



Who's in and who's out: Labour law and those excluded from its protection¹

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SUMMARY

The article examines the role of trade unions in relation to the difficult question of which workers are, or should be, regarded as employees for the purposes of labour legislation.

It starts by noting the changes in the globalised labour market that have led to the creation of hierarchies (divisions) amongst workers in the workplace – between those employed by the owner of the workplace and the workers of ‘temporary employment services’ (TESs); between workers and ‘independent’ contractors who are not really independent; between workers in standard and non-standard employment; and between workers who are employed and those who are self-employed.

The article argues that trade unions cannot afford to ignore these hierarchies. To do so means ignoring the traditions of working class solidarity on which trade unionism is founded and helping to entrench these hierarchies. The alternative is to challenge the divisions by organising the workers who are excluded at present. Significant gains can be made, it suggests, by working in parallel with other organisations, including those mobilising in the informal economy. The starting point, however, is in the workplaces where their own members are located.

The article looks at the amendments introduced to the Labour Relations Act (LRA) and Basic Conditions of Employment Act (BCEA) in 2002, whereby certain workers are presumed to be ‘employees’, and criticises the shortcomings of the amendments. The basic problem, it suggests, is not only to expose disguised employment relationships by recognising ‘dependent contractors’ as employees but to extend protection to employees in ‘triangular’ employment relationships (those who are treated as employees of the TES and not of the employer for whom they actually work) and others who are excluded from important provisions of labour legislation.

1 This article draws and develops, the argument put forward by the author in ‘The erosion of workers’ rights and the presumption as to who is an employee’ (2002) 6 *Law Democracy & Development* 27.

This struggle, the article concludes, is at the same time a struggle to organise the unorganised. The article warns against placing too much reliance on the courts. The best prospect for achieving broader legal protection is by effectively organising those who are excluded. But 'before we can expect a change of mindset from the courts', it suggests, 'there must be a change of mindset amongst the unions'.

1 INTRODUCTION

In an important article about the relationship between trade unions and politics, more specifically about the relationship between trade unions and the Labour Party in Britain, Perry Anderson had this to say:

'Trade unions can never achieve the highest level of action of a political party. Nor, for the very same reason, do they tend to sink to the lowest level either – melting *en bloc* into the system. For their function is rooted in the natural organisation of capitalism itself – the labour market. The result is that trade unions are less easily chloroformed and suppressed totally than political parties, because they arise out of the groundwork of the economic system. As long as there are classes – and it is no longer in dispute that they exist in the West as much today as ever in the past – there will be class conflict.'²

The reference to 'the West' gives away that this was written forty years ago, in the late 1960s, before the dismantling of the Berlin wall had swept away the Cold War notion of an East-West divide. It was also before the British Labour Party was swept away by Thatcherism. Of great significance for the rest of the world, it was also before the economic crisis of the 1970s, and the restructuring of capitalism that ensued, and which is still ongoing.

It must have been the effects of this restructuring that Klaus Schwab had in mind when he referred to 'a flat world' in an opinion piece by that appeared in the local newspaper, shortly before the start of this year's World Economic Forum meeting.³ Whether as a result of 'globalisation' or technological change, he claims, 'we are witnessing everywhere a changing power equation. Power is moving from the centre to the periphery. Vertical command and control structures are being replaced by horizontal networks of social communities and collaborative platforms.'⁴

It is, of course, false that power is moving from the centre to the periphery. The reverse is true. Power is concentrated in ever few hands, located mainly in the developed world, and the divide between rich and poor has never been greater. That is the significance of the notion of a 'North-South' divide that replaced the 'East-West' one. What has changed is the manner in which power is exercised. Vertical command and control structures are indeed being replaced, where they are perceived as being unnecessary or inefficient (a process one commentator terms 'vertical disintegration').⁵ But there is no

2 Anderson P 'The limits and possibilities of trade union action' in Blackburn R and Cockburn A (eds) *The incompatibles: Trade union militancy and the consensus* (1967)

3 Klaus Schwab is the chairperson of the World Economic Forum.

4 Also published in *Business Report* 23 January 2007 (available at <http://www.busrep.co.za/index.php?fArticleId=3640671>)

5 That is, in contrast to the 'vertical integration' that characterised industrial organisation in the earlier twentieth century: see Collins H 'Independent contractors and the challenge of vertical disintegration to employment laws' (1990) 10 *Oxford Journal of Legal Studies* 353.



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suggestion they are being replaced in the low wage countries where mass manufacture is increasingly located.

