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The outlines of a strategy**

Jan Theron

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The Institute of Development and Labour Law
University of Cape Town
Private Bag
Rondebosch 7701
South Africa
Tel: 27-21-650 5634
Fax: 27-21-650 5660
Email: faldielah.khan@uct.ac.za
<http://www.labourlaw.uct.ac.za>

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Non-standard employment and labour legislation: The outlines of a strategy

Jan Theron*

1. Introduction

The Labour Relations Act (LRA) of 1995, like any other law, was a product of its time. The labour relations system it established was premised on a number of assumptions that seemed valid then, but are no longer so. For example, the organisational rights the LRA provided assume that all workers work in a workplace which is controlled by their employer. This was because most employers did control the places where their workers worked, at the time the law was introduced. Nowadays, however, there are large numbers of workers who do not work at a workplace controlled by their employer.

Similarly, the LRA did not differentiate between different categories of employees (with few exceptions).¹ This was on the assumption, we would argue, that by treating all workers alike it would be providing uniform coverage to all those who labour for others.² However, uniform coverage has not been the result. This is in large part as a result of the increase in what we now refer to as non-standard employment. This includes workers who work at a the workplace of a client, rather than their employer, and who find it difficult if not impossible to exercise their organisational rights for this reason, as we will explain in more detail below. No-one can say exactly how many workers are in this situation.

The amendments to the LRA adopted by Parliament in 2014 go some way toward addressing the situation of workers in non-standard employment. For the first time, the legislation recognises the need for specific provisions to protect certain categories of non-standard employment. However the amendments can be criticised for not going far enough, in that they do not deal with all forms of non-standard employment, as we discuss below. They can also be criticised for the way they deal with particular forms of non-standard employment. Labour broking is of particular significance in this regard, since a call by organised labour to “ban” labour broking in about 2008 is what kick-started the protracted process that gave rise to the amendments. The amendments do not try to implement a ban, but they drastically limit the period for workers can be placed at a client. This was probably also the most contentious of the amendments, and the last to be finalised.³

The amendments to the LRA also have to be read with the amendments to other labour laws, and specifically the Basic Conditions of Employment Act (BCEA), the Employment Equity Act (EEA), as well as a new statute, the Employment Services Act, adopted by Parliament at about the same time.⁴ Where we refer to “the amendments” in general, or the “present amendments”, we mean all the amendments to labour legislation assented to in 2013 or 2014. In the case of the BCEA and EEA, the legislation can be criticised for the way it deals with issues affecting those forms of non-standard employment the LRA recognises.

The fact that it has taken as long as it has to finalise the LRA amendments is not simply because of disagreements between the representatives of organised labour, business and government. It is also because of the particular challenge for our labour relations system which the increase in non-standard employment poses, and because there are no easy answers as to how to meet this challenge. Whatever the short-comings of the present amendments, it does not seem likely they will be rectified any time soon. This likelihood should also inform the approach we take to the amendments.

What approach should trade unions and other organisations who are concerned with the situation of workers take? One approach would be to simply accept the law as amended, and ignore its shortcomings. Yet if the legislation does not deal with all forms of non-standard employment, this would mean focusing only on those forms of non-standard employment which it regulates, at the expense of those forms which are unregulated. The unintended consequence of doing so would in all likelihood be to encourage the growth of unregulated forms of non-standard employment. This is because, we argue, you cannot consider particular forms in isolation from other forms of non-standard employment, and indeed other forms of work.

What we argue for here, rather, is a comprehensive strategy for all forms of non-standard employment. This strategy needs to be rooted in social reality. This means, firstly, accepting that the extent to which regulation is able to shape social reality is limited, particularly in the absence of organisation. Non-standard employment cannot simply be legislated away. Secondly, it means accepting that not all forms of non-standard employment pose the same challenge to our labour relations system, and one at least, we will later argue, may represent a solution (albeit partial) to a situation in which there is not enough work for all those who need work.

The focus of this strategy needs therefore to be on developing appropriate safeguards for the less destructive or comparatively beneficial forms of non-standard employment. At the same time, the focus needs to be on how workers in non-standard employment can best be organised and represented, since without organisations that represent non-standard workers, and forums where they can be heard, there is no way any endeavour to regulate non-standard employment can be effective.

However, any strategy that is seen as accepting, let alone promoting, any form of non-standard employment is bound to be controversial in a South African context. It is obvious that most workers, including those looking for work, would choose standard employment. It may also be argued that by accepting or promoting any form of non-standard employment, you undermine the prospects of full employment in standard jobs. To deal with this objection, it is first of all necessary to understand how the structure of employment has changed, and the challenges this poses for our system of labour relations. Accordingly, this booklet is in two parts.

In Part One, we outline the domestic and global context at the time the LRA was adopted. In doing so, we set out more fully certain key assumptions on which it was premised, in order to demonstrate why these assumptions no longer apply. We

illustrate our argument with three sectoral case studies. We then consider the implications of this analysis for any attempt to regulate non-standard employment.

In Part Two, we are concerned primarily with the legislation as amended, and identifying ways in which its provisions, despite their short-comings, can be utilised. We begin by considering what non-standard employment means, in the LRA as amended. We then proceed to consider the amendments themselves, and their shortcomings. We go on to propose a strategy for particular forms of non-standard employment. Part of this strategy, we suggest, might be the development of charter of worker rights, and a code, setting out not only how the amendments should be interpreted in practice, but also how the short-comings of the amendments may be addressed.

2. Part One

2.1 The context when the LRA was adopted

When the LRA was adopted, South Africa was an industrialised country, with a significant manufacturing sector. The manufacturing sector was the primary base of a trade union movement that had emerged in the late 1970s and 1980s, and by 1990 it also had a significant presence in mining. It was the ability of the trade union movement to bring these important sectors to a standstill that made it powerful. Its organisation in the public sector was miniscule at that time.⁵

A significant proportion of the workforce in manufacturing and mining (amongst other sectors) were in what today would be called non-standard employment. These were the so-called migrant or contract workers, working on fixed term contracts in terms of a migrant labour system. Although it was believed in many quarters that the contract workers would be resistant to organisation, the contrary proved true. Trade unions recruited them in numbers, and in so doing established the principle that labour rights should apply to all workers, including migrant workers. This undermined one of the rationales for the migrant labour system.

With the phasing out of the migrant labour system, it seemed reasonable to suppose that all employment, with few exceptions, would be “permanent”. This is what we now refer to as standard employment, or a standard job: that is a job which is continuous and full time. At the time that the process of deliberations that resulted in the LRA began, it was also taken for granted that workers were employed on the premises of their employer. Labour brokers existed, but no one paid much attention to what they were up to, because this mainly involved placing skilled workers with clients, often on large projects.

The LRA can be seen as consolidating the labour rights that had been established through a process of organisation and collective bargaining, in the late 1970s and 1980s. For present purposes, it is convenient to identify four assumptions which underlie the approach the law has taken:

- Firstly, employment is a reciprocal relationship between an employer who is accountable for the conditions under which workers work, and the workers

who labour for him or her (or it). Nowadays this relationship is sometimes described as “bi-lateral employment”, to emphasise there are only two parties to the relationship. Sometimes it is also referred to as “direct employment”.

- Secondly, there is an imbalance of power between workers in an employment relationship and their employers. Labour rights protect workers in an employment relationship for this reason. Those who work “independently”, on the other hand, are not in need of protection.
- Thirdly, although the employment relationship can take different forms, the standard is employment that is continuous, full-time, and takes place at the workplace of the employer.
- Fourthly, although the primary way to address the imbalance of power between workers in an employment relationship and their employers was through trade union organisation in the workplace, trade unions are most effectively able to do so where they bargain collectively at the level of a sector.

In reality, of course, things were never as simple as this. Even at the time the LRA was adopted, there were ongoing debates about how to distinguish between workers who are genuinely independent, and could not be regarded as labouring for others, and those who were “employees”, to whom the legislation applied. The definition of “employee” in the LRA did not resolve this issue.

More fundamentally, the LRA itself contributed to undermining the notion that employment was a reciprocal relationship, by declaring a labour broker to be the employer of those workers whom it procures or provides to a client. This was despite the fact that there is little that can be described as reciprocal about the relationship between a labour broker and the workers he or she places with a client. In reality, the labour broker is merely an intermediary.⁶

At the same time, in practice, employers remained by and large resistant to collective bargaining at the level of a sector.

