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**An evaluation of the amended Temporary Employment Service Provisions in the South
African Labour Relations Act**



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Plagiarism Declaration

I declare that “An evaluation of the amended Temporary Employment Service Provisions in the South African Labour Relations Act” is my own work that has not yet been submitted before any highest committee of degree examination. I made used of sources such as articles, cases, books and journals and I have acknowledge them as the complete references.

Signed: **Yonela Ciliwe**

Date: 20 December 2016



Dedication

Firstly, I would like to thank my Supervisor Mr Pieter Koornhof for allowing himself to be my supervisor and produce this paper in his guidance. His understanding and patience with me has been amazing. Secondly, I would also like to thank my writing couch Tinashe Chigwata for availing himself to constantly proof read and advise me on my writing. Lastly I would like to thank my Mother and my Sister who have been both my strength and a motivator while writing this paper.



Abbreviations and Acronyms

LRA: Labour Relations Act 66 of 1995.

LRAA: Labour Relations Amendment Act 6 of 2014.

BCEA: Basic Conditions of Employment Act 75 of 1997.

ESA: Employment Services Act 4 of 2014.

EEA: Employment Agencies Act of 1973.

RRA: Race Relations Act of 1976.

NMWA: National Minimum Wage Act of 1998.

TES: Temporary Employment Services.

CIET: International Confederation of Private Employment Agencies.

TAW: Temporary Agency Workers.

AWR: Agency Workers Regulation 2010.

AWD: Agency Workers Directive 2008/104/EC.

ILO: International Labour Organisation.

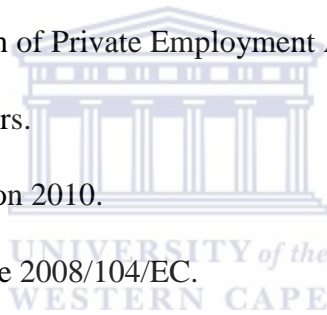


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CHAPTER 1

1.1 Background of the Study

The practice of Labour Brokering¹ in South Africa (SA) has been in existence for many years and has provided deployment opportunities for numerous people. Nevertheless, a number of concerns have been raised that while labour brokers provide employment opportunities, the rights of the people that they employ are often violated in the process. During the 19th Century SA discovered minerals; the migrant employees became the sole of labour movement in SA.² TES role was to procure persons to clients in return for a reward, the employees had to be recruited from the most parts of Southern Africa to be employed in the mines.³ During the year 2002, a total of 4000 workers at the century-old East Rand Proprietary Mines (ERPM) gold mine east of Johannesburg went on strike.⁴ The entire mine workforce was employed by a TES and not the mine owners.⁵ The workers demanded that the TES pay them money it had received from the mine, which they felt should be part of their wages.⁶ In most cases, it had occurred that the TES escaped their duty to pay the employees a reasonable wages.⁷ The demand originated from the fact that the most of the mine workers believed that they were employed directly by the mine.⁸ Consequently, the mine terminated its contract with the TES due to the fact that the broker had failed to provide an uninterrupted supply of labour. This left 4000 mine workers unemployed as well as the mine without a workforce.⁹ The mine rescued the situation by engaging the National Union of Mine Workers on the number of people it would re-employ directly.¹⁰

¹ Labour Broking (TES).

² Mavunga RA *Critical Analysis of labour brokers: Should they be regulated or banned in South Africa* (unpublished thesis, University Of Pretoria, 2010) 19.

³ Theron J, Godfrey S & Lewis P 'The Rise of Labour Broking and its Policy Implications, Development and Labour Law Monographs'(2005) *Development & labour Law Monographs* 18.

⁴ Benjamin P 'To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia' in Malherbe K & Sloth-Nielsen J *Labour Law into the Future : Essays in honour of D'Arcy du Toit* 1 ed (2012) 189.

⁵ Benjamin P (2012) 189.

⁶ Benjamin P (2012) 189.

⁷ Kutumela MT *Legislative Framework Governing Labour Broking in South Africa* (unpublished thesis, University of Limpopo, 2013) 3.

⁸ Benjamin P (2012) 189.

⁹ Benjamin P (2012) 189.

¹⁰ Benjamin P (2012) 189.

Previously, TES employees did not enjoy their employment rights which the standard type employees were entitled to, rights such as the security of employment.¹¹ TES employees were unable to exercise the right to join labour unions.¹² Clients and the TES were able to avoid the obligation towards employees by the clients and the TES.¹³ The growth of triangular employment relationships has become one of the most contentious issues in the SA's labour market.¹⁴

TES is a practise that involves three parties within the employment relationship. The three parties are the TES, Clients and the employee.¹⁵ TES is the employer of the persons whom it pays to work for a client and a TES and its clients are jointly and severally liable for the specified contraventions of employment laws.¹⁶ Triangular employment can be viewed as an employment relationship in which the recruitment, dismissal and the employment functions performed by the employer are outsourced to an intermediary while the 'task side' of the relationship is not outsourced.¹⁷ The agency supplies its clients with employees to work under the client's instruction.¹⁸ The extents to which the agency comes between the employees and the clients and the client is a subject that all labour law systems have been battling with throughout the world.¹⁹

According to the Labour Relations Act²⁰ a TES "means any person who, for a reward, procures for or provides to a client other persons, who renders services to or perform work for, the client and who are remunerated by the temporary employment service."²¹ The Act further provides that a person whose services have been procured for, or provided to, a client

¹¹ Cohen T 'The effects of Labour Relations Amendment Bill 2012 on non-standard employment relationships' (2014) 35 *ILJ* 2601 2607.

¹² Bote A 'The history of labour hire in Namibia: A lesson to South Africa' (2012) 16 *PER* 506 525.

¹³ Tshoose C & Tsweledi B 'A Critique of protection afforded to non-standard workers in temporary services context in South Africa' (2014) 18 *Law Democracy and Development* 334 338.

¹⁴ Benjamin P (2012) 190.

¹⁵ Van Eck B.P.S 'Temporary Employment Services (Labour brokers) in South Africa and Namibia' (2010) 13 *PER* 107 108.

¹⁶ This means that both the client and TES are liable under Section 198, the TES employee can institute proceedings against either.

¹⁷ Davies , P & Freeland , M 'Changing Perspective Upon the Employment Relationship in British Labour Law' in Barnard C, Deakin S & Morris G *The Future of Labour Law* (2004) 129.

¹⁸ Benjamin P (2012) 191.

¹⁹ Benjamin P (2012) 191.

²⁰ Labour Relations Act 66 of 1995 Section 198.

²¹ LRA Section 198(1).

by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.²²

In *Khumalo v ESG Recruitment CC (Mecha Trans)*²³ the applicant referred a dispute regarding the fairness of her dismissal to bargaining council. The background to the case is that the applicant signed a contract of employment with a temporary employment services in terms of which she was employed for the period that her services would be required by the employer's client. The client indicated that the worker had no right of renewal after the termination date. However, there was no termination date specified.²⁴ The employment contract was subsequently terminated on 24 hours' notice on instructions of the client.²⁵ In adjudicating whether the applicant was dismissed fairly or not, the arbitrator made reference of the Bill of Rights, which states that "everyone has the right to fair labour practices." It was confirmed that a contract of employment may not diminish an employee's rights granted by the LRA, BCEA or any other law. The court found that the worker was dismissed and that her dismissal was both substantively and procedurally unfair.²⁶

1.2 Rationale of the Study

Prior to the 1995 LRA, TES supplied individuals to clients.²⁷ Regulation of these services was introduced because of large firms within the growing labour hire sector who had structured employment relationships with the workers they placed so that they would not receive the protection of statutory wage regulation measures.²⁸ Individuals would approach the TES for employment, these individuals would then be asked to complete application forms.²⁹ This application form would not necessarily create an employment relationship. It would just be a mere application form for placement. In this tri-partite relationship, hiring of the worker would only take place upon placement when the client consents to the placement of the worker concerned.³⁰ If the client does not consent, there would be no question of hiring

²²LRA Section 198(2).

²³ *Khumalo v ESG Recruitment CC (Mecha Trans)* 2008 (29) *ILJ* (BCA) 1331.

²⁴ *Khumalo v ESG Recruitment CC (Mecha Trans)* 2008 (29) *ILJ* (BCA) 1331 para 1.

²⁵ *Khumalo v ESG Recruitment CC (Mecha Trans)* 2008 (29) *ILJ* (BCA) 1331 para 1.

²⁶ *Khumalo v ESG Recruitment CC (Mecha Trans)* 2008 (29) *ILJ* (BCA) 1342 para 12.

²⁷ Benjamin P (2012) 191.

²⁸ Brassey M & Cheadle H 'Labour Relations Amendment Act 2 of 1983' (1983) 4 *ILJ* 3 9.

²⁹ Theron J 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (2005) 26 *ILJ* 618.

³⁰ Theron J (2005) 618.

and consequently employment. Seemingly, each placement constituted a separate contract of employment which is dependent on the client.³¹ This is always so even if the ‘employer’ remains the same throughout the entire employment period. Similarly, if the client terminates its contract with the TES, the placement also terminates.³² It follows then that the client has the power to create and terminate employment.

Prior to the amendment of the 1995 LRA, TES generally started by employing workers to place them with clients and their remuneration was often retained.³³ Clients were jointly and severally liable for breaches of sectoral determinations, collective agreements or arbitration awards. Clients were, however, not jointly and severally liable for unfair dismissal or breaches of contracts of employment.³⁴

In late 2014, South Africa amended the Labour Relations Act³⁵ in order to overcome challenges that workers in TES have been facing. These amendments seek to protect temporary services employees’ rights and also to ensure that they are treated like permanent workers. The amendments also stipulates the set period of the workers duration of service while working for the clients. The newly introduced Section 198A of the LRA provides that a “temporary service is a work for a client for a period not exceeding three months.”³⁶

There are a large number of workers who are working informally, and it has been asserted that the large number of workers in informal employment in the SA labour market has led to inadequate legal protection of temporary workers.³⁷ It is submitted that the goal of the amended LRA is to assist vulnerable workers to ensure adequate protection and decent work. The rationale of this study is to assess the process and commitment around the law since the amendments, to evaluate whether the amendments are serving its purpose to ensure the protection of the temporary workers.

³¹ This was the position adopted in *Dickens v Cozens Recruitment Services* (2001) 22 ILJ (CCMA), although it was criticised cases followed where arbitrators adopted contrary views .

