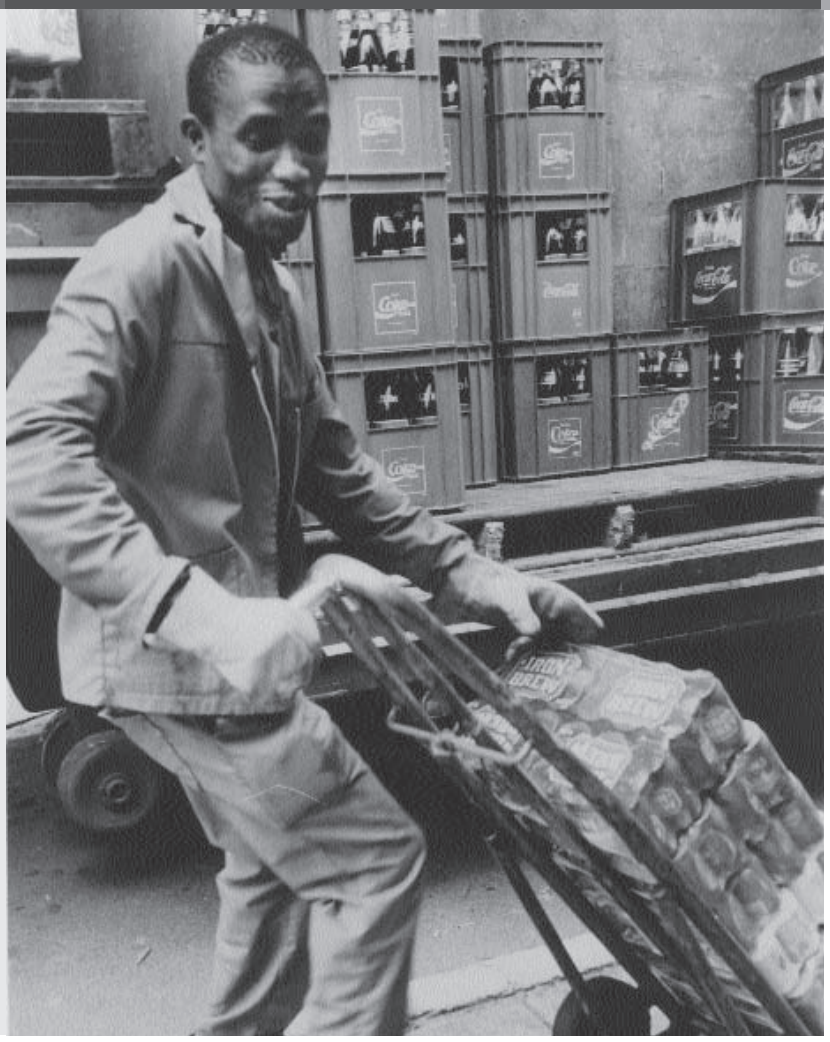
Labour's casualisation cancer spreads

The emergence of 'atypical' or 'non-standard' employment is worrying the labour movement and policy makers. This is an edited version of the **Department of Labour's** official report on the findings of four research papers that were prepared as part of the research project on 'the changing nature of work and atypical forms of employment'.



The Department of Labour is worried that, despite a largely 'new' labour market regulatory framework put in place since 1994, which has by all accounts vastly improved conditions for workers, new casualisation trends are likely to affect workers negatively and contribute to insecurity in the labour market. Such concerns are shared internationally.

WHAT IS ATYPICAL WORK?

The report, defines 'atypical' as workers in formal employment who do not fit into the (perceived) norm of permanent, full-time workers, whose employer owns their workplace. By extension, atypical workers include:

- temporary or casual workers;
- workers in outsourced or subcontracted work or who are supplied by labour brokers;
- part-time workers; and
- home workers.

We refer to the process by which employees are deprived of their workplace rights as 'casualisation'. This is the process where employment relations deprive employees of their basic statutory and constitutional rights.

Casualisation is not synonymous with 'casual work'.