2.2 The restructuring of employment in the late 1990s and subsequently

Public sector trade unionism flourished in the post 1990 period, and with it the establishment of a comprehensive system of public sector bargaining councils. However, outside of the public sector, there was no significant expansion of collective bargaining at a sectoral level. In the manufacturing sector, the historical base of the trade union movement, trade union membership has declined. Indeed, in the aftermath of the Marikana massacre, the trade union movement is probably more fragmented than it has been at any point in the last twenty or so years.⁷

Since there is a tendency nowadays to blame this situation on the rise of labour broking, it is important to consider this question more closely. One of the reasons no one paid much attention to what labour brokers were up to before 1995 was that even though they were utilised to by-pass industrial council or bargaining council

agreements, the skilled workers they placed were complicit in this. The perceived “benefit” for the skilled workers was a higher cash wage, for which they forfeited their entitlement to a social wage (by virtue of memberships of pension funds, medical aid and the like).⁸

Soon after the LRA came into force, however, there was a spike in the utilisation of labour brokers in order to place lesser skilled workers with clients. This was surely in response to the introduction of the LRA, and in particular the establishment of the CCMA. Through utilising labour brokers, employers found that they could have workers hired and fired without being held legally accountable. This is not to say, however, that the LRA was the cause, or the sole cause, of the increased utilisation of labour brokers.

Employers in South Africa were also taking a cue from what employers in the global North were doing in the 1990s, especially in countries like the United Kingdom and the United States where trade union organisation had already been rolled back. These employers were restructuring employment relations in one of two ways, or a combination of two ways, depending on the nature of the industry in which they were located. These were as follows:

- The first way involved changing the composition of workforce, by minimising the number employed in standard employment, and maximising the number of temporary and/or part-time workers employed, which are forms of non-standard employment (NSE). We refer to this as casualisation, to distinguish it from the second way in which employment was being restructured.
- The second and more radical way also involves minimising the number employed, but instead of (or as well as) employing workers themselves, employers structure their business so as to utilise service providers or contractors to undertake tasks they define as “non-core”. As a result, legal accountability for the conditions under which each workforce of a service provider or contractor is externalised. Accordingly, we refer to this as externalisation.

Labour broking is thus simply a form of externalisation. Undoubtedly the LRA facilitated the growth of labour broking, not only by designating the labour broker as the employer of workers that it procures or provides to a client, but in failing to limit the period for which workers could be so placed.⁹ The LRA did not, in other words, specify what was “temporary” about a supposedly “temporary employment service”. This, we argue, introduces a legal contradiction which has had two important consequences:

- It permitted these workers to be indefinitely employed. This made it commercially viable for employers to engage supposedly “temporary workers” on an indefinite basis, alongside “permanent workers” doing equivalent work. In the absence of a collective agreement, employers were also able to pay such workers a fraction of what a permanent worker doing equivalent work earned. The result was increased inequality and fragmentation in the workplace.

- Apart from the word “temporary” in the name, there was nothing in the definition of a TES to differentiate it from any other service where a person “for reward, procures for or provides to a client other persons, who render services to, or perform work for, the client” and which persons are remunerated by the client. Accordingly, it can be contended the definition extends to these other services. The CCMA, for example, has held that an employer which styled itself a contract cleaner was in fact a labour broker in terms of the LRA.¹⁰ Conversely, if the definition is not regarded as extending to such other services, it becomes easy for a labour broker to style itself as a service to which the LRA does not apply.

Because of the ease with which labour brokers can convert their businesses into another service, and also because the restructuring of employment which labour broking has been instrumental in bringing about has already taken place, it becomes all the more important to develop a strategy for responding to externalisation. What is driving the growth of externalisation, is a process of industrial concentration. Industrial concentration refers to the well-known tendency in a capitalist system for ever fewer, ever larger firms to dominate production, at both a national, regional and global level. At the global level, industrial concentration is evidenced by the rise of multi-national or transnational corporations (TNCs), including large retailers operating at a global and regional level which determine the prices for which many commodities are sold, and who gets how much in the value chain. In the value chain literature, those who determine who gets how much are called lead firms.

Industrial concentration, coupled with advances in technology, and a global environment in which it is easy for TNCs to relocate their operations, has led to deindustrialisation in many countries, including South Africa. As a consequence of de-industrialisation, the prospects for full employment are diminishing, let alone employment in a SER. Diminishing prospects of employment mean that the one area in which there is scope for competition is the price of labour. At a global level, this competition takes the form of low wage countries undercutting higher wage countries. At a national level, it has resulted in a plethora of contractors and service providers competing with one another for contracts. More often than not this competition boils down to whose wage bill is the lowest. This is the proverbial race to the bottom.

The weakness of labour organisation has facilitated the restructuring of employment relations. This was evident at a global level when, in 1997, the International Labour Organisation (ILO) tried to introduce a convention to regulate what we call externalisation, and which the ILO at the time termed “contract labour”. After unprecedented opposition from employers, the adoption of this convention was frustrated. In the same year the ILO adopted a convention on labour broking. This legitimated what South Africa and other countries had already done, by declaring the labour broker the employer. The proposed contract labour convention was defeated in 1998.

These events at a global level made it difficult for South Africa to consider regulating externalisation or labour broking, when amendments to labour legislation were

mooted in 2000. At the same time organised labour did not push for this, even though it was clear labour broking was undermining our system of labour relations. The only amendment relevant to these developments was the introduction, in 2002, of a presumption as to who was an employee (“the presumption”). However the presumption was primarily intended to address what the ILO has since termed “disguised employment.” This was far too restrictive a concept to be of help to the increasing number of workers who were not protected adequately or at all by the LRA, due to the restructuring taking place.

In the light of the above analysis, the call to ban labour broking was made at least ten years too late. It was also a naïve demand. It focused attention on only one way in which employment has been externalised. It was also not a demand labour could win, given the global context outlined above, coupled with the fact that South Africa is a constitutional state. Even if it had been possible to implement a ban, labour brokers would in all likelihood have been able to reinvent themselves as “services”, as some have already done, and carry out the same activity under another guise.

In summary, the assumptions on which the LRA of 1995 was founded no longer apply to all workers. Employment is increasingly not a reciprocal relationship. Many employers are not truly accountable for the conditions under which the worker labours, except in a formal sense. This is both because lead firms in the value chain determine the margins within which these employers operate, and because of externalisation.

The imbalance of power is far greater today than when the LRA was adopted. However, this can no longer be seen simply as an imbalance between an employer and those whom he or she employs. It is also an imbalance of power between an employer and a client or lead firm that engages the employer to provide goods and services. This in turn has made the notion of a sector, and bargaining at the level of a sector, increasingly problematic, as we shall illustrate in the case studies below. Employment that is continuous, full-time and takes place at the workplace of the employer is the norm for only a section of the workforce. There is a large section of the workforce that is in non-standard employment. There are also more and more workers who are ostensibly independent, yet are in no less unequal relationship than workers in an employment relationship.

2.3 Sectoral case studies

The different ways in which employment has been restructured, and the effects of industrial concentration, can be illustrated by considering three sectors which provide employment to significant numbers, namely manufacturing, retail and local government. Before doing so, it is necessary to point out that accurate data about the extent of externalisation (and specifically labour broking) is hard to come by.

The most important reason for this is that statistical data about employment is collected per sector, and externalisation undermines the notion of a sector. Jobs that are externalised in productive sectors of the economy such as manufacturing or mining are re-categorised as jobs in services, because this is how it suits employers to categorise these jobs even though, in reality, these “services” are an integral part

of the production process, but for which they would not exist. This re-categorisation has in turn lead to inflated claims about job growth, specifically in services. It is likely that many of the “new” jobs supposedly created over the last ten or so years are jobs that were previously performed in-house, as part of the production process, and not new at all.¹¹

Manufacturing

Manufacturing is a sector which has always relied on temporary employment to meet temporary upturns in demand. From the employers’ point of view, however, it may be as feasible to employ additional workers on fixed-term contracts as to engage a labour broker, in order to meet a temporary upturn in demand. It appears that both forms of temporary employment are utilised.

However it appears that all manufacturers now rely on external service providers to provide certain services, such as security, industrial cleaning and transport. As a result, there are now multiple workforces in the manufacturing workplace. As well as the workforce of the manufacturer concerned, which is probably unionised, there are the workforces of a variety of service providers. In some sectors of manufacturing, the number employed by the manufacturer is roughly equal to the former.

The only workers of service providers which are unionised belong to trade unions organising industries such as cleaning and security. These trade unions have implicitly accepted that workers engaged in industrial cleaning, for example, are not part of the manufacturing sector. In effect this has meant accepting a definition of the industry that suits the employers, rather than holding out for a definition of the industry that suits workers.

Manufacturing has been affected by industrial concentration in different ways. In the case of motor assembly, the South African industry is made up of assembly plants that are wholly dependent on the TNCs which own them, or own the license in terms of which motor cars are assembled there. These TNCs represent lead firms in the global value chain. In the case of clothing, the lead firms are generally retailers, which determine the prices at which manufacturers must produce goods. Bargaining in the clothing sector, and the extension of the collective agreement to smaller firms that are not party to the bargaining council in places like Newcastle, has been particularly problematic for this reason. Manufacturers are now “price-takers”, who are not able to compensate for wage increases, by adjusting the prices for which they sell their goods.¹²

In some sectors of manufacturing, the manufacturer contracts someone else to make a component of whatever articles they produce. Sometimes this is done directly, by way of a contract between the manufacturer and the person concerned, in which case it may be described as contracting or sub-contracting. Sometimes it is done through an intermediary. Persons contracted to provide components of articles range from small or medium firms in the formal economy, to sweat-shops and home-based enterprises in the informal economy.