The history of South Africa over the past forty years has been shaped by these developments. South Africa can be described as a Southern country with Northern pretensions. On account of its Northern pretensions it embraced trade liberalisation at about the same time as it embraced constitutional democracy. Faced with an increasingly competitive economic environment as a result of its integration into the global economy, firms were constrained to cut costs. Labour is usually the only significant cost over which firms have some control. By restructuring their operations to externalise employment, firms were able at one stroke both to cut costs and eliminate vertical command and control structures.

As a consequence of firms restructuring and for other reasons, the structure of the labour market has changed and is changing still. On the one hand, the notion of a dual economy, corresponding to a formal-informal divide, has now received official sanction. While the existence of an informal economy is not new, all indications are that it has grown relative to the formal economy since 1994, specifically as a consequence of the relative decline of the primary sector and manufacturing.⁶ On the other hand, what employment growth there has been, has been in the services sector and in industries akin to services, like construction.

The expansion of the services (or 'tertiary') sector raises challenges of a particular kind for trade unions. As in the informal economy, workers in this sector are largely unorganised. More profoundly, the dynamic of employment in the tertiary sector is in many respects different from employment in the primary or secondary sectors. The notion of services privileges the customer or client to whom services are rendered, giving employment a triangular character. In the case of some services, such as contract cleaning, security and temporary employment services, the client literally determines the parameters of the employment contract between the service provider and those who do the actual work. In these circumstances there is, in the strictest sense, a triangular employment relationship.

The challenge the informal economy poses for trade unions is no less profound. Indeed, it is not a separate challenge. The notion of an informal economy is contested, but all definitions regard it as economic activity that is in effect unregulated. Although workers in employment in the services sector are covered by labour legislation, labour legislation has been formulated largely in response to the experience of workers and employers in the primary and secondary sectors. Workers in a triangular employment relationship are in effect excluded from key protections that legislation provides, even though they are perhaps better off than workers who are entirely excluded because they are not regarded as 'employees' as defined in labour legislation.

⁶ For an analysis of trends in the informal economy, see Devey R, Skinner C and Valodia I 'Second best? Trends and linkages in the informal economy in South Africa.' Development Policy Research Unit working paper No 06/102 (2006) University of Cape Town.



The effect of these changes in the labour market is to create a series of hierarchies amongst the employed. Firstly, there is a hierarchy in the formal workplace between those who are employed by the person who owns or controls that workplace and the workers of the service providers whom that person engages as client. In a more or less equivalent position, there are individuals engaged as 'independent' contractors, who are not really independent and to whom the term 'dependent contractor' more appropriately applies.⁷ This hierarchy can also be described in terms of the divide between standard and non-standard employment. Secondly, it is a hierarchy between those in an employment relationship of some kind and workers who are self-employed.

Trade unions can of course ignore these hierarchies. But to do so would mean ignoring the traditions of working class solidarity on which trade unionism is founded, thus following in the footsteps of many political parties that did this to their cost. It would also have the effect of entrenching these hierarchies in the workplace and the labour market as a whole. The alternative course is to challenge it through organising the excluded workers. This is too large a task for trade unions to accomplish on their own. In parallel with other endeavours to mobilise in the informal economy, however, significant gains could be made, starting in the workplaces where their own members are located, and where unions have the most clout.

2 LEGAL CLAIMS AND THE DEFINITION OF EMPLOYEE

Since the first Industrial Conciliation Act in 1924 the definition of an employee has always been a key mechanism to exclude workers from the scope of labour legislation. The current definition is based on the definition in the 1956 Labour Relations Act. Then, as now, it comprised two parts. The first part concerns any person whomsoever who is employed by or working for any employer and receiving or entitled to receive remuneration. The second includes any other person whomsoever 'who in any manner assists in the carrying on or conducting of the business of an employer'.⁸

The capacity of trade unions to organise those whom the legislation excludes has always depended on their capacity to utilise what legal space is available for this purpose. Legal space is not found by a close reading of the provisions of black-letter law, I would argue, as much as by claiming it, based on a position that is just and politically defensible. Law, in this analysis, is not simply a set of meanings assigned by lawyers and courts, but derives from the meanings that the broader community assign to it and, in the case of labour legislation, the meanings assigned to it by organised labour and business.

In the period prior to the political transition that started in 1994, there are a number of examples of trade unions successfully claiming legal space in this way in order to extend the scope of the definition of 'employee'. Before 1979, when the recommendations of the Wiehahn Commission were adopted, the reference to 'any person whomsoever' in the definition of 'employee' was

7 The phrase 'dependent contractor' is up until the present not recognised in South African law. However it has received statutory recognition in some other jurisdictions, notably Canada.

