial pressure
- There must be a clear and unequivocal offer and acceptance of the agreement. Once an agreement is made, it cannot be unilaterally cancelled by one party. In **ZESA v Smith & 55 Ors** S-9-05 the employer unsuccessfully tried to reverse an offer accepted by its employees for sale of its houses to them, on the basis that it had made a mistake.
- The employee is always a natural person with legal capacity, (a human being) but the employer may be a juristic person (a legal person, like a company). This distinguishes the employee from the independent contractor who may also be a juristic person.
- The employee must be paid a salary or wage for making their services. Generally an employee is not paid substantially by way of commission or dividends.
- The employee works under the control and direction of the employer in terms of the work to be done. She or he has a duty of subordination.

The parties must have the requisite legal capacity. Certain persons have restricted capacity. These include minors, foreigners, insolvents, mental patients and persons whose capacity is specifically restricted by statute. Generally under s 15 of the General Law Amendment Act [*Chapter 8:07*], every person who is eighteen years of age or above has legal capacity to enter into contracts. However, under s 11 (1) of the Labour Act the minimum age of employment is 15 years and 13 years for apprentices, provided no person under 18 years may be employed in work that may jeopardise their health, safety or morals. The above provisions are incorporated in s 4 (1) of the CBA, S.I.1 of 2008. The CBA also stipulates a maximum age of employment of not more than sixty years of age in terms of s 4 (3) (b). Expatriate employees require employment permits under s 21 of the Immigration Act [*Chapter 4:02*]. Section 3(2) of S.I. 1 of 2008 states that the CBA does not apply to expatriate employees unless this is specified in the contract.

The above is what distinguishes an "employee" from an "independent contractor." Under s 2 of the Act a "contractor" means "a person who renders to an employer services which are related to or connected with those of the employer's undertaking." A contractor is equal to an employer whereas an employee is subordinate. The employee has defined working hours, whereas the contractor may have flexible hours. The employee has to render personal service, whereas the contractor may sub-contract the services, and may not even be a human being. Whereas the employer usually supplies the tools, raw materials and so forth, the contractor may supply its own.

In most situations, the above is sufficient to identify a contract of employment as distinct from the contractor. In some situations the distinction is blurred. Sometimes a person may exhibit both features of an employee and a contractor. In such situations one weighs the factors that point out to an employee and those of an independent contractor and come up with the dominant impression. This is called the dominant impression test. Under s 2 of the Labour Act the most important factor is whether the person is "in a position of economic dependence" to the other regardless of who provides the tools, the flexibility of working hours etc. Put differently the key question is - "whose business it is." This is called the Economic Realities Test and is the one that underlies the definition of "employee" under s 2 of the Labour Act. This reads:

"Employee means any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person -

in circumstances where, even if the person performing the work or services supplies his own tools or works under flexible conditions of service, the hirer provides the substantial investments in or assumes the substantial risk of the undertaking; or

in any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services."

The above was applied in **Chiworesé v Rixi Taxi Services Co- Op Society** HH-13-93 where a taxi driver had flexible working hours, was paid by com-

mission, was described as an independent contractor but could not work for another company and was still held to be an employee, on the basis that this was consistent with the objective of the Act of advancing the interests of employees.

Besides the above requirements, the contract must also comply with the formalities of a contract under the common and under the CBA.

Under common law the main formalities are capacity, lawfulness, possibility of performance and certainty. The contract or its objects must be lawful, and must not be against statutes, public policy or morality. The agreement must not discriminate on the unfair grounds that are specified in s 5 of the Labour Act and s 56 of the Constitution, that is, "nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock." In **S v. Collett** 1978 (1) RLR 205, an agreement under which the worker authorized the employer to exert the punishment of whipping for misconduct was held unlawful. In **Zimbabwe Energy Workers Union and National Energy Workers Union v ZESA Holdings (Pvt) Ltd** HH-887-15 an agreement by the employer and employee to pay lower salary than that specified in a registered CBA was held to be unlawful and unconstitutional. Also - **Mutandiro v PTC** HH-43-01.

