



The growing informalisation of work: Challenges for labour – recent developments to improve the rights of atypical workers

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SUMMARY

The South African labour market faces a number of challenges; key to this is the shift from formal employment to atypical work. This phenomenon is not a South African problem but a growing challenge to labour throughout the world.

The growing informalisation of the workforce brings significant changes to the traditional employment relationship, including the workplace. Informalisation is characterised by workers shifting from permanent employment to casual employment and fixed-term contracts, outsourcing and employment through labour brokers. These forms of employment are accompanied by growing insecurity of employment, the undermining of basic conditions of employment, the erosion of workplace rights and decreasing access to skills and equity at work.

While it is important to understand these changes, society does not seem to have accepted that there is a new form of employment relationship. Various proposals and legislative considerations should be assessed to address and stem the tide of atypical work. These should include improving minimum standards and providing enhanced protection to atypical workers; improving monitoring and enforcement and reforming labour market institutions to better confront the shift from permanent to casualised employment.

Research indicates that the shift from formal employment to atypical forms of employment is on the increase. Many workers who exit the labour market having been in formal employment will most likely re-enter the market as an atypical employee. This has had, and will continue to have, a major impact on the character of the workforce. It leads to instability within the labour market and impacts negatively on employment growth, and on the reduction of underemployment and poverty and decreasing inequality. The consequences are greater social and economic insecurity.

Existing legislation does not emphasise the protection and improvement of the rights of atypical workers. Organised labour has made useful recommendations for improving protection for atypical workers; particularly those

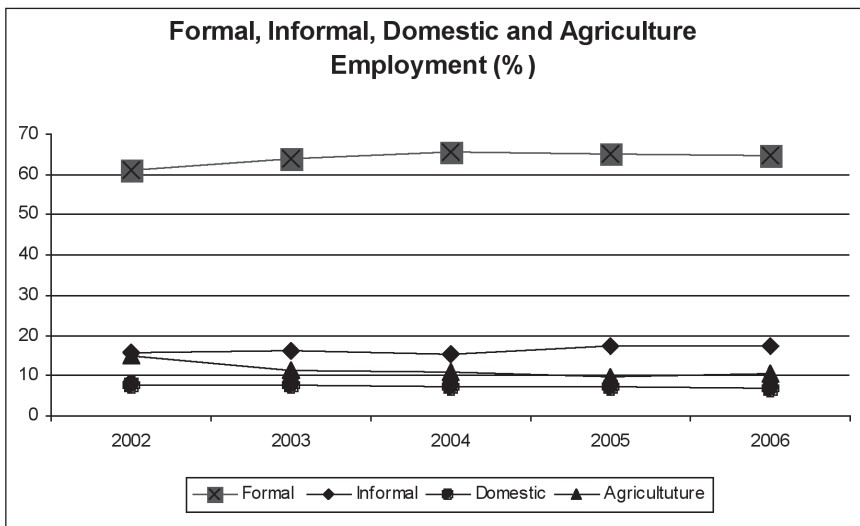
employed in triangular employment relationships.¹ Due consideration should be given to possible legislative changes; the establishment of a tripartite statutory body to regulate labour brokers; the development of a code of good practice for workers engaged in atypical employment contracts and improving monitoring and enforcement mechanism through tougher penalties.

1 INTRODUCTION AND BACKGROUND

Casualisation of the workforce has increased significantly in the last decade. The number of contract workers, independent contractors, those employed through labour brokers and other workers employed on a similar basis has grown dramatically during this period.

This growing informalisation of the workplace has undermined not only security of employment but also worker rights and their conditions of employment, challenging the traditional employment relations to which we have become so accustomed.

The following graph reflects that the growth in informal employment is quite minimal. However, many workers are not accounted for and thus the true number of workers in atypical employment is probably much higher than is reflected here.



Source: Labour Force Surveys

¹ That is, those workers employed via temporary employment services or, as they are more commonly known, 'labour brokers'.