8 S 1(1), Act 28 of 1956



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qualified by a racial exclusion.⁹ When in the 1940s this exclusion referred to the gamut of regulations that applied to 'native' men, trade unions, such as the Food and Canning Workers Union claimed the legal space that existed as a result of the fact that African women were not required to bear passes to organise African women into a registered union.

In the 1970s, long after that particular loophole had been closed, the emergent unions claimed the legal space that other statutes provided to organise workers: wage determinations (the predecessors of sectoral determinations) in terms of the Wage Act,¹⁰ and works committees in terms of the Black Labour Relations Regulation Act.¹¹ Moreover, even when the claims made were clearly outside the provisions of black-letter law, if not downright illegal, emergent unions discovered legal space in the hesitancy of the authorities to enforce legal provisions that were widely rejected as not being just or politically defensible.¹²

The phrase 'working for any employer' in the first part of the definition also appears to signify someone other than an employee who works for an employer but to whom the legislation nevertheless applies. So, too, arguably, is the second part of the definition. There seems to be no reason why a union seeking to organise and protect the rights of workers in non-standard employment, even including a contractor who is not genuinely independent, could not claim this legal space on the basis that the definition applies. Yet this did not happen under the 1956 Act, nor has it happened under the LRA of 1995.

Under the 1956 Act, arguably, trade unions did not have occasion to consider the situation of workers in non-standard employment since the process of restructuring described above is a comparatively recent phenomenon. A conventional view is that it was a response to the economic shock induced by the oil price increases of 1973. In fact, it only took off in a Northern country, such as Britain in the mid-1980s;¹³ in South Africa it is primarily a phenomenon of the 1990s. Yet recent research suggests that well before the 1980s employers, or a section of employers, had anticipated the kinds of changes they would later be implementing.

In the 1950s and 1960s in the United States, during the hey-day of the 'New Deal' model of labour relations, the 'temporary help' industry, or what is now called temporary employment services (TESs) in this country, led by Manpower Inc., successfully prosecuted a legal claim of some magnitude. In a series of legal struggles in state courts it managed to win recognition for the proposition that the agency was the legal employer of the workers it placed

9 In the original definition of 'employee', the exclusion applied to indentured Indian workers and Africans required to bear passes who, until the 1950s, were limited to men. See s 1, Industrial Conciliation Act 36 of 1937.

10 Act 5 of 1957, repealed by the Basic Conditions of Employment Act 75 of 1997

11 Act 48 of 1953, repealed by Act 57 of 1981, which in turn has been repealed by the LRA of 1995.

12 See, for example, Friedman's account of the 1973 Durban strikes and the failure of the police to intervene, as well as the utilisation of statutory provisions to organise African workers: Friedman S *Building tomorrow today* (1987) at 46–60.

13 See Atkinson J 'Flexibility or fragmentation? The United Kingdom labour market in the eighties' (1987) 12 *Labour and Society* No 1 at 87.



with a client.¹⁴ In that country and elsewhere, TESs constituted an 'active institutional presence' promoting vertical disintegration.¹⁵

Further research is required to establish the circumstances in which, in 1983, the definition of employee was amended to provide for the notion of a labour broker's office and to 'deem' labour brokers to be the employers of those whom they supplied to their clients.¹⁶ But it is probably not coincidental, given the experience in the United States, that at that time Manpower Inc. had been operating in the country for some years.¹⁷ In any event, the amendment signified, firstly, that labour broking was legitimate. Secondly, as in the case of the United States, it signified for employers at large an opportunity to insulate themselves against labour-related risks.

This was at a juncture at which workers and unions were becoming increasingly litigious. At the same time, the growth of the emergent unions was putting upward pressure both on direct and indirect wage costs. So, too, was the phasing out of the migrant labour system. The irony is that, as the migrant labour system was being phased out, labour brokering was phased in: For the legal tool utilised in the migrant labour system, the fixed-term contract, was the same legal tool that labour brokers, or TESs, would rely on.

Thus, whereas migrant workers used to work year in, year out for the same employer without ever acquiring the status of permanency, workers placed by TESs may work 'temporarily', year in, year out for the same client. The term of their contract is determined by the operational requirements of the client. They can therefore count themselves lucky if the client does not terminate their services because another TES can provide the service cheaper. If the client does terminate for this reason, as frequently happens, the contract may terminate automatically.¹⁸ This is also the situation in which workers in contract cleaning and security services, amongst others, find themselves.