The contract must be physically or lawfully capable of performance. The terms of the contract must be clear and not uncertain or vague on the essential features of a contract of employment.

The CBA for the Electricity and Energy Industry stipulates several other formalities that must be followed under sections 4,5 and 6. These include:

- the contract of employment must be in the prescribed form in terms of s 54 of the CBA
- passing the appropriate examination or possessing the appropriate qualifications
- having been interviewed and found suitable for the job
- producing original or certified copies of educational and professional

qualifications submitting to a medical examination by a medical practitioner who must grant a certificate certifying that the person "is free from any mental or physical defect or disease which is likely to interfere with the proper discharge of the duties" she or he is to do.

TYPES OF CONTRACTS

There are various forms of the contract of employment. Differences mainly arise from the duration of the contract or the work cycle or nature of the work to be done.

The work cycle gives rise to full time contracts and part time contracts. Full time refers to a situation when the worker works for the whole period or work cycle, such as the whole day, week or month. Part-time refers to a situation where one works only for a portion of such period.

There are permanent and temporary contracts. A permanent contract is a contract that does not specify its duration or date of termination, or as used in s 12 (3) of the Act is "a contract without limit of time." A contract may be permanent full-time or permanent part-time.

A temporary contract is a contract in which the time for completion is specified or the contract expires on completion of a specified service or task. The contract may be temporary full-time or temporary part-time. A "contract employee" is defined under s 2 of the CBA as – "a person who is employed by a Company as a temporary employee in terms of a separate contract of employment which is renewable or otherwise for a specified period and/or for a particular type of work, and includes an expatriate employee."

There are various types of temporary contracts, including a seasonal employee and a casual employee. A casual employee is defined under s 2 of the CBA as "an employee who is engaged by an employer for not more than a total of six weeks in any four consecutive months." This is derived from s 2 of the Act. A probation contract is a contract for a defined trial period to test suitability and competence usually before a permanent is given, and is terminable by either party on or before expiry of such period - **Kazembe v Adult Literacy Organisation S-173-94**. Under s 7 of the CBA every employee "shall be on probation for a single non-renewable proba-

tionary period of not more than one week in the case of casual work or seasonal work, and three months in any other case. This is derived from s 12 (5) of the Act.

In terms of s 3(1)(a) of the CBA, the provisions of S.I. 1 of 2008 shall apply to all contract and casual employees only to the extent specified in Part III of the CBA. For contract employees this includes provisions on salaries, hours of work, health and safety at work, accrual of vacation leave and those relating to misconduct, suspension and grievances. But excluded are Part VII allowances relating to housing, electricity and fuel; Part VIII benefits like Pension Fund, Benefit Fund, Death Levy Scheme, Funeral Grant and staff loans unless these are provided in an applicable Administrative Policy and Procedures Manual; and certain types of leave like vacation leave in advance, study leave and occasional leave.

A casual employee is only paid the appropriate salary stipulated by the employer and is not entitled to any leave or other benefits or allowances provided under the CBA in terms of s 11. She or he has no employment security and the contract of employment may be terminated on 24 hours notice without any reason being required to be given in terms of s 11(4) of the CBA.

However, the Labour Act provides some protection to temporary employees. Under s 12(3) a contract that does not specify its date of duration or date of termination other than a contract of casual work or seasonal work or for the performance of some specific service shall be deemed to be a contract without limit of time – s 12(3). Further under the new s 12(3a) a fixed term contract shall be deemed a contract of employment without limitation of time upon the expiry of a period of continuous service as may be fixed by the NEC, or where the NEC has not done so there is no NEC in the industry in a period prescribed by the Minister. In that case the employee shall be afforded the same benefits as are under the Labour Act and CBA. This means that the provisions of Part VII of S.I. 1 of 2008 will only apply to contract employees and casual employees who have not yet qualified to become permanent under the new s 12(3a) of the Act.