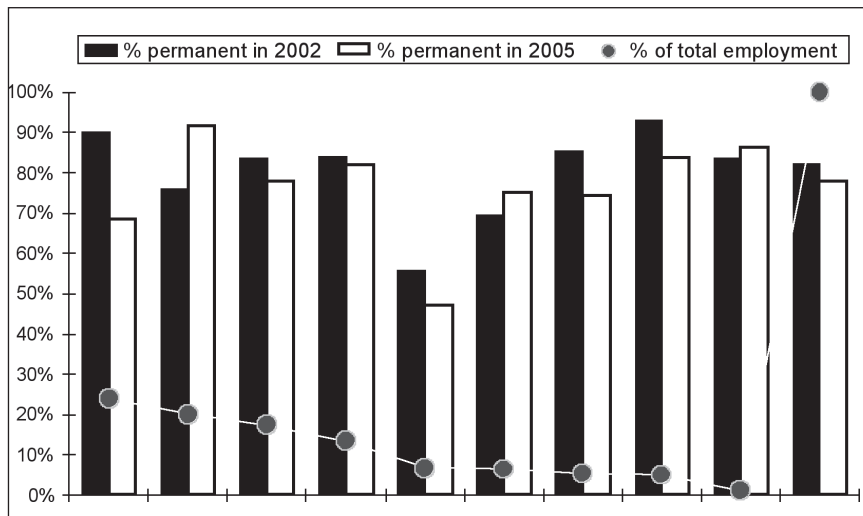


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Although formal employment continues to constitute the largest component of total employment, formal employment growth as a percentage of total employment has shown a decline from 65.7% in 2004 to 64.7% in March 2006. On the other hand, informal employment as a percentage of total employment has grown from 15.5% to 17.6% in the same period.

A further indication of the shift from permanent to casualised employment is illustrated in the chart below. While growth brought about some decline in unemployment, casualisation increased.

Casual and permanent employment by sector, 2002 and 2005



Source: Labour Force Surveys

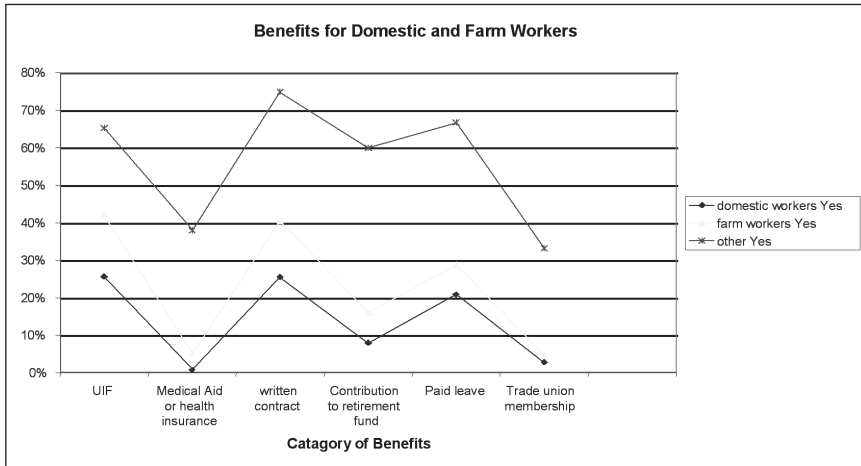
Although the decrease of formal employment and the growth of informal employment are modest, there has been a definite shift in trend. This in turn has an impact on income and the security of employment. In vulnerable sectors, there tends to be a larger number of employers who selectively pay workers minimum wages, and provide them with minimum benefits, as are illustrated below.

The following graph shows the level of benefits provided for agricultural and domestic workers.





LAW, DEMOCRACY & DEVELOPMENT



Source: Labour Force Survey, September 2005

The figures show that many employers within the relevant sectors continue to ignore the basic conditions of employment prescribed by the sectoral determinations. Even contributions towards the Unemployment Insurance Fund are relatively low compared to those in other sectors in the economy, with a compliance rate of only 26% for domestic workers and 42% for farm workers.

‘[L]abour legislation in turn has facilitated the segmentation of the employed workforce’². This has given rise to various precarious employment relationships, and the emergence of a class of workers that lack basic security of employment in the workplace. This has taken various forms but the most common is the growing emergence of the temporary employment services (TES) sector.

