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Labour Appeal Court overturns ruling on TES employees

By Lauren Salt

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The Labour Appeal Court handed down judgment on 10 July 2017 in a highly anticipated appeal ruling on the interpretation of section 198A of the Labour Relations Act, 1995 (LRA) and the nature of temporary employment service employees' deemed employment with the client.

The judgment provides clarity on the interpretation of the 'deeming provision', contained in the section. This provision provides that the client of a TES is deemed to be the employer of the TES employees, earning less than the Basic Conditions of Employment Act, 1997 earnings threshold (currently R205,433.30 per annum), who have been placed at the client for more than three months.

Prior Labour Court ruling overturned

Prior to the Labour Appeal Court's judgment in NUMSA v Assign Services and Others, the debate on whether the deeming provision means that the client of a TES becomes the sole employer or the dual employer of the TES employees, was settled by the Labour Court in a previous round of this matter. The Labour Court interpreted section 198A to mean that there was a dual employment relationship between the TES and the client of the TES.

However, the Labour Appeal Court has now overturned this ruling and has found that the deeming provision means that the client of the TES becomes the sole employer of the TES employees.

In determining whether employment rights and obligations vest concurrently in both the TES and the TES's client once the deeming provision takes effect, the Labour Appeal Court considered the purpose of the insertion of section 198A, which is to confine the use of TES employees to circumstances of temporary work.

Temporary service upgraded to standard employment

The Labour Appeal Court found that, bearing in mind that the purpose of the amendment was to have the temporary employment service restricted to one of "true temporary service," the intention of the section must have been to upgrade

the temporary service to the standard employment and free the vulnerable worker from atypical employment by the TES. In addition, the Court noted that there is also no wording in section 198A, which envisages a joint employment relationship. Accordingly, the Court favoured the sole employer approach.

Practical application

In explaining what this meant practically, the Labour Appeal Court found that:

- The TES remains the sole employer of the placed employee until the employee is deemed the employee of the client. The TES will be responsible for its statutory obligations regarding the placed workers for as long as the deeming provision has not kicked in;
- The sole employer approach would not be a transfer of the TES employees' contracts of employment, as is the case in instances of section 197 transfers. 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. The Court emphasised that it is important to appreciate that the employment relationship between the placed worker and the client arises by operation of law, independent of the terms of any contract between the placed worker and the TES;
- 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 would be an unwarranted "middle-man" adding no value to the employment;
- On the question of the 'logistics' of employment, which was raised by the Respondents, the TES may continue, for example to, be the party paying the salary of the deemed employee for several reasons. Should the TES fail to pay the salary in compliance with the existing practice, the client's employee retains the right to institute proceedings against either the TES or the client or both in terms of section 198(4A)(a) of the LRA. This, however, does not elevate the TES to being an employer. Similarly, should the TES cease to pay the salary of the employee of the client, the joint liability burden will also cease; and
- The dismissal of the worker by the TES has no bearing on the employment relationship created by operation of law between the placed worker and the client.

Summary

In summary, the Court found that the TES does not continue to be the employer of the TES employees, even after the application of the deeming provision. Further, there is no reason, in principle or practice, why the TES should not be relieved of its statutory rights and obligations towards the TES employees, as these transfer in total to the client. The deeming provision does not invalidate the contract of employment between the TES and TES employee, but it becomes of no consequence once the statutory employment relationship arises between the employee and the client.

As an aside, the Court stated that the sole employer interpretation does not ban TESs. However, it does regulate them by restricting the TES to genuine temporary employment arrangements, in line with the purpose of the amendments to the LRA.

This is unlikely to be end of the debate and this issue is likely to be explored further by the courts. This judgment leaves questions around a number of issues, including who will be liable for historical liability where the obligation arises to equalise, amongst other things, the remuneration and benefits of the “deemed employees” with their permanent comparators at the client.

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