CONTENT OF CONTRACTS OF EMPLOYMENT

Generally the content of the contract is as agreed between the parties. A paramount public policy is for courts to enforce contracts made between parties - **Magodora & Ors v CARE International** S-24-14. At common law there is no need to reduce the contract into writing, but this is a requirement under s 12(1) of the Labour Act and s 6 of the CBA.

The contract may be constituted of express terms, tacit terms and implied terms. Express terms are those provisions on which the parties expressly have agreed. Tacit terms not drawn from the express terms of a contract but rather inferred from the conduct of the parties.

Incorporated terms are provisions in legislation which are "read into" into a contract of employment or CBA by operation of the law. For instance s12 (3a) of the Act on temporary employees is read into the CBA. Other provisions may be of regulations made by the Minister in terms of s 17(2) or mandatory minimum wage notices in terms of sections 20 or s 82 (1) of the Act.

Implied terms, are those terms which the parties have not even put in their contract but are incorporated by operation of the law, in particular common law. For instance the common law provides various implied duties of employers and employees.

Common law duties of parties

Employees have the duty to work or provide service in terms of the contract of employment; the duty of subordination that is to obey all the lawful instructions of the employer; the duty of competency, that is to carry out their job with reasonable competence and efficiency and not to be grossly negligent, inefficient or incompetent; the duty of loyalty or good faith, that is to advance the interests of the employer and not place themselves in a position of conflict with that of the employer such as stealing, or destruction of property or disclosure of confidential information and generally to refrain from conduct which undermines by act or omission any express or implied term of their contract of employment.

Employers have the duties of: to provide work or receive the employee into service in terms of the contract; to pay the agreed salary and benefits;

to ensure reasonable safety and health of the employee including in equipment and work systems; the duty of good faith including adhering with any duties placed on it by any enactment and to refrain from any conduct that unfairly undermines the employment relationship.

Summary of duties of parties under the CBA

The CBA and Labour Act provide for further particulars to be included in the contract of employment. These are largely based on the common law. Section 54 of the CBA provides the particulars that must be included in every contract of employment. These cover the parties details; duties; rights and termination of the agreement.

Clause 3 specifies duties of the employee including: diligent and competent performance of work; adhering to the specified working hours; not engaging for profit or otherwise in any other trade, business without the employer's approval; not to divulge confidential information; to abide by the Employment Regulations, Code of Conduct, Health and Safety Rules and CBA, and to promote the interests of the employer in all matters relating to his/her employment. The employee should acquaint themselves with the CBA, Employment Code and employment manual – cl 6. On termination of employment, the employee should vacate any company accommodation and surrender any property of the company she/he may have per cl 8.

Clause 4 stipulates the duties of the employer, including: to pay the appropriate salary, allowances and bonus as may apply to her grade, less statutory deductions; to provide appropriate insurance for the employee under the National Social Security Authority Act [Chapter 17:04] and company accident insurance policy and to provide appropriate accommodation. The employer has a further duty to respect the employee's rights provided under cl. 5, namely: the right to membership of the Company's Staff Pension Fund, Medical Aid Scheme or other scheme for the benefit of employees; right to participate in a Company's Housing Guarantee scheme/Loan, Motor Vehicle Loan Scheme in terms of the rules of the scheme; and the right to any appropriate type of leave. Part IX of the CBA provides the different types of leave that are available, namely: vacation leave; vacation leave in advance; special leave; sick leave; maternity

leave; unpaid leave; study leave; occasional leave; National Events leave; and Mandatory leave.

Summary of duties of parties under the Labour Act and Constitution

In terms of s 12 (2) of the Labour Act every employer is required to reduce the employment agreement into a written contract that specifies the following particulars:

the name and address of the employer

the period of time, if limited, for which the employee is engaged

the terms of probation, if any

the terms of any employment code

particulars of remuneration, its manner of calculation and the intervals of payment

particulars of the benefits receivable in the event of sickness or pregnancy

hours of work

particulars of any bonus or incentive production scheme

particulars of vacation leave and vacation pay

particulars of any other benefits provided under the contract of employment.

