Labour rights for brokered workers?

Are informal, brokered and illegal workers protected?

Most people believe that labour broker workers have no rights. **Urmilla Patel** however outlines some recent judgements which give some protection. She also outlines that illegal, informal, undocumented and home workers have rights if they can prove that they are employees.

The labour rights of informal and undocumented workers and those doing illegal work will depend on whether they can be termed 'employees'. In order to assess what labour rights they have, we need to look at the definition of an employee in the Labour Relations Act (LRA) and in the Basic Conditions of Employment Act (BCEA). These laws define an employee as 'any person, excluding an independent contractor, who works for another person or the State and who receives or is entitled to receive remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer.'

So who is covered by this definition? The exclusion of independent contractors means that the self-employed are excluded from the definition of 'employee'. But whether a person is employed by another, or self-employed, is an increasingly grey area particularly in the area of informal workers. Informal workers are workers who are not employed by a single employer and are not in full-time permanent employment.

What about workers who do not have the legal status to work in South Africa or who are doing illegal work? Are these workers 'employees' in the eyes of the law and are they entitled to protection under labour laws?

WHAT IS AN INDEPENDENT CONTRACTOR?

If a worker needs protection under the law, the law has to determine if s/he is an independent contractor or not. Section 200A of the LRA says that if a worker earns less than R149 736 per annum or R12 478 per month and any one of the factors below apply, then the person is presumed to be an employee and can claim rights. These factors are:

- if the work is subject to the control of another
- if there is control over the person's hours of work
- if the worker forms part of the organisation
- if the worker has worked for the same person for at least 40 hours per month over the last three months
- if the worker is economically dependent on the person for whom s/he works
- if the employer provides the worker with tools of the trade or work equipment
- if the worker renders a service to one person only.

The onus is on the employer to prove that the worker is not an employee if the above factors are present, and the onus is on the employee to prove s/he is an employee when these factors are absent. In both cases the courts or an arbitrator will use the 'dominant impression' test to decide if the worker is an employee or not.

There is a Code of Good Practice on the issue of who is an employee and the court or arbitrator must take this into account. The Code emphasises that the judge must look beyond the wording of the contract to determine the true relationship between the parties.

A contract often aims to disguise the true relationship of employment. So, for example, when a worker is induced to enter an 'independent' contract with the employer as in the case of an owner-driver, but the relationship with the employer does not change, the judge or arbitrator will still see this person as an employee.

Generally, an employee renders a personal service for a set time while an independent contractor is engaged to produce a specific result in a specific time.

Durban Asiye Etafuleni

Informal workers in a Durban market.

INFORMAL WORKERS

Informal workers include part-time, temporary, labour broker workers, casuals, home workers and contract workers. They are often unskilled, vulnerable to abuse and exploitation, largely not unionised and are often not covered by collective bargaining. They often have less favourable conditions of employment and lower job security. In South Africa and elsewhere there has been a big increase in informal workers compared with those in the formal sector.

The labour rights of informal workers will depend on whether they qualify as employees.

If they qualify they have the usual rights to approach the Commission for Conciliation, Mediation & Arbitration (CCMA), bargaining councils, Labour Courts and the Department of Labour (DoL). If the worker does not qualify as an employee then his/her only redress lies in the law of contract.

Contract or fixed-term workers

A contract worker will qualify as an employee. An employer's refusal to renew a contract if the worker has a reasonable expectation of renewal will probably be seen by the court as an unfair dismissal.

In contracted worker cases the LRA and BCEA apply and the worker can approach the CCMA, Labour Court, or bargaining council in cases of unfair dismissal or unfair labour practices. A contract worker can also go to the DoL if the employer does not comply with the BCEA on issues such as overtime pay, annual leave or family responsibility leave.

Labour broker workers

A labour broker worker is an employee of the labour broker. These employees are often deprived of the benefits of labour legislation because their contracts normally state that if the client no longer needs their work the contract of employment automatically terminates.

The contact is designed as a fixed-term contract with the termination date linked to the client's requirements. The client is under no obligation to give reasons for the termination of a contract and the employee has no right to state his/her case or refer the dispute to the CCMA or bargaining council.

Recent judgements have however reversed this.

For example: in *Cosawu obo Nyakza v Prestige Cleaning Services* (CCMA) the commissioner found that section 5 of the LRA applied. This section says that any provision in a contract which has the effect of preventing an employee from exercising a right in terms of the LRA is invalid.

The Commissioner found that the clause in the contracts providing for automatic termination of service deprived the employee of protection against unfair dismissal in terms of the LRA. The Commissioner therefore found that the employee was unfairly dismissed.

So labour broker employees who find their services terminated by the client should claim unfair dismissal. However, the labour broker can then fairly retrench the worker on the grounds that there is no further work.

Part-time workers

Part-time workers may qualify as employees if they are employed on a regular basis. If however they work less than 24 hours per month, they have no entitlement to the rights under the BCEA such as annual, sick, maternity or family responsibility leave, notice of termination or severance pay. This might affect, for example, domestic workers who are employed by different employers in a week for less than six hours a day. This also applies to casual and temporary workers.