³² Theron J (2005) 628.

³³ Benjamin P (2012) 196.

³⁴ See Harvey S ‘Labour brokers and Workers Rights: Can they co-exist in South Africa’ (2011) 1 SALJ 123 102.

³⁵ Labour Relations Amendment Act 6 of 2014.

³⁶ LRA Section 198A(1)(a).

³⁷ Van Eck BPS ‘Temporary Employment Services (Labour Brokers in South Africa and Namibia)’ (2010) 13 PER/PELJ 117.

1.3 Literature Review

As noted, regulations for labour brokers were introduced in amendments to the previous Labour Relations Act³⁸ in 1983.³⁹ At that time, labour brokers were deemed to be the employers of individuals who they placed to work with their user companies provided they were responsible to remunerate them.⁴⁰ The 1956 LRA also sought to set official rules regarding collective relations between parties, employers and workers.⁴¹ In effect, South Africa adopted a position permitting employment of agencies to be classified as the employers of those whom they placed to work with a client more than a decade prior to this type of arrangement being reflected in international standards with the adoption of ILO Convention 181⁴² in 1997.⁴³

Post-1983, the 1956 LRA required that employment agencies register with Department of Labour, provided that the client's premises were deemed to be the place of work for those workers.⁴⁴ When the 1995 LRA was introduced, it was also criticised by some for not adequately dealing with issues of TES, which was being hotly debated within the ILO given that instruments relating to temporary employment and triangular employment relationships were being proposed.⁴⁵

Section 198 of the LRA defines the concept TES as any person who for reward, procures for or provides to a client other persons, who render services to or perform work for the client, and who are remunerated by the temporary employment services.⁴⁶ The labour broker is also the employer of the employee.⁴⁷ This would also include the rights contained in the

³⁸ Labour Relations Act 28 of 1956.

³⁹ Labour Relations Amendment Act 2 of 1983.

⁴⁰ Benjamin P 'Law and Practice of private employment agency work in South Africa' *Sector Working Paper* No 292 (2013) 2.

⁴¹ Nel P.S Erasmus B & Swanepoel B *Successful Labour Relations* 2nd ed (1993) 14.

⁴² C181 - Private Employment Agencies Convention, 1997 (No. 181). It should be noted that South Africa has not ratified this convention.

⁴³ Benjamin P (2013) 2.

⁴⁴ Alleter C 'International Labour Standards and Private Employment Agencies- Are South Africa's Recent Legislative Amendments Compliant?' 2015 *International Convention* 3.

⁴⁵ Van Eck BPS 'Regulated Flexibility and the Labour Relations Amendment Bill of 2012' (2013) 2 *ILJ* 46 36.

⁴⁶ LRA 66 of 1995 Section 198(1)

⁴⁷ LRA 66 of 1995 Section 198(2).

(BCEA)⁴⁸; fair labour rights as well as the rights contained in the Employment Equity Act (EEA).⁴⁹

SA amended the LRA⁵⁰ in 2014 in order to overcome challenges that workers in temporary employment services have been facing. Prior the amendments, section 198 of the LRA merely provided the basic aspects of labour broker's employees and the party entitled to the whole spectrum of the employment rights in spite of the atypical nature of their employment.⁵¹ The amended provisions now require that a TES provide employees with written particulars of employment that comply with section 29 of the BCEA when the employee commences employment.⁵² TES employees may also institute proceedings against either the TES, the client, or both.⁵³

Literature and studies on TES workers' rights in SA are quite limited. As discussed above, TES workers previously did not have any effective protection until the recent amendments. The ILO formulated the Private Employment Agencies Convention 181 of 1997 which seeks to ensure that workers placed by employment agencies received adequate protection under labour law.⁵⁴ While there are several materials on TES locally and abroad, there is not much available literature after the 2014 amendments.

In the case of *Assign Services (Pty) Ltd v CCMA & others*⁵⁵ the court had to interpret the meaning of the amended section 198A(3)(b) which deems workers who are placed with a client by the TES for more than three months to be the employees of the client.⁵⁶ The judge argued that the word 'deemed' in s198 means that the client becomes the sole employer of the placed worker for the purpose of the LRA.⁵⁷ This case raises questions for both the client and the TES on the employment of the temporary workers.

⁴⁸ Basic Conditions of Employment Act 75 of 1997.

⁴⁹ Employment Equity Act 55 of 1998.

⁵⁰ LRA 66 of 1995.

⁵¹ Botes A 'The history of labour hire in Namibia: A lesson for South Africa' (2013) 1 *PER/PELJ* 16 525.

⁵² LRA Section 198(4B)

⁵³ LRA Section 198(4A)

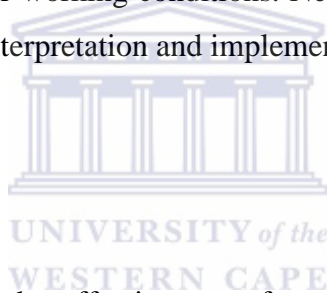
⁵⁴ Benjamin P (2012) 191.

⁵⁵ *Assign Services (Pty) Ltd v CCMA & Others 2015* (11) BLLR 1160 (LC).

⁵⁶ *Assign Services (Pty) Ltd v CCMA & Others 2015* (11) BLLR 1160 (LC) para 2.

⁵⁷ *Assign Services (Pty) Ltd v CCMA & others 2015* (11) BLLR 1160 (LC).

In the UK, the rights of agency workers are viewed to be partially protected through the 2010 Agency Workers Regulations.⁵⁸ In *Moran and others v Ideal Cleaning Ltd*⁵⁹ The appellants were employed for many years by the first respondent but later on were placed to work as agency workers at the premises of the client and under the supervision of the second respondent. They argued that they qualified for protection under Agency Workers Regulations. The Employment Tribunal which heard that matter had to determine the definition of ‘temporary’ since the regulations only apply to workers who had been employed by the temporary work agency to work on a temporary basis for the client.⁶⁰ The judgement of the Tribunal focused on the concept of ‘temporary’ in terms of the AWR and the Agency Workers Directive.⁶¹ The judge indicated that the workers were not permanent but rather were placed to work as agency workers on a temporary basis. The workers therefore fell outside the scope of the AWR.⁶² It is submitted that there was possibly a lack of understanding of the AWD by the parties. The Directive’s aim is to improve the rights of the agency workers as well as to their working conditions. Nevertheless, the case of *Moran and Others* portrays a slight diverse interpretation and implementation of the Directive.⁶³



1.4 Research Questions

This research seeks to examine the effectiveness of protecting employees under TES as stipulated by section 198 of the LRA. It will seek to answer the following questions.

Question 1: What prompted the amendment of section 198 of the LRA?

Question 2: How effective are the amended provisions of the LRA in allowing TES workers to successfully institute proceedings for unfair labour practices and dismissals?

⁵⁸ Agency Worker’s Regulations, 2010.

⁵⁹ *Moran and others v Ideal Cleaning Services Ltd* (2013) 3 UKEAT/0274/13/DM (EAT).

⁶⁰ *Moran and others v Ideal Cleaning Services Ltd* (2013) 3 UKEAT/0274/13/DM (EAT).

⁶¹ Agency Workers Directive 104/EC 2008.

⁶² *Moran and others v Ideal Cleaning Services Ltd* (2013) 3 UKEAT/0274/13/DM (EAT).

⁶³ Also see LF ‘Less than adequate: Regulating temporary agency work in the EU in the face of an internal market in Services’ (2009) 2 *CJOR* 395.

1.5 Research Methodology

The research will be conducted by making use of primary sources which include legislation, policies and case law as well as secondary sources which include articles, journals, textbooks, web publications and original narratives.

This research will be carried out through a comparative analysis of the relevant labour laws in SA and UK. The research will not look at any other African country for comparative analysis because African countries generally tend to lack uniformity with regard to the application of labour law.⁶⁴ Also, African countries are incorporated into the ILO conventions, however in practice, there are several variations in their implementation.⁶⁵ The selection of the United Kingdom is made against the background that it is one of the countries in Europe that has had a greater change in labour law over recent years.⁶⁶ The country has increased its regulations on employment and also increased the worker protection on alternative employment contracts.⁶⁷ The country also can be used to show how the European Union Directives on the right to equal treatment of part-time workers, fixed term contract workers and temporary workers have been implemented.⁶⁸

1.6 Limitations of the Study

Due to word limitation, this research will mostly focus on sectors where employees are at greatest risk for exploitation by TES, such as mining, agriculture, and retail. Insofar as there are cases and principles from other sectors that may be of relevance, these would still be analysed.

1.7 Overview of the Chapters

This paper will be organised into five chapters. This chapter seeks to outline the background of the study, aims, rationale and significance of the research.

⁶⁴ Nhlabatsi R Working Together: Consulting Africa Intelligence ‘The role of labour law harmonisation in improving the living standards of the poor in a globalised Africa’ available at www.consultancyafrica.com/index.php?option=com (accessed 20 August 2015).

⁶⁵ Nhlabatsi R Working Together: Consulting Africa Intelligence ‘The role of labour law harmonisation in improving the living standards of the poor in a globalised Africa’ available at www.consultancyafrica.com/index.php?option=com (accessed 20 August 2015).

⁶⁶ Deakin S, Malmberg J & Sarkar P ‘How do Labour Laws affect unemployment and the Labour share of National Income?’ The experience of six OECD Countries 1970-2010 (2014) 153 *ILR* 1 8.

⁶⁷ Deakin S *et al* (2014) 8.

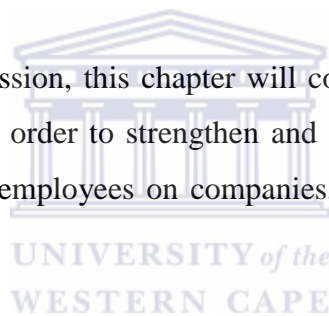
⁶⁸ Deakin S *et al* (2014) 12.

Chapter two provides a background and history of SA's labour law. The chapter will outline the country's previous and current economic position and legal provisions on temporary employment contracts. The chapter will also highlight the reasons for the amendment of the LRA as it relates to TES.

Chapter three will provide an overview, background and the history of UK's labour laws as well as the country's current economic position, particularly in relation to temporary employment contracts. This chapter will also provide the regulation and developments on temporary agency workers in UK.