Section 12 also provides for certain mandatory particulars in relation to the duration, probation and termination aspects of the contract.

The employer is also required to abide by various rights of employees provided under the Labour Act and Constitution. These relate to non-discrimination, fair labour standards, working hours, different types of leave, dismissal and termination of employment including applicable notice periods. Section 65 of the Constitution also enshrines certain labour rights including employees' rights to organise, collective bargaining, collective job action, to just, equitable and satisfactory conditions of work, to fair and safe labour practices including a fair and reasonable wage and equal pay for equal work between men and women. In **Zimbabwe Energy Workers Union and National Energy Workers Union v ZESA Holdings (Pvt) Ltd** HH-887-15 an agreement by the employer and employee to pay a lower salary than that specified in a registered CBA was held to be an unconstitutional viola-

tion of the right to collective bargaining.

VARIATION OF CONTRACT OF EMPLOYMENT

The employer has the duty to adhere to the terms set out in the contract and a registered CBA per s 6(1) of the Act. However, the employer may unilaterally vary the terms of employment where such variation does not amount to substantial change of the contract or job description of the employee - **Guruva v Traffic Safety Council of Zimbabwe** 2009 (1) ZLR 58(S). This may relate to: location of work or department, especially where the employee is spread nationally; to facilitate disciplinary action; minor changes to the job description; removal of discretionary allowances or working hours; and the promotion or non-promotion of employees.

On the other hand the courts have been more reluctant to accept unilateral changes by employers such as where there is: reduction or removal of contractually guaranteed salaries and benefits; substantial reduction or change of the status or job description of the employee - **Muzondo v University of Zimbabwe** 1981 ZLR 33. In **Taylor v Minister of Higher Education & Anor** 1996 (2) ZLR 772 (S) the court reversed the dismissal of an employee of over 10 years service from Bulawayo to Harare, stating that he must have been consulted. This was recently affirmed in the case of **Sagandira v Makoni RDC** S-70-14.

Under s 25A (5) of the Act as read with s 65(1) of the Constitution there is an obligation on the employer to consult the Works Council before effecting major changes in the workplace and payment of discretionary payments. In **Martindale School v Jongwe** LC/H/1165/04 an employer unilaterally changed the contract of employment to remove a benefit and subsequently dismissed an employee who refused to accept such variation. The court reversed this.

TERMINATION OF CONTRACT OF EMPLOYMENT

The contract of employment may be terminated through various methods under the CBA, Labour Act and common law. Section 54 (cl. 9) and Part XI of the CBA provide several methods:

Death of the employee. The death of the employee terminates the contract. The salary and terminal benefits accruing to the deceased em-

employee are paid into the deceased estate – cl 10. Also - **RBZ v Siwawa Estate's Executor** 1999 (1) ZLR 185 (S).

Retirement. Under s 48(1) of the CBA an employee shall retire immediately on attaining the age of six, unless the employer, on application by the employee, extends the age of retire, up to sixty five years. An employee can take early retirement at fifty five years.

Summary dismissal. Section 49(6) of the CBA allows summary dismissal of an employee for misconduct under the Employment Code or any other grounds recognised in law. The dismissal must though be procedurally and substantively fair under s12B(2) (a) of the Labour Act. Further an employee is deemed unfairly dismissed if the employee resigned with or without notice because the employer made continued employment intolerable for the employee per s 12B(3) (a) of the Act. An example is where the employer fails to protect the employee from repeated sexual harassment.