Retail

Employment in the retail sector ranges from workers employed by the large retailers in SERs to street-traders working for themselves in the so-called informal economy. In the formal economy, there has been significant casualization. This is the only sector where casualization has primarily taken the form of an increase in part-time employment. The reason is that the extension of shopping hours makes part-time employment viable. Because part-timers are in continuous employment, it has been possible to organise some of them. Some part-timers in the retail sector have been organised into trade unions, for reasons we discuss below.

The large retailers also utilise labour brokers in certain circumstances, and have externalised certain functions such as security. An externalised function that is specific to retail is merchandising, where an external agency is responsible for packing product on the shelves. Another form of externalisation found in the retail sector is franchising. In the case of franchising, the franchisor, directly or indirectly determines the conditions under which workers employed by smaller retail outlets operate, but avoids accountability for this.

Local government

Employment in the public sector has been restructured as a result of both casualization and externalisation, although the extent to which this has happened is often difficult to determine. As well as the difficulty with data about externalisation already noted, this is because there is no consistent approach, across departments and across provinces, as to how data concerning employment should be reported.¹³ However unlike in the private sector, the employer in this instance is under some obligation to be transparent about the extent of externalisation, since it concerns how public money is being expended.

Local government is a case in point. Waste collection is certainly a local government function, and local government is spending large sums engaging private contractors to do so. But it seems local authorities do not consider themselves obliged to report how many workers are employed by such contractors. The indications are it is a significant number. Attempts to extend the bargaining council agreement to them have thus far been successfully resisted.¹⁴

In cases such as recycling, where it is not as clear-cut whether it is a local authority function or not, it suits local government not to be held accountable for the conditions under which workers engaged in recycling work. However from the workers' point of view, there is a close relation between waste collection and recycling, since the manner in which waste is collected determines the flow of recyclables.

Self-employed waste pickers operating on land-fills belonging to the local authority or elsewhere are an example of workers that are independent but in need of protection. This is most obvious in respect of health and safety, since the nature of their work exposes them to hazardous situations.

2.4 The policy implications

In each sector there is a core of workers in standard employment, and workers in various forms of non-standard employment, as well as independent workers in need of protection. The make-up of the workforces depends on the nature of the sector. It also depends on how the sector is defined. Certain forms of non-standard employment may not be seen as part of the sector. In the local government sector, for example, waste pickers on land-fills, or workers engaged by private contractors to collect waste, are disregarded.

The reason trade unions have had somewhat more success in organising workers in part-time employment in retail is that this is continuous employment. It is therefore relatively more secure than other forms of non-standard employment. In theory, a part-time worker should be as effectively protected against unfair dismissal as a worker in standard employment. In practice, a lot depends on whether a part-time worker is employed for a guaranteed number of hours a week, and for how many hours a week. Currently, part-time employment is primarily confined to the retail sector. The Sectoral Determination gives employers a great deal of latitude regarding the hours for which they may employ part-time workers.

Temporary employment is by definition for a fixed term, and ends when that term expires. It is therefore not continuous, and relatively less secure for this reason. There is a big difference, however, between temporary employment for a longer term (six months or longer, for example) and for a short-term. There is also a big difference between temporary employment as a result of casualisation, where workers are still in a bilateral relationship, and where employment is externalised.

Externalised employment is inherently insecure, insofar as it depends on a commercial contract entered into between a client or core business and the actual employer, be it a service provider or contractor or other entity. If the contract with the client is terminated, the workers employed by that employer may automatically be without a job. In this event, these workers will also have no recourse against the core business. They may not even have recourse against their employer.

Arguably they should have legal recourse, where the contract is terminated on account of their membership of a workers' organisation. This should represent a violation of a constitutional right, to freedom of association. However in practice it is difficult to see how workers or their organisations would ever be able to do so, except in the unlikely event that the workers' employer was party to an action against the client or core business.

The core business is also able to control workers employed by contractors in other ways. In the case of manufacturing, the core business need merely issue an instruction to the service provider or its security personnel to refuse to allow the worker of a service provider access to the premises, in order to get rid of perceived trouble-makers. For the same reason workers are also not able to exercise the organisational rights the LRA provides.

In summary, even though every worker has the constitutional right to freedom of association, as well as the right to form and join a trade union, in practice many workers in non-standard employment find it difficult if not impossible to exercise these rights.¹⁵ The constitution only envisages workers engaging in collective bargaining through trade unions, and a trade union is defined in terms of the LRA as an “association of employees, whose principle purpose is to regulate relations between employees and employers...”¹⁶ This makes it very difficult for any workers who are not members of a trade union to have any voice in any structures or forum our labour relations system creates.

3. Part Two

Where workers are eligible to join trade unions, it may be said that they have themselves to blame for the consequences of failing to exercise their rights to do so. However, the matter is not so simple in the case of workers in non-standard employment. Amongst other obstacles these workers face, may be the fact that the trade union best able to represent them is not willing to accept them as members. In the case of independent workers in need of protection, it is questionable whether the trade union is the appropriate form of organisation, rather than a co-operative or other form of association. Arguably their right to belong to such organisations should be as effectively protected as the right of workers to belong to trade unions.

The objective of this part is to identify the key provisions of the constitution, the LRA and other laws, that may assist in extending organisational and other rights to all workers.

3.1 What is non-standard employment

Non-standard employment is not an exact concept. The term is borrowed from the social sciences, but social scientists are not agreed as to how it should be defined. Non-standard employment is also not defined in the amendments to the LRA, or the amendments to other labour laws, such as the BCEA. The only mention of the term is in the heading of chapter 9 of the LRA, and in sub-sections 21(8)(b)(v) and 32(5A). The former subsection concerns the whether a trade union is sufficiently representative for the purpose of exercising organisational rights. The latter concerns whether a bargaining council is sufficiently representative.

Chapter 9 contains the provision regarding temporary employment services (“TESs”) ie labour broking. As well as amending those provisions, it introduces new provisions regarding fixed-term contracts and part-time employment. These are forms of non-standard employment, but do not constitute the entirety of non-standard employment. This is clear from sub-section 21(8)(b)(v), which refers to “other categories of non-standard employment” in the workplace as well as those already mentioned above.¹⁷

The LRA provides no guidance as to what these other forms of employment are but the BCEA empowers the Minister of Labour to make Sectoral Determinations which prohibit or regulate “home work and contract work” (as well as task-based work and piecework).¹⁸ The amendments to the BCEA have now added “sub-contracting” to

this list.¹⁹ None of these terms are defined, and it is not clear what distinguishes contract work and sub-contracting. However in terms of this analysis these can be regarded as different terms for forms of externalisation. They also provide a basis for arguing that the “other categories of non-standard employment” must be regarded as including externalised employment.

Section 55(4)(k) of the BCEA also permits the Minister to set minimum conditions of employment for persons other than employees, and has done so in the case of the Sectoral Determination for domestic workers. A domestic worker is defined as including “independent contractors”.²⁰ It is not clear whether this provision is constitutional, however. Like the LRA, the BCEA applies only to employees, and specifically excludes independent contractors.²¹ It is difficult to see how a statute that expressly excludes independent contractors can be interpreted as empowering the Minister to make a determination that is binding on them.

Be that as it may, the fact that the BCEA seeks to extend beyond the ambit of the employment relationship strengthens the argument that non-standard employment should be regarded as encompassing workers who are independent, but nevertheless in need of protection. How conditions of employment for independent workers would be enforced would depend on the circumstances of each case. One can, for example, conceive of conditions relating to health and safety being enforceable in the case of waste pickers operating on a municipal land-fill.