The research indicates that three inter-related processes are generating the increase in non-standard employment: casualisation, externalisation and informalisation. Externalisation, refers to the process by which employment regulated by a contract of employment is being displaced by employment that is regulated by a commercial contract. Casualisation groups together part-time, temporary, seasonal and casual work while externalisation refers to outsourcing, subcontracting, home working and the use of 'temporary employment services' (TESs). Informalisation refers to the process by which employment is increasingly unregulated, in part or altogether

THE EXTENT OF ATYPICAL WORK

Casualisation is not a new phenomenon. High levels of casualisation and vulnerability have been traditionally found among significant groups of South African workers such as farm workers, domestic workers, home workers (often described as outworkers), and security guards, amongst others. But recent surveys show that there has been a growth in atypical work and casualisation:

- Sixty percent of manufacturing firms indicated that they had increased their use of atypical workers between 1990 and 1995, in a survey undertaken by Horwitz and Erskine.
- A recent study of metal and engineering industries, which account for about a third of all manufacturing in the country, found that between 1999 and 2002 the number of workers contracted through labour brokers has increased from 3% to 10% of total employment and that atypical employment has been the primary driver of employment growth between the period 1999-2002.
- The South Africa Establishment Surveys, which were conducted in the Greater Johannesburg Metropolitan Area (GJMA) in 1999 and the Durban Metropolitan Unicity (GDMA) in 2002, further confirm the high proportion of both large and small firms that employ atypical workers.
- The Labour Force Survey (LFS), conducted by Statistics South Africa in September 2003, suggests that more than 20% of all employees, or 2 million workers, could be described as being in 'atypical' forms of employment (i.e. casual and temporary employment).
- A sectoral breakdown of the survey results indicates that the sectors with highest proportions of their workers being 'atypical' include construction (56%), agriculture (30%), wholesale and retail trade (26%), and transport (24%).
- There are disturbing trends emerging in the mining, construction and retail sectors.
- In the mining industry, the subcontracting of a number of mining activities, including so-called core and non-core functions, has become more prevalent since the 1990s.
- In construction, there is the new phenomenon of labour only subcontracting (LOSC). LOSCs vary from an employer (usually an artisan) with three or four employees to operations with 20 to 30 employees.
- In the retail sector, there is a general practice of stopping appointing cashiers and packers as permanent full-time employees. Over the last two decades employers in the retail sector have increasingly relied on various forms of 'casual' employees, specifically part-time employees, to staff their stores during peak periods, holidays, on weekends and for late night shopping. Many of these tend to be female. Stores have outsourced many certain non-core functions such as security, cleaning, maintenance, canteen services, logistics and distribution (transport). The subcontracting of merchandisers became a major trend. Hence, these merchandisers (or shelf packers) are no longer employed by the retail firms, but are engaged by the suppliers of goods. As a result while these workers, who tend to be male, work on the premises of retailers, they are not employed by them, but by a number of suppliers instead.
- Companies involved in labour broking range from relatively large entities such as Adcorp Holdings, Logical Options (who own Kelly's) and Teamsters Recruiting Services, to smaller companies and even the so-called 'bakkie brigade' (comprising brokers who procure labour from street corners and outside informal settlements).

WHY ARE FIRMS OPTING FOR CASUALISATION?

Research seems to suggest that there is evidence that firms are opting for 'casualised' workers both as a response to competitive pressures and also as a reaction to increased regulation, post-1994, in the SA labour market.

Firms are beginning to utilise labour in increasingly diversified and selective ways in an effort to benefit from the resulting flexibility this offers. Some forms of atypical employment, such as the employment of casual or temporary workers, allow for greater numerical labour flexibility, which enable companies to meet fluctuating demands competitively. Other forms of atypical employment, such as sub-contracting or various forms of 'externalisation', also allow both the contractor and sub-contractor to focus on core business and raise efficiencies though functional flexibility.

The view that firms are opting for casualisation in order to benefit from greater flexibility is also reflected in the results from the survey of manufacturing firms in the Greater Cape Town Metropolitan Area. Apart from the move to 'atypical' employment as a way to improve competitiveness of the firm, it is evident that it has also been a reaction to the post-1994 labour market regulatory framework. The research indicates that management has, often, reacted to the new labour law architecture, designed to protect workers and introduce dynamic economic efficiency, by avoidance or circumvention.

