

**South Africa
2002**

**Workers' Protection:
An update on the situation in
South Africa**

Marlea Clarke
Shane Godfrey
Jan Theron

Table of Contents

Introduction	3
Section One: New Regulatory Framework	5
(a) Overview of New Legislation	5
(b) Flexibility vs Regulation in the BCEA	10
(c) Regulating Non-standard and Triangular Employment Relationships	14
(d) Monitoring and Enforcement of Legislation	17
Section Two: Labour Market Trends	21
(a) Contours of the Post-Apartheid Labour Market: Formal and informal employment changes	21
(b) Changing Patterns of Employment	28
(c) Sectoral Case Studies	35
Section Three: Assessing the Regulatory Framework	40
(a) Role of the Labour Court and the CCMA: A survey of cases concerning temporary employment services	41
(b) The Distinction between Independent Contractor and Employee	47
Section Four: Amendments and New Policy Initiatives	48
(a) Regulating Temporary Work: Developing an Employment Services Act	49
(b) Amendments to the LRA and BCEA: A new direction?	52
(c) The Negotiation Process	56
(d) The Impact of the Negotiations and the Final Amendments	57
Conclusion	60
Bibliography	

Introduction

The objective of this country study is to provide an update on the status of “workers’ protection” in South Africa. Since coming to power in 1994, the ANC government, mainly through the Department of Labour (DoL), has implemented a range of strategies aimed at transforming the apartheid labour market and supporting economic growth. The development of a new regulatory framework, through the modernisation of labour legislation, the development of new institutions and statutory bodies, and the introduction of new labour statutes, has been at the centre of this programme. Importantly, negotiated through tripartite structures, new labour laws modelled on the ILO’s standards for labour rights, combined with a strong affirmative action and skills development strategy, have been developed and implemented.

However, within only a few years allegations regarding perceived ‘rigidities’ in the labour market raised questions whether the regulatory framework allowed sufficient scope for flexibility. Indeed, even before new legislation was fully implemented, the appropriateness of labour market policy was already being discussed, with business and opposition parties arguing that the labour market was too rigid thus undermining the country’s international competitiveness. Organised labour and the DoL challenged this perception and pointed to other barriers to employment creation, and drew attention to existing forms of flexibility in the labour market. In fact, from labour’s perspective, new legislation hadn’t gone far enough in protecting workers in vulnerable sectors and employment, and had created too many loopholes that business was able to exploit in order to bypass legislation. The pressure exerted by business paid off. Shortly after the promulgation of the Basic Conditions of Employment Act (BCEA),¹ in his opening address to Parliament the President announced that the Department of Labour would undertake a review of labour market regulations to identify any aspects of the regulatory framework that were viewed as impacting negatively on investment attraction and employment creation.

In July 2000, the Basic Conditions of Employment Amendment Bill and the Labour Relations Act Amendment Bill were presented for public comment and negotiations within the National Economic Development and Labour Council (NEDLAC). While the amendments proposed to the Labour Relations Act (LRA) were something of a mixed bag, with gains for both business and labour, the BCEA Amendment Bill proposed extensive amendments, many of which favoured employers and significantly eroded workers’ rights. It appeared that the government had decided, within a very short space of time, that the ‘regulated flexibility’ balance in the Act was not the right one. The proposed amendments aimed at introducing greater flexibility into the labour market. Further, the proposed amendments did little to address existing weakness in the legislation, specifically the failure to address the rapid growth of non-standard employment and the lack of adequate regulation and protection for workers on the margins of the economy. Little wonder that the Congress of South African Trade Unions (COSATU) strongly opposed the changes and fought for a different package of amendments throughout the negotiation process. In the course of the negotiations at NEDLAC, as well as the Millennium Labour Council (MLC) negotiations, a number of the proposed changes were dropped and

¹ The Act was passed in November 1997 and, after a delay in which research was conducted on its likely impact on small business, it was promulgated in full on 31 December 1998.

labour gained ground in respect of a number of other amendments. After almost two years of negotiations the final packages of amendments, the Labour Relations Amendment Act 12 of 2002 and the Basic Conditions of Employment Amendment Act 11 of 2002, were signed by the President and were promulgated in full on August 1, 2002.

