RECOMMENDATIONS

To improve the state of labour market intelligence these issues must be prioritised:

- It is necessary for the Department of Labour to build an effective Labour Market Information System.
- The capacity of Further Education and Training Colleges and SETAs to undertake proper labour market research.
- The capacity of labour market institutions, including state departments to analyse labour market data.
- The capacity of stakeholders and users of labour market information such as education managers, planners, policy-makers, unionists, employers, community leaders and students to use labour market information through training programmes.
- Wide collaboration between research institutions and state departments with a view to sharing databases and developing joint research initiatives.
- Regular production of Labour Market Information Analysis Reports over and above the Statistics SA Labour Force Survey. The dissemination of labour market information to job seekers.
- Attention to policy and programme evaluation and impact analysis.
- Improvement and relevance of labour studies programmes in tertiary institutions.

CONCLUSION

Labour market information requirements will increase and become more complex as the economy grows and integrates into global markets. Unless efforts are made to improve the research and analytic skills of users of labour market information, there will be a problem making labour markets more efficient. LB

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Unlocking labour laws

Near our union offices a number of sex workers ply their trade and sometimes ask us for help with labour problems. Do sex workers have the constitutional right to fair labour practices? Are they entitled to claim relief, even though their work is illegal? And if they have protection against unfair dismissal, can they claim reinstatement, or alternatively compensation? And are they entitled to other labour rights, such as the right to join unions, to bargain collectively and to strike?

These are some of the questions that were answered in the recent Labour Appeal Court case of *Kylie v CCMA*.

In a previous edition of Unlocking Labour Laws (*SALB 33.5*) we commented on the judgement of the Labour Court in the same case. The Labour Court held that sex workers are not entitled to protection of section 23 of the Constitution, which provides for the right to fair labour practices. While they may be 'employees' in accordance with the definition of 'employees' of the Labour Relations Act (LRA), they cannot claim protection under the LRA because of the illegal nature of their contracts of employment.

However, the Labour Appeal Court (LAC) overturned the decision of the Labour Court. The LAC noted that section 23 affords the right to fair labour practices to 'everyone'. This is extremely broad in its scope, and literally includes all people within its sphere of protection. Also included are those who may have an employment relationship, but who do not have an enforceable contract of employment – such as sex workers. The illegal activity of sex workers does therefore not prevent them from enjoying a wide range of constitutional rights.

The LAC also referred to an earlier case of the Constitutional Court, *S v Jordan & others 2002*, where it was decided that sex workers have the right to be treated with dignity by their customers and law enforcement officers. This logically implies that their employers have a similar obligation.

All of this does not necessarily mean that a court, or an arbitrator, will grant a remedy to a sex worker. The general rule of our law is that if a contract is illegal, it will not be enforced. This of course also applies to sex workers. However, the LAC said that this is not an inflexible rule. The rule can be relaxed if it is necessary to prevent injustice.

According to the LAC, the constitutional right to fair labour practices was designed to ensure that the dignity of all workers should be respected and that the workplace should be based on principles of

social justice, fairness and respect for all. These are goals which the LRA strives to achieve. Courts, and we could add, arbitrators too, should therefore be vigilant in protecting those employees who are particularly vulnerable to exploitation.

Sex workers are generally exposed to exploitation and abuse by a range of people with whom they interact, including their employers. On the facts before the court, this was also true of the sex worker in this case, 'Kylie'. It appeared that she worked 14 hours a day, seven days a week, and was subject to strict rules and fines not allowed by the labour law of the country.

However, this does not mean that the full range of remedies provided by the LRA should be available to sex workers who are unfairly dismissed. As a matter of public policy, reinstatement would not be an appropriate remedy, because of the illegal nature of a sex workers' services. This might also be true of compensation as a remedy, if the dismissal was substantively unfair.

However, where the dismissal was *procedurally* unfair, compensation might be appropriate, as in this case compensation is seen as a consolation for the loss by an employee of her right to a fair procedure. Whether and, if so, what measure of relief should be available to a sex worker will be determined on a case by case basis.

Does this mean that sex workers can form and join trade unions, and exercise organisational rights, and have the right to bargain collectively and strike?

The LAC made it clear that even if these workers could form or join a trade union, they could not exercise any right to participate in any unlawful activities through such a trade union. Nor could they use the vehicle of the union to further the crime of being involved in sex work. Therefore, they would not be able to conclude enforceable collective agreements, or to enjoy organisational rights or the right to strike.

My union organises a lot of workers who are employed by labour brokers. If a worker is employed by a broker can the client who has a contract with the labour broker and for whom the employee directly works, discipline the worker?

Mr Nape was employed by a labour broking firm (INTCS), worked at Nissan as a sales consultant. He sent an offensive email over the Intranet system to a colleague. For this he was disciplined by INTCS: a final warning was issued. However, Nissan refused to let Mr Nape resume work. He was then retrenched by INTCS. For this Mr Nape claimed unfair dismissal.

These were the facts of the Labour Court (LC) case of *Nape v INTCS Corporate Solutions (2010)*.

As happens often in matters such as this, there were two contracts which INTCS relied on to justify Mr Nape's dismissal. The first contract was between INTCS and Nissan. This allowed Nissan to request the removal of the employee on any ground.

The second contract was between INTCS and Mr Nape. This provided that INTCS was entitled to dismiss Mr Nape 'on grounds proven by the client to be reasonable and/or substantively and procedurally fair.'

The judge in this case, Acting Judge Boda, found that these contracts were not conclusive. The reality of Nissan's superior bargaining power could not be ignored.

Also he ruled that the protection against unfair dismissal which Mr Nape enjoyed could not be undermined by contractual provisions, contained in the agreements between Nissan and INTCS and between INTCS and Mr Nape. This would be against public policy, and unenforceable. Public policy and the guarantees of the Constitution incorporate the principle of *fairness* into all contracts.

The LC noted that three parties are involved in a labour broking arrangement – the labour broker, the client and the worker. The client is usually most powerful, and the worker the most vulnerable. Inasmuch as the worker is obliged to act in good faith to the client (the so-called fiduciary duty), the client of the broker also must pay due regard to the worker's right to fair labour practices.

It is, therefore, possible that the broker can take action against the client who refuses to treat the worker fairly. It may approach a court to order the client to refrain from such conduct. In appropriate cases the LC may order the client to reinstate the unfairly dismissed employee.

In this matter the LC decided that Nissan's demand that Mr Nape be removed from its premises after the final warning given by INTCS, was unlawful and in breach of Mr Nape's constitutional right to fair labour practices.

In the end, Mr Nape's dismissal by INTCS was held to be substantively unfair, since INTCS should not have succumbed to Nissan's unlawful conduct.

This column is jointly contributed by Marius Olivier, director of the Institute for Social Law and Policy and extraordinary professor in the faculty of law, Northwest University, Professor Avinash Govindjee in the Faculty of Law, Nelson Mandela Metropolitan University and a part-time senior commissioner at the CCMA, and Debbie Collier deputy director of the Institute of Development and Labour Law at the University of Cape Town. LB

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