A conventional view of the LRA is that it consolidated the achievements of the emergent unions in the years of struggle. Yet the consequences of some of the compromises arrived at in the negotiations that gave rise to the LRA are only now becoming apparent. In these negotiations, organised labour had an historic opportunity to reverse the proposition that the TES was the employer.¹⁹

14 See Gonos G 'The contest over 'employer' status in the post-war United States. The case of temporary help firms' (1997) 31 *Law and Society Review* No 1 at 81-110.

15 See Peck J and Theodore N 'Temped out? Industry rhetoric, labor regulation and economic restructuring in the temporary staffing business' (2002) 23 *Economic and Industrial democracy* 143.

16 A labour broker was defined as someone who 'conducts or carries on the business of a labour broker's office.' A labour broker's office was defined as 'any business whereby a labour broker for reward provides a client with persons to render services to or perform work for the client or procures such persons for him, for which service or work such persons are remunerated by the labour broker.' See s 1 of Act 28 of 1956, as amended by Act No 2 of 1983.

17 See Theron J with Godfrey S and Lewis P 'Labour broking and its policy implications' Labour and development monograph (2005) 1, University of Cape Town.

18 The situation legal commentators have euphemistically described as 'second-generation outsourcing' is generally a consequence of this form of undercutting. On the effect of the termination of work for a client on the employment contract of a TES employee, see *NUCCAWU v Transnet Ltd t/a Portnet* (2000) 21 *ILJ* 2288 (LC) and *Hlanga v Ithemba Labour Facilitation* (Case no WE3144-07; unreported arbitration award dated 11 June 2007).

19 The historical significance of this opportunity was that the entire package of provisions making up what is now the LRA of 1995 was the lannego.



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It does not appear that this possibility was even contemplated. Similarly, organised labour had the opportunity to seek a more expansive definition of 'employee', or at least to retain the ambiguity of the *status quo*, particularly the reference in the 1956 Act to a person who works for (as opposed to one employed by) another. Instead it accepted a wording that eliminates one possible interpretation of the phrase 'works for', by inserting the qualification 'other than an independent contractor'.²⁰

It might be said, as organised business doubtlessly argued, that the qualification 'other than an independent contractor' merely affirmed the position that had always prevailed, as confirmed by the courts. But this is to disregard the role of legislation as a signifier. In this instance, a provision implying a strict dichotomy between 'employee' and 'independent contractor' signifies that decision-makers should not acknowledge or allow a space to develop in which those who were not in employment, strictly defined, could make claims. At the same time, the provisions signify a legal space for employers to utilise in order to evade the legislation.

It is indisputable that employers have done so in the period since the LRA was adopted. Indeed, it was primarily to combat the use of this space by such as the employer federation COFESA, and the increase in what has been characterised as 'disguised employment', that the presumption as to who was an employee was introduced by way of the 2002 amendments to labour legislation.²¹ This presumption is discussed in more detail below.

3 THE COURTS, THE COMMON LAW AND THE EXCLUDED

The necessity for labour legislation is generally ascribed to the inability of the common-law of contract to regulate labour relations, and specifically because of the unequal power the parties to the relationship have. What this means in practice, of course, is that the employer determines the terms of the contract and the employee accepts, because she or he needs a job and is in no position to bargain. One of the essential terms of this contract is that either party may terminate it on notice. Unless the employee has skills that are not easily replaced, the shorter the period of notice the better from the employer's standpoint. Unless the employee has security of employment, she or he remains in a weak bargaining position.

Labour legislation does not displace the common law. However, the common law and the courts are often regarded as playing a minor role in labour relations.²² Consistent with this view, the regulation of labour relations is

20 The State is also referred to as an employer. See s 213 of the LRA.
 21 The explanatory memorandum published with the bills referred explicitly to the conduct of the Confederation of Employers of South Africa (COFESA), which 'advise[d] employers that they can avoid labour legislation merely by stipulating in contracts that workers are independent contractors without any fundamental change in the employment relationship'. It is, however, unclear why it was not possible to deal with what was widely perceived as a sham in terms of the existing provisions of the LRA. See, for example, *Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC & Another* (2001) 22 ILJ 120 (LC) in which a contract supplied by COFESA was described as a 'sham' that 'perpetrated a cruel hoax' on the employees who signed it.
 22 Kahn-Freund, for example, said: 'In the formulation of the rules which regulate the relations between employers and workers the common law has played a minor role. The courts have a share, but only a small share in their evolution': *Labour and the law*, 2ed (1977) at 18–24.



sometimes regarded as having shifted from a position in which employment was defined primarily in terms of contract to a status, the aim of which is to reduce the contractual element of the relationship to the barest minimum.²³

For workers in non-standard employment relationships, however, the contractual element is now of overriding importance, and especially so in the case of workers in a triangular employment relationship. This is because the term of their employment is determined by the contract of employment, as already noted in the case of workers placed by TESs and others. Moreover, these contracts are crafted so as to minimise the chance of workers whose contracts are terminated at the instance of the client to successfully claim unfair dismissal.²⁴ At the same time, the economic reality is that not only their employment security but also their wages depend on the terms of another contract to which they are not privy, namely the commercial contract between the service provider (TES) that employs them and the client.