Chapter four will comprise an analysis of SA against UK employment laws in relation to TES. The chapter will evaluate the efficiency of the amendments and the developmental practices in both countries. The chapter will also gather the current methods to prevent labour exploitation as well as the methods of promoting decent work for TES workers in both countries.

Drawing from the analysis discussion, this chapter will conclude the paper by pointing out the possible recommendations in order to strengthen and enforce the labour regulations for temporary employment services employees on companies, labour broking as well as in the rest of the labour market in SA.



CHAPTER 2

AN OVERVIEW TEMPORARY EMPLOYMENT SERVICES IN SOUTH AFRICA

2.1 Introduction

In South Africa, the nature and extent of TES has changed as the nature of employment adapted to the structural changes of the SA economy.⁶⁹ Currently, TES agencies are not only affected by the provisions of the amended LRA, but also regulated in terms of the Employment Services Act.⁷⁰ The act's purposes include:

- Improving access to the labour market for work seekers;⁷¹
- Providing opportunities for new entrants to the labour market to gain work experience;⁷²
- Improving the employment prospects of work seekers, in particular vulnerable work seekers;⁷³ as well as
- Promoting employment growth and workplace productivity.⁷⁴

This chapter discusses the current position regulating TES. Prior to this, an overview of the historic development of legislation relating to TES will be set out.



2.2 The Development of Temporary Employment Services Regulation in South Africa

Previously, the South African Industrial Conciliation Act of 1924 (ICA)⁷⁵ made provisions for the creation of employee and the employer councils with the powers of negotiation and wage determination.⁷⁶ The ICA was meant to control and prevent industrial conflict through providing collective bargaining and conciliation in the event of a dispute.⁷⁷ The passage of

⁶⁹ Bhorat H Cassim A & Yu D 'Temporary Employment Services in South Africa: Assessing the industry's economic contribution' (2014) 1.

⁷⁰ Employment Services Act 4 of 2014.

⁷¹ ESA 4 of 2014 Section 2(1)(b).

⁷² ESA 4 of 2014 Section 2(1)(c).

⁷³ ESA 4 of 2014 Section 2(1)(d).

⁷⁴ ESA 4 of 2014 Section 2(1)(g).

⁷⁵ Jordaan C & Ukpere WI 'South African Industrial Conciliation Act of 1924 and current affirmative action : An Analysis of Labour Economic History' (2011) 5 *AJBM* 4 1094.

⁷⁶ Jordaan C & Ukpere WI (2011) 1096.

⁷⁷ Jordaan C & Ukpere WI (2011) 1094.

the ICA was also characterised by a coercive power owing to the fact that it was passed to facilitate collective bargaining and conciliation.⁷⁸

In 1983, the LRA was amended to introduce regulations labour brokers. It encouraged it by designating the labour broker as the employer, and provided an incentive to firms to externalise and to avoid the contingent costs of an adverse finding in unfair dismissal proceedings.⁷⁹ Furthermore, it provided a new approach for TES and other service providers who implicitly or explicitly offered to assume the risks of adverse findings in court.⁸⁰

After the end of the apartheid era in 1994, the democratic government initiated a complete overhaul of the regulation of the South African labour market. This resulted in the enactment of the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998 and the Skills Development Act 97 of 1998. The LRA came into effect in October 1996. The passing of the LRA in 1995 was the first step undertaken to try and redress the imbalances and inequalities of the past that led to the exploitation of workers in the labour markets.⁸¹ While South Africa has not ratified ILO Convention 181 of 1997,⁸² it has been submitted and some of its guiding principles have been adopted in principle through statute.⁸³

Proposals for amendments to the LRA and BCEA were submitted to the South African cabinet in March 2012.⁸⁴ The proposed legislation aimed to avoid exploitation of employers and to ensure decent work for all employers as well as to protect the employment relationship, to introduce laws, to regulate contract work, subcontracting and outsourcing, to problems of labour broking and prohibit abusive practises. Amongst the new provisions that

⁷⁸ Jordaan C & Ukpere WI (2011) 1094.

⁷⁹ Theron J 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (2005) 26 *ILJ* 618.

⁸⁰ Theron J (2005) 639.

⁸¹ Clarke M 'Ten years of labour market reform in South Africa' Real gains for workers? *Canadian Journal of African studies* (2004) 38 *CJAS* 3 512. Also see Brand EH *The legal framework for the protection of employees of labour brokers in South Africa* (Unpublished LLM thesis, University of Cape Town 2013) 2; Kutumela M *Legal Framework Governing Labour Broking in South Africa* (Unpublished thesis University of Johannesburg, 2012) 3

⁸² C181 - Private Employment Agencies Convention, 1997.

⁸³ Maduna NP *An analysis of TES within the information Technology Sector* (Unpublished thesis, University of Johannesburg, 2012) 3.

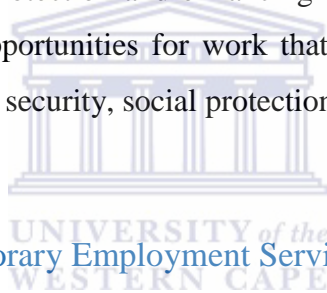
⁸⁴ Media Briefing by minister of labour on 'the bills amending the labour relations act and the BCEA'. available at www.labour.gov.za/media-deskmedia (accessed on 05 March 2016).

were introduced was a legal requirement for labour brokers to register with the department of labour. However, Maduna notes that the system to register is not effectively enforced.⁸⁵

2.3 International Perspectives regarding Non-Standard Work

It is provided that when interpreting any legislation, every court must prefer a reasonable interpretation that is consistent with international law.⁸⁶ Given the international nature of several parts of South African labour law, it is beneficial to analyse relevant conventions in order to assist our courts when dealing with relevant issues.

The goal of the ILO is to achieve ‘Decent Work’ for both women and men in conditions of freedom, equality, security, and human dignity.⁸⁷ In achieving this, four strategic objectives are set out, including promoting rights at work, encouraging decent employment opportunities, enhancing social protection and enhancing dialogue in handling work related issues. This involves creating opportunities for work that is productive and delivers a fair income, while also promoting job security, social protection for families.⁸⁸



2.4 The Legal Nature of Temporary Employment Service

Traditionally there are two sets of contracts in a TES relationship. The first was a service contract between the labour broker and the client company in relation to the services or skills required and procured, the period of engagement, payment rates and the terms and conditions for this service provision. This contract allowed the client company delegation of employment where it would reap the rewards and use the employee at will but without the risk associated with being an employer.⁸⁹

⁸⁵ Maduna NP *An analysis of TES within the information Technology Sector* (Unpublished thesis, University of Johannesburg, 2012) 3.

⁸⁶ Constitution of the Republic of South Africa, 1996, Section 233.

⁸⁷ International Labour Organisation ‘The ILO at a glance’ available at : <http://www.ilo.org/public/english/download/glance.pdf> (accessed 29 May 2016).

⁸⁸ International Labour Organisation ‘The ILO at a glance’ available at : <http://www.ilo.org/public/english/download/glance.pdf> (accessed 29 May 2016).

⁸⁹ Theron J (2005) 619.

The second type of contract is, naturally, between the worker and the TES employer. TES are usually employed through fixed-term contracts.⁹⁰ This type of a contract automatically terminates after a set period, or upon agreement by both parties,⁹¹ unless an extension is agreed upon. The natural termination of a fixed-term contract does not usually equate to that of a dismissal,⁹² unless a reasonable expectation of renewal exists.⁹³

These above two sets of contracts are interrelated and give rise to a triangular employment relationship of sorts. This triangular relationship has often resulted in confusion and leads to questions being asked about the real employer in this kind of labour practice.⁹⁴ It is provided that the parties to an employment contract were free to make whatever agreement they wish in order to determine their respective rights and duties.⁹⁵ This statement was however questionable as employees who were desperate for employment were not in the same position of power as the client company and the labour broker. Employees would just sign the employment contract due to the lack of other or better employment options and without proper consultation with regard to the legalities of the contract they bind themselves to.⁹⁶ In a tripartite relationship, the client companies were normally the dominant partner and hence wield the greatest bargaining power.⁹⁷ The parties were therefore not at an equal footing.⁹⁸

A particularly problematic situation with triangular relationships arise in instances of business transfers, When TES workers work alongside employees of a client and this client is transferred as a business in terms of section 197 of the LRA, traditionally these employees were not transferred with the client's own.⁹⁹ This was made quite clear by the wording of section 198 where the Act provides that they are the employees of the TES and not the client.

⁹⁰ Theron J (2005) 621.

⁹¹ Brassey 'Employment and Labour Constraints on the Termination of Fixed Term Contracts of Employment: An Enquiry into Recent Developments' (1996) 17 *ILJ* 1003.

⁹² Van Niekerk & Chistianson *Law at work* 1st ed (2008) 19.

⁹³ LRA Section 186(1)(b).

⁹⁴ Maduna NP *An analysis of TES within the information Technology Sector* (Unpublished thesis, University of Johannesburg, 2012) 23.

⁹⁵ Wynn M & Leighton P 'Will the real employer please stand up? Agencies clients Companies and the employment status of the Temporary Agency Worker' (2006) 35 *ILJ* 3 3.

⁹⁶ Maduna NP *An analysis of TES within the information Technology Sector* (Unpublished thesis, University of Johannesburg, 2012) 24.

⁹⁷ Theron J (2005) 616.

⁹⁸ Bidwell M & Fernando-Mateo I 'Three's a crowd? Understanding triadic employment relationships' in employment Relationships: in Capelli P (ed) *New Models of White Collar Work* (2008) 143.

⁹⁹ Todd C du Toit D & Bosch C *Business Transfers and Employment Rights in South Africa* 1st ed (2004) 46.

