Assessing labour market legislation since 1994

Have workers made any gains over the last ten years in relation to labour laws? **Anton Roskam** argues they have, and progressive organisations such as Cosatu should be defending the dispensation in view of the constant attack by forces from the right.

Labour market regulation introduced since 1994 is a marked advance for workers and their rights. I do not back critics who say the Labour Relations Act (LRA) sold out workers because it did not, for example, entrench centralised collective bargaining. Their arguments reflect a misguided approach and underestimate the powerful forces at play in the labour market both internationally and locally which informed what was possible in the context of the early days of our democracy.

WORKER VICTORIES

The advances began with the new Constitution, which entrenches, a number of fundamental rights for workers. The right to lock-out was not entrenched as a fundamental right in part owing to the mass mobilisation and protests of workers.

The various labour related statutes passed after 1994 gave expression to these fundamental rights. The new LRA established the rules of collective engagement between employers and workers in such a way that it encouraged collective bargaining, and in particular sectoral collective bargaining.

The LRA regulates the right to freedom of association; it facilitates the growth and sustainability of trade unions through providing mechanisms for acquiring organisational rights, including union security arrangements; it provides for and regulates collective agreements; it protects workers that are on strike from being dismissed and it provides for effective dispute resolution processes. It also promotes collective bargaining.

The Basic Conditions of Employment Act (BCEA) also constitutes a substantial advance for workers. Obviously the BCEA was not without controversy, especially in relation to the question of the variation of basic conditions or rights. In general, some basic conditions or rights were ring fenced. With some the degree of variation was controlled, and with others variation can only take place with the agreement of a union or a bargaining council. The extent to which the minister of labour may make variation is also controlled.

An important development occurred in November 1999 when the minister of labour under section 50(1) of the BCEA varied the basic conditions of employment of employees in small businesses employing less than 10 workers. The 'downward variation' in respect of these businesses was as follows:

- the maximum number of overtime hours that an employee may work in a week is extended from 10 to 15;
- the rate of payment for overtime work was reduced from 'time and a half' to 'time and a third';
- averaging of hours of work may be permitted by written individual agreement instead of collective agreement; and
- employee's entitlement to three days family responsibility leave was included in their entitlement of 21 annual leave days.

This meant that the floor of rights or basic conditions for employees at small businesses was reduced significantly.

The Employment Equity Act was also another substantial step forward in that it clarified the question of unfair discrimination and set up mechanisms for implementing affirmative action measures.

The biggest problem with the unfair discrimination section is that, unlike the Promotion of Equality and Prevention of Unfair Discrimination Act (which deals with discrimination broadly and not in the workplace), the EEA does not prescribe who bears the onus of proving discrimination.

In regard to affirmative action, the EEA tends to be of importance to upper and middle level employees and not blue-collar workers.

LABOUR RELATIONS REGIME

It was not surprising that following the adoption of the 1995 LRA a review process was instituted in 1999 relating to the so-called unintended consequences of the LRA. The so-called unintended consequences turned out in some instances to be a euphemism for trying to roll back some of the gains achieved by workers.

The initial proposals made by the minister of labour included changes to section 189 dealing with retrenchments, changes to way collective agreements concluded at a bargaining council may be extended, the inclusion of lawyers and labour consultants in the CCMA, the ability to make costs orders in the CCMA and the

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removal of an employee's right to a premium payment for work on Sundays.

In the end, through pressure from the labour movement, the proposals were changed. It is, however, perhaps also important to note that changes in line with so-called greater labour market flexibility were made and included:

- the dismissal of probationary employees;
- section 197, and in particular the right to change the terms and conditions of employees whose terms and conditions are not regulated by collective agreement (who in the main are white-collar workers); and
- pre-dismissal arbitrations.

For the labour movement the key amendments related to retrenchments, section 197 transfers, presumptions about who is an employee and disclosure of information in retrenchment consultations.