In order to deal with a scenario such as this, the role of the dispute resolution system established by the LRA in maintaining standards of fairness assumes increased importance. It is public knowledge, of course, that the Commission for Conciliation Mediation and Arbitration (CCMA) handles a vast case-load, and the CCMA itself is not shy about trumpeting its successes in settling disputes or the number of cases determined at arbitration. However, such data reveal nothing about the number of workers in services such as security and cleaning whose claims are unsuccessful because in terms of their contract they were not dismissed.²⁵ These are cases dismissed on preliminary points or because the CCMA finds that it has no jurisdiction. According to an official of one union organising in such services, their members are used to being told by CCMA commissioners that they should have challenged the contract before they signed it.²⁶

In a profession that is itself the product of hierarchy, it should come as no surprise that such deference to the contract of employment should still prevail. For a key element of the 1990 accord that gave rise to the present dispensation was acceptance of the hierarchy which the old LRA had already established, in terms of which a Labour Appeal Court, presided over by a high court judge, was the final arbiter of labour disputes. The judicialisation of labour relations this represented was not questioned at the time.

23 See, for example, Kahn-Freund O 'A note on status and contract in British labour law' (1967) *Modern Law Review* at 635; Honeyball S 'Employment right and the primacy of contract' (1989) 18 *ILJ* (UK) 97. See also Jordaan in Rycroft and Jordaan *A guide to South African labour law* 2nd ed (1992) at 26–32.

24 For examples of such contracts, see Theron *et al* (fn 17 above).

25 According to data from the CCMA's Annual Report and Review of Operations for 1 April 2005 until 31 March 2006, 125 035 cases were referred to the CCMA in this period. 31% were screened out on the basis that the CCMA did not have jurisdiction. Of 47 899 arbitrations conducted, 17 028 (or 35%) were determined by way of a preliminary point. It is likely that a substantial proportion of the cases where the CCMA, correctly or incorrectly, is considered not to have jurisdiction concern workers in non-standard employment. In cases that go to arbitration and are decided by way of a preliminary point, it is likely that many if not most concern employees placed by service providers on fixed-term contracts, although further research is needed to verify this. The writer is indebted for the data to Paul Benjamin, who is not responsible for its analysis. See also (fn 17 above).

26 Interview with Jackson Simon, SATAWU.

²⁷ Rather, organised labour appears to have subscribed to the view that it was a matter of influencing the personage of the judiciary and insulating the labour courts from the court system as a whole.²⁸

One of the consequences of judicialisation is a tendency to defer, in debates concerning what should be regarded as matters of labour relations policy, to 'the law' as enunciated by the judiciary. However, the judiciary on the whole is concerned with doctrinal consistency. The Labour Appeal Court's reaffirmation in 1999 of a decision twenty years earlier to adopt the so-called 'dominant impression' test to differentiate between employees and independent contractors is an example of the judiciary ensuring doctrinal consistency with little or no acknowledgement of how radically the world of employment had been transformed in the interim.²⁹ It still relies on a categorisation derived from Roman law in terms of which an employee is described as someone who renders 'personal services' as opposed to an independent contractor who performs certain specified work or produces a certain result.³⁰ It still relies on the example of the plumber and the electrician to validate this distinction, rather than the IT technician (whose task is never complete). There are, of course, independent contractors who perform certain specified work or produce a certain result but, increasingly, there are employees who do so as well.³¹ In the modern economy, where employment is ever more defined as a service, a characterisation of an employee as rendering services is not merely archaic but confusing. Between 'employee' and 'independent contractor' there is increasingly a grey area that is not adequately captured by either.³²

In fact it would have been perfectly possible, given the wide scope second part of the definition of employees, for the courts to regard 'independent contractors' located in this grey area as employees. That they have not done so can be attributed to the primacy they accord to the contract in terms of which the relationship between the parties is framed. For the courts, the nature of the relationship must always be ascertained from the terms of the contract unless there is evidence that it has been varied or is a sham.

