

EMPLOYMENT

The LAC rules on the TES deeming provision

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THE CLIENT BECOMES THE SOLE EMPLOYER WHEN THE DEEMING PROVISION KICKS IN

INTRODUCTION

In *NUMSA v Assign Services & others*, handed down on 10 July 2017, the Labour Appeal Court (LAC) finally resolved the interpretation of s 198A(3)(b) of the Labour Relations Act 66 of 1995 (LRA), which is known as the “deeming provision”.

Under the LRA, employees placed by a temporary employment service (TES) with a client are designated as being employed by the TES. But s 198A(3)(b), which was part of the 2014 amendments to the LRA and applies only to employees earning below the prescribed earnings threshold, changed this in relation to employees within scope. It provides that where such an employee is not performing a “temporary service” for a client (defined as exceeding three months), the employee: (i) is “deemed to be the employee of that client and the client is deemed to be the employer”; and (ii) is “employed on an indefinite basis by the client” (unless employed on a fixed-term contract).

The issue in *Assign Services* was whether, when the deeming provision kicks in, the client becomes the *sole* employer of the placed worker, or the client and the TES are *both* employers of the placed worker. Put differently, does the deeming provision serve to add the client as an employer together with the TES, or substitute the client for the TES as the sole employer? The controversy arises in the light of the fact that in law, the word “deemed” means different things in different contexts.

THE LABOUR COURT'S JUDGMENT

The matter first came before the Commission for Conciliation, Mediation and Arbitration (CCMA) as a test case, with the commissioner opting for the sole employer interpretation.

But the award was set aside on review by the Labour Court (see [2015] 11 BLLR 1160 (LC)). In so doing, Brassey AJ rejected the sole employer interpretation and opted for what may be termed the parallel employer interpretation. The essence of the court's reasoning was that, upon the triggering of the deeming provision, two employment relationships operate in parallel but on separate lines: the employment relationship between the TES and placed worker arising from the contract of employment between them (which the court found endures post-deeming); and the statutory employment relationship between the client and the placed worker arising from the deeming provision. As far as the court was concerned, each employer has its own separate bond with the employee.

THE LAC's JUDGMENT

Sole employer interpretation

On appeal, the LAC (per Waglay JP, Tlaetsi DJP and Phatshoane AJA) overturned the Labour Court's judgment and thus restored the award of the CCMA commissioner.

The conclusion reached by the court was this:

“The plain language of s 198A(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.”

Temporary service and plain reading

In reaching this conclusion, the court commenced by focusing on the definition of “temporary service” in s 198A(1), which defines the term as being “for a period not exceeding three months”.

Having found that where a placed worker works for a client of the TES for a period in excess of three months, he / she is not performing a temporary service, the court held that who the employer is in such circumstances is determined by s 198A(3)(b). With reference to the text of the section, the court found that “[s]uch a worker is therefore deemed to be the employee of the client and the client is deemed to be the employer of the worker”, and he / she is “employed by the client of the TES on an indefinite basis”. In effect, on a plain reading of s 198A(3)(b), the court appears to have found that it provides unambiguously for sole employment by the client.

Explanatory memorandum and protection measures

The court found support for sole employer interpretation in the relevant explanatory memorandum, which recorded that the main thrust of the amendments to ss 198 and 198A was “to restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant ‘temporary work’, and to introduce various further measures to protect workers employed in this way”.

In addition to the deeming provision, the court found that the measures introduced to protect vulnerable workers referred to in the explanatory memorandum include: s 198A(4), which protects the deemed employee against dismissal by either the TES or the client to avoid the operation of the deeming provision; and s 198A(5), which protects the deemed employee against unfair discrimination by the client, and requires the employee to be treated no less favourably than an employee of the client performing the same or similar work. The purposes of these protections, said the court, “is to ensure that the deemed employees are fully integrated into the enterprise as employees of the client”.

Relationship between placed worker and client

Turning to the relationship between the placed workers and the client, the court found that it “is created by a statutory deeming clause”, which results in “the placed workers becom[ing] employed by the client for an indefinite period on the same terms and conditions to employees of the client performing the same or similar work”.

In effect, these employees are upgraded from temporary to standard employment with the protections typically associated with it. The purpose of the deeming provision “is not to transfer the contract of employment between the TES and the placed worker to the client, but to create a statutory employment relationship between the client and the placed worker”. This employment relationship “arises by operation of law, independent of the terms of any contract between the placed worker and the TES”.

TESs post-deeming

Finally, regarding the position of TESs post deeming, the court held that the sole employer interpretation does not ban TESs, but regulates them by restricting them to “genuine temporary employment arrangements”. While s 198(4A) effectively provides for joint and several liability as between the client and the TES when the deeming provision kicks in, the provisions are a disincentive to TESs remaining on the scene post-deeming. According to the court, the legislative design is such that the TES will fall out of the employment equation:

“It would make no sense to retain the TES in the employment equation for an indefinite period if the client has assumed all the responsibilities that the TES had before the expiration of the three-month period. The TES would be the employer only in theory and an unwarranted ‘middle-man’ adding no value to the employment relationship.”

COMMENT

The message from the LAC is loud and clear: once the deeming provision kicks in, the client becomes the sole employer, with the TES no longer being an employer of any description – this for the purposes of the LRA. What is equally clear is that the position of TESs post-deeming is tenuous in the eyes of the LAC. Given the implications of the judgment for the TES industry, an appeal to the Constitutional Court thus seems inevitable.



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