

Regulate or ban?

What to do with labour brokers

WHAT SERVICE DO BROKERS GIVE?

Recent debates on labour brokers have forced brokers and employers to do some clever thinking. If they do not project their services as growing the economy, they will be seen as expendable.

The triangular relationship that exists in an agreement between the labour broker and the employee and the broker and the client (employer) is weighted against the employee. Although a relationship exists between the employee and the client, in legal terms worker rights are unenforceable. The worker, in the agreement with the broker, signs away employment rights with the client and directs them to the broker.

The employee and broker 'agree' that the broker is only liable for pay, PAYE and UIF 'as and when' the employee's services are required by the client. This results in an unscrupulous abuse of worker rights.

If you ask labour brokers to explain their services they will reply in the manner of this Umkhonto Labour Brokers advert: "we remove the hassle and risk associated with employing permanent staff members." At present such candour is certainly not strategic!

Brokers have responded to the debates by arguing that they can place skilled workers in the right jobs, can oversee the financially unrewarding task of interviewing and selecting candidates; and that they take away the burden of paying UIF and PAYE.

Some brokers have euphemistically moved away from the title of 'labour broker' to 'placement agencies'.

Historically, placement agencies charge a once-off fee or a

Two main ideas dominated recent parliamentary discussions on labour brokers. These were: must labour brokers be regulated or must broking be removed altogether? **Shanta Reddy** considers some of the issues in the labour broking debate and asks critical questions.

commission from job seekers for placing them in employment. The contract between the agency and the job seeker is no more than placing people in jobs and so an employment relationship does not arise.

Once in the job, an employment contract is agreed between the job seeker, now an employee, and the employer.

Labour brokers, or nowadays 'placement agencies', however identify themselves as the employer and retain from the employee's salary or directly from the actual employer, a percentage of the worker's salary. A continuous contract exists between the employer, broker and employee. This is not the service of a placement agency.

According to the South African Municipal Workers Union employers give these reasons for using brokers in the municipal sector:

- ability to engage labour at lower costs without future claims;
- access to temporary labour when absenteeism occurs;
- reduction of labour problems like negotiations;
- temporary placement within the context of a jobs moratorium;
- budget reductions;

- internal municipal structures not finalised;
- grant conditions which stipulate that staff costs must not consume more than 28% of operating costs;
- move towards a core management team;
- easier terminations.

These reasons show no benefit to workers or service to communities.

In discussions, brokers have not admitted that what they actually do is protect the employer against lawful obligations to employees such as annual, sick, family responsibility and maternity leave. Also, they allow employers to sidestep rights in the areas of retrenchment, transfer of businesses, unfair dismissal and unfair labour practice, over-time claims, union recognition, collective bargaining, health and safety and employment equity. Further, brokers allow the employer to avoid paying benefits such as pension, medical aid and housing allowances, career development such as promotions, acting appointments, long service bonus awards and skills and intellectual development training.

In submissions made by employers and brokers, there is no word of employees receiving decent salaries

or benefits via the broker.

Brokers make the realisation of worker rights impossible. Workers are kept in the dark about their rights by the broker. Workers are often so desperate to earn an income that abuse is secondary.

There is another dimension. To challenge abuse means taking on two opponents: the broker and the employer. This is costly, and a litigation nightmare. Two opponents are stronger than one, and an employee often does not last.

Workers are faced with many technical issues before a dispute is heard.

Firstly, who is the employer? Often workers cite the client as the employer whereas the Labour Relations Act defines the broker as employer. Some commissioners strike out the dispute, thereby forcing the employee to launch it again and apply for condonation.

Secondly, was there a dismissal? The defence by brokers is that the contract came to an end and so there is no dismissal.

Thirdly, is the worker's union recognised by the broker? Especially in retrenchment cases brokers refuse to consult with unions in terms of Section 189 of the Labour Relations Act (LRA). In ordinary dismissals unions cannot represent members at hearings because they are not recognised by the broker.

Finally, is the union sufficiently representative of the brokers' workers in the particular workplace? Brokers sometimes provide minimal labour in small sections of the client's large manufacturing process making it impossible for the union to be sufficiently representative.

Then there is another factor. Section 198 of the LRA identifies the broker, and not the client, as the employer. So even when workers win reinstatement after unfair dismissals, they are not reinstated because the broker alleges it has no power or



A delegate to Cosatu's recent congress made the food union's views known.

right to force a client to reinstate a worker it does not want. A robust approach was adopted by an arbitrator in *Khumalo v ESG Recruitment CC Transportation* (2008) who held that as the LRA does not accept as a fair reason for dismissal the cancellation of a contract by the client, the dismissal was unfair.

If the proposed amendments to the LRA are intended to counter these illegitimate employment practices, there is still no guarantee against abuse of worker rights. As long as there is a three-way relationship, the employee, irrespective of who is committing the abuse, has to challenge both employers. They are joined at the hip.