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- ²⁷ See Theron J 'Trade unions and the law: Victimisation and self help remedies' (1997) 1 *Law, Democracy & Development* 11. On the concept of judicialisation, see Ferejohn J 'Judicializing politics, politicizing law' (2002) 65 *Law and Contemporary Problems* No.3.
- ²⁸ Even now, the shock of some trade unionists and their sympathisers at the recent decisions of the Supreme Court of Appeal in *NUMSA & others v Fry's Metals (Pty) Ltd* [2005] 5 BLLR 430 (SCA) and *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021 (SCA) is expressed with reference to the person of the judge who handed down the decision, whom they had supposed to be sympathetic to their cause.
- ²⁹ See *SABC v McKenzie* [1999] 1 BLLR 1 (LAC) in which the approach followed in *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) and earlier decisions was endorsed.
- ³⁰ That is, the distinction between *locatio conductio operarum* and *locatio conductio operis*.
- ³¹ For example, it is permissible to pay employees on a piece-work basis or a task basis. The use of task-based systems of remuneration is increasingly prevalent.
- ³² Benjamin categorises dependent contractors and semi-independent workers as being in dependent self-employment: Benjamin P 'An accident of history: Who is (and who should be) an employee under South African labour law (2004) 25 *ILJ* 787. Cheadle suggests that home workers, labour tenants, owner-drivers, freelance journalists and sales representatives may be in 'economically dependent relationships of work', as distinct from persons who run their own businesses, whom he regards as the genuine 'independent contractor', or the genuinely 'self-employed'. See Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 363.

³³ But 'sham' is a strong term, which will only apply in a limited number of cases.³⁴ The notion of 'disguised employment', introduced by the International Labour Organisation, is open to the same objection.

These notions imply a deliberate intent to bypass labour legislation and employment security provisions in a manner in which is not legitimate. Employers, in general, have no need to resort to this kind of measure if they are able to bypass labour legislation legitimately. All indications are that the most commonly utilised method of doing so is through externalisation, by utilising TEs and other service providers, and by utilising fixed-term contracts.

4 THE AMENDMENTS TO LABOUR LEGISLATION ADOPTED IN 2002

In July 2000 the government proposed introducing a 'presumption as to who is an employee' in both the LRA and BCEA, amongst a number of other far-reaching amendments to labour legislation. It will be argued that this was not an adequate response to the restructuring that had taken place, described above. A presumption of this kind, it should be noted from the outset, is not of assistance to workers in a triangular employment relationship where the issue is not *whether* they are employed, but *by whom* they are really employed. Nevertheless, the presumption signified government's intention to engage in some of the issues arising from externalisation. Anecdotal evidence suggests that, as a consequence, employers have re-examined certain categories of dependent contractor, such as the owner-driver, with a view to ensuring that they could withstand legal challenge.³⁵

The test of the new section, however, would be whether it would create legal space to challenge the kind of employment contracts that were increasingly regulating non-standard employment. As initially proposed, the section commenced as follows:

'A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract of employment, if any one or more of the following factors is present ...'³⁶

The reference to 'regardless of the form of the contract of employment' was modified in a later version to become 'regardless of the form of the contract', putting it beyond doubt that even where someone is ostensibly a contractor in terms of a written agreement, they may be presumed to be an employee in any situation where one or more of the listed factors are present. But the presumption is rebuttable; in other words, the employer may prove the contrary.

Seven factors were listed. However, one of the factors is of overriding importance: whether the 'person is economically dependent on the other person for

³³ *Liberty Life Association of Africa Ltd v. Niselow* (1996) 17 ILJ 673 (LAC)

³⁴ For cases in which the courts have regarded contracts 'converting' lesser skilled workers to employees as a sham see Christianson M 'Defining who is an employee' (2001) October, 11, *Contemporary Labour Law* No 3, and the cases cited therein. See also *Motor Industry Bargaining Council v MacRites Panel Beaters and Spray Painters (Pty) Ltd* 2001 JDR 0100 (N) and *Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC & Another* (fn 21 above)..

³⁵ Personal contact, May 2007

³⁶ S 83(1) of the BCEA and s 200A(1) of the LRA

whom he or she works or renders services.³⁷ This is broad enough to encompass any situation in which a contractor is in fact dependent on the person who engages him or her, since such dependence is at root economic. It could also, conceivably, cover another category of workers to which the explanatory memorandum referred, namely 'those who fall within the definition of an employee but who are in practice unable to assert their rights as employees', such as those engaged in part-time work, homework or casual work.³⁸

What this factor implied was the development of some form of economic dependence test.³⁹ Yet it remains to be seen is to what extent the creation of a presumption will contribute to the development of such a test. Take the case of a trade union claiming its collective agreement applies to workers whom the employer regards as excluded. The presumption is, after all, rebuttable. It will simply be necessary for the employer to put forward proof to rebut it. Until there is a hearing and the matter is determined, the union's claim cannot be enforced. Similarly, it is difficult to see how the presumption will help a bargaining council to bring recalcitrant employers in line.