Studies have confirmed this trend, which is particularly evident in the primary and secondary sectors.³

‘To establish that workers placed by TESs constitute an underclass, it is enough to establish that they do not have the same employment security as other workers, and that they are paid less than other workers.’⁴

It would appear that the use of labour brokers has in part been motivated by employers’ desire to avoid being subject to labour legislation.⁵ ‘More specifically, the desire is to avoid unfair dismissal proceedings, coupled with a desire to reduce wage levels for workers performing non-core functions, or lesser-skilled workers.’⁶

2 See Theron J ‘Intermediary or employer? Labour brokers and the triangular employment relationship’ (2005) 26 *ILJ* 618 at 622.

3 *Ibid* at 626

4 *Ibid* at 642

5 *Ibid* at 626

6 *Ibid* at 626





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It has also been noted that 'labour legislation is skewed towards those in standard employment relationships, and is ineffective in protecting workers in non-standard employment'.⁷

2 RESEARCH

Acting on recent research into atypical forms of employment, we have started to engage with Business and Labour to improve legislative compliance and to introduce more laws to protect vulnerable workers. Some of these proposals seek to improve the conditions of employment of atypical workers – that is, all workers other than full-time, permanent employees.

The vast majority of these workers are defined as part-time and casual workers and are concentrated largely in the domestic, agricultural, retail and construction sectors. However, there is an increase in the number of atypical workers in all sectors of the economy.

The debate on atypical forms of employment has previously relied on anecdotal evidence. More recently, the emergence of a number of research papers on the matter has contributed to a better understanding of the growing phenomenon of externalisation of employment. Although much of the research is ongoing and relatively new, specific research studies will concentrate on sector specific challenges.

3 WHAT ARE THE CHALLENGES POSED BY CASUALISATION?

While the labour market will continue to be one the most talked about subjects, it is critical that any discussions around labour reform are underpinned by the principle of decent and quality work.

Labour has made several important proposals in this regard, which it has tabled at NEDLAC. These proposals endeavour to set minimum standards, improve the monitoring and enforcement of existing labour legislation, strengthen collective organisation and adapt systems and institutions. They also attempt to understand the triangular relationship between the employer, the employee and the providers of temporary employment (the TESSs).

4 SETTING MINIMUM STANDARDS

4.1 Existing legislative standards

Any consideration of change to labour legislation, whether it is progressive for workers or not, is not easy. There is an inherent risk involved. When the social partners consider changes to labour law that indirectly allows room for debates relating to other sections of the law that may lead to a limitation of workers' rights. It becomes a 'juggling act' with much at stake and thus a key dilemma confronts us: How do we improve the rights of atypical workers without limiting or reducing other hard won rights?

⁷ *Ibid* at 627



This has always been a complex challenge to face. Under difficult circumstances the social partners have considered a number of proposals to explore the following amendments to the legal framework that could improve protection of atypical workers:

4.1.1 *The LRA*⁸

- Consider improving the protection of workers against dismissal, including retrenchments, and unfair labour practices, through tighter legislative measures, including the elimination of the existing threshold on the right to strike for operational dismissals.
- Regulate representation for outsourced workers.
- Improve regulation in those sectors with a high incidence of casualisation (through sectoral determinations and consultation with bargaining councils), and to extend the kinds of work regulated by sectoral determinations.
- Specify the powers of bargaining councils to regulate outsourcing and subcontracting arrangements.
- Add a definition of 'employer' and the concept of a user enterprise or host employer. The Code of Good Practice on who is an employee has helped to some extent in determining who is an employee and employer. However, it has not proved sufficient when applied in complex triangular employment relationships (such as those involving TESSs).
- Specify how long a temporary worker must be employed in order to become permanent (they propose three months or three roll-overs of a contract).
- Redefine 'workplace' so as to make it clear that employees can enforce their rights against the employer in charge of the workplace in which they work, as well as against their own employer, and to address the situation in the services sector, where the concept 'workplace' has no exact meaning.