According to Benjamin, the client may now choose subject to any contractual obligation to terminate its relationship with the TES in respect of the employee and pay the employee directly.¹⁰⁰ Previously, a worker used to be considered by law as an employee of the agency, who further had no legal obligation to provide continuous employment or a certain number of assignments.¹⁰¹ This made things easy for labour brokers to simply lay off employees and cite operational reasons as a mitigating factor.¹⁰² However, the amended LRA provides that a worker must be treated no less favourably than the clients other employees performing the same or similar work.¹⁰³

In the case of *Dyokwe v Mondi Packaging South Africa (Pty) Ltd and Stratostaff (Pty) Ltd*¹⁰⁴ there were questions relating to the true nature of the employer, whether employed by the TES or its client at the time of dismissal. The applicant was employed by the respondent Mondi for more than two years and was informed that they must sign a new contract of employment with the fourth respondent, a TES agency.¹⁰⁵ The applicant had signed a new contract with the fourth respondent.¹⁰⁶ The applicant was asked to sign the new contract with no understanding of the terms of the contract.¹⁰⁷ The contract did not contain any fixed term period. The commissioner argued that the applicant employment with Mondi was temporary and that the applicants contract was never terminated and the fourth respondent did not procure the applicants services.¹⁰⁸ The Commission for Conciliation Mediation and Arbitration (CCMA) declared that “Mondi” was indeed the applicant’s true employer of the time of his dismissal.¹⁰⁹

In *Bhandi v Kelly Girl Temp Services/ First Direct*,¹¹⁰ the case involved a temporary employee. The employee was a secretary and placed to work for a client. For some reason, there was a discrepancy with her salary. She approached the client concerning it and her employment was terminated thereafter by him. She then instituted proceedings in the CCMA

¹⁰⁰ Benjamin P ‘Restructuring Triangular Employment: The interpretation of Section 198A of the Labour Relations Act’ (2016) 37 *ILJ* 28 38.

¹⁰¹ Ratti L ‘Agency work and the idea of dual employment ship: A comparative perspective’ (2009) 31 *Comparative Labour Law & policy journal* 1 1-44.

¹⁰² Maduna NP *An analysis of TES within the information Technology Sector* (Unpublished thesis, University of Johannesburg, 2012) 24.

¹⁰³ LRA Section 198A (5).

¹⁰⁴ *Dyokwe v Mondi Packaging South Africa (Pty) Ltd* (2012) C148/11 (CCMA) para 2.

¹⁰⁵ *Dyokwe v Mondi Packaging South Africa (Pty) Ltd* (2012) C148/11 (CCMA) para 80.

¹⁰⁶ *Dyokwe v Mondi Packaging South Africa (Pty) Ltd* (2012) C148/11 (CCMA) para 4.

¹⁰⁷ *Dyokwe v Mondi Packaging South Africa (Pty) Ltd* (2012) C148/11 (CCMA) para 17.2.

¹⁰⁸ *Dyokwe v Mondi Packaging South Africa (Pty) Ltd* (2012) C148/11 (CCMA) para 77.

¹⁰⁹ *Dyokwe v Mondi Packaging South Africa (Pty) Ltd* (2012) C148/11 (CCMA) para 80.2.

¹¹⁰ *Bhandi v Kelly Girl Temp Services/ First Direct* (1997) GA 952.

and cited the client as her employer. It was affirmed by the arbitrator and her application was dismissed advised her to commence actions afresh against the TES without even considering the facts of the case or without having regard to the reason for the dismissal of the concerned employee.¹¹¹

Cases such as the ones mentioned above, necessitated amendments to protect more vulnerable, lower paid workers, many of which are employed on a temporary work basis.¹¹² Moreover, the amendments were to respond to labour broking to ensure that labour legislation is in line with the developments in labour law. This was necessary in order to enhance market institutions and also to fulfil obligations as a member state of the ILO.¹¹³

2.5 Conclusion

This chapter briefly outlined the history of TES in South Africa. It has been pointed out that TES workers were placed under unfair conditions of employment. Due to unfair conditions, workers endured difficulties and contractual disputes in the process of the employment relationship with clients as well as with labour brokers.

The chapter provided the legal provisions on TES contracts as well as the reasons for the 2014 LRA amendments. The 2014 LRA amendments grant authority to the workers to institute proceedings on clients as well as brokers. This is expected to better the practise of the labour law as well as the treatment of the workers by both clients and the labour brokers. In the next chapter, the position in the UK will be set out, before returning to the South African position for purposes of analysis.

¹¹¹ *Bhandi v Kelly Girl Temp Services/ First Direct* (1997) GA 952.

¹¹² CCMA Commissioners indaba (2012) 4.

¹¹³ Memorandum of the 2014 Labour Relations Act Amendments.

CHAPTER 3: THE CURRENT POSITION OF TEMPORARY AGENCY WORKERS IN UNITED KINGDOM

3.1 Introduction

In the United Kingdom, the first attempt at providing rights for Temporary Agency Workers (TAW) was done in 1973 with the Employment Agencies Act, although it was generally seen as problematic and not enforced in practice.¹¹⁴ After years of effective exclusion of TAW from proper employment rights, the UK introduced the EU Temporary Agency Work Directive¹¹⁵ in the form of the Agency Workers Regulations.¹¹⁶ The country implemented the Directive to provide employment rights for TAW and also to establish similarities between the employee from the user company if both parties perform the same duties and are integrated into the organisation.¹¹⁷

The purpose of this chapter is to provide an outline and a framework on how TAWs are regulated in the UK. The chapter seeks to discover the current position of the TAWs before comparing it to the South African position. This chapter will firstly outline the brief history of temporary agency employment in the UK. Secondly, it will discuss the economic position of the UK in relation to agency employment. Thirdly, the paper will provide the legislative framework relating to TAWs and discuss the nature of TAW contracts of employment before finally concluding.

3.2 History of Temporary Agency Workers

Previously, TAW's were not properly protected by traditional employment rights as they were applicable only to fixed-term workers. In fact, such categories of workers were explicitly excluded in most employment regulations.¹¹⁸ TAWs were not a separately-identified legal category in the UK, unlike in several other EU countries.¹¹⁹ Many UK agency

¹¹⁴ Stanworth C & Druker J 'Labour Market Regulation and Non-Standard Employment: The case of Temporary Agency Work in United Kingdom' (2000) 8 *IJES* 1 5.

¹¹⁵ AWD.

¹¹⁶ Agency Workers Regulations, 2010 (SI 2010/93).

¹¹⁷ Voss E Vitols K Farvaque N Broughton A Behling F Dota F Salvo L & Naedenoen F "Temporary Agency Work and Transitions in the Labour Market" (2013) 43.

¹¹⁸ Green F Temporary Work and Insecurity in Britain: A Problem Solved? (2008) 88 *EJ* 1 155.

¹¹⁹ Green F Temporary Work and Insecurity in Britain: A Problem Solved? (2008) 88 *EJ* 1 155.

workers were treated as employees but were not seen to be ones, and did not have true knowledge of their employer or relevant rights.¹²⁰

After many years of exclusion, the UK government introduced the Employment Agencies Act.¹²¹ The act provides that the secretary of the state may issue regulations to secure the proper conduct of employment agencies and employment business.¹²² The act mainly focused on the proper conduct of agency businesses and licencing, however it did not directly regulate the rights of workers much. Essentially, the act recognised the interests of the people availing themselves for agency services without stipulating those interests.¹²³

Subsequent to the EAA¹²⁴ the Employment Rights Act¹²⁵ (ERA) was introduced. These rights included the programme of creating minimum rights for these workers were distinct benefits, such as a minimum wage, paid holiday entitlement, or else access to a procedure that is intended to bring benefits, such as the right to apply to one's employer for access to flexible, family-friendly, working times.¹²⁶ However, TAWs were generally unable to assert employee rights due to the fact that their employment status as employees had always been called into question.¹²⁷

For a very long time, there was no strong relationship between the workers and the employers due to the length of assignments and *ad hoc* types of services. The relative lack of protection for temporary agency workers was an externally-imposed and market distorting incentive for employers to make use of temporary work contracts.¹²⁸

In *Montgomery v Johnson Underwood Ltd*,¹²⁹ an agency worker approached an employment agency for employment, who then subsequently placed her at a local company. Montgomery had worked at the placed company for years until she was then dismissed by the company who was dissatisfied with the number of personal phone calls she was making. The agency worker claimed for unfair dismissal from both the agency and client. The Employment

¹²⁰ Bercussion N 'Transnational labour Regulations' in Ahlberg et al *Transnational Labour Regulations* A case study of Temporary Agency Workers 1 ed (2008) 12.

¹²¹ Employment Agencies Act of 1973

¹²² EAA of 1973 Section 5(1).

¹²³ Purcell K, Cam S *Employment, Intermediaries in the UK: Who uses them?* Employment Studies research unit (Cardiff University, 2002) 7.

¹²⁴ EAA.

¹²⁵ Employment Rights Act of 1996.

¹²⁶ Green F 'Temporary Work and Insecurity in Britain: A Problem Solved?' (2007) 88 *EJ* 1 150.

¹²⁷ Green F Temporary Work and Insecurity in Britain: A Problem Solved? (2007) 88 *EJ* 1 155.

¹²⁸ Green F Temporary Work and Insecurity in Britain: A Problem Solved? (2008) 88 *EJ* 1 155.

¹²⁹ *Eyton Morris Winfield (Montgomery v Johnson Underwood Ltd)* [2001] IRLR (Ser C) No 42.

Tribunal declared that the worker was employed and unfairly dismissed by the agency company. On appeal, the Employment Appeal Tribunal affirmed this decision. The court of appeal disagreed with the Employment Tribunal's decision, holding that Montgomery was not an employee of the agency, and that her remedy would not be against them. However, the court did not make a finding as to whether she was an employee of the client company, rather lamenting the fact that a *lacuna* in the laws of the time existed. The court of appeal further provided that the EAT should call for a legislation intervention into the status of agency workers to clarify whether parliament intended agency workers to be covered by unfair dismissal legislation.¹³⁰

A complicating factor in examining agency work is the factor of a triangular employment; agency work has a dual relationship with both the employment agency as well as the client firm to which they are assigned.¹³¹ In the case of *Muschett v HM Prison Service*¹³² an agency worker was offered a temporary position as a cleaner at Feltham Young Offenders Unit.¹³³ The worker had received a letter of engagement which clearly stipulated that his employment could be terminated at any time.¹³⁴ The worker commenced work in January 2007 and completed work in May the same year.¹³⁵ After termination of his employment, Muschett claimed unfair dismissal as well as discrimination on the grounds of sex, race, and religion against the Prison service as well as the agency worker.¹³⁶ Muschett further claimed that it was always intended that he would take on a permanent position with the prison service in terms of an implied contract that was entered into. The Tribunal found that he was not an employee and there was no contract between Muschett and the Prison and therefore the claim was dismissed.¹³⁷ On appeal, it was further held that the applicant was under no obligation to work for the prison and that there was no evidence to the existence of the implicit agreement or its implications.¹³⁸ The appeal tribunal also held that the applicant was not an employee according to the Race Relations Act as there was no contract to execute any work.¹³⁹

¹³⁰ *Eyton Morris Winfield (Montgomery v Johnson Underwood Ltd)* [2001] IRLR (Ser C) No 42.