The procedure whereby there may be a hearing is for a 'contracting party' to approach the CCMA for an advisory award to determine whether the person involved in the arrangement are employees.⁴⁰ But given that the more powerful economic entity invariably sets the terms for any such arrangements, it is difficult to conceive of any circumstance in which such an entity would wish to seek the CCMA's guidance. It is similarly difficult to conceive of the less powerful 'contracting party' doing so, by virtue of the fact that it is less powerful and hence more vulnerable. The fact that since this procedure was adopted there have been very few advisory awards confirms this dynamic.

Even so, the introduction of the presumption seemed to hold promise. It codified certain aspects of the 'dominant impression' test, while the prospect of the development of an economic dependence test suggested a basis on which more effective protection to workers in a triangular employment relationship. Three other factors were consistent with the development of such a test, as well as being objectively verifiable and hence less open to the objection that 'dependence' is a vague concept. One such factor was that the 'person has worked for that person for an average of at least 40 hours per month over the last three months'.⁴¹ Another was that 'the person only works for or renders services to one person'.⁴² The third was that the person is 'provided with the tools of the trade or work equipment by the other person'.⁴³

But to develop a new test requires adopting a new mindset. The indications were that the CCMA (and, by implication, the courts) should adopt a new mindset in determining what is or is not an employment relationship.

37 Ss (1)(e)

38 Basic Conditions of Employment Amendment Bill, 2000: Explanatory memorandum, Government Gazette 21407 of 27 July 2000

39 See, for example, Du Toit *et al Labour relation law: A comprehensive guide* 5 ed (2006) at 77–78.

40 S 200A(3)

41 Ss (1)(d)

42 Ss (1)(g)

43 Ss (1)(f)

The fundamental question the presumption raised was whether these indications were clear enough. As it turned out, a change to the initial proposal was made at a late stage, apparently at the instance of organised business in the deliberations of the Millennium Labour Council. A provision was introduced limiting the scope of the presumption to persons earning less than an earnings threshold determined by the Minister in terms of section 6(3) of the BCEA.⁴⁴ There can be no valid conceptual rationale for this threshold. If the factors introduced are valid indicators of an employment relationship, they must hold for all employment relationships. The effect of the threshold was to fundamentally undermine the integrity the proposed new presumption and its potential to effect a new mindset, given that the factors proposed did not apply to persons earning above the threshold.

4.1 The code of good practice: who is an employee

For anyone who supposed there was a more optimistic reading possible regarding the introduction of an earnings threshold in the new presumption, the recently promulgated 'Code of Good Practice: Who is an employee' makes depressing reading.⁴⁵ The Code is 53 pages long. Notwithstanding the inclusion of the ILO's 2006 'Recommendation concerning the employment relationship' there is little evidence of a new mindset in it. Instead, it comprises merely another exposition of 'the law' as it stands, including an exposition concerning laws other than the BCEA and LRA.

Evidently this is a document drafted by lawyers for lawyers, which is intended to apply in any proceedings in terms of the BCEA or LRA in which a party 'alleges that they are an employee and one or more parties ...disputes this allegation'. It may well be of assistance to lawyers in cases of 'disguised employment'.⁴⁶ However, as I have argued, 'disguised employment' ought not to have been the primary object of the reform.

In any event it is not clear on what basis the Code seeks to oblige decision-makers to have regard for its provisions. Its authority emanates from the tripartite process of consultation that gave rise to it. However, this may well prove a constraint placed on organised labour's capacity to make legal claims based on what is just and politically defensible, for very little return. After all, the fact that a party satisfies the requirements of the presumption does not establish the applicant is an employee. All it does it to shift the onus onto the employer to lead rebutting evidence. Where rebutting evidence is led, it appears that the factors contained in the presumption are of no

44 That is, the threshold concerning the regulation of hours of work. See ss 83A(2) of the BCEA and 200A(2) of the LRA. S 6(3) of the BCEA requires the Minister, on the advice of the Employment Conditions Commission, to make a determination excluding the chapter regulating hours of work from applying to any category of employees earning in excess of an amount stated in that determination. The threshold was set at R115 572 per year in 2003: *Government Gazette* No 25012 of 14 March 2003

45 *Government Gazette* No 29445 of 1 December 2006

46 A case in point is *Sepheu Moffat Modishane v Noordval Security* (Case no GAPT9564-06; unreported CCMA award) where the commissioner found that a contract stating the applicant was an independent contractor was calculated to disguise an employment relationship.