3.2 The amendments

The amendments do not attempt to address all the challenges facing our system of labour relations. Most obviously, they do not expressly deal with externalisation, apart from labour broking, although it has been argued that the new section 200B may be interpreted to apply to other forms of externalisation.²²

In terms of section 200B, an “employer” will be regarded as including persons who “carry on associated or related activities or businesses by or through an employer” if the intent or effect of doing so is or has been “directly or indirectly to defeat the purposes” of the LRA or other employment laws. In the event that more than one person is held to be an employer in terms of this section, these persons will be jointly and severally liable for “any failure to comply with the obligations of an employer” in terms of the LRA or “any other employment law.”²³

However, “associated or related activities or businesses” carried out “by or through an employer” seems a particularly convoluted way to describe externalised employment. The forms of non-standard employment to which the LRA clearly does apply, in terms of the amendments, are labour broking, part-time workers and temporary workers in direct employment (which are referred to as “employees with fixed term contracts”). In this regard, there are three new sections which apply to workers earning below a specified threshold, as well as amendments to certain existing sections. The threshold in the three new sections is in each case different, which adds to the complexity of the provisions. Thus:

- In the case of workers employed by labour broker, there is an earnings threshold only.²⁴ This is the same earnings threshold which the BCEA empowers the Minister of Labour to set, in order to exempt certain employees from provisions relating to overtime work and the like.²⁵
- In the case of part-time and temporary workers in direct employment, the same earnings threshold applies. In addition, workers in small enterprises (employing less than 10 employees) are excluded, and also workers in enterprises employing less than 50 employees which have been in operation for less than two years.²⁶
- In the case of part-time workers only, there is an additional provision, excluding workers during their “first three months of continuous employment...”²⁷

Perhaps the most important innovation in these three sections is a principle that, where a labour brokers is utilised, or workers are (directly) employed on fixed-term contracts or a part-time basis, they must be treated “on the whole not less favourably than an employee of the client doing the same or similar work, unless there is a justifiable reason for different treatment.”²⁸ For convenience, this can be referred to as the “equal treatment principle.”

Disputes regarding the application of this principle, as well as any other dispute arising from the interpretation or application of these sections, may be referred to the CCMA to be conciliated or arbitrated “within six months after the act or omission concerned”. Possible “justifiable reasons” for treating non-standard workers to whom these sections apply differently are listed, and include “merit” and “the quality or quantity of the work performed”.

Other significant provisions regarding non-standard workers which the amendments to the LRA introduce, whether by way of amendments to existing sections or by introducing new sections, are as follows:

Labour broking

The LRA now requires all TESs (ie labour brokers), and not only those below the threshold, to provide an employee whom it procures or provides to a client with written particulars of employment that comply with the BCEA. (Actually, TESs were already obliged to do this in terms of the BCEA, but few did so). Further, it is unlawful for such employee to be employed on terms and conditions which are not permitted by labour legislation, or a sectoral determination, or a collective agreement concluded in a bargaining council.²⁹ The issue as to whether a TES is covered by a bargaining council agreement must be determined by reference to the sector and area in which the client is engaged.³⁰ Accordingly, a labour broker providing workers to a client in manufacturing will be regarded as part of the manufacturing sector.

The period for which an employer is entitled to utilise workers provided by a labour broker is drastically limited, as noted. This has been done by introducing the concept of a “temporary service” There are three kinds of temporary service listed:

- where a worker works for a client for a period not exceeding three months;
- where a worker works as a substitute for an employee who is temporarily absent (eg a worker on maternity leave); or
- where a particular category of work is designated as a temporary service in terms of a collective agreement concluded in a bargaining council, or in terms of a sectoral determination, or by the Minister of Labour.

A worker earning below the threshold who works for more than three months for a client is no longer performing a temporary service. He or she is then “deemed to be the employee of that client...and employed on an indefinite basis.”³¹ Further, the termination by the temporary employment service of an employee’s service with the client...for the purpose of avoiding the operation of subsection 3(b) [in terms of which the client is deemed the employer] or because the employee exercised a right in terms of this Act, is a dismissal.”³² It seems as if a worker who is substituting for another employee may be regarded as engaged in a temporary service even though he or she is working in the position for longer than three months, while in the event of a determination by the Minister or bargaining council, a “temporary service” may be for whatever period is considered justifiable.³³

Temporary workers in direct employment

So far as temporary workers in direct employment are concerned, probably the most significant amendment to an existing provision of the LRA concerns the grounds on which a worker can claim he or she has been dismissed. Ordinarily, as noted, a worker whose contract terminates is not regarded as dismissed. The only basis on which he or she could contend otherwise was if he or she “reasonably expected” the contract to be renewed on the same or similar terms.

Now, there is an amendment introducing a new ground in terms of which a worker may challenge the termination of a contract: where the worker reasonably expects the employer to retain him or her “on an indefinite basis on the same or similar terms as the fixed term contract...”³⁴ In theory, therefore, any worker on a fixed term contract can now bring a claim of unfair dismissal to the CCMA. Arguably, it is the relatively high earning employees that are likely to benefit most from this provision, because their contracts are generally of longer duration, and it will be easier to prove such an expectation in such circumstances. The likely outcome will thus be the increased utilisation of the CCMA by high earners.

It is, on the other hand, debatable whether lower earners will gain much from this provision. The worker of a labour broker is employed on a fixed term contract, which is typically defined in terms of a specified task. Although in theory he or she could bring such a claim, in this instance the expectation of indefinite employment would be with the client. It is difficult to see how a claim against a client could succeed. The worker of a service provider would face a similar difficulty. As regards temporary workers who are directly employed and who earn below the threshold, the new section on fixed term contract introduces such a restrictive approach to the entering

into and renewal of fixed-term contracts that it seems implausible that an expectation of indefinite employment could arise.

Thus an employer who offers to employ a worker on a fixed-term contract (or to renew a fixed term contract) must do so in writing, stating the reason it considers it justifiable to do so. In the event of a dispute being referred to the CCMA, the employer must prove that reason was justifiable.³⁵ Unless an employer has a justifiable reason to do so, he or she may not employ workers on a fixed term contract for longer than three months.³⁶ If the CCMA should find it was not a justifiable reason, then the worker concerned will be deemed to be indefinitely employed.³⁷ This will undoubtedly be a significant deterrent to employers directly employing temporary workers.

This highly restrictive approach is in contrast to the very broad definition of a “fixed-term contract”, which includes a contract that terminates “on the completion of a specified task or project”. Task contracts, as they are sometimes called, are frequently utilised by labour brokers, as already noted. They are problematic for workers, particularly where the task or project is a service, since it is the employer (or client, in the case of a labour broker) who determines when the task or project is complete. Consequently, a worker may simply be informed that the task or project is completed, and his employment is accordingly terminated, which is tantamount to termination without notice.

Although the definition of fixed term contract is broad enough to cover workers earning below the threshold in services such as cleaning (“contract cleaning”) and security, the section does not apply to “an employee employed in term of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.”³⁸ There is thus an incentive for an employer wishing to utilise temporary workers to enter into collective agreements with trade unions.³⁹ There can be no objection to such an incentive, if a trade union entering such an agreement in fact represents the affected workers. However, it is a different matter in the case of sectoral determinations. The question that arises here is as to the basis on which a different standard is justified in respect of the same category of worker.

Mention has already been made of the “equal treatment principle”. In the case of a temporary worker, the comparator is with a worker “employed on a permanent basis performing the same or similar work...”⁴⁰ An employer must also provide such employee with the same access to opportunities to apply for vacancies as a “permanent” worker.⁴¹

A worker who is employed on a fixed term contract for a period exceeding 24 months qualifies for severance pay on the same basis as prescribed in the BCEA, ie one week’s remuneration for each completed year of service.⁴² However the worker will not be entitled to severance pay where the employer offers him employment, or procures employment with a different employer “on the same or similar terms”.⁴³

Part-time workers

A “part-time employee” is defined as someone “...who works less than a comparable full-time employee”. A full-time employee is in turn defined primarily “in terms of the custom and practice of the employer”, but not including a full time worker “whose hours of work are temporarily reduced for operational requirements as a result of an agreement.”⁴⁴ This is presumably intended to refer to situations where firms have to work short-time, as well as where a compressed working week is introduced in terms of the BCEA.

The only indication that part-time work is continuous i.e indefinite employment is the provision already referred to, which excludes a part-time worker from the provisions of the LRA during his or her “first three months of continuous employment”. No doubt some sharp employers in the retail sector will contend that this means a worker must first work a cumulative total of three months before the provisions apply.

As already noted, the “equal treatment” principle applies in respect of part-time employment. Here the comparator is “a comparable full time employee doing the same or similar work.....” There is also a further subsection, which states that for the purposes of identifying a “comparable full time employee” regard must be had to the workplace of the part-time employee, or if there is no comparable employee in that workplace, regard may be had to a comparable full-time employee employed by the employer in any other workplace.⁴⁵

The employer of part-time workers must provide access to training and skills development on the same basis as a “comparable full-time employee”, and must all provide such a worker with the same opportunities to apply for vacancies as it provides to those who are employed full-time.⁴⁶

Amendments to BCEA

We have already referred to the amendment to section 55(4)(g) of the BCEA, referring to subcontracting. In the absence of a definition of subcontracting, it is not possible to attach any significance to this amendment. What is significant is the introduction of a new provision prohibiting an employer from requiring or accepting payment “by or on behalf of an employee or potential employee in respect of the employment of, or allocation of work to, any employee.”⁴⁷

The challenge, however, will be to enforce this provision in respect of the category of worker to whom it is most likely to apply, namely self-employed workers. These workers are of course not employees, as defined in the BCEA. An example of the kind of practice which this amendment is arguably intended to curtail is where workers have to pay a daily fee to an intermediary for the “right” to operate as a “car guard” in the parking area of a shopping mall. These workers are also issued with an “official” hat and waistcoat. It is relevant in this regard that the section also prohibits an employer from requiring a worker to purchase any goods or services from the employer.