In addition, we also suggest that the social partners

- Consolidate efforts to develop a Code of Good Conduct on outsourcing, contracting, temporary, casual and part-time work, as required by the LRA.
- Develop a broader communication campaign to ensure that employers, in particular, understand the nature of minimum standards and laws on dismissal and how they apply to atypical workers.

4.1.2 *EEA*⁹

In respect of the EEA, consideration should be given to ensuring that where there is a majority of part-time and/or temporary workers, they must have conditions of employment that are equivalent or proportional to those of full-time, permanent workers doing essentially the same work.

⁸ Labour Relations Act 66 of 1995

⁹ Employment Equity Act 55 of 1998

4.1.3 BCEA¹⁰

Contemplation should be given to defining those types of work regarded as atypical by the BCEA in order to set a floor for definitions in sectoral determinations and bargaining council agreements. This might protect such workers in terms of their conditions of employment, and provide a regulated but flexible alternative to outsourcing.

There is a need to extend benefits for non-standard workers through more generous minimum annual and family leave entitlements for atypical workers, essentially by giving pro rata benefits to those employees who have employment contracts lasting less than a year

4.1.4 *Monitoring and enforcement*

Consideration should be given to having labour brokers register under the LRA. To register, they will have to demonstrate that they have abided by all relevant laws, including the BCEA, the LRA, and the EEA. Employers who make use of unregistered brokers should be subjected to sanctions or penalties. Employers and labour brokers should be bound by bargaining council agreements on atypical work.

The Department of Labour should establish a hotline for employees, employers or any other parties to complain about the use of unregistered brokers.

Amendments to the LRA or BCEA could require that employers provide workers or unions with information on the working conditions of atypical workers, on demand.

The Department of Labour should review its enforcement strategy to ensure that practices that contribute to casualisation are identified and combated.

4.1.5 *Strengthening stakeholders' organisation*

Ultimately, a statutory regulatory institution for registered brokers should be established, with organised labour represented on that body. The body should seek to ensure adherence to minimum standards by all labour brokers, improved access to non-wage benefits, and expanded skills development in the industry. This builds on the idea that formal temporary employment services, who abide by the laws, have an interest in stopping undercutting.

The law should be reviewed to ensure that, in future, the agency shop can be extended by collective agreement to atypical workers. This amendment will work only if unions truly represent atypical workers in negotiations.

Generally, the Department of Labour should intensify efforts to encourage the formation of bargaining councils that are established to support vulnerable workers, such as informal and atypical employees.

The Department of Labour should also assist vulnerable workers to enforce their rights (through education, improving access to the CCMA and the courts, etc.).

¹⁰ Basic Conditions of Employment Act 75 of 1997

4.1.6 *Adapting institutions and systems for atypical workers*

This should include:

- Exploring options to make it easier for atypical workers to participate in formal provident and pension funds and other social benefits enjoyed by many other workers.
- Providing greater access to SETA training programmes.
- The Minister, prior to the publication of a sectoral determination in terms of section 54 of the BCEA, should, via the Employment Conditions Commission consider the prevalence and nature of non-standard work in the sector and area concerned.
- Any consideration of a reduction of working hours in terms of Schedule 1 of the BCEA must take account of the prevalence of non-standard work in a sector.
- In section 1 of the EEA, the definition of 'employment policy or practice' must include all non-standard employment arrangements.

5 ENGAGEMENT BY LABOUR: DEVELOPING A COHERENT RESPONSE

It is common cause that there is a shift towards atypical forms of employment, while 'research on atypical forms of employment indicates that labour standards are being eroded in some or all the respects'.¹¹ A number of recommendations call for improved union organisation; improving worker participation in the workplace and better organising strategies to address the difficulties associated with organising atypical workers.

While some of these recommendations are useful, they fail to recommend any legislative change to improve wages, conditions of work, improving health and safety, increasing the level of skills and employment equity or introducing social security measures, such as retirement funds or medical aid and job security amongst the increasingly externalised workforce.

Engagement with social partners must ensure that any possible amendments are tabled without opening up the labour laws in general and in an undesirable way. There has been some progress in the report arising from the work done through the Department of Labour. Due consideration from a Labour standpoint should take into account the following:

5.1 Setting minimum standards

Overall, the proposals are fairly good, especially in terms of the agency shop and making the actual employer rather than the subcontractor responsible for breaches of workers' rights.