On notice: A contract may be terminated on notice by either party on three months in writing in terms of 49(1) (4) of the CBA. Such termination is permissible on grounds of incapacity due to illness, where the employee is found guilty of misconduct under the Employment Code of Conduct in a case warranting termination on notice, or by mutual agreement in cases of abolition of office or re-organisation of department; or "any other grounds in law as justifying termination of employment." This provision must be read in conjunction with the new s 12(4a) of the Act which permits termination on notice by an employer only where there is a mutual agreement, for a fixed term contract, or in terms of an employment code or pursuant to retrenchment. In such circumstances the employer must pay compensation for loss of employment per s 12(4b) as read with s 12C(2). This overrides the position that was taken in **Nyamande & Anor v Zuva Petroleum (Pvt) Ltd** S-43-15 that under common law, an employer has the right to terminate a permanent contract provided this is in terms of the contract. Note though that termination on notice will be held unfair if it is disguised retrenchment or dismissal for misconduct - **PG Industries (Pvt) Ltd v Mabhena** S-44-03 and **Mkandla & Anor v CANAPE Investments (Pvt) Ltd & Anor** LC/H/111/2015.

Both parties can terminate a fixed term contract by giving the due notice and without giving reason under s 10(9) of the CBA, provided that where the termination is at the initiative of the employer, the employee shall have a right to payment for a period corresponding to the remainder of the contract – s 10(9) of the CBA. This is similar but better than s 12(4a) (c) and s 12(4b) of the new Act which allows such termination, but does not oblige payment of compensation for loss of employment. A contract of a casual worker can also be terminated without reason and on giving 24 hours notice, in writing per s 11(4) of the CBA. There is no obligation to give compensation for loss of employment.

Retrenchment. Employment may be terminated by way of retrenchment because the job has become redundant or operational reasons pertaining to the undertaking. The procedure was previously set under s 50 of the CBA, which required the approval of the Minister after recommendation of the Retrenchment Board as per the old s 12C of the Act. However, this has been impliedly amended under the new s 12C of the amended Act. Under this retrenchment negotiations are done at the works council, or in its absence or if parties so wish, at the NEC. The section provides a minimum statutory package of one month salary for every two years of service or portion thereof, but parties can negotiate more. If the employer cannot afford the package, an application is made to the NEC.

Incapacity due to illness. An employee who has been on sick leave for two hundred and sixty consecutive working days and is still prevented by ill-health from resuming duties may have their contract terminated in terms of s 39(10) as read with s 49(4) of the CBA. The CBA grants more days than the 180 days under s 14 of the Labour Act. Termination is not automatic but on notice and only after a medical practitioner or a medical board, as applicable, is of the opinion that such employee's case is a case of protracted or incurable illness. In **ZIMASCO (Pvt) Ltd v Marikano** S-6-14 it was held that the similar provision in s 14 (4) of the Labour Act required that the employee who has exhausted his/her sick leave days should be consulted before termination of the contract.

Other instances recognised in law. Under s 49 (4) of the CBA termination on notice is permissible "on any other grounds recognised in law as justifying termination of employment." The same applies for summary dismissal under s 49(6). Some such other modes of termination of employ-

ment recognised under the Act and common law include:

- Mutual agreement. The employer and employee can agree to terminate the contract by mutual agreement in writing and on notice, provided that the employer should pay compensation for loss of employment under the new s 12C(2) as read with s 12(4a)(c).

Expiry of fixed term contract. A contract of employment for a specified duration or for the performance of a specific task expires automatically at the end of the period or completion of the task. No notice or reason is required - **Chikonye and Anor v Peterhouse School** 1999 (2) ZLR 329 (S). However, the employee is deemed unfairly dismissed under s 12B(3)(b) of the Act if on termination of the contract the employee had a legitimate expectation of being re-engaged, and another person was engaged instead of the employee. Legitimate expectation includes where prior promises were made to the employee, or in instances of several past renewals or the employee continued working for a considerable period after the expiry of the contract. In **Magodora & Ors v CARE International** S-24-14 it was held that an employee is bound by an express provision in the contract that they do not have a legitimate expectation of renewal. The term "person" includes a juristic person or a person internally taken to replace the employee.

*Prepared for NEC Zimbabwe Electricity and Energy Industry
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Zimbabwe Labour Centre
"empowering creators of wealth"