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relevance whatever. Instead the 'dominant impression' test is applied.⁴⁷ Given that the factors creating the presumption are no longer relevant, as well as the breadth and subjective nature of the 'dominant impression' test, it is difficult to see what purpose the presumption serves. The same result could have been achieved simply by placing an onus on the party disputing there is an employment relationship, without any reference to factors. On this interpretation, what the code creates is conceptual confusion.

The same conceptual confusion is found in its commentary on employees of temporary employment services. Section 198 is the section of the LRA that designates the TES as the employer of the workers it provides to its client.⁴⁸ In order to determine whether or not the section applies, the Code states, it is necessary to determine 'whether the relationship between the client is a genuine arrangement and not a subterfuge entered for the purpose of avoiding any aspect of labour legislation'.⁴⁹ It would be of considerable value if this provision of the Code could be used to disclose the terms of an agreement between the client and the temporary employment service. Yet it seems unlikely this will happen. In any event this provision of the Code misses the point about section 198: that by designating the TES as employer it in effect legitimates avoidance of aspects of labour legislation.

'Whether or not an individual supplied to a client by a TES is an employee of the client or an independent contractor', the Code states, 'must be determined by reference to the actual working relationship between the worker and the "client".... If it is found that the individual has an employment relationship with the client, then for the purposes of the LRA and the BCEA (a) the individual is an employee of the TES; (b) the TES is the individual's employer'.

To the layperson this seems like gobbledygook. The effect is to preserve law as the domain of lawyers and courts, depriving the broader community, and organised labour and business, of a role in its interpretation.

5 CONCLUSION

The struggle to include the excluded is at the same time a struggle to organise the unorganised. One lesson to be learnt from the history of previous struggles is not to place undue reliance on the courts. The best prospect for achieving an expansive interpretation of the employment relationship in the CCMA and the courts is by establishing effective organisations of those that are currently excluded from its protection. Perhaps before we can expect a change of mindset from the courts there must be a change of mindset amongst the unions.

⁴⁷ S 22(b), Code.

⁴⁸ The equivalent section in the BCEA is s 83.

⁴⁹ S 55, Code



BIBLIOGRAPHY

- Anderson P 'The limits and possibilities of trade union action' in Blackburn R and Cockburn A (eds) *The incompatibles: Trade union militancy and the consensus* (1967)
- Atkinson J 'Flexibility or fragmentation? The United Kingdom labour market in the eighties' (1987) 12 *Labour and Society* No. 1
- Benjamin P 'An accident of history: Who is (and who should be) an employee under South African labour law (2004) 25 *ILJ* 787
Business Report 23 January 2007
- Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 363
- Collins H 'Independent contractors and the challenge of vertical disintegration to employment laws' (1990) 10 *Oxford Journal of Legal Studies* 353.
- Devey R, Skinner C and Valodia I 'Second best? Trends and linkages in the informal economy in South Africa.' Development Policy Research Unit working paper No 06/102 (2006) University of Cape Town
- Du Toit *et al Labour relation law: A comprehensive guide* 5 ed (2006)
- Ferejohn J 'Judicializing politics, politicizing law' (2002) 65 *Law and Contemporary Problems* No. 3
- Friedman S *Building tomorrow today* (1987)
- Gonos G 'The contest over 'employer' status in the post-war United States. The case of temporary help firms' (1997) 31 *Law and Society Review* No 1
- Honeyball S 'Employment right and the primacy of contract'. (1989) 18 *ILJ* (UK) 97
- Kahn-Freund O *Labour and the law* 2ed (1977)
- Kahn-Freund O 'A note on status and contract in British labour law' (1967) *Modern Law Review*
- Peck J and Theodore N 'Temped out? Industry rhetoric, labor regulation and economic restructuring in the temporary staffing business' (2002) 23 *Economic and Industrial Democracy* 143
- Rycroft and Jordaan *A guide to South African labour law* 2nd ed (1992)
- Theron J 'The erosion of workers' rights and the presumption as to who is an employee' (2002) 6 *Law Democracy & Development* 27
- Theron J 'Trade unions and the law: Victimization and self help remedies' (1997) 1 *Law, Democracy & Development* 11
- Theron J with Godfrey S and Lewis P 'Labour broking and its policy implications' Labour and development monograph (2005) 1, University of Cape Town