While the amendments don't mark a shift in the overall architecture of the statutes, they do introduce important changes to some sections of both pieces of legislation. Changes to flexibility provisions in both the BCEA and LRA were welcomed by business, while amendments with regard to retrenchments and the right to strike were seen as key victories for labour. With regard to non-standard workers, amendments introduce significant changes to existing legislation with regard to the legal status of the employment relationship and protection for workers in ambiguous employment relationships. In particular, the final amendments add considerably to the powers of the Minister in deeming people to be employees for the purposes of labour legislation, and provide a mechanism whereby workers seeking the benefit of the rebuttable presumptions regarding employment status can proactively clarify their status. Whether this will be effective in addressing the problem of disguised employment relationships, and whether this will extend protection to more non-standard employees is of course another issue. A tentative assessment of the possible impact of these amendments with regard to workers' protection will be discussed in this paper.

The paper is organised in the following way. The first section will provide a brief overview of the legislative framework put in place from 1994 to 1999. After outlining important provisions in the legislation designed to transform the apartheid labour market, this section will discuss some of the weaknesses and loopholes in the legislation with regard to regulating non-standard work and protecting vulnerable workers. A summary of flexibility provisions, and an assessment of the enforcement mechanisms put in place with new legislation will also be provided. The second section will explore other changes in the labour market that have placed increased pressure on labour legislation. It will begin by outlining the general contours of the labour market, tracing changes in both formal and informal employment. It will then trace important trends in employment practices, such as the rise of temporary employment and other forms of non-standard employment. The search by business for enhanced flexibility and the attempt by some employers to bypass legislation has resulted in an increase in sub-contracting, outsourcing, and the conversion of employees into 'independent contractors'. Further, there has been a dramatic rise in temporary work, with labour brokers and other types of temporary help agencies now supplying temporary employees to all sectors in the economy.

The third section will provide a brief overview of the role of the Labour Courts and the Commission for Conciliation, Mediation and Arbitration (CCMA) in interpreting and enforcing legislation (with particular reference to the independent contractor issue, temporary help agencies and labour brokers). The last section will review the new amendments to labour legislation and other policy measures aimed at strengthening the legislation, specifically with regard to addressing the growth of disguised employment relationships, and better protecting workers in non-standard employment arrangements. As we shall see, legislation hasn't gone far enough in re-regulating the labour market. A growing number of workers are situated on the margins of the economy, either unable to utilise the protection afforded by legislation

or in employment arrangements that place them outside the protective embrace of labour laws. In general, there has been an overall decline in standard employment arrangements, and a parallel increase in atypical employment and informal work. Poor monitoring and enforcement mechanisms, and weaknesses and unintended loopholes in new legislation have allowed non-standard employment practices to flourish. As a result, the post-apartheid labour market is characterised by deepening labour market segmentation and income polarisation.

Section One: New Regulatory Framework

(a) Overview of New Legislation

Guided by the framework outlined in the Ministry of Labour's Five Year Programme, during the ANC's first term in office, the Government introduced four key pieces of labour legislation. These were: the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA), the Employment Equity Act 55 of 1998 (EEA), and the Skills Development Act 97 of 1998 (SDA).

Labour Relations Act

After a lengthy and difficult negotiation process², the new LRA was passed by Parliament on 13 September 1995 and came into operation in November 1996.³ Drawing on international practices and in compliance with relevant ILO Conventions, the Act sets out to give effect to and regulate the rights outlined in the Constitution.⁴ The LRA marked a major advance for organised labour. The Act formalises and codifies union organisational rights, lays a basis for worker participation in the workplace, grants workers a meaningful right to strike (without fear of dismissal), introduces a new dispute resolution system, provides strong support for collective bargaining, and extends coverage to most workers. In fulfilling the ANC's commitment to provide protection to marginalised and previously excluded workers, the Act extends coverage to domestic workers, farmworkers, public sector workers and the South African Police Services. Excluded from the Act are members of the National Defence Force, National Intelligence Agency, and the South African Secret Service.

Labour was successful in realising many of their demands regarding industrial action. The new LRA gives effect to the right to strike and recourse to lock out provided for in the new Constitution, but limits their exercise. Although the Constitution does not

² It took close to a year to negotiate the LRA and another year to work out how to set up the dispute resolution structure, the CCMA, established by the statute. During this time negotiations broke down several times and labour twice called its members into the streets to press forward its demands. Thousands of workers responded to these calls and, in most cases, labour was victorious.

³ The LRA was published on 13 December 1995 but only came into operation nearly a year later, on 11 November 1996.

⁴ Section 27 of the Constitution (the Chapter on Fundamental Rights) entrenches the following rights: (1) Every person shall have the right to fair labour practices; (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers organisations; (3) Workers and employers shall have the right to organise and bargain collectively; (4) Workers shall have the right to strike for the purposes of collective bargaining; (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to subsection 33(1).

include a right to lock-out⁵ the Constitutional Court has ruled that the right to bargain collectively in the new Constitution includes the employer's right to exercise economic power, which can include the lockout. Strikes or lock-outs that comply with the provision of the LRA are protected, but employers can dismiss workers on grounds of misconduct during the strike⁶. Procedures in the Act are far less onerous than those required by the old LRA, and though workers can be dismissed for participation in unprotected strikes (those not in compliance with the Act), unprotected strikes are no longer illegal and participation in these strikes is not a criminal offence.