However, there is no amendment which addresses the hours of work of part-time workers, or which explicitly prohibits or restricts an employer from varying the hours of work, or which prohibits what in the United Kingdom are referred to as a “zero hour contract”.⁴⁸ The BCEA also does not prohibit zero hour contracts. It only stipulates a maximum number of “ordinary hours” a worker may work, and does not clearly preclude an agreement in terms of which there is no set number of hours. There is also evidence that in the retail sector, which is regulated by a sectoral determination, there are workers on zero hour contracts.⁴⁹

Amendments to EEA

If our notions of “employment equity” concerned equity between workers doing equivalent work in the same workplace rather than appointment to managerial positions, then the EEA could potentially be a means of addressing the gross inequities that are the result of externalisation. As it is, the only provision that had any bearing on the question of equity between workers doing equivalent work was section 27. This was headed “income differentials”, and required the employer to submit a statement “on the remuneration and benefits received in each occupational category and level of that employer’s workplace. It also required an employer to “take measures” to progressively reduce any income differentials which are disproportionate.

In terms of the amendments, section 27 is now headed “income differentials and discrimination”. It appears the reference to discrimination is intended to correspond with an amendment to section 6, which envisages that differences in the terms and conditions of employment of workers performing “work of equal value” may give rise to a claim of unfair discrimination.⁵⁰ However the amendments are poorly drafted terms, and in any event, only apply to the employees of an employer. They therefore do not apply to workers of contractors or service providers working for a client, such as the workers collecting waste for local authorities. This is ironic, in the case of local government, since previously it was not a “designated employer”. In terms of the amendments, local government will now be.⁵¹

Even though the EEA does not attempt to address issues of equity between workers of different employers in the same workplace, data regarding the number of workers employed by labour brokers, or on fixed-term contracts, or in part-time employment, would be useful. However it appears the only category of non-standard employment the Department of Labour is interested in, to gauge from the regulations published in terms of the EEA, is “temporary employees.” These are defined as employees who are employed for less than three months.⁵² This definition obviously does not correspond with the provisions of section 198B.

3.3 An evaluation of the amendments

It is clear from the previous section that there are a number of provisions of the amendments that are open to different interpretations.⁵³ However the primary focus of this section is not on the narrower technical problems such as may give rise to litigation in the courts, as on issues of policy. Indeed, it does not appear the amendments are informed by a coherent and sustainable policy. This is evident both

from the issues which the amendments address and those which they fail to address.

The most obvious issue they fail to address adequately is externalisation. If section 200B is intended to address externalisation, it is problematic. This is both because of the convoluted wording already referred to and because, as already indicated, a person is jointly and severally liable only where the “intent or effect” of the activities or businesses he is engaged can be shown to “directly or indirectly to defeat the purposes” of the LRA or other employment laws. It seems highly unlikely that a court will be willing to make such a finding, and is in any event besides the point.

The point is that it should be possible to hold accountable whoever in fact determines a workers conditions of employment, whether in terms of a contract with a service provider or contractor, or otherwise. One of the most serious impediments to establishing who in fact determines these conditions is information. It would have been possible to amend the provisions regarding disclosure of information, to make explicit that an employer is required to disclose relevant information about the terms on which it engages service providers or contractors, for example.

As a consequence of the failure to adequately address the problems externalisation poses, except in the coy references to “other categories of non-standard employment”, the principle of “equal treatment” is considerably undermined. It is difficult to see, for example, how it will be possible for workers of a labour broker to be treated “on the whole” not less favourably than workers of a client doing the same or similar work when, in the same workplace, there are workers of other service provider(s) who are being less favourably treated. The unintended consequence of this and other provisions may be to encourage forms of externalisation not dealt with by the LRA.⁵⁴

The status of this principle is also undermined by the introduction of an earnings threshold. The precedent for doing so was the introduction of an earnings threshold in section 200A of the LRA in 2002, which concerns a presumption as to who is an employee. An earning threshold may well be justifiable in determining who has access to the CCMA, but then it should apply to other rights the LRA establishes, such as rights concerning unfair dismissal and unfair labour practices. However, it is difficult to see on what basis an earnings threshold should apply to a labour right, such as “equal treatment”, or a worker’s employment status, as is the case with section 200A, and the definition of part-time workers or fixed-term contracts.

In this regard, it should be emphasised that workers in non-standard employment are by and large unorganised, and even where they are organised, they are comparatively vulnerable. This is less true for higher paid workers, however. Higher paid workers in part-time or temporary employment, for example, may have had the resources to establish what “equal treatment” means for different forms of non-standard employment, and thereby establish a precedent that benefits workers who are not able to bring test cases.

Part-time employment, we have suggested, is generally preferable to temporary (direct) employment, unless it is for a relatively long term. Temporary (direct)

employment is preferable to working for a labour broker, or an external service provider who provides temporary employment. There are, in other words, trade-offs between different forms of non-standard employment, which a coherent strategy on non-standard employment needs to take into account.

It can be argued that the amendments show some awareness of a potential trade-off between the utilisation of part-time and temporary workers, in that they do not seek to restrict the utilisation of part-time workers to the same extent as temporary workers. This argument is however negated by the exclusion of part-time workers during the first three month's continuous employment. This exclusion is inexplicable, given that the obligations imposed on an employer of part-time workers are hardly onerous. By preventing workers and their trade unions from invoking the "equal treatment" principle during the first three months of a worker's employment, the LRA is in effect giving employers license to treat them differentially. The fact that potentially large retailers could exploit this situation underscores its regressive nature.

In any event, the more obvious trade-off is between temporary (direct) employment as opposed to labour broking. In the situation where a manufacturer has a temporary upturn in demand, it is obviously preferable from the workers point of view to be appointed on a fixed-term contract rather than work for a labour broker. It is not clear why, therefore, the amendments should seek to limit fixed-term contracts to a period of three months, and in addition to impose relatively burdensome formalities regarding the offer of employment and the like.

What makes this limitation even more peculiar is that it is the same period for which workers earning below a specified earning may be employed by a labour broker, without the client being deemed the employer (except in the circumstances already noted above). This can be seen to imply that it is immaterial, from the point of view of the LRA, whether a worker is employed directly or by a labour broker.

If there were a constitutional challenge to the amendments, it would most likely be on account of the limitation imposed on labour broking, which does represent a serious constraint. A good defence to such a challenge, however, would be that it is untenable for the LRA to provide for a temporary employment service without defining what is temporary about it. Here again, the fact that the concept of "temporary service" only applies to workers earning below a threshold undermines this argument. Somewhat absurdly, it implies that workers earning above the threshold are not employed in a "temporary service".

A worker earning below the threshold who is not performing a temporary service for the client any longer, because he or she has worked longer than three months or for any other reason, is "deemed to be the employee of that client...and employed on an indefinite basis."⁵⁵ Further, the termination by the temporary employment service of an employee's service with the client...for the purpose of avoiding the operation of subsection 3(b) [in terms of which the client is deemed the employer] or because the employee exercised a right in terms of this Act, is a dismissal."⁵⁶

The aforementioned amendment will almost certainly give rise to litigation. It is not clear what the termination of an employee's service by a labour broker is intended to mean. A labour broker, like any other employer, can dismiss a worker at any stage, and if there is a dispute, the onus is ordinarily on the worker concerned to prove there was a dismissal.⁵⁷ If the contract terminates due to the expiry of the term, it will not be a dismissal, except in the limited circumstances envisaged in the LRA. It is not clear whether the amendment was intended to change this position. If so, it does not appear the amendment will be effective in realising this intention.

Viewed as a whole, it seems the drafters, or the parties to the legislative process, were not able to make up their minds between two conflicting policy objectives. The one is to craft labour rights for non-standard workers which take account of the nature of their employment, with a view to making certain forms of non-standard employment fairer. This objective is premised on the assumption that non-standard employment is here to stay. In terms of the other objective, all forms of non-standard employment are inherently undesirable. The objective is therefore to make it as difficult as possible for employers to resort to non-standard employment, and to induce them to employ workers in standard jobs. However, this is not realistic, in the context outlined in part 1.

If, however, the objective was to craft labour rights that take account of the nature of non-standard employment, one would have expected a much stronger set of rights for part-time workers. In this regard, we have already noted the failure of the BCEA to require an employer to stipulate the minimum number of hours or days a worker in part-time work is required to work. Related to this short-coming is the fact that the amendments also do not explicitly state that part-time employment is of a continuous and indefinite nature.