FUTURE CHALLENGES

There is and will be increasing pressure on the government to erode these rights and rules in favour of capital in the name of greater labour market flexibility, being investor friendly, job creation and small business.

In order to counteract these proposed erosions the trade union movement must challenge the propaganda and sound bites that are repeated over and over again in the hope that their repetition will ensure their truth. These sound bites include such startling notions as:

- 'The biggest problem that we face in South Africa is that the labour market is too inflexible; for example, if we could only fire people more easily, we would hire more people and thereby create more employment'.
- 'Its too easy for a person to declare a dispute at the CCMA'.
- 'If we could pay our workers less then businesses would hire more people and therefore help solve the employment problem'.

In many instances these kinds of sound bites are, amongst other things, a mask for managerial incompetence. Instead of resolving the problem such as a dispute about an unfair labour practice the employer tries to get rid of it or prevent it from being articulated, which is a sure recipe for industrial strife. These kinds of arguments are also often a smokescreen for employers

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being able to extract greater profits. The proponents of these arguments frequently display ignorance of labour market regulations. Only sometimes are these sound bites a misguided articulation of a genuine problem.

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The problem with many of these justifications is that they lack empirical evidence justifying this course of action. The ideologies behind them do not have the best interests of the working class in mind.

LABOUR MARKET FLEXIBILITY

In a paper presented to the 12th Annual Labour Law Conference in 1999 Professor Halton Cheadle broke the concept of labour flexibility, which in essence refers to an employer's capacity to make changes speedily and at minimal cost, down into three categories.

- The first is employment flexibility. This in turn involves three components: (a) numerical flexibility, which relates to flexibility about the size of the workforce; (b) structural flexibility, which refers to flexibility about how people are appointed and promoted i.e. the work organisation structure; and (c) work time flexibility, which refers to flexibility about when and where a worker works.
- The second category is called wage flexibility, which involves the ability to increase or decrease wages.
- The third category involves work process flexibility, which relates to the ability to change work practices.

Employment flexibility – numerical flexibility

The argument from the neo-liberal camp is that the law of unfair dismissal contained in the LRA puts a brake on the employment of new employees because the provisions of that chapter make it more difficult to dismiss an employee. I do not know of any empirical study that proves this startling assertion.

In my view the law relating to probation does not have a significant impact upon blue-collar workers, and if the law relating to probation still remains a problem, and this problem can be properly demonstrated, then perhaps the labour movement should consider accepting further relaxations on the procedural requirements relating to dismissals of probationary employees provided employees are guaranteed the right to refer their disputes to the CCMA and have them adjudicated there.

The second argument is that there is great difficulty in dismissing employees for operational requirements so that employers do not hire employees when the operational need arises. The logic of the assertion is dubious to say the least. Our recent history and the thousands upon thousands of workers who have lost their jobs through retrenchments is testimony to the ease with which retrenchments can take place.

In any event, even if this argument were correct, as Cheadle points out if employers do not know how long they may need employees they can always offer fixed-term contracts.

The rise of casualisation, labour brokers and temporary employees is testimony to the

second argument being erroneous. The extent of this casualisation and the use of labour brokers is itself a problem affecting the welfare of working people and something that I believe requires greater regulation.

The third argument is that 'it is costly to dismiss – transaction time (disciplinary hearings, CCMA hearings, meetings with lawyers, Labour Court hearings) and the actual costs (legal, settlement or compensation)'. As Cheadle correctly and rather bluntly points out: 'If the employer wishes to avail himself of the state machinery that costs nothing directly, it must be then prepared to expend the transaction time.'

It is also important to question whether the costs of the CCMA and the Labour Court are out of kilter with other legal processes. I know of no empirical study that proves this point. There is, nevertheless, certainly a perception that the CCMA and its processes are not kind to small employers. Examples are quoted of long delays, postponements and requirements that a small employer attend the CCMA many times drawing the entrepreneur away from valuable productive time at his or her business. Again it is difficult to establish the real cause of the problem: Is it the CCMA or is it the employer?