¹³¹ Forde C & Slater G 'The Nature and Experience of Agency Working in Britain' (2003) 20.

¹³² *Muschett v HM Prison Service* [2010] IRLR (Ser 451) No 25.

¹³³ *Muschett v HM Prison Service* [2010] IRLR (Ser 451) No 25.

¹³⁴ *Muschett v HM Prison Service* [2010] IRLR (Ser 451) No 25.

¹³⁵ *Muschett v HM Prison Service* [2010] IRLR (Ser 451) No 25.

¹³⁶ *Muschett v HM Prison Service* [2010] IRLR (Ser 451) No 25.

¹³⁷ *Muschett v HM Prison Service* [2010] IRLR (Ser 451) No 25.

¹³⁸ *Muschett v HM Prison Service* [2010] IRLR (Ser 451) No 25.

¹³⁹ Race Relations Act of 1976 section 28.

In *Brook Street Bureau (UK) Ltd v Dacas*¹⁴⁰ the court recognised that an employee may have more than one employer in a triangular employment relationship and also that an employee may possibly also have more than one employment contract with more than one entity exercising the duties of being an employer. These are the situation that the agency workers face from time to time with no true knowledge of the true employer of their employment details or rather their employment conditions.

In 2002 the Conduct of Employment Agencies and Employment Business Regulations proposed a fee to transfer temporary agency workers to clients in instances where the client offers a permanent employment to a worker who was initially placed by an agency.¹⁴¹ The proposals appeared to be in accordance with the stated aim of more and better jobs adopted under the European Employment strategy by the European council.¹⁴² In the same year, the European Commission (EC) proposed the Temporary Agency Workers Directive, intended to improve the employment protection of TAWs whilst removing the restrictions on the use of the workers.¹⁴³ According to Bercussion, the attempts of EU regulation in the temporary work industry can be understood as an attempt to harmonise national labour regulations.¹⁴⁴ Furthermore, the introduction of the Directive sought to enforce transnational minimum standards on agency work for the first time.¹⁴⁵ The Directive was declined by UK officials as well as the trade unions on the basis that the equal treatment provisions threatened the government's desire to maintain a balance between flexibility and protection. It was submitted that people had a fear that the Directive would have negative effects on an industry which was one of the fast growing in UK.¹⁴⁶ A compromise was finally reached between the

¹⁴⁰ *Brook Street Bureau (UK) Ltd v Dacas* (2004) EWCA Civ 217.

¹⁴¹ Bercussion N 'Transnational labour Regulations' In Ahlberg et al *Transnational Labour Regulations* A case study of Temporary Agency Workers 2008 7.

¹⁴² Busby N & Christie D 'The regulation of Temporary Agency Workers in the European Union' *ETUC* 2005 15.

¹⁴³ Busby N & Christie D 'The regulation of Temporary Agency Workers in the European Union' *ETUC* 2005 15.

¹⁴⁴ Bercussion N 'Transnational labour Regulations' In Ahlberg et al *Transnational Labour Regulations* A case study of Temporary Agency Workers 1 ed (2008) 7.

¹⁴⁵ Hakansson K Isidorsson T Pond R Teissier C Unterschütz J & Warneck F *Representation of Agency Workers in Europe at National and Local level in France, Netherlands, Sweden, Poland and the United Kingdom* (2009).

¹⁴⁶ Forder C & Slater G 'The Effects of Agency Workers Regulations on Agency and Employer Practise' 2014 Research Paper 12.

government, businesses and trade unions in May 2008.¹⁴⁷ After the Directive was agreed upon, the UK introduced the 2010 Agency Workers Regulation.¹⁴⁸

3.3 Current Legislative Framework of Temporary Agency Work

As indicated above, TAWs did not traditionally have any legal protection against unfair dismissal or labour practices, which meant that they could be dismissed relatively easily, even after working for an employer for many years.¹⁴⁹ The Temporary Agency Workers Directive changed this, requiring all the European member states to amend their national legislation in order to reach a common level of protection for agency workers.¹⁵⁰

As noted, the 2010 AWR was the UK implementation of the Directive, conferring various rights on temporary workers.¹⁵¹ Labour Brokers are now further regulated under the AWR. Under the AWR the rights afforded to the TES workers are divided into two categories.¹⁵² The first category is so-called “Day One” rights that must be provided by the client on the first day when workers start an assignment.¹⁵³ These rights include the right to access to facilities as well as information regarding available vacancies in the workplace.¹⁵⁴ These rights provide that if there are any vacancies that are being advertised by the client, the client should allow an opportunity to the agency worker to apply for those vacancies.¹⁵⁵

The second category of rights is the “twelve week” rights which come into practise when the worker has been employed by a client for twelve weeks or longer.¹⁵⁶ The regulation provides that the worker is entitled to basic conditions of employment that are no less favourable

¹⁴⁷ Forder C & Slater G ‘The Effects of Agency Workers Regulations on Agency and Employer Practise’ Research Paper 2014 12.

¹⁴⁸ Agency Workers Regulation 2010.

¹⁴⁹ Biggs D ‘The changing world of the temporary worker: The potential HR impact of legislation’ (2006) 35 *ISS* 2 194.

¹⁵⁰ Freshfields Bruckhaus Deringer *The Agency Workers Directive* (2012) LLP 1.

¹⁵¹ Freshfields Bruckhaus Deringer *The Agency Workers Directive* (2012) LLP 7.

¹⁵² AWR 2010.

¹⁵³ Slater D ‘Amendment Act to significantly change labour industry’ available at <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13> (accessed 24 July 2016).

¹⁵⁴ AWR 2010, Regulation 13.

¹⁵⁵ Slater D ‘Amendment Act to Significantly change labour industry’ available at <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13> (accessed 24 July 2016).

¹⁵⁶ Slater D ‘An amendment Act to Signify change labour industry’ available at <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13> (accessed 24 July 2016).

compared to permanent employees of the client.¹⁵⁷ The implementation and the development of the AWR in UK has significantly reduced the levels of uncertainty in terms of agency workers' rights and consequently in terms of obligations on the part of the agency and the user undertaking.¹⁵⁸ The AWR gave agency workers the right to the same basic working and employment conditions that the workers would have received had they were direct workers of the end user.¹⁵⁹

The case of *Moran and others v Ideal Cleaning Ltd*¹⁶⁰ involved temporary workers at Ideal Cleaning Services who were placed there under the supervision of an agency. Given that the workers had been placed there for several years, they argued that they were entitled to their twelve week rights under the AWR. The employment tribunal ruled that they were not covered by the regulations, who then appealed.¹⁶¹ The appellants argued that the tribunal had misinterpreted the word "temporary" in the regulations to mean "Short term" rather than "not permanent."¹⁶² The Appeal Tribunal found that the word temporary could mean both, but ultimately found on the facts that the workers in question were in effect indefinitely employed, and therefore fell out of the Regulations.¹⁶³ This interpretation is particularly problematic, as it means that agencies and clients can easily circumvent the regulation's twelve week rights through a simple rewording of the terms of work of a person, and has been criticised as circumventing the purpose of the Directive.¹⁶⁴

The National Minimum Wage Act¹⁶⁵ (NMWA) applies to workers who have contracts to do work personally, other than for a customer or a client.¹⁶⁶ The regulation submits that agency charges may not reduce a worker's basic entitlement.¹⁶⁷ Prior to the adoption of the NMWA, employment agencies were free to set payment levels and employment conditions as they saw

¹⁵⁷ AWR 2010, Regulation 12.

¹⁵⁸ Spattini S 'Agency Work: A Comparative Analysis' (2012) 1 *EJ* 4 196.

¹⁵⁹ Nash H 'When does equal treatment not apply?' available at www.rec.uk (accessed 03 May 2016) 1.

¹⁶⁰ *Nottingham (Moran and others v Ideal Cleaning Services Ltd)* [2013] UKEAT (Ser D) No 3.

¹⁶¹ *Nottingham (Moran and others v Ideal Cleaning Services Ltd)* [2013] UKEAT (Ser D) No 3.

¹⁶² *Nottingham (Moran and others v Ideal Cleaning Services Ltd)*[2013] UKEAT (Ser D) No 3 para 3.

¹⁶³ *Nottingham (Moran and others v Ideal Cleaning Services Ltd)* [2013] UKEAT (Ser D) No 3.

¹⁶⁴ See Penny R 'Agency Workers Regulations: please mind the gap?' available at <https://www.carson-mcdowell.com/news-and-events/insights/agency-workers-regulations-please-mind-the-gap> (accessed 25 November 2016).

¹⁶⁵ National Minimum Wage Act 1998.

¹⁶⁶ NMWA 1998 Section 1(2).

¹⁶⁷ NMWA Section 34.

it fit subject only to the pressures of the local labour markets.¹⁶⁸ The rights to claim unfair dismissal or redundancy payments were subjected to a minimum service of one year; as a result many agency workers were unlikely to be eligible.¹⁶⁹ In *Annabel's Berkeley Square Ltd v Revenue and Customs Commissioners Ltd 2009*¹⁷⁰ workers at a restaurant had a troncmaster in charge of tips.¹⁷¹ Tips would be distributed to all the employees based on the length of service under a points system.¹⁷² The troncmasters were senior managers and were given the job by the employer,¹⁷³ who also deducted certain amounts prior to distributing the collected tips. It was argued that this system was contrary to the National Minimum Wage Regulations (NMWR).¹⁷⁴ It was argued that the tips or the tronc system did not count under the NMWA and the regulations did not apply as such. The Regulations state that the money paid by customers by a way of service charge, tip, gratuity or cover charge that is not paid through the payroll is not a legitimate reduction.¹⁷⁵ The Judge held that the tips were not part of the pay and the restaurants were in breach of the NMWA.¹⁷⁶ Since the developments of the Act, changes on the status on agency workers minimum wage were made.¹⁷⁷

The AWR provides that agency workers should have the same relevant terms and conditions as permanent employees on a comparable level,¹⁷⁸ unless an arrangement is made whereby a temporary worker is permanently employed by the agency and pay is provided even between assignments.¹⁷⁹ The agency employer should be aware as to whether the person who the agency wishes to employ has not signed any other contract of employment elsewhere.¹⁸⁰

¹⁶⁸ Stanworth C & Druker J 'Labour Market Regulation and Non-Standard Employment: The case of Temporary Agency Work in United Kingdom' (2000) 8 *IJES* 1 9.

