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Labour brokers – some certainty at last

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National Union of Metalworkers of South Africa v Assign Services & others

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ISSUE

Who is the employer of an employee placed with a client by a TES?

SUMMARY

Employees, earning below the prescribed earnings threshold of R205,433.30 per annum, who are placed with a client by a temporary employment service ("TES") for a period exceeding three months are solely employed by the client, and the TES is no longer the employer of that employee.

FACTS

Assign Services ("Assign") is a temporary employment service ("TES") that provides employees to, amongst others, Krost Shelving & Racking ("Krost"). Assign had placed 22 workers at Krost for a period in excess of three months on a full-time basis. These workers fell within the scope of the application of section 198A(3)(*b*) ("the deeming provision") of the Labour Relations Act 66 of 1995 ("LRA"). The deeming provision provides that where an employee, who earns below the earnings threshold determined by the Minister of Labour from time to time, works for a client for a period exceeding three months the employee is "deemed to be the employee of that client and the client is deemed to be the employer". The issue in *Assign Services* case was whether the client becomes the sole employer of the placed workers upon the completion of three months of service by the employee ("sole employment interpretation"), or the client and the TES both become employers of the placed worker ("dual employment interpretation").

FINDINGS

This matter ran the full course from the CCMA to the Constitutional Court.

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION'S AWARD

The CCMA favoured the sole employment interpretation, holding that the deeming provision of the LRA should be interpreted to mean that the client becomes the sole employer of the placed workers once the threshold of the three-month period elapses. The Commissioner reasoned that the sole employment interpretation afforded greater protection for the vulnerable class of employees, which accorded with the memorandum of objects that accompanied the first version of the Labour Relations Amendment Bill B16D – 2012 ("Amendment Bill").

THE LABOUR COURT'S JUDGMENT

The CCMA's award was set aside by the Labour Court ("LC") on review. The LC adopted the dual employment interpretation, reasoning that nothing in the deeming provision invalidated the contract of employment between the TES and the placed workers. The LC held that the

employment relationship between the TES and the placed workers, which arose from the contract of employment, operated in parallel to the statutory employment relationship between the client and the placed workers created by the deeming provision of the LRA.

THE LABOUR APPEAL COURT'S JUDGMENT

The LAC overturned the LC's judgment, thereby restoring the CCMA's award. The LAC concluded:

The plain language of s198A(3)(b) of the LRA, interpreted in context, unambiguously supports the sole employer interpretation and is in line with the purpose of the amendment, the primary object of the LRA and protects the rights of placed workers.

The LAC's decision was based on four reasons. First, on a plain reading of section 198(A)(3)(*b*), the sole employment interpretation is favoured, as the text of the section references the worker being deemed as the employee of the client and is employed by the client on an indefinite basis. Secondly, the sole employment interpretation is consonant with the purpose of the amendments to sections 198 and 198A outlined in the Explanatory Memorandum accompanying the Amendment Bill, which is to provide further measures to protect more vulnerable, lower-paid workers. The protections against unfair dismissal and unfair discrimination of placed workers afforded by the LRA, are measures purposed at ensuring that the deemed employees are fully integrated into the enterprise as employees of the client.

Thirdly, the joint and several liability provisions in section 198(4A) of the LRA restricts the TES to genuine temporary employment arrangements, a measure which reinforces the protection of lower-paid workers. Lastly, the purpose of the deeming provision was to create a statutory employment relationship between the client and the placed worker, rather than transferring the contract of employment between the TES and the placed worker to the client. The employment relationship between the placed worker and the client is created by the operation of law, free of the terms of the contract between the placed worker and the TES.

THE CONSTITUTIONAL COURT'S JUDGMENT

The Constitutional Court, by majority decision, dismissed the appeal by Assign Services, restoring the LAC position. The CC, having interpreted the deeming provision in light of sections 198 and 198A of the LRA as a whole, and giving effect to the purpose of the Amendment Bill, favoured the sole employment interpretation. In effect, the client becomes the sole employer of the placed workers upon the completion of three months of service by the employee.

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