If it is accepted that part-time employment is continuous, then part-time workers should be entitled to the same number of days annual leave and sick leave as a comparable full-time worker, at the same salary as they would ordinarily earn. It appears this is not, however, how the legislation is currently interpreted. At least one commentary suggests that part-time workers may only be entitled to annual leave and sick leave on a "proportional basis".⁵⁸ While the "equal treatment" principle may strengthen arguments that this interpretation is incorrect, it remains unclear how the CCMA would interpret the matter.

Perhaps the clearest demonstration that the amendments lack coherence is that the EEA regulations do not require employers to report on the forms of non-standard employment which the LRA provides for, or even acknowledge the existence of part-time employment.

3.4 Outlines of a strategy

The fact that there are, at this juncture, no obvious ways in which to address legally the problems externalisation give rise to, or that the amendments have failed to address burning issues affecting non-standard workers, is first and foremost due to a failure of organisation. Non-standard workers are by and large unorganised. They also have no forums where they can voice their demands.

Trade unions have by and large not succeeded in organising non-standard workers. Where they have done so, their primary concern has often been to secure “permanent” status for these members. Whilst this is understandable in the case of temporary workers in direct employment, the question arises whether it is a sustainable demand in respect of other forms of non-standard employment.

The question also arises to what extent the failure of trade unions to attract non-standard workers is due to a model of organising and bargaining that does not cater for them. Arguably, there is a need for a more experimental approach to organising and bargaining. Coupled with this, there is a need for tolerance and support on the part of trade unions toward other forms of organisation which are, in some sectors, organising workers in non-standard employment, or organising in sectors which have been difficult for trade unions to organise in, such as agriculture and domestic work. Examples are cooperatives and associations bringing together self-employed workers, and NGOs.

These are questions of strategy, and one of the objectives of this document is to identify the steps that need to be taken to implement a comprehensive strategy toward non-standard work. We suggest the following:

Step 1: Information

The primary basis for any strategy must be to obtain better information regarding the incidence of non-standard employment. First and foremost, this means finding out:

- The number of workers in temporary (direct) employment, and the period for which they are employed;
- The number of part-time workers, and the minimum number of hours they work;
- The different categories of externalised employment in the workplace, and the numbers of workers employed in each such category;
- The terms on which service providers and contractors are engaged;
- Within a sector, which categories of independent (self-employed) worker are in need of protection.

The official statistics agency, Statistics SA, is capable of obtaining data regarding the numbers in non-standard employment at the level of the firm, and could in the medium term be engaged to do more regular or thorough firm level surveys in this regard. However it would not be realistic to rely on official statistics in this regard. It remains unclear, for example, how Statistics SA would report externalised employment: is a worker employed by a labour broker in a manufacturing plant in the services or manufacturing sector?

Statistics SA can also not be expected to uncover data about certain forms of externalisation, for example, or independent workers operating in the sector. It may

be, for example, that local government does not wish to draw attention to the extent to which it relies on contractors or external agencies to perform municipal functions. For this reason, and it may not require such contractors or agencies to disclose how many workers they employ, and under what conditions. In the absence of a legislative requirement to obtain these particulars, local government is able to simply say it does not know the answer to these questions.⁵⁹

For trade unions, however, the number of workers in non-standard employment, and the conditions under which they are employed, should be seen as a legitimate issue for consultation or negotiation. This is the case whether or not the employer with whom they are consulting or negotiating is the employer of these workers or not. The principle that an employer is required to disclose information about all categories of non-standard employment in the workplace is established by sub-section 21(8)(b)(v) of the LRA. Although the distinction between “consult” and “negotiate” is not clear-cut, it would be appropriate in the present context for a trade union to consult regarding workers who were not its members and negotiate regarding its members. In addition, there is Section 16 (3) of the LRA. This is a little utilised provision that establishes a right to information for a trade union representing the majority or workers in the workplace. Whenever an employer is consulting or bargaining with a representative trade union “the employer must disclose...all relevant information that will allow the representative trade union to engage effectively in consultation or bargaining.” This information should enable a trade union to assess how and why non-standard employment is being utilised, and to be able to present alternatives, if these are feasible, or to negotiate appropriate safeguards for the workers concerned, if they are not.

In order for trade unions to assess how and why non-standard employment is being utilised, it is important to understand where a given firm or employer fits in the value chain, as well as the sector of which it is part. The value chain concerns the vertical relationship between firms, such as between the motor assembly plants and the plants that supply them with components, and may cut across different sectors. The sector concerns the horizontal relationship between firms or employers engaged in comparable activities, and which may therefore be regarded as competitors. In this booklet, value chain analysis is seen as complementary to a sectoral analysis, rather than in opposition to it.

Step 2: Promoting awareness within trade unions

Not only is better information needed, but there needs to be better dissemination of information within trade unions about the situation of workers in non-standard employment, and particularly about the situation of workers in externalised employment and the self-employed. This will help counter what appears still to be a fairly widespread view that extending labour rights to workers in non-standard employment represents the “thin edge of the wedge”, and will undermine the potential for full employment in standard jobs. As the analysis in part 1 seeks to show, this argument is no longer valid. Full employment in standard jobs as it is currently understood is not on the cards, either in South Africa or globally, in the foreseeable future.

Step 3: Promoting organisation of non-standard workers

The fact that the LRA now requires the CCMA to take into account the composition of the workforce in the workplace when there are disputes of organisational rights is an acknowledgment that the workplace has been transformed, and is in many cases a place in which a number of different employers operate. The introduction of an “equal treatment principle” is an acknowledgment of the problem that this gives rise to. It is a problem that can be addressed through organisation and collective bargaining, where the legislation does not provide a remedy.

There are one of two ways in which non-standard workers can be unionised, where they share the same workplace as the employer of unionised workers (e.g. in manufacturing): either they can be recruited into the same union, or a different union. Workers ought to be permitted to join whatever trade union best represents their interests, and the fact that they have a different employer from other workers ought not to matter. Employers ought to have no say in this decision, which concerns the workers freedom of association. Although they may not want to recognise the right of trade unions to represent certain kinds of non-standard workers, there is nothing new about struggles over recognition.

In services, however, the workplace is often not obvious, and this true for government services as much as any other, as we have already noted in the case of local government. Municipal workers engaged in waste collection may clock-in at a municipal office or depot, but they work throughout the area of that local authority. Other workers doing that work in the same area could likewise belong to the same trade union or a different union. In the case of waste-pickers, it may make more sense for them to form a co-operative. Whatever form of organisation workers elect to belong to, there ought to be organisational tolerance between trade unions and co-operatives.

Step 4: Adopting an experimental approach to representation and bargaining

Where separate trade unions have been established, as has happened with cleaning and security services in many manufacturing workplaces, there is a need for forums at workplace or local level, where workers belonging to different trade unions can bargain with employers over issues that workers have in common. There is arguably also a need to bring other kinds of organisation into such forums. Local government might be an example. The creation of such forums at a local or regional level has been mooted in agriculture, to kick-start a bargaining process.

Although a lot of collective bargaining nowadays takes place at the level of the workplace, or the company, trade unions have for historical reasons been suspicious of the creation of anything resembling a bargaining forum at workplace level. For this reason they have rejected the institution of the “workplace forum” in terms of the LRA of 1995. However what is envisaged here would fulfil an entirely different function, which the workplace forum as currently defined cannot: it would provide representation to workers who are currently are not employees of the person in whose workplace they work, and have no voice in the labour relations system.

Another example of innovative approaches to representation and bargaining have been attempts to re-conceive the workplace, for example by focusing on the retail mall, or a transport hub such as OR Tambo airport.

Step 5: Prioritising direct employment

Where work for a minimum number of hours is guaranteed, part-time employment is no threat to our labour relations system. In a context in which there are limited prospects for employment in a SER, we have argued that part-time employment offers a more secure alternative than temporary employment, except temporary employment for a longer term.

Instead of attempting (unsuccessfully) to hold a line against all forms of non-standard employment, trade unions need to declare unambiguous support for part-time work, where part-time work is viable and subject to appropriate safeguards. A case in point are community care-givers (CCGs) providing home-based care on a part-time basis in the Health Sector. This is an important service which would almost certainly disappear if trade unions were to demand that the workers be employed on a full-time basis.

However part-time work is not possible in all contexts. Temporary (direct) employment is obviously preferable to externalisation, as noted, and the positive aspect of the relatively draconian provisions regarding fixed-term contracts is that they provide employers with an incentive to enter agreements with trade unions to allowing a more permissive approach to the utilisation of this form of employment. However this will only be an option where there is a bargaining council.