Employment flexibility – structural flexibility

Structural flexibility deals with the way employees are appointed and promoted. In general the only two aspects of South African legislation that regulate this are the prohibition of unfair discrimination, which in the EEA is extended to applicants for employment, and the prohibition in the unfair labour practice definition of unfair conduct relating to promotions. There is, besides this, complete flexibility and none of the rigidities that one sees, for example, in the American labour market are apparent in South Africa.

There may be further regulation that is agreed to by employers in collective agreements or set out by employers themselves in policy documents, which they are required to adhere to, but in this case they have developed such policies or agreements out of their own volition and they should take responsibility for their own actions.

Employment flexibility – work time flexibility

Working hours are determined by way of individual or collective agreement, except that agreements must comply with the floor of minimum rights in the BCEA or a sectoral determination issued by the minister of labour in terms of the BCEA.

There is no specification in law about what the nature of the shifts should be – for example, should it be a two or three shift system - provided they fall within the parameters set or exemptions allowed by the BCEA. Working hours must be determined by agreement, as is the case with all contracts, although often employers are now trying to determine them unilaterally or with the threat of dismissal.

It is important to note that exemptions have already been granted to small business and I refer in this regard to the exemptions granted in November 1999. It seems that this exemption was granted without any evidence of the need for these exemptions. I anticipate that a further downgrading of the floor of rights with regard to work time arrangements will be proposed.

Wage flexibility

Wages are determined by collective or individual agreement and collective bargaining. There is, unlike other countries, no minimum wage, except that in certain sectors, which are usually sectors where workers have little bargaining power and may be vulnerable to unacceptable levels of exploitation, the minister of labour deems it necessary to issue sectoral determinations specifying minimum wages and terms and conditions of employment.

Collective agreements concluded in a sector may be extended to non-participants. These collective agreements generally set minimum wages and terms and conditions of employment. There is therefore flexibility upwards. As regards downward flexibility the LRA requires all collective agreements to have exemption mechanisms built into them so that employers can apply for exemptions. The vast majority of exemption applications to bargaining councils are in fact granted.

Section 30(1)(b) of the LRA requires bargaining councils constitutions to provide for the representation of small and medium enterprises on the council.

I suspect there will be further attacks on the ability of parties to extend collective agreements to non-participants. In the run-up to the 2002 amendments there were calls for the minister of labour to be granted a greater discretion with regard to the extension of collective agreements to non-parties and for such criteria such as job creation to be introduced into the evaluation of whether or not an agreement should be extended. I believe trade unions should oppose the introduction of subjective criteria of this nature, which are not easily evaluated.

Work process flexibility

Work process flexibility, which deals with ability to change work practices, generally falls in our law within the area of managerial prerogative, which in essence provides for comprehensive flexibility. It is within workers' rights to declare disputes about such matters, and to demand agreements relating to these issues. No one should be excluded from campaigning for such demands.

OTHER KEY ISSUES FOR THE FUTURE

Aside from concerns around the legislation, including the Skills Development Act, the effectiveness of some key labour market institutions needs to be addressed. These include the following:

- The Labour Court and status of Labour Appeal Court.
- The CCMA - In the main I believe the CCMA is an efficient body. This is not to say that it is without problems. In certain regions more attention has to be paid to the efficacy of the CCMA processes and the quality of its commissioners. It is important that a proper investigation is made of the functioning and efficacy of the CCMA. I do not believe that poor efficacy and functioning of such an institution should be allowed to justify

the erosion of workers' rights.