¹⁶⁹ Stanworth C & Druker J 'Labour Market Regulation and Non-Standard Employment: The case of Temporary Agency Work in United Kingdom' (2000) 8 *IJES* 1 9.

¹⁷⁰ *Annabel's (Berkeley Square)Ltd v Revenue and Customs Commissioners* [2009] EWCA (Ser 361) No 1123.

¹⁷¹ *Annabel's (Berkeley Square)Ltd v Revenue and Customs Commissioners* [2009] EWCA (Ser 361) No 1123.

¹⁷² *Annabel's (Berkeley Square)Ltd v Revenue and Customs Commissioners* [2009] EWCA (Ser 361) No 1123.

¹⁷³ *Annabel's (Berkeley Square)Ltd v Revenue and Customs Commissioners* [2009] EWCA (Ser 361) No 1123.

¹⁷⁴ National Minimum Wage Regulation 1999.

¹⁷⁵ NMWR 1999 Regulation 31(1) (e).

¹⁷⁶ NMWA 1998.

¹⁷⁷ Stanworth C & Druker J 'Labour Market Regulation and Non-Standard Employment: The case of Temporary Agency Work in United Kingdom' (2000) 8 *IJES* 1 9.

¹⁷⁸ AWR 2010 Regulation 5 (3) (1) (a).

¹⁷⁹ AWR 2010 Regulation 10.

¹⁸⁰ TUC 'Agency Workers have rights too! Work Smart, Know your Rights' available at www.worksmart.org.uk (accessed 20 September 2015).

Though the contract of employment remains a problem for agency workers in the UK, employment of workers on agency contracts has been reported as one type of flexible working arrangement which is becoming increasingly prominent, especially in retail, mining, and manufacturing and farming sectors.¹⁸¹ TAWs often have an appraisal system and salary reviews which is different from that of direct employees who may be doing the same job.¹⁸² It has been highlighted that the use of workers on agency contracts varies substantially and can result in complex employment arrangements.¹⁸³ However individuals are always seeking for employment as well as income, training and job satisfaction may not matter the most when one is seeking for work. Therefore, agency contracts favour those workers who are on such situations.¹⁸⁴

3.4 UK's Economy in Relation to Agency Work

UK agency work contributes towards the economy in such a way that it reduces unemployment by serving as a stepping stone into the labour market.¹⁸⁵ TAW has rapidly grown in recent years and people have suggested that this growth reflects the rise of the knowledge economy. Seemingly, an employer's use of these workers relates to pressure on labour costs and may be driven by short term cost considerations.¹⁸⁶ Agency workers tend to be hired more frequently when the economy tends to recover. TAW employment in UK has shown an increase from 2013 being 36 million to 40 million in 2014.¹⁸⁷ It has been indicated that a percentage of 57% to 61% of TAWs were employed in 2014.¹⁸⁸ The estimates for 2015 were also nearer to 61%.¹⁸⁹ It has been pointed out that TAWs have gained easy access to the labour market, moving from education to work from unemployment to work from one

¹⁸¹Business Ethics Briefing 'Fairness in the Workplace: Staffing and Employment Contracts' *IBE* 2015 1.

¹⁸²Business Ethics Briefing 'Fairness in the Workplace: Staffing and Employment Contracts' *IBE* 2015 1.

¹⁸³Business Ethics Briefing 'Fairness in the Workplace: Staffing and Employment Contracts' *IBE* 2015 2.

¹⁸⁴Business Ethics Briefing 'Fairness in the Workplace: Staffing and Employment Contracts' *IBE* 2015 2.

¹⁸⁵ Economic Report 2010 *International Confederation of Private Employment Agencies* The Agency Work Industry around the world (2010) 7.

¹⁸⁶ Forder C & Slater G 'The Nature and Experience of Agency Working in Britain'(2003) 26.

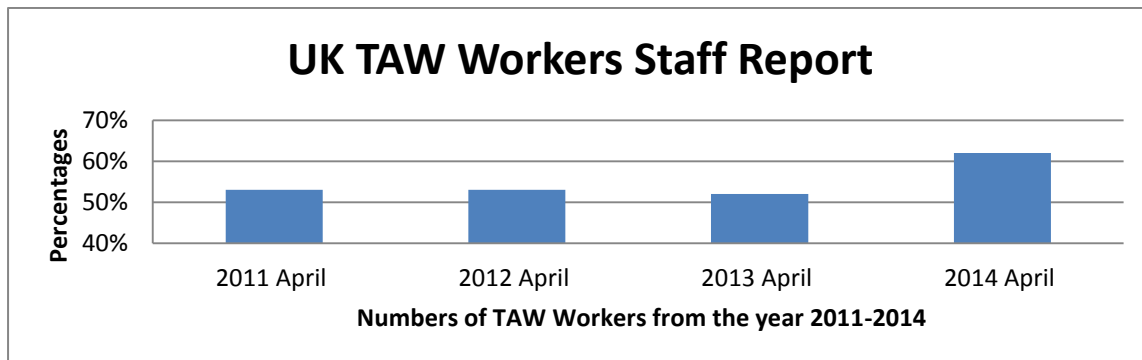
¹⁸⁷ Ciett Economic Report: International Confederation of Private Employment Services (2015) 24.

¹⁸⁸ Ciett Economic Report: International Confederation of Private Employment Services (2015)70.

¹⁸⁹ Ciett Economic Report: International Confederation of Private Employment Services (2015)70.

job to another.¹⁹⁰ The amounts of temporary agency jobs have also increased from 2011 to 2015.¹⁹¹ The index below interprets how the industry has grown in UK over the years.

Figure 1: UK Temporary Agency Workers Staff Report



The index above indicates that the UK Agency market has mostly grown at a steady pace since 2011.¹⁹² This clearly points out the positive response with regards to the employment recruitment industry and well as the workers who have been afforded an opportunity to work in various companies.¹⁹³ Moreover, this also indicates the rise within the recruitment industry which correlates with the economy of UK as the whole country. Seemingly, the introduction of the AWR has therefore not had a negative impact on the growth of temporary work. It is submitted that it has instead created an influx of confidence in the system, having more people consider temporary work as a viable means of employment.

3.5 Conclusion

This chapter has discussed the history of employment rights for temporary workers as well as development of temporary agency workers in the United Kingdom. The chapter discussed the history and the absence of employment rights for agency workers. A development on the provisions of the employment rights to the agency workers has also been discussed.

¹⁹⁰ Ciett Economic Report: International Confederation of Private Employment Services (2015)70.

¹⁹¹ International Confederation of Private Employment Services *Economic Report* (2014) 24.

¹⁹² Rompuy Herman Economic Report International Confederation of Private Employment Services (2014) 24.

¹⁹³ Rompuy Herman Economic Report International Confederation of Private Employment Services (2014) 24.

The chapter also highlighted the country's economic improvement due to the use of agency workers in across the country in various sectors. There are still some minor challenges faced by workers about employment contracts and identifying the true employer. Nevertheless, it is evident that, agency workers in UK have reached a point where their job security and long-term prospects have significantly been improved.



CHAPTER 4: ANALYSIS OF THE IMPLEMENTATION AND EFFECTIVENESS OF THE LRA AMENDMENTS ON SECTION 198

4.1 Introduction

The South African labour sector presents a good example of how labour law generally acts in response to the social and economic changes in society at different times in history. Various pieces of labour legislation have been enacted to address challenges in promoting and protecting the right to fair labour practice conferred by section 23 of the Constitution. As noted, the Labour Relations Amendment Act 6 of 2014 attempts to extend further protection for temporary employees.

The objective of this chapter is to evaluate the level of implementation of the 2014 Amendments and to establish if they have been effective in ensuring that employees of TES are not unfairly treated. This chapter will provide an analysis of the implementation and effectiveness of the LRA amendments of Section 198. In doing so, it will first provide an overview of the implementation of the amendment; secondly it will evaluate the amendments. Thirdly, it will discuss the success on the implementation of the amendments and the loopholes of the amendments. Fourthly it will identify the lessons to be learned by South Africa from the United Kingdom and lastly will be the conclusion.

4.2 Implementation of the LRA Amendments

As indicated on a previous chapter that the purpose of the LRA amendments on section 198 was to reduce the vulnerability of TES employees. The clients are defined as the employers who employ TES workers through intermediary transaction to work for them.¹⁹⁴ The terms of employment are often determined by the clients and the end results of this transaction are called a triangular employment relationship.¹⁹⁵

The amended LRA revises and expands Section 198 while introducing further regulations for employees earning below the BCEA threshold in the form of Section 198A. The expanded provisions of Section 198 now provide greater clarity regarding how and against whom a

¹⁹⁴ Synthesis Report Changing Nature of Work and 'Atypical' Forms of Employment in South Africa (2014) para 2.4.

¹⁹⁵ Synthesis Report Changing Nature of Work and 'Atypical' Forms of Employment in South Africa (2014) para 2.4.

temporary employee is able to institute claims for unfair labour practices and dismissals.¹⁹⁶ Additionally, temporary employees are entitled to written particulars of employment,¹⁹⁷ and greater protection is extended in terms of the applicability of collective agreements.¹⁹⁸

Section 198A is particularly important as it covers the most vulnerable workers. Section 198A applies to temporary work not exceeding three months,¹⁹⁹ as a substitute for an unavailable permanent employee,²⁰⁰ or if the minister deems the category of work to be temporary.²⁰¹ Of these three categories, the first (dealing with the three-month window) is the most relevant. Initially the draft amendment provided for maximum assignment period of six months, which was then reduced. The reason for this reduction was a result of pressure from trade unions to limit the use of labour brokers. It has been argued by Bote that the time period is not favourable to the larger labour market.²⁰² Clients might prefer to employ few workers to avoid the responsibilities of the labour broker employees after the prescribed three month period has come to an end.²⁰³ The views and the approach of the labour industry will be discussed further below.

Section 198A(3)(b)(i) provides that if the worker does not perform temporary work in accordance with the criteria set out in s198A(1), then the client will be deemed to be the employer of the TES employee. Furthermore, they will be deemed to be employed on an indefinite basis.²⁰⁴ This means that the client will be responsible for the employer's obligations as provided for in the LRA. As such, the temporary employee may not be treated less favourably than permanent employees.²⁰⁵ However, the amendments do not destroy the TES employment relationship, and instances such as removal from the client by the agency are still covered.²⁰⁶ It is submitted that a problematic aspect of the provision is that it effectively transfers an employee to the client under certain circumstances, but this transfer is

¹⁹⁶ See sections 198(4) and 198(4A).