One of the key goals of the Act was to shift industrial relations away from its adversarial heritage and create a new system that would be able to meet the challenges posed by globalisation (du Toit et al, 2000: 39). Thus, significant reforms were made to the dispute resolution system. The Industrial Court was abolished and new dispute resolution systems and institutions were established: the CCMA, a national Labour Court and a Labour Appeal Court. Governed by a tripartite board and funded by the state, the CCMA is an independent institution tasked to resolve disputes by conciliation and, when necessary, through arbitration. Arbitration awards are final, thus correcting the problem of long delays during the appeal process under the old system. The role set out for the CCMA in the Act is extensive, with the Commission responsible for providing a variety of dispute-resolution services. The CCMA can arbitrate on a range of disputes, including unfair dismissals based on misconduct or incapacity, organisational rights, the interpretation of collective agreements, and certain other issues.

Disputes can also be referred to private agencies and the Act allows parties to establish their own dispute resolution procedures. This is a significant change from previous legislation under which parties were obligated to use the statutory procedures (conciliation boards or industrial councils). The newly established Labour Court replaces the old Industrial Court and has the same status as the Supreme Court. Since the intention of the Act was to have disputes resolved more quickly and 'with a minimum of formality', most cases must be taken to the CCMA (or a private agency) before they can be heard by the Labour Court.⁷ The new Labour Appeal Court was established by the Act as the final court of appeal on labour matters.

Basic Conditions of Employment Act

In terms of employment standards reform, the most important legislation introduced was the new BCEA, passed in November 1997 and promulgated in full on 31 December 1998. It repealed the previous 1983 BCEA and the Wage Act of 1957. Similar to the LRA, the Act aims to advance equity and workers rights, while balancing these against the need to create more efficient and competitive workplaces. The Act establishes a floor of minimum employment conditions that is extended to all

⁵ The interim Constitution guaranteed the employer's recourse to lock-out. Labour opposed this, and was successful in having it omitted from the final text.

⁶ The dismissal must still be fair.

⁷ The following issues can be referred to the Labour Court: freedom of association; admission of parties to bargaining or statutory councils; strikes not in compliance with the Act; picketing; unfair dismissals relating to strikes or closed-shop agreements; unfair dismissals based on operational requirements; and automatically unfair dismissals.

workers except members of the National Defence Force, the National Intelligence Agency, and the Secret Service. Importantly, the Act extends coverage to many workers previously excluded from the old BCEA. Farm and domestic workers are covered by the Act, as are many casual workers. While previous legislation excluded those employees that worked less than three days per week, the new BCEA applies in its entirety to those who work more than 24 hours per month and certain sections cover those who work less than 24 hours per month. This marks a significant gain for workers, as many employees previously defined as ‘casual’ and thus excluded from coverage are now protected. However, those who do not fit the definition of ‘employee’ are still excluded from protection. Independent contractors, homeworkers, and the self-employed are not covered.

Terms and conditions set out in the Act apply to all contracts of employment, unless other laws or agreements provide better terms. By and large, this Act represents a step forward for workers – minimum standards have been improved and new conditions have been introduced. Improvements were made in working time, maternity leave, overtime rates, and annual leave provisions. Family responsibility leave has been introduced, and the Act incorporates the severance pay provisions from the LRA. With regard to working time, hours have been reduced to 45 hours per week,⁸ (from 48 for farmworkers, 60 hours for security guards and 46 for other workers) and the Act provides a procedure for the progressive realisation of a 40-hour week. Overtime pay is increased from one-and-a-third times the normal hourly wage, to one-and-half times. For employees who do not usually work on Sundays the rate of pay in the new BCEA is double the normal rate, and one-and-a-half times the normal rate for those who do normally work on Sundays. Annual leave is increased from 14 consecutive days in respect of each year worked to 21 days. Women workers are now entitled to four consecutive months maternity leave⁹, and most workers are entitled to three days’ family responsibility leave per year.