¹¹ Borat H and Cheadle H 'Labour reform in South Africa: Measuring regulation and a synthesis of policy suggestions' (2007) unpublished paper, available on file from this author.

However, the proposal could be much more specific. In particular, the LRA should place the burden of proof on the workplace employer to demonstrate that he is not breaking a contract with a labour broker when the primary employer (labour broker) intends dismissing workers unfairly, as a result of the contractual termination between the primary and secondary employer. This would be in line with the current law on retrenchments, in terms of which employers must demonstrate genuine operational reasons for dismissal.

The amendment to the EEA should apply not only where a majority of workers are part-time or temporary, but should also require that the majority of part-time or temporary workers be HDIs.¹² But this is only in the case where the majority of employees are atypical in nature. In the instance where there is a mix of permanent and atypical workers as is the case in many retail stores then atypical and permanent workers should be treated in the same way.

A Code of Good Practice could be developed to enhance understanding of the contract of employment, for example, whether certain conditions of employment are permissible or not. Such a code could also clarify procedures for the termination of the contract of employment.

A default sectoral determination regulating atypical forms of employment is a useful recommendation. The determination can borrow from section 200 of the LRA, with regard to the presumption as to who is an employee. This determination could specify that a contract of employment would become permanent after a certain period.

The proposal to ensure that the DPSA (Department of Public Service and Administration) develops a code on outsourcing is very welcome, but the code should be tabled at the PSCBC as a sectoral agreement.

5.2 Monitoring and enforcement

These proposals are to be welcomed but would be improved if the Department of Labour were to establish a unit dedicated to improving conditions of employment in sectors with high levels of atypical work – that is, farming, construction, retail and domestic work.

The proposal to allow the extension and enforcement of basic employment conditions in proportion to the duration of an employment contract is a good one. This will help establish conditions of employment for casual employees that are no less favourable than those enjoyed by permanent employees.

We further suggest that harsher penalties be imposed to ensure strict adherence to minimum standards.

5.3 Strengthening stakeholders' organisation

The proposal to strengthen the organisation of stakeholders should also be welcomed. The idea of establishing a tripartite body with regulatory and administrative powers for TESs is important. This is because TESs would in

¹² Historically disadvantaged individuals



all likelihood support moves to ensure that all brokers adhere to the BCEA, because they too are adversely affected by the undercutting practices of unscrupulous employers.

The proposals should include an agreement to reduce the representivity requirements for the recognition of bargaining councils in sectors with a large number of atypical workers.

We should also explore the idea of co-operative, union or public employment agencies, which can provide ongoing benefits and fairly allocate jobs in sectors with high levels of casual labour. This would make it easier to organise highly casualised sectors, such as domestic and construction work. Such a measure has been highly successful in other countries, for instance amongst dockworkers.

To function properly, these agencies would have to serve the needs of employers too, by dealing with legal requirements and training in particular. But the law should also make it harder if not impossible to employ people in these industries without the brokerage of a TES agency through regulations or tax measures.

6 CONCLUSION

While high levels of unemployment remain a major economic challenge for SA, the creation of a decent work strategy is pivotal to a proper job creation strategy. That must incorporate fundamental protections against low wages, poor enforcement of rights and basic conditions and improved job security and must define the concepts of decent and quality employment

A decent work strategy must be central to addressing our concerns relating to the increase in casual labour. These challenges should be addressed in a consistent and co-ordinated manner. While formal employment remains the largest sector in the labour market, there is a growing migration from formal to informal employment.

While the measures we have suggested above will provide legislative protection to vulnerable workers, they cannot stand alone. Indeed, they will become mere 'paper laws' if Labour does not make a concerted effort to improve conditions of employment in vulnerable sectors of the labour market. The key challenges for Labour are to adapt our own organisations to recruit casual workers. Unions remain the best enforcers of the law, as evidenced in strong manufacturing and primary sectors, such as mining. Failure to recruit and grow membership among casual workers will reinforce the perception that we represent only the 'elite' of the working class.

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