Non-standard employment and labour laws

New strategies needed

The Labour Relations Act (1996) has served its purpose and is a product of its time. **Jan Theron** argues that certain key assumptions on which it was based no longer apply especially in the case of non-standard unemployment therefore new laws and strategies are needed.

LRA CONTEXT

When the Labour Relations Act (1996) 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 very small at that time.

A significant proportion of the workforce in manufacturing and mining (amongst other sectors) were in what we today call 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 that 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.

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

EMPLOYMENT RESTRUCTURING

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, there was no significant expansion of collective bargaining at a sectoral level outside of the public sector. 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 20 or so years.

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).

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 Commission for Conciliation Mediation and Arbitration (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.

The first way involved changing the composition of the 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 was externalised. This is referred to 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. The LRA did not, in other words, specify what was 'temporary' about a supposedly 'temporary employment service' (TES).

This introduces a legal contradiction which has had two important consequences. Firstly, 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.

Secondly, 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. 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 which refers to the well-known tendency

in a capitalist system for fewer larger firms to dominate production, at national, regional and global levels. 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 an 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. 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 earlier, 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 sectoral bargaining, increasingly problematic.

Employment that is continuous, full-time and takes place at the workplace of the employer is the norm only for a section of the workforce. There is a large section 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.

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. 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…' 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. LB

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