Home workers

Home workers may qualify as employees based on the dominant impression test. They may be an employee or an independent contractor.

Informal sector

What about those working in the informal economy – are they employees entitled to protection or not, for example; the person selling fruit or goods at the traffic lights? This person may source and sell his/her own goods and be self-employed or he/she may be employed by another to sell for him/her.

Where the person is employed by someone else, labour laws protect

this person but there is a problem of enforcement. These employers are hard to pin down and hard to force to give their workers proper rights and in most cases the employer does not register their workers with the Unemployment Insurance Fund (UIF).

However, *sectoral determinations* now lay down *minimum wages* and conditions of employment in many sectors that were previously viewed as informal. For example domestic, farm, forestry and taxi workers and waiters and kitchen staff in the hospitality sector. These minimum wags can be enforced through the DoL.

Undocumented foreigners

Section 38 of the Immigration Act prohibits a person from employing a foreigner without the necessary permit to work legally in South Africa. In *Discovery Health Ltd v CCMA & others* (2008) the employer dismissed an Argentinean when his residence permit expired. The court ruled that the contract of employment was not invalid even if the worker was an 'illegal alien'. It found that the worker qualified as an employee in terms of the LRA even though the contract under common law did not recognise him as an employee. This means that the LRA takes precedence over other laws.

This would apply to any undocumented foreigner such as for example an illegal refugee who works for another person. As an employee s/he is entitled to protection under the LRA and rights under the BCEA. However, the undocumented worker is limited to claiming compensation rather than reinstatement in the case of unfair dismissal as the courts cannot give rights where the contract is illegal or invalid.

ILLEGAL WORK

Illegal work occurs when a person performs that which is against the law such as sex work.

In the case of *'Kylie' v CCMA & others* (2010), Kylie was a sex worker who was dismissed from a massage parlour. The CCMA ruled that it had no jurisdiction over her dismissal as the subject matter of the contract was unlawful.

On review, the Labour Court ruled that Kylie was an employee in terms of the LRA definition, but it could not give her relief as this would be sanctioning illegal activities.

Kylie appealed to the Labour Appeal Court (LAC), and claimed that the Labour Court had disregarded her constitutional right to fair labour practices. The LAC accepted that illegal contracts are void, but there was still an employment relationship. This meant that her case fell within the scope of the CCMA and it could arbitrate on the matter.

The LAC also held that the state was bound to safeguard employees who were vulnerable to abuse and exploitation such as sex workers. The court said it did not intend to sanction sex work, but rather to uphold the rights, dignity and safety of sex workers.

The court further held that sex workers did not have the right to participate in trade union activities or to bargain collectively. Redress for unfair dismissal would be limited to compensation possibly only for procedural unfairness.

It remains to be seen if the courts will apply the same interpretation to other forms of illegal work such as a person who works for a drug dealer, or car hijacking syndicate. If the worker argues that s/he is part of an unemployed vulnerable class subject to exploitation, the same reasoning may apply.

Another example of illegal work occurred in *SITA (Pty) Ltd v CCMA & others* (2008) in the LAC. In this case an employee worked for a front company of the South African National Defence Force (SANDF). He was retrenched and then rehired through the mechanism of a close corporation as the regulations did not allow him to be rehired.

When the SANDF cancelled the project, they also cancelled his contract and he was effectively dismissed. The court looked at whether an employment relationship existed and ignored the contracts. They found there was an employment relationship and the SANDF was ordered to pay him compensation. Reinstatement was not possible due to the illegal nature of the contract. LB

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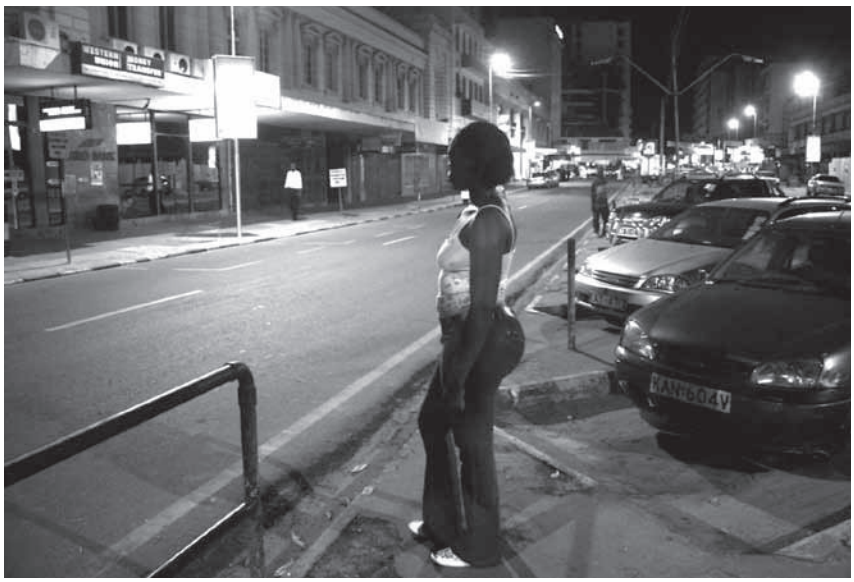

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