Step 6: A charter of rights for non-standard workers

Consistent with supporting part-time work subject to appropriate safeguards, trade unions need to demand that part-time workers be guaranteed employment for a minimum number of hours per week or month, and that the employer is not permitted to vary these hours in circumstances in which it would be impermissible to vary the hours of work of a comparable full-time worker. “Zero hour contracts” should be prohibited. The existing provisions of the retail sector sectoral determination would have to be drastically revised.⁶⁰

These and other demands relating to non-standard employment could be formulated as part of a charter of rights of non-standard workers.⁶¹ The objective of a charter would be to list realisable goals, prioritising those which would facilitate the rights of these workers to organise themselves, and to represent themselves. Even if some of these goals require further amendments to legislation, for reasons discussed in the introduction the focus of a Charter should be on demands that can be realised within the existing legislative framework, or by adopting policies that are consistent with (or not inconsistent with) this framework.

Obviously a charter that was drafted with the involvement of worker organisations would be more credible, and would have a greater impact, than one drafted without

their involvement. A list of issues that might form part of such as charter are listed in an appendix, Appendix A.

Step 7: A code of conduct

The law as amended, despite its limitations, does now recognise that specific provisions are needed in respect of non-standard employment. Employers, to be sure, will utilise spaces in the legislation to advance their own interests. Workers' organisations will need to do likewise, if they are to begin to counter the effects of the restructuring of employment.

One way to try and safeguard workers' interests would be to set out in a document such as a code of conduct not only how the amendments should be interpreted in practice, but also how the short-comings of the amendments may be addressed, whether in terms of labour legislation or other provisions, including the Constitution. The topics or issues included in a code would obviously be closely related to those listed in the charter. There could be one code for all workers in non-standard employment, or there might be different codes, and the code(s) would not only address the LRA and other labour laws, but other legislation also. For example, in the case of workers employed by contractors or service providers engaged by local government, local government legislation and specifically the Municipal Systems Act (MSA) is relevant.⁶² Some issues that might be dealt with in such a code are listed in Appendix B.

Conclusion

The objective of strengthening worker organisation and collective bargaining is consistent, we argue, with the provisions of the Constitution regarding labour relations, and the purposes of the LRA, including social justice and the democratisation of the workplace. Social justice and the democratisation of the workplace are not attainable (we argue) so long as workers in non-standard employment have no place in the labour relations system.

The amendments to the LRA could be a first step to the inclusion of non-standard workers in the system. But this will not happen without organisation, and effective organisation of workers in non-standard employment will not get off the ground without a comprehensive strategy, which is seen to address workers' needs.

APPENDIX A:

A CHARTER OF RIGHTS

The goals a Charter might include, amongst others, are the following topics or issues:

A.1 Information

There must be a simple classification of workers employed in “other categories of non-standard employment” (ie workers who are not covered by the provisions of sections 198 A-C of the LRA): eg workers employed by contractors, service providers, franchisees or licensees and self-employed workers.

Employers (including national, provincial and local government) must disclose which “other categories of non-standard employment” there are in any workplace under their control.

In addition to the above, employers must disclose how many workers there are in each of these “other categories”, and particulars regarding their wages and conditions of employment. Employers must also disclose particulars regarding any contract entered into between the employer in his/her capacity as client and any service provider or contractor he engages, insofar as this contract affects the conditions of employment of workers of that service provider or contractor. In particular, the circumstances in which that contract may be terminated must be disclosed.

The EEA regulations must be amended, to require designated employers to report on “other categories of non-standard employment”, as well as on temporary workers (on fixed term contracts), part-time workers and workers of labour brokers.

Stats SA must collect data regarding the number of workers in the categories of non-standard employment dealt with in sections 198 A-C of the LRA and in “other categories of non-standard employment”, as enumerated.

In each sector, the self-employed workers, or workers forming autonomous associations or cooperatives, need to be identified.

A.2 Freedom of association and rights of organisation

A more permissive approach must be adopted when considering when a trade union is sufficiently representative for the purpose of exercising organisational rights.

The existing definition of workplace in the LRA is an obstacle to the exercise of freedom of association and organisational rights, due to the transformation of the workplace. It must be changed, to facilitate the organisation of workers in services.

Active steps need to be taken by government as an employer to proclaim the right to freedom of association of workers employed by service providers and contractors that it engages, and to create a mechanism for reporting violations of this right.

A.3 Representation and collective bargaining

Trade union policy toward the recruitment and representation of workers in non-standard employment must be reviewed.

Where there is more than one employer operating in a workplace, structures need to be established alongside those that exist for workers in standard employment, where workers of different employers operating in the same workplace can be represented. It must become policy to promote the recognition by employers of self-employed workers in a sector eg by issuing of identity cards to waste pickers by local government. Where such workers have formed associations or cooperatives, these must be recognised, and granted similar facilities to those that trade unions enjoy.

A.4 Part-time work

It must become policy to promote part-time work, on the basis that:

- it is continuous and indefinite; and
- a minimum number of hours or days in a week or month is guaranteed; and
- a worker is able to accept alternative employment for the time that is not guaranteed.

On the basis that part-time work is continuous and indefinite, the “equal treatment” principle must apply when employment commences. Collective agreements must give effect to this principle.

It must become policy that employment without any guaranteed number of hours or days must be regarded as unlawful. The retail sectoral determination should give effect to this policy.

In sectors in which part-time work is feasible, it must be promoted, including steps to promote the recognition and status of part-time workers

The CCMA must monitor how many disputes are referred to it in terms of section 198(C) of the LRA.

A.5 In respect of temporary workers

The use of task contracts must be limited to situations where the task in question is concrete and ascertainable (the painting of a house, for example), and where it is objectively determinable when it is complete.

The CCMA must monitor how many dismissal disputes are referred to it in terms of section 186(b)(ii) of the LRA, and how many of these are referred by workers earning above the threshold set in terms of section 198(B) of the LRA.

The CCMA must monitor how many disputes are referred to it in terms of section 198(B) of the LRA.

A.6 In respect of externalisation and in general

The “equal treatment” principle must be extended to “other categories of non-standard employment” (ie workers who are not covered by the provisions of sections 198 A-C of the LRA).

There must be a procedure to establish whether any person who utilises the services of workers (“user”) without employing them in fact determines, or is in a position to determine, the conditions under which such workers are employed. To this end, there must be full disclosure of all relevant information pertaining to their employment.

Where local government considers utilising an “external mechanism” to provide municipal services, there must be compliance with section 78(2)(b) and (3) of the Municipal Systems Act. In any assessment of “external mechanism”, such as envisaged in the MSA, there must be full disclosure of the contract price to be paid, the number of workers who will be employed, and the wage scales that will be applied.⁶³

Steps must be taken to publicise the provisions of the BCEA about the “selling of jobs”, particularly amongst the self-employed, and amongst foreign migrants.

A.7 A review of the Sectoral Determinations

There must be a review of the process by which sectoral determinations are arrived at, to promote greater participation by trade unions and other worker organisations.

There must be a review of existing sectoral determinations, specifically as regards their impact on workers in non-standard employment. The criteria on the basis of which certain kinds of fixed-term contracts are recognised in sectoral determinations need to be disclosed.

APPENDIX B:

A CODE

The topics or issues dealt with in a Code(s) might include the following:

B.1 Information

A Code would define the “other categories of non-standard employment” (ie workers who are not covered by the provisions of sections 198 A-C of the LRA), and help ensure that these categories were consistently applied, for the purposes of data collection, disclosure of information and compliance with the provisions of section 21(8)(b)(v) and 32(5A) of the LRA.

A Code would stipulate that any trade union seeking to exercise organisational rights is entitled to be informed by the employer concerned as to how many workers there are in non-standard employment in a given workplace, and in which categories.

A Code would stipulate that in accordance with the provisions of section 16 of the LRA, “all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining” includes information as to the value chain of which an employer is part, and the particulars of any contracts entered into with service providers and contractors.

A Code would detail the obligations of local government to maintain data about the number of workers employed by contractors and service providers that it has engaged, in terms of its obligations to “monitor and assess” the provision of such services. Similarly, it would detail the obligations of local government to provide particulars regarding the contracts entered into with such contractors and service providers, and the steps taken by local government to ensure that they comply with labour legislation.⁶⁴

B.2 Freedom of association and rights of organisation

The Code would stipulate that it would constitute a violation of the freedom of association of the workers concerned to terminate the engagement of a contractor or service provider, on account of the fact that his or her workers have joined a trade union or other worker organisation.

The Code would establish guidelines for a more permissive approach in determining when a trade union is sufficiently representative. It would put an end to the practice whereby employers in some sectors (agriculture, for example) set the threshold for rights of access and stop order facilities at fifty percent plus one.

The Code would indicate how a CCMA commissioner should take into account the composition of the workforce in a workplace, in disputes regarding organisational rights. Although the LRA does not expressly say so, it would argue that the presence of non-standard workers in the workplace, particularly “other categories”, should

mean the threshold for rights of access and stop order facilities should be lower than would otherwise be the case.