There is no possibility that the employer or the broker will solely defend a worker abuse claim. It has never happened in the past and it is fantasy to believe it will in the future.

The conclusion is that if employers did not want to avoid their obligations, they would not have used

a broker in the first place. To now argue that broking is essential to growth in the economy is false. Revelations that government departments paid R124m in the past year to brokers is not balanced by evidence that the economy has grown as a result.

Ironically the Department of Justice was the largest user of brokers. It paid R89.3m of the R124m to brokers.

Angela Dick, CEO of the labour broker Transman, said in the *Natal Mercury* that brokers' contribution to the economy was "invaluable... We provide a minimum of 500 000 South African citizens with jobs... At least six to 10 people are supported by each of these breadwinners, meaning that [brokers] are responsible for feeding at least 3 to 4 million South African citizens daily."

What Dick does not acknowledge is that millions of people are left without food when brokers assist employers to keep workers out of work.

Dick also asks whether the banning of broking will “magically” result in the permanent employment of workers. Thus she admits that brokers have prevented their permanent employment. Brokers have not increased the employment rate. They don’t create jobs, they merely fill them. Does Dick believe that if brokers did not exist that employers would not employ workers?

WILL BANNING INCREASE UNEMPLOYMENT?

Many labour brokers protest that to eliminate them will lead to higher unemployment. This is a fallacy.

Employers may prefer to hide behind brokers but their business interests will not evaporate if brokers do not exist. Will workers and the jobs that brokers fill no longer exist if brokers are banned? The answer is ‘No’.

Why does employment require two employers anyway? There is no law, ethical or equity principle, policy or practice that justifies two employers. Why are the courts not balancing the employers’ justification that labour laws are inflexible and not conducive to growth, with workers’ constitutional rights to fair labour practices, dignity and collective bargaining?

By banning brokers, 500 000 jobs will become secure, better paying jobs, and the working relationships will be legitimate. Does the Constitution allow otherwise?

WHAT DOES BROKING PREVENT?

Broking prevents compliance with the Constitution. The rights to human dignity, collective bargaining, freedom of expression, fair labour practices, basic services and housing are harmfully affected by broking services. Even with the limit on worker rights in the Constitution, this does not allow for the abuse of workers’ rights by brokers and employers.

No employee has ever claimed that a broker has encouraged better working conditions, helped realise socio-economic rights and encouraged loyalty to the employer.

Employers use brokers to avoid the legal consequences of a direct employment relationship. Municipalities, for example, repeatedly use the same workers, sometimes indefinitely renewing six-month contracts.

Unions and workers are rightly dissatisfied with the unfair labour practice jurisprudence. It has allowed employers to perpetrate worker abuse that the Constitution does not allow.

Some believe that a national minimum wage would allow workers, brokers and employers to happily cohabit. This is not the answer. Minimum wage rates exist in various sectors. But many employers, including brokers, avoid minimum rates by not registering within the scope of the relevant bargaining council or applying for exemptions. Employers justify their non-compliance through unaffordability. How will minimum wage rates suddenly become affordable if broking is regulated? Clearly they will not.

Some years ago a retrenchment in the paper industry went wrong for the employer. The labour court heard evidence of a worker being retrenched and employed the next day in the same job by a broker at less than half her original salary. The employer had no objective reason for this. It was retrenching for a soon to be implemented mechanisation of production.

The plastics sector is rife with brokers who refuse to recognise unions. In one dispute, the employer increased its number of employees to ensure that the union did not achieve the minimum threshold of representivity. It attempted to define itself nationally

to further increase the size of its workforce. After a year of unnecessary litigation, the broker settled by agreeing to recognise the union.

Experience in litigation shows that even obtaining a labour court order is ineffective against unwilling employers.

Two employees worked most of their lives as machine operators. Enter a labour broker, and they were unfairly dismissed. They could not find other jobs at this stage in their lives. The dismissals were referred to the labour court and by an order of court they were reinstated. The broker reinstated them as packers and alleged they were not packing properly. It asserted that as it had complied with the court order.

Labour broking impedes the growth of the economy. Placing people in temporary employment services does not allow the labour market to develop. It does not allow for the reduction of inflation or for businesses to grow. The economy can only grow if workers are developed and better themselves. Defending a position that skills development is time-wasting and financially unrewarding, loses sight of the goal of development.

It is clear that an unwillingness pervades employment relationships. Whether taking part in collective bargaining or not, employers and brokers strive to avoid providing better wages, improved benefits, security of employment, union recognition, the dignity of workers and their families, fair treatment and the promotion of career growth.

Regularisation of labour broking will not cure the problems because employers and brokers are loath to give up the benefits of their symbiotic relationship. LB

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