Hence, while some forms of atypical employment can be rationalised economically, it is also clear that atypical employment is used to avoid the 'hassles' of dealing with labour. This could be seen as indicative of the wider failure of business in South Africa to come to terms with the new dispensation and contribute wholeheartedly to national economic development.

THE IMPACT OF ATYPICAL WORK

Analysis based on the September 2002 LFS indicates that often atypical workers earned considerably less than permanent workers. Over 40% earned under R500 a month, compared to 10% of permanent workers. Moreover, only 11% of casual and temporary workers earned over R4 500 a month, compared to 33% of permanent workers. In

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addition, the September 2003 LFS confirms that these workers are much less likely to belong to unions, get paid leave, belong to retirement funds or have UIF paid on their behalf.

In construction we found that LOSC has had a huge impact on minimum conditions of employment. In general LOSC do not comply with labour legislation or bargaining council agreements. Wage rates are therefore set unilaterally and there is no limit to hours of work. There is, furthermore, no holiday pay, sick pay, notice pay, etc.

Besides the direct impact of LOSC on the conditions of employment of workers engaged in such arrangements, the growth of LOSC has placed increased pressure on the formal part of the industry to lower standards.

In mining we found that levels of subcontracting seem to have stabilised at about 10% of the workforce, and that the impact on conditions of employment also varies from contractor to contractor. Generally, however, evidence suggests that employees of contractors are paid lower wages than regular employees. They also tend not to have access to similar benefits.

In the retail sector we found similar trends. In addition, employment security for permanent workers as well as 'casual' workers is undermined by the growth of 'variable hour employment'.

It is much easier to get rid of 'casual' workers without due process. One way of doing this is to reduce the number of hours worked by such workers as a form of discipline. In the absence of a guaranteed number of hours per week or per month, it is hard to prove that such an action constitutes victimisation.

The use of labour brokers and the growth in 'triangular' employment relationships has also had various negative effects. In the presence of labour brokers a lot of uncertainties arise as to who is the 'real' employer. A recent study for the ILO, between 1997 and 2001 there were 39 arbitration awards handed down by the CCMA in cases involving dismissals of farm workers recruited by agents. In the majority of cases, the dismissals were found to be unfair, but most of the cases were then dismissed for jurisdictional reasons, including on the grounds that it had not been established that the employment relationship was with the defendant employer. More recent research by Theron et al (2004) confirms these trends.

In sum, it appears that casualisation is contributing to growing vulnerability and insecurity in the labour market. The research identifies the following groups of workers vulnerable as a result of atypical employment:

- Casual or temporary workers who remain perpetually in this status (and with inferior wages and conditions), or 'permanent casuals'.
- Workers who are employed on a part-time or casual basis to remove the obligation on the part of the employer to provide benefits.
- Casual or temporary workers who accept whatever terms and conditions offered by employers because they hope to be given a permanent contract in the future.
- Casual or temporary workers who are not unionised because of their precarious employment status.
- Sub-contracted or brokered workers whose pay and conditions are lowered as a result of the new employment relationship (while performing the same work).
- Sub-contracted or brokered workers who are not unionised because of the difficulty of organising these employees.
- All workers to the degree that atypical employment can be used - within a context of high levels of unemployment - to undermine the ability of workers to bargain with employers on a 'level playing field'.

The research shows that atypical workers often face:

- less job security and worse pay than permanent workers;
- difficulties in obtaining minimum standards set in the BCEA and, on dismissal, unfair labour practices and organisational rights, in the LRA;

- difficulties in joining unions because their conditions of employment differ substantially from the majority in the workplace, especially in terms of the immediate employer and hours of work;
- worse non-wage benefits;
- neglect of training and skills development, let alone imperatives of employment equity legislation;
- the often inadequate health and safety conditions at their workplaces.

POLICY RESPONSES TO ATYPICAL FORMS OF WORK

The Department of Labour has responded to emerging trends in the labour market in recent years. For instance, the legislative changes introduced to the LRA and the BCEA in the 2002 Amendments Acts, in particular, the presumption of employment, has dealt effectively with the problem of the inappropriate use of 'independent contracting' to deprive employees of their benefits. However, the research is showing that there is a need for additional and far-reaching interventions, particularly to ensure that the use of these employment relationships do not contribute to greater casualisation and increased vulnerability in the labour market. The research also suggests that these policy responses need to take into account existing regulatory frameworks, and initiatives of stakeholders, together with the relevant international experiences.