¹⁹⁷ Section 198(4B).

¹⁹⁸ See Sections 198(4C) to 198(4F).

¹⁹⁹ LRA 198A(1)(a).

²⁰⁰ LRA Section 198A(1)(b).

²⁰¹ LRA Section 198A(1)(c).

²⁰² Bote A 'A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments' (2015) 100 *SALJ* 129.

²⁰³ Bote A 'A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments' (2015) 100 *SALJ* 130.

²⁰⁴ LRA Section 198A(3)(b)(ii). Note that this is subject to the provisions of Section 198B, which deals with fixed-term contracts.

²⁰⁵ LRA Section 198A(5).

²⁰⁶ See Section 198A(4) which provides that such a removal, irrespective of who requests it, is a dismissal.

not a formal one recognised or regulated by Section 197 of the act. As such, there is some uncertainty about the practical effects of Section 198A(3).

In the case of *Assign Service (Pty) Ltd v KPost Services and Packaging (Pty) Ltd and another*²⁰⁷ the Commissioner was called upon to determine the interpretation of Section 198A(3)(b)(i). The commissioner held that Section 3(a) of the LRA requires that any person applying the Act must interpret its provisions to give effect to its primary objectives. The commissioner provided that the interpretation of Section 198A(3)(b)(i) is one that provides for the protection of vulnerable workers. In the case of *National Union of Metal Workers of South Africa obo Nkala and others v Durpo Workforce Solutions*²⁰⁸ the workers were employed by the TES and were placed to work for the client. The workers had lodged a dispute in terms of Section 198D seeking an order that they had been transferred to the clients by virtue of section 198A(1) and that they should be employed by as permanent workers of the client. The commissioner held referred to the case of *Assign Service (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others*²⁰⁹ and held that TES remains the employer of the placed workers. The court had found that the deeming provision does not create substitution of parties but only concurrent employers for the period of three months.²¹⁰

The commissioner granted an award and provided that during the first 3 months, the TES will be regarded as the employer and after 3 months the client will be regarded as the employer.²¹¹ The case of *Refilwe Esau Mphirime and Value Logistics Ltd BDM Staffing (Pty) Ltd*²¹² the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) was also faced with the question of how Section 198A(3)(b) of the LRA should be interpreted. The NBCRFLI found in favour of a sole employment relationship.²¹³ The council also held that if the worker earns below the threshold, that worker will therefore be deemed to be the worker of the client.²¹⁴

²⁰⁷ *Assign Service (Pty) Ltd v Krost Services and Racking (Pty) Ltd* (2015) at para 5.1.

²⁰⁸ *National Union of Metal Workers of South Africa obo Nkala and others v Durpo Workforce Solutions* (2016) 3 BALR 229 (MEIBSC).

²⁰⁹ *Assign Service (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others* (2015) 11 BLLR 1160 (LC) para 4.

²¹⁰ *Assign Service (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others* (2015) 11 BLLR 1160 (LC).

²¹¹ *Assign Service (Pty) Ltd v Krost Services and Racking (Pty) Ltd* supra (2015).

²¹² *Refilwe Esau Mphirime v Value Logistic Ltd/BMD Staffing (Pty) Ltd* 2015 (8) BALR 788 (T).

²¹³ *Refilwe Esau Mphirime v Value Logistic Ltd/BMD Staffing (Pty) Ltd* 2015 (8) BALR 788 (T).

²¹⁴ *Refilwe Esau Mphirime v Value Logistic Ltd/BMD Staffing (Pty) Ltd* 2015 (8) BALR 788 (T).

While the LRA amendments protect TES workers, the Employment Services Act²¹⁵ further regulates aspects relevant to TES workers.²¹⁶ The ESA provides for the establishment of Public Employment Services “To promote the employment of the youth and vulnerable persons.”²¹⁷ Additionally, it provides for regulation of private employment agencies, including the registration of such agencies,²¹⁸ as well as for the establishment of an Employment Services Board to assist in advice and regulation of employment services.²¹⁹ The Act also takes proactive steps in proposing an institution (named ‘Productivity South Africa’) to promote job growth,²²⁰ while also providing enhanced opportunities for employees with disabilities.²²¹ It should, however, be noted that many of these provisions have yet to be fully enacted yet. It has been indicated that both the ESA and the LRA amendments have tried to ensure protection to TES workers, however both of the Acts still lack some of the features of the ILO Convention on Private Agencies as indicated in chapter 1.²²²

4.3 Challenges in response to the 2014 Amendments

The 2014 amendments to the LRA on TES were not appropriately welcomed by the employment industries. The primary response by the employers to the amendments has been negative. As a result, approximately half of TES workers were terminated and some were retrenched after the amendments came into effect in 2014.²²³ The table below illustrates the effects of the TES amendments on TES workers. As can be seen, 22% of TES workers have not been affected by the LRA amendments and were allowed to safely keep their jobs.²²⁴ 11.88% workers were moved from TES workers contract and were employed on fixed term

²¹⁵ Employment Services Act 4 of 2014.

²¹⁶ It should be noted that the ESA, while relevant, does not pertain to the substantive rights provisions of TES employees, and as such a detailed discussion thereof falls outside the scope of this paper.

²¹⁷ See the Preamble to the Act, as well as Chapter 2.

²¹⁸ See Chapter 3 of the ESA.

²¹⁹ See Chapter 4 of the ESA.

²²⁰ See Chapter 5 of the ESA.

²²¹ See Chapter 6 of the ESA.

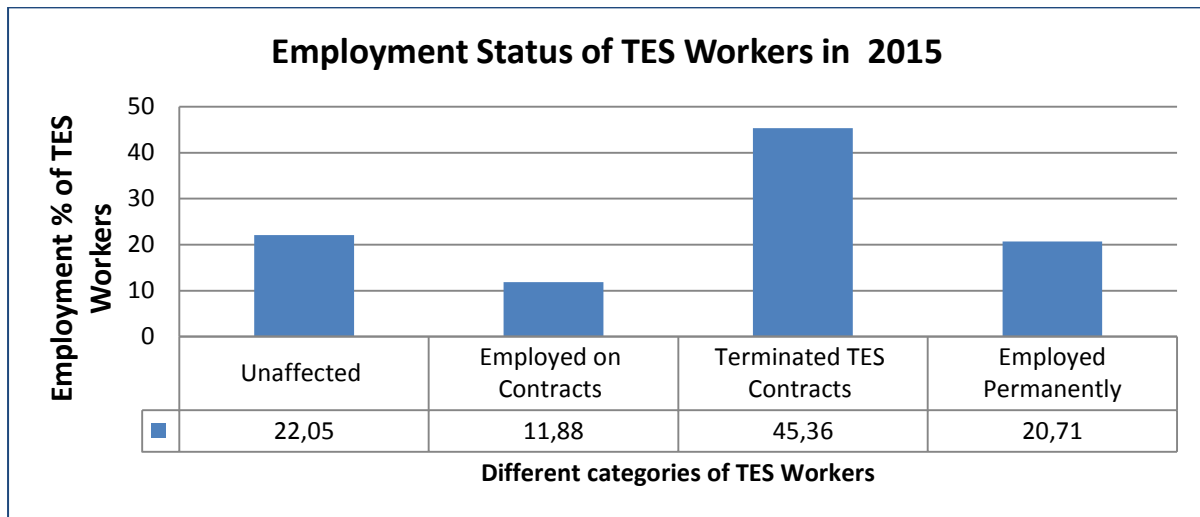
²²² ILO Convention on Private Employment Agencies 181 of 1997.

²²³ Borat H Magadla S & Steenkamp F ‘Employment Effects in the Temporary Employment Service Sector: Post Regulatory Amendment Effects’ A brief Note June (2015) 3.

²²⁴ Borat H Magadla S & Steenkamp F ‘Employment Effects in the Temporary Employment Service Sector: Post Regulatory Amendment Effects’ A brief Note June (2015) 3.

contracts, while 20.71% were absorbed by several industries and were employed permanently.²²⁵

Figure: 2: The Effects of the Post-LRA Amendments Section 198 for TES workers.



As highlighted above, employer’s responses to the LRA amendments has not been that positive. The Department of Labour has indicated that if employers terminate the employment service of the worker with the client with the aim of avoiding the deeming provision of section 198A(3)(b)(i) from occurring then that would be regarded a dismissal. The worker therefore has rights to approach the CCMA for relief. Employers who are found avoiding this provision will be held accountable.²²⁶

There have been reports that labour brokers are anticipating less employment growth in South Africa and as a result, they are expanding activities outside the country. The amendments have also led organisations to constantly review their staffing needs, which also have a negative impact on temporary employment.²²⁷

Since the implementation of the amendments, employers have had to become extra careful in complying with relevant standards. It has been indicated that compliance has become a process whereby employers with a large number of workers had to examine the extent of risk relating to the use of labour brokers, especially when it came to issues of non-compliance.

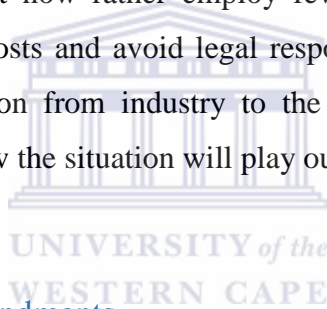
²²⁵ Bhorat H Magadla S & Steenkamp F ‘Employment Effects in the Temporary Employment Service Sector: Post Regulatory Amendment Effects’ A brief Note June (2015) 4.

²²⁶ Lusanda Raphulu ‘Relationship between Labour Brokers and their Clients under Fire’ available at www.humancapitalreview.org (accessed 24 July 2016).

Employers had to also examine and decide as to what extent they will need to adjust their company benefits in to consider TES workers who have been working for longer than three months.²²⁸

It cannot be disputed that the LRA amendments have provided protection for TES workers. This is good for TES workers however it can also cause confusion for the employers. If the client and the TES are both regarded as the employers then which trade union would the worker fall into? Can the workers join the client's union or the TES union or both? Which disciplinary code is most applicable to the employee, the TES or the client? Seemingly after three months, these aspects would weigh more towards the client than the TES, but it is not conclusive. This has a potential of causing more confusion than solutions.

