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EMPLOYMENT

Contracts of temporary employment services employees

14 April 2016 *2 min read*

National Union of Metalworkers of South Africa obo Nkala and others v Durpo Workforce Solutions [2016] 3 BALR 229 (MEIBC)

ISSUE

Whether the contracts of employment of temporary employment service ("TES") employees will transfer to the client of the TES in terms of section 198A of the Labour Relations Act 66 of 1995 if the employees have been utilised by the client for a period in excess of three months.

COURT'S DECISION

In the case of *National Union of Metalworkers of South Africa obo Nkala and others v Durpo Workforce Solutions* [2016] 3 BALR 229 (MEIBC), the employees were placed by the TES to work for the TES's client. The employees lodged a dispute in terms of section 198D seeking an order that they had been transferred to the client by virtue of section 198A and should now be regarded as permanent employees of the client. The respondents contended that if the employees were to be granted the order, they would be worse off as they would have to start afresh on new employment contracts with the client, and would thus lose their years of service with the TES. The Commissioner relied on *Assign Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2015] 11 BLLR 1160 (LC) ("Assign Services"), and held that for the purposes of all labour legislation, save for the LRA, the TES remained the employer of placed employees. In Assign Services the court had to decide whether the deeming provision (section 198A) meant that there was a dual employment relationship between the TES and the client. The court found that the deeming provision does not create a substitution of parties, but rather that the client is a concurrent employer with the TES after the 3 month period of employment. In conclusion the court held that there was no basis in law to grant the applicants the order, and the dispute was accordingly dismissed.

IMPORTANCE OF THIS CASE

This case serves to reiterate the principle of Assign Services, namely that only for the purposes of the LRA will an employee be deemed an employee of both the TES and the client. For all other labour related legislation the employee will remain the employee of the TES.

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