There are many in our country, especially within organised business or sympathetic financial journalists, who would argue that 'flexibility' combats the social evil of unemployment. They would tend to argue that: 'If one makes it less costly for enterprise to employ people, they will employ more. If it is legal to offer temporary, fixed term, part-time, agency-despatched, specific-project contract work, and other forms of atypical employment, they will hire more workers. That this leaves the people they employ insecure and without health insurance or holiday or pension entitlements is unfortunate, but it is better than leaving them unemployed'.

Unfortunately, these are arguments that have little supporting evidence and ignore the immense social costs of the negative impacts of atypical work. Similarly, arguments that state that 'atypical' work is a result of a sea-change in employment practices or is the result of social change and increasing affluence leading people to prefer temporary employment, have little support in the literature from both industrialised and developing countries.

Casualisation is a process that is recognised in a limited way by the existing labour market regulatory framework. The researchers argue that, 'Casualisation is therefore not aided by the statutes because they don't reduce such employees' rights, but casualisation is also not restricted by the statutes'.

It is argued that a far-reaching response needs to be formulated to address the negative impacts of casualisation and that efforts to improve conditions for atypical workers require three types of legal and systematic change:

- Laws setting labour rights and minimum standards must cover atypical workers. This has largely been done by defining all workers, whether on fixed contracts, casual or part time, as employees. In addition, the responsibility for ensuring minimum standards now falls squarely on the owner of the workplace even in the case of outsourced workers or those provided by labour brokers. But the situation for unfair dismissal and employment equity could be strengthened, as discussed below.
- Institutional and legal efforts to support monitoring by stakeholders, especially by improving information flows and supporting stakeholders' organisations. This could include the regulation of labour brokers to ensure stakeholders are aware of their prevalence and impact.
- Development of systems that make it easier for employers to provide skills as well as access to retirement funds and medical schemes for atypical workers.

RECOMMENDATIONS FOR A DEPARTMENT OF LABOUR STRATEGY ON 'ATYPICAL' WORK

The proposals focus on the three areas outlined above. Some of the recommendations by the researchers are included for further investigation.

Setting minimum standards

There is a need for the closure of legal loopholes that allow atypical employment to create and exploit vulnerable workers.

- S198 of the LRA currently makes persons who engage workers through a labour broker/TES jointly responsible if the TES contravenes bargaining council agreements; binding arbitration awards on conditions of employment; the BCEA; or a sectoral determination. Further investigation is required as to how this category of workers can be given effective protection from dismissal, including retrenchments, and unfair labour practices.
- In addition, we should investigate whether the law can do more to regulate representation for outsourced workers.
- Improving sectoral regulation in sectors with high incidence of casualisation (through revisiting sectoral determination and through a process of consultation with bargaining councils).

Amendments to the Employment Equity Act may require that where there is a majority of part-time and/or temporary workers, they must have conditions of employment equivalent in value to full-time, permanent workers who do essentially the same work.

In the past three years, outsourcing has become common in the public service. The Department of Labour should investigate these trends and work with the Department of Public Service and Administration (DPSA) to develop a Code of Good Conduct. Current efforts to develop a Code of Good Conduct on outsourcing, contracting, temporary, casual and part-time work, as required by the LRA, should be consolidated. The Code should form part of a broader communication campaign to ensure that employers, in particular, understand the nature of minimum standards and laws on dismissal, in particular, and how they apply to atypical workers.

Monitoring and enforcement

As part of the strategy, it is proposed that the department be involved in the promotion of effective governance and regulation in the labour broking/TES sector. Where appropriate, legislative changes should be made to adjust the coverage of legislation or to stop loopholes that are being exploited by unscrupulous employers and TESs. The LRA already defines labour brokers as temporary employment agencies. They can be required to register through a simple amendment to the LRA or by making regulations under the

Skills Development Act.

