

EMPLOYMENT

Application of changes to the LRA to TES employees earning below the threshold

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ISSUE

Whether the employees' fixed term contracts were cancelled to avoid the 'deeming provisions' of the Labour Relations Act ("LRA")? If so, whether the termination of the contracts should be regarded as an unfair dismissal?

COURT'S DECISION

In the case of *Lehkgothaoane and others / Sandoz & Capital Outsourcing Group* (2016) 25 NBCCI 7.1.8, the employees began their employment with Sandoz, as electricians, in 2008 and 2011 respectively. The employees were then transferred to a temporary employment service provider ("TES"), Capital Outsourcing Group. The employees were both dismissed on 15 May 2015 and were subsequently re-employed on 29 May 2015 by Sandoz on fixed term contracts of employment. They were then dismissed again on 30 September 2015 by Sandoz. The employees referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration. The dispute was ultimately referred to arbitration before the National Bargaining Council for the Chemical Industry ('NBCCI').

At the NBCCI the employees argued that by dismissing them for the first time and then rehiring them, Sandoz was in effect attempting to circumvent section 198A of the Labour Relations Act 66 of 1995 ('LRA'), and that the termination of their contracts on 30 September amounted to an unfair dismissal.

Section 198A(1) defines 'temporary employment services' as work done by an employee:

- for a period not exceeding three months;
- as a substitute for an employee of the client who is temporarily absent; or
- if the work is determined to be a temporary service by a collective agreement, a sectoral determination or a notice published by the Minister.

Section 198B(3) states that an employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if—

- the nature of the work for which the employee is employed is of a limited or definite duration; or
- the employer can demonstrate any other justifiable reason for fixing the term of the contract.

The employees alleged that section 198B(3) did not apply to them because they had been performing the same work since the commencement of their employment with both Sandoz and Capital Outsourcing Group. In so doing, the nature of their work was not for a limited duration and hence they were not performing a temporary employment service. The employees were also responsible for training other employees so that such employees could take over their positions upon the termination of their employment.

The arbitrator agreed with this reasoning. He found that because the employees had been performing the same duties for many years, they could not be said to be performing a temporary service. Furthermore, as indicated by section 198A(3), an employee who is not performing a

temporary service is deemed to be the employee of the client. For this reason the arbitrator held that the applicants were indeed the permanent employees of Sandoz.

Having regard to section 198A(4), the arbitrator held that the termination by the temporary employment services of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection 198A(3)(b) or because the employee exercised a right in terms of this Act, constitutes a dismissal.

IMPORTANCE OF THIS CASE

This case illustrates how the changes to the LRA relating to a TES employee who earns below the threshold are to be applied. Such an employee who is not engaged in “temporary services” will deemed to be an employee of the client of the TES.

Furthermore, if such employees’ temporary contracts of employment are terminated so as to avoid the ‘deeming provision’ being triggered, this too will amount to a dismissal.

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