The threshold for rights of access and stop order facilities should in any event never be higher than thirty percent in any workplace.

B.3 Representation and collective bargaining

The Code would provide particulars as to the kind of structures that can be established to provide representation for workers in non-standard employment, as envisaged in the Charter, without compromising existing collective bargaining forums.

B.4 Part-time work

The Code would provide particulars as to how collective agreements and sectoral determinations can effectively stipulate minimum hours of work.

The Code would specify how to calculate the number of months in which a worker in part-time employment has been employed.

The Code would indicate how the “equal treatment” principle will be applied to leave (annual, sick, public holidays, compassionate leave etc). In doing so it would also debunk the idea that part-time workers are only entitled to a “pro rata” proportion of the entitlement of a full-time worker.

B.5 In respect of temporary workers

The Code would set out the legal basis for limiting the use of task contracts to situations where the task in question is concrete and ascertainable, and where it is objectively determinable when it is complete.

B.6 In respect of externalisation and in general

The Code would set out how the “equal treatment” principle should be extended to workers who are not covered by the LRA amendments.

The Code would set out the legal basis for holding persons who are not employers legally accountable for the conditions of those who work for them, or of those who work on premises controlled by them.

END NOTES

* Labour and Enterprise Policy Research Group (LEP), Institute of Development and Labour Law, University of Cape Town.

¹ The most significant exception is in respect of temporary employment services, or labour broking, as we shall later explain.

² According to Bob Hepple, the originator of the idea that labour law should be uniform in its application is Hugo Sinzheimer, the German labour lawyer. See B.Hepple, 1986. *The Making of Labour Law in Europe*. Mansell, London: 9.

³ Although the amendments to the LRA have been assented to by the President, they have still to be promulgated at the time of finalising this monograph (November 2014).

⁴ The amendments to the BCEA (Act 20 of 2013) were assented to on 9 December 2013. The amendments to the EEA (Act 47 of 2013) were assented to 1 August 2014. The Employment Services Act (No 4 of 2014) was assented to on 3 April 2014.

⁵ See for example the breakdown of the membership of the Congress of South African Trade Unions (COSATU) in 1987-88 in J.Baskin, 1991. *Striking Back: A history of COSATU*. Raven, Johannesburg: 282

⁶ See J. Theron, 2005. Intermediary or employer? Labour Brokers and the Triangular Employment Relationship. *Industrial Law Journal*, Vol 26; 618.

⁷ What I refer to as the Marikana massacre took place on 16 August 2012, and resulted in the deaths of 32 workers at Lonmin PLC's Marikana platinum mine. It is currently the subject of a Commission of Enquiry which at the time of writing is not yet concluded. The sequel to the massacre was a series of strikes and protest actions on farms in the rural Western Cape, and a massive exodus from the National Union of Mineworkers (NUM) on platinum mines, COSATU's largest affiliate at the time NUM. It is public knowledge that COSATU, at the time of writing, is riven by internal conflict.

⁸ See J. Theron, 2005. Note 6 above.

⁹ Section 198(1), LRA of 1995.

¹⁰ See J.Theron, 2008. *The Shift to Services and triangular employment: Implications for labour market reform*. *Industrial Law Journal*, Vol 29, January 2008, 1.

¹¹ See J.Theron, Note 10 above.

¹² See S.Godfrey, 2013. *A Study of Changes and Continuities in the Organization and Regulation of Work with an Empirical Examination of the South African and Lesotho Clothing/Retail Value Chain*. Ph D Thesis, University of Cape Town.

¹³ J.Theron, 2014. *Non-standard Work arrangements in the Public Sector- The Case of South Africa*. ILO Working Paper 302, International Labour Office, Geneva.

¹⁴ J.Theron and T.Perez, 2012. *The Prospects of Decent Work in Municipal Services: Case Studies in Care Work and Waste Management*. www.idll.uct.ac.za.

¹⁵ Section 23(2)(a)-(c) and section 18, Constitution of the Republic of South Africa.

¹⁶ Section 23(5), Constitution; section 213, LRA, definition of "trade union".

¹⁷ There is a similar reference in section 32(5A), which concerns determining whether the parties to a bargaining council are sufficiently representative.

¹⁸ Section 55 (4)(g), BCEA.

¹⁹ Section 8, BCEA: Amendment Act (20 of 2013). For a more detailed discussion on the amendments and the role of the BCEA, see S.Godfrey, 2014. *The Basic*

Conditions of Employment Act Amendments: Enabling Redistribution? *Industrial Law Journal*, Vol 35: 2587.

²⁰ Section 1(1), Sectoral Determination 7: Domestic Worker Sector.

²¹ Definition of employee, section 1, BCEA.

²² See C. Bosch, 2013. The Proposed 2012 Amendments relating to Non-standard Employment: What Will the New Regime Be? *Industrial Law Journal*, Vol 34, July 2013: 1631.

²³ Section 200B(2). This gives rise to a paradoxical situation. Joint and several liability in respect of a failure to comply with the obligations of an employer is much broader than the notion of joint and several liability in respect of labour broking, in terms of section 198(4) of the LRA.

²⁴ Section 198A (2), LRA.

²⁵ Section 6(3), BCEA.

²⁶ Sections 198B (2), section 198 C (2), LRA.

²⁷ Section 198C (2)(d), LRA.

²⁸ Sections 198A (5), 198B (8)(a) and 198C (3)(a), LRA.

²⁹ Section 198 (4B) and (C).

³⁰ Section 198 (4D).

³¹ Section 198A (3), LRA. Concerns have been expressed in some quarters regarding the implications of the term “deemed”. However the identical term was used in the 1983 amendment to the LRA of 1956, that first introduced the concept of labour broking in South African law.

³² Section 198A (5), LRA.

³³ Section 198A (1), LRA.

³⁴ Section 186 (b)(ii), LRA.

³⁵ Section 198B (6) and (7), LRA.

³⁶ Section 198B (3), LRA.

³⁷ Section 198B (5), LRA.

³⁸ Section 198B(2)(c), LRA.

³⁹ Significantly, this incentive does not only apply to collective agreements entered into at a bargaining council.

⁴⁰ Whereas in the case of workers of a labour broker and part-time workers, the LRA require they be treated “on the whole not less favourably”, in the case of workers on fixed-term contracts it states that they “must be treated not less favourably.” This implies a stricter test, although it is not clear whether this was the intention.

⁴¹ Section 198B (9), LRA.

⁴² Section 198B (10), LRA.

⁴³ This does not seem to preclude an offer of a fixed-term contract. See 198C (11).

⁴⁴ Section 198C (1), LRA. It should be emphasized that this definition only applies in respect of workers earning below the threshold.

⁴⁵ Section 198C (3)(a) and (5), LRA.

⁴⁶ Section 198C (3)(b) and (4), LRA.

⁴⁷ Section 33A, BCEA.

⁴⁸ In terms of a “zero hour contract”, a worker is on call for an employer, but the employer is not obliged to provide employment for him or her. There is no set number of minimum hours, and therefore cannot truly be regarded as continuous employment.

⁴⁹ See M.Visser and J.Theron, 2010. Part-time employment and the Mall. Working Paper, Institute of Development and Labour Law, University of Cape Town.

⁵⁰ Section 6(4), EEA.

⁵¹ Section 1, EEA.

⁵² Section 1, Employment Equity Regulations, 2014, Government Gazette No 37873, 1 August 2014.

⁵³ The memorandum that accompanied the bill prior to its adoption is not especially helpful in clarifying the drafters' intentions. For the most part it simply presents a potted summary of what the legislation seeks to do.

⁵⁴ The introduction of a system of registration, as envisaged in section 198(4F), may also encourage this.

⁵⁵ Section 198A(3), LRA.

⁵⁶ Section 198A(5), LRA.

⁵⁷ Section 192, LRA.

⁵⁸ P.Benjamin and D-A. Pretorius, 2011. Commentary on the Basic conditions of Employment Act in SA Labour Law, Juta. BB1-6.

⁵⁹ The functions and powers of local government are set out in Chapter 5 of the Municipal Structures Act, 117 of 1998. Section 76 (b) of the Municipal Systems Act, 32 of 2000, allows local government to provide a service by means of an "external mechanism" including any "licensed service provider", community based organization or "other institution, entity or person..."

⁶⁰ See Visser and Theron, 2010, note 47 above.

⁶¹ Section 233 of the Constitution makes provision for Parliament to adopt Charters of Rights, in order to deepen a culture of democracy.

⁶² Local Government: Municipal Systems Act (32 of 2000).

⁶³ Section 78(3)(c) envisages an assessment of whether the service will provide "value for money", addresses "the needs of the poor" and will be "affordable for the municipality and residents."

⁶⁴ Section 81(1)(b), MSA.

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