- Section 189A of the LRA is an unhappy compromise and is a cumbersome section mainly because of the nature of the deal struck at Millennium Labour Council (MLC) and Nedlac about this matter. I believe that it will in the long run promote technical litigation. The core issue – the balance between the employer's right to change the operation of his or her business and the work security of its employees – remains a debate. It will not be decisively resolved through legislation. I do not foresee the social partners being able to strike an all-encompassing resolution to this debate.
- Section 187(1)(c) of the LRA – see p66.
- Employees and independent contractors - The 2002 amendments to the BCEA and LRA ushered in an important amendment relating to the presumption of who is an employee. This has stemmed the tide of crude attempts by employers and employer organisations, notably COFESA, to redefine employees as independent contractors. The effect of being an independent contractor as opposed to an employee is that the worker falls outside the ambit of labour legislation and therefore cannot claim its protections. The 2002 amendments were a good advance, but the attempts to redefine employees as independent contractors will continue. The next phase of this issue will be the establishment of a code of good practice. Government has circulated a draft code of good practice. This code could be an important instrument that further strengthens and protects employees and vulnerable workers from the unscrupulous actions of employers. Cosatu should therefore thoroughly engage with this document.
- Atypical workers - A key issue for the future relates to atypical workers (see p27) This issue has been on the agenda for some time, but it seems that South Africa has been slow to develop regulations around it. Atypical workers are vulnerable workers. This issue deals with the quality of an employee's job and a person's long-term job security. I anticipate that regulations relating to such workers will be resisted in the name of possible future investment in the country and in the interests of small and medium businesses.

On the legislative front it may be possible to explore the following:

- Casual or temporary employees in certain sectors should be guaranteed a minimum amount of pay. If temporary employees are called in for some Saturdays in a month and they are not sure which Saturdays, and how many they will be called in for, then they must be guaranteed at least some pay per month irrespective of the number of Saturdays they are called in for. This allows employees to be guaranteed some kind of income and to gain some kind of security. As regards short fixed-term contracts (i.e. temporary workers) there should be some indication, as I believe there is in the Dutch legislation, that if an employer enters into a number of consecutive temporary employment contracts then such arrangements convert themselves into permanent arrangements. In the definition of dismissal there is a presumption that if a person was given a reasonable expectation of continued temporary employment and that expectation is not fulfilled then that it may amount to a dismissal. This is not sufficient.
- Labour brokers - The rise in the use of labour brokers is dramatic. What are the issues that Cosatu should consider in discussions on the regulation of labour brokers? In my view further regulation is necessary. It is important to note that already in terms of section 198 of the LRA and section 82 of the BCEA the client is jointly and severely liable with the labour broker in respect of basic conditions of employment, the provisions of sectoral determinations, the implementation of arbitrations and collective agreements concluded at a bargaining council that regulates terms and conditions of employment. In essence what the LRA and the BCEA do is extend the liability of the labour broker to the client. But this has proved insufficient. Regulation of the relationship between the labour broker and the client is necessary so that the relationship cannot be used to undermine basic labour rights. Another area that I think is important to consider is whether section 197 of the LRA should be made applicable to the situation where a client brings in a labour broker. It is arguable in certain circumstances that the use of a labour broker does not involve a transfer of business as a going concern. Perhaps it is necessary to circumvent this debate by making section 197 explicitly applicable. This will inevitably mean that at least upon the transfer of the employees to the labour broker the employees will be guaranteed the terms and conditions of employment that existed while they were employed by the client. It may also have the effect of increasing the cost of using a labour broker. Besides these kinds of legislative interventions, Cosatu needs to look at organisational campaigns in relation to labour brokers, which have the effect of increasing the cost of using these labour brokers. There is no reason why a trade union cannot strike in relation to the use of a labour broker. This may have the effect of discouraging employers from using unscrupulous labour brokers.

CONCLUSION

This article has given a brief assessment of labour market regulation and some of the key challenges facing workers in the foreseeable future. Some of these challenges may be resolved through changes to the legislation, others in the way in which labour market institutions are run and administered. Some are not capable of legislative solution and require sophisticated and powerful organisational campaigns.

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This is an edited version of a paper presented by Roskam at Cosatu's conference to celebrate ten years of democracy. Roskam is a practising attorney and director of Cheadle Thompson Haysom Inc. (CTH). The views expressed in this paper are the personal views of the writer.