It is submitted that the three months period in terms of Section 198A(3) may cause problems for clients and the TES industry as a whole, as the flexibility offered by the TES industry might be affected. Clients might now rather employ few permanent workers rather than employing TES works to save costs and avoid legal responsibilities which relates with the process. While the initial reaction from industry to the 2014 amendments has not been positive, it remains to be seen how the situation will play out over the long run.



4.4 Criticism of the 2014 Amendments

For many years TES workers have always struggled to identify the true employer for the purposes of instituting claims. Now that the amendments have clarified that the TES and the client are both responsible for the employment of the worker, it is submitted that these uncertainties have come to an end. Seemingly, the South African position is clearer than the UK one in this aspect, given the problematic interpretation of 'temporary' in some UK cases.

As noted, in the UK all agency workers earn the same as the permanent workers after 12 weeks, The South African position is different, as the provisions of Section 198A only applies to employees earning below the BCEA threshold.

²²⁸ Slater D 'Amendment Act to significantly change Labour Industry?' available at www.polity.org.za (accessed 24 July 2016).

As previously discussed, in addition to the twelve week rights afforded to UK temporary workers, they are also given so-called ‘day one’ rights (including access to information regarding vacancies). Whereas some collective labour rights are afforded under the amended LRA Section 198, South Africa does not have a direct equivalent to these rights, although some of these opportunities are indirectly given to employees who are both temporary and also regulated under Section 198B of the Act.

It is submitted that the structure and the process employed in the UK can be meaningful for SA, temporary agency workers in SA do not have this set of structure, they are merely employed without the knowledge of which rights they are entitled to. The amendments stipulate that the TES worker will be the employee of the client and the TES but there is no clear distinction as to whether which rights will be applicable for the worker or for which period.

Section 198A(4) provides that when the client terminates the employee services before the end of the assignment period, it will be considered a dismissal. The status of how unfair or automatically unfair dismissals may work in this context is however, still unclear. Furthermore, the fact that a dismissal has taken place does not guarantee that an employee will have a successful claim. Furthermore, the instances of abuse such as when clients dismiss workers prior to the 3-month period is still a reality, and also leaves a worker with little to no notice (or payment for termination). In the UK when a TES wishes to terminate a contract of employment for the TES worker, the TES is required to pay the worker an amount equivalent to four weeks wages.²²⁹ It is submitted that this can also be implemented in SA in order to provide additional protection to TES workers.

TES employers and clients have always had a freedom of determining the wages that the TES worker will receive. However, the wages determination by the TES employers and the clients should always be in the bracket of the prescribed and regulated threshold for TES workers. It is submitted that a sectoral determination is required to regulate this aspect properly. TAW in UK are regulated by the NMWR,²³⁰ and this provides certainty to the agency workers as they are entitled to standardised wages or salary.²³¹ Clients and employers do not decide the amount of wages to pay the worker; they comply accordingly with the national minimum

²²⁹Department for Business Innovation and Skills *Agency Worker Regulation Guidelines* May (2011) 40.

²³⁰ NMWR, 1999.

²³¹ Department for Business Innovation & Skills *Agency Workers Regulations Guidance* (2011) 36.

wage act. This is still a challenge in SA; employers still pay agency workers ridiculous salaries while others decide to pay in their own terms.

Unlike the UK, SA workers who earn above the stipulated threshold will not be protected by the amendments.²³² It has been highlighted earlier that the aim of the LRA amendments is to ensure that vulnerable workers are protected by law. This does not seem to be the case in this situation, not all workers will be protected by the amendments.

Companies who operate with the minimum of 15-20 workers and the maximum of 50 workers are not regulated by the LRA amendments.²³³ It is generally known that there are economic reasons which might have been advanced by the government for such limitation of these rights. This therefore assists and protects these small companies by not burdening them with legislative provisions which they will likely fail to meet. In contrast to this, in the UK even small companies must comply with the Agency Workers Regulations.²³⁴ Though the LRA amendments seek to protect vulnerable workers, they do not entirely protect those TES workers employed by smaller companies, which is an oversight given the amount of SMEs employing individuals in South Africa.

TAW's in UK have safety and security rights.²³⁵ The agency is responsible to ensure that before the agency worker commences with the assignment the client should confirm that the worker will be safe. This is however vice versa in SA; the TES completes the employment process with urgency to place the TES worker to the client. The client is the one who should then ensure that the agency worker is safe while working at his premises.

4.5 Conclusion

The reasons which led to the amendments of the LRA Section 198 were to firstly allow TES workers to become regulated and realise their employment status. Secondly, the aim of the amendments was to provide fair labour practises to TES Workers. It has also been discovered

²³² LRAA Section 198A(2).

²³³ LRAA Section 198B(b).

²³⁴ Great Britain Parliament House of Lords: European Union Committee *Modernizing European Union Labour Law : Has the UK anything to gain?* 22 Report (2007) 2 .

²³⁵ Department for Business Innovation & Skills *Agency Workers Regulations Guidance* (2011) 36.

that there are positive characteristics which the amendments have brought forth however there are also loopholes which then slightly defeat the purpose of protective vulnerable workers.

Moreover, in order to answer the question as to whether the amendments will be effective and allow employees to institute proceedings against the TES or the Client or both? This is the interesting factor for temporary workers as some countries only allow a worker to file for unfair dismissal after 2 years of working on a temporary basis. The effectiveness thereof will only depend to the court on how it will interpret the provisions. So far the courts are still trying to interpret and assist the employers to implement the amendments accordingly. At this stage, it is without a doubt that the ruling of the court would constantly have positive outcomes in cases where temporary employees enforce their acquired rights. The implementation of the amendment may be successful and effective however the success of can be determined by the measures taken by the relevant parties to enforce the amendments.



CHAPTER 5: GENERAL CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This research paper is about the evaluation of the Amended Temporary Employment Service Provisions in the South African Labour Relations Act. Firstly, the LRA amendments aimed to provide regulation for the TES workers to eliminate vulnerability. Secondly, the amendments also aimed to provide equal pay on claims and fair processes for all TES workers. Thirdly, the LRA found it necessary to amend and regulate TES in order to change the labour broking environment for the better and also to provide new methods of employment to the businesses. Moreover, there are problems within the amendments. Though the legal provisions are in place for the TES workers some workers have not yet receive adequate protection by the amendments.

Chapter one provided a background of Temporary Employment Services (TES) in South Africa as well as how it functions. It has been highlighted South African Labour Brokers has found difficulties in regulating TES. This chapter has found TES workers to be vulnerable. This chapter was discussed to provide the general background of TES as well as how it operated before the amendments.

Chapter two of the research also discussed an overview and a broader understanding of South Africa's TES and its current state. This chapter discussed TES before the amendments and how the exclusion of the vulnerable workers from the amendments had affected them.

Chapter three of the research discussed an overview of the current position of the Temporary Agency Workers (TAW) in United Kingdom. The chapter had discussed the key strategies and policies in place to protect the rights of the agency workers. The reason why this chapter was discussed is because there was a need for understanding on how the European Union recognised the need for regulation of agency work and how the workers should be treated. Having the understanding therefore has formulated recommendations for SA TES. The chapter discussed the attractive working conditions for UK agency workers and that the employment of the agency workers became more effective.

Chapter four provided an analysis of the effectiveness of the LRA amendments in relation to TES work. It has been identified in this chapter that TES workers are regulated but they still lack the understanding as well as the information on how to exercise their rights. This chapter

has discovered that though the TES workers are regulated and protected by the law the implementation of the amendments has not been fully applied. The reason for the discussion of this chapter was to provide an understanding of what the amendments have provided, what they have successfully achieved and also what has not yet been achieved.

5.2 Main Findings

As noted above, the goal of the promulgation of the 2014 Labour Relations Amendment Act amendments was to improve the relationship between temporary workers and their employers. Furthermore, the amendments are meant for these workers to be treated fairly by the employers while in those temporary assignments.

In answering the question of the effectiveness of the amendments in allowing TES workers to institute proceedings against the TES or the Client for unfair dismissal, it is submitted that this is not necessarily an easy pill to swallow for either the TES and the client. However, it must be done to ensure effectiveness to the provision. It remains to be seen how this will truly play out in practice. It should be noted that a client could still be safeguarded by having the TES indemnify them against the outcome of any court proceedings. If such provisions are held to be valid, the TES remains responsible for the payment of the claims and this therefore may derail the purpose and effectiveness of this provision.

The findings of this research are that the amendments have not been completely implemented. Currently, the status of the implementation is not yet fully satisfactory. There are weaknesses on the implementation of the amendments, the weaknesses are on the inequalities of wages, the exclusion of TES workers who are earning slightly above the thresholds are not recognised by the amendments and this does not necessarily address challenges that are faced by the TES workers as a whole.

5.3 Recommendations

In order to address the above main findings, the following recommendations should be taken into cognisance;

- Companies who regularly make use of TES employment should adhere to the amendments to maintain compliance. It has been discussed in chapter 4 that companies have not received the amendment well. Possibly, a stricter method of enforcing compliance should be adopted by the legislature. This is vital to exercise efficiency and adequate implementation.
- Government should adhere to the ILO Private Employment Agency Convention. One of the purposes of the ILO Private Employment Agency Convention is to the protection of the agency workers within the framework of convention provision. This will provide a guide on how the employers of temporary employment agencies should protect the rights of TES workers.
- Government should also ensure consistency and a proper audit of companies who fail to adhere to the provisions of the amendments in order to ensure that TES workers enjoy the provisions of the amendments.
- TES workers should be made aware of the amendments and they should be able to exercise their rights. This will ensure that the TES workers' rights are not denied. The awareness will add value towards the amendments and ultimately lead to effective implementation.
- The problems of inequality in terms of wages of TES workers will have to be addressed. It will be necessary to provide a standardised wages for TES workers. In doing so, TES employers will not decide of whichever amount to pay TES workers. Government should consider introducing a Ministerial Determination to be used for the TES workers. The Ministerial Determination will determine the rights and the employment conditions of TES workers in the most vulnerable industries.
- The above Ministerial Determination should also stipulate the “day one” rights as well as the “day twelve” rights as regulated by the AWR in UK. This will assist in identifying the applicable rights of the TES workers when they are assigned to a client by the TES employer. It will also provide a clear understanding and prohibit the confusion that often occurs when TES workers commence with their assignments.



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