To register, labour brokers will be required to demonstrate that they abide by all relevant laws, including the BCEA and Employment Equity Act. Employers who use unregistered brokers can be made liable for sanctions. Employers and labour brokers will still be bound by bargaining-council agreements on atypical work. The Department of Labour can establish a hotline.

The Department of Labour's enforcement strategy needs reviewing to ensure that practices contributing to casualisation are identified and targeted when they fall foul of the law or regulations.

Strengthening stakeholders' organisation

Ultimately, the registration process for labour brokers/TESs should lead to a statutory regulatory institution for registered brokers, with stakeholders, including organised labour, represented on the board. This body will seek to ensure progress in all areas, including ensuring adherence to minimum standards, improving access to non-wage benefits, and expanding skills development in the industry. It will build on the efforts of existing employers who maintain decent standards and are currently undercut by less ethical labour brokers.

The law will be reviewed to ensure that in future, the agency shop can be extended by collective agreement to atypical workers. This amendment will have to take the realities of representation into account.

WAY FORWARD

The proposals and processes developed here are prudent, viable and, like our overall labour law framework, depend largely on empowering stakeholders.

It is possible to fast-track proposals for registering labour brokers, the proposed amendments to the LRA on dismissal and the agency shop, work with the SETAs and the Codes of Good Practice at NEDLAC and the public service. The other proposals require systematic work to develop implementation plans.

As a first step, we would like to propose the establishment of an 'internal' Department of Labour 'task team', with representatives from each of the 'branches', to take forward the implementation phase of this process. LB

Other specific recommendations on legislative interventions to maintain minimum standards:

A definition of employer

It is proposed that consideration should be given to introducing a definition of employer, and of the concept of a 'user enterprise' or 'host' employer.

Regulation by sectoral determination

It is suggested the list of different types of work that may be regulated is amplified.

Regulation by bargaining council

It is necessary to make explicit the powers of bargaining councils (in terms of section 28 of the LRA) to regulate sub-contracting and outsourcing arrangements.

Definition of casual or part-time work

Consideration needs to be given to a definition of casual or part-time work in the BCEA. This would help set a floor with regard to the various definitions in sectoral determinations and bargaining council agreements, would explicitly protect such workers in terms of their conditions of employment, and would provide a regulated but flexible alternative to externalisation.

A limit to temporary employment

Section 57 of the EEA provides that a worker provided by a TES becomes the employee of the client (or user enterprise) after a period of three months for the purposes of chapter three of the Act. The transfer of employment from TES to user enterprise should be considered with regard to other legislation. Section 57 also raises the possibility of temporary workers becoming permanent after a certain period (e.g. three months) or after a contract has been rolled over a certain number of times (e.g. three).

Definition of 'workplace'

The definition of 'workplace' in the LRA must be amended to make it clear that employees can exercise rights against the employer controlling the workplace where they work as well as against their own employer, and to address the situation in the services sector, where workplace has no exact meaning.

The extension of benefits to non-standard employees or improvement of benefits

Consideration should be given to extending benefits for non-standard workers. More generous minimum annual leave entitlements can be introduced to the BCEA, e.g. a minimum of one day's annual leave for any period worked which increases once a certain number of days have been worked (e.g. 17 days).

ADAPTING INSTITUTIONS AND SYSTEMS FOR ATYPICAL WORKERS

Unfair labour practice

Consideration could be given to utilising section 186 of the LRA to provide that certain unfair acts or omissions relating to the employment of non-standard workers would constitute an unfair labour practice.

Advice regarding sectoral determinations

When advising the minister on the publication of a sectoral determination in terms of section 54, the Employment Conditions Commission must consider the prevalence and nature of non-standard work in the sector and area concerned.

Reduction of working hours

The consideration in respect of the reduction of working hours in terms of Schedule 1 of the BCEA must take account of the prevalence of non-standard work in a sector.

Regulation by bargaining councils

It is necessary to make explicit the powers of bargaining councils in terms of section 28 of the LRA to regulate sub-contracting and outsourcing arrangements.

Non-standard employment as an 'employment policy or practice'

In section 1 of the EEA the definition of 'employment policy or practice' must include all non-standard employment arrangements.