Improved conditions and the move towards stronger regulations in the Act are offset by the possibility of standards (apart from certain ‘core standards’) being varied downward. Four methods of varying standards are outlined in the Act: variation by collective bargaining (bargaining councils and by collective agreement); by individual contracts of employment; by sectoral determinations made by the Minister on advice of the new Employment Conditions Commission (ECC);¹⁰ and by Ministerial determination and exemption procedures. Agreements between individual employees and their employers can vary (with some limitations) the provisions of the BCEA

⁸ Transitional provisions were outlined in the Act. For the first 12 months after the commencement of the Act farmworkers’ ordinary weekly hours were 48 per week. Security guards’ hours were reduced to 55 hours for the first 12 months after the commencement of the Act, then 50 hours for a second period of 12 months.

⁹ This is unpaid maternity leave. In terms of section 25 of the BCEA, a female employee is entitled to four months’ maternity leave, but the employer has no statutory obligation to pay any remuneration for the period of leave. However workers covered by the Unemployment Insurance Act 63 of 2001 (UIA) are entitled to maternity benefits. While many workers (such as domestic workers) were not covered by the old UIA, the new Act introduces a graduated scale of benefits. The scale of benefits may vary between a maximum rate of 60% of remuneration for lower-income contributors and a lower rate of remuneration for higher-income contributors. The latter rate is to be determined by thresholds set out in Schedule 3 of the Act. The Unemployment Insurance Act 63 of 2001 and the Unemployment Insurance Contributions Act 4 of 2002 (the UICA) both came into effect on 1 April 2002.

¹⁰ The main intent of these determinations is to introduce minimum wage levels for the relevant sectors (unorganised sectors and those without bargaining councils).

pertaining to ordinary daily and weekly hours of work, overtime, meal intervals, daily and weekly rest periods, payment for work on Sunday, and sick leave. For instance, a public holiday may be exchanged for another day by verbal agreement, and a written agreement may produce a compressed working week, a reduced meal interval, or a reduced rest period. Subject to certain limitations, ordinary collective agreements may replace or exclude any basic condition to the extent permitted by the Act. For example, an employer and a trade union may conclude an agreement at plant level to average hours of work over a four month period, or to reduce family responsibility leave.

Employment Equity Act

It was widely recognised that specific legislation was needed to address ongoing discrimination in the labour market, and to correct the demographic imbalance in the workforce resulting from apartheid policies and practices. The Employment Equity Act (EEA) aims to do this by compelling employers to eliminate unfair workplace discrimination, and by accelerating the recruitment, training and promotion of people from disadvantaged groups. Affirmative action measures are also intended to contribute to actively promoting people from designated groups. Thus, the Act promotes equal opportunity and fair treatment in employment “by eliminating unfair discrimination in any employment policy or practice” (section 5). Based on 19 listed grounds, unfair discrimination by employers is prohibited by this Act and is backed by the reversal of the normal onus of proof (thereby shifting the onus to the employer to disprove discrimination). Excluding workplaces with less than 50 employees, employers are required to develop employment equity plans detailing the ‘numerical goals’ to achieve equitable representation in their workplace and a timeline within which such goals would be realised.

Grounds listed in the Act that constitute unfair discrimination are extensive, including: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language or birth (section 6(1)).¹¹ For example, ‘pregnancy’ includes ‘intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy’. And, family responsibility is given a wide meaning, including: the responsibility of employees in relation to their spouse(s) or partner(s), their dependent children or other members of their immediate family who need their care and support.

Affirmative action is viewed as a form of ‘positive measure’ - employers must take action to advance specified groups of workers in all categories of employment. Designated employers¹² are obligated to develop and implement affirmative action measures. This includes a range of actions, from conducting an analysis of employment policies to drawing up an employment equity plan and reporting on the implementation of the plan to the Department of Labour. Measures must be aimed at ‘further diversity in the workplace based on equal dignity and respect for all people’, and creating ‘reasonable accommodation’ to ensure specified groups ‘enjoy equal

¹¹ These grounds were previously in the LRA and have been shifted across to the EEA with minor additions.

¹² Defined as employers that employ 50 or more employees, or those that have an annual turnover equal to or above the annual turnover for small businesses of their class. See section 1 of the Act.

opportunities and are equitably represented in the workplace' (section 15). For example, the wide definition of 'employment policy and practice'¹³ in the Act compels employers to identify direct and indirect ways in which their policies and practices unfairly discriminate.

The Act is ambitious and comprehensive. As du Toit et al (2000: 49) correctly note, the EEA directly confronts and seeks to correct systemic discrimination in the workplace, and thus has the potential to be the most intrusive of all the new labour statutes. However while the Act sets broad parameters regarding affirmative action and the elimination of unfair discrimination, much of the actual detail of these measures is left to collective bargaining and thus dependent on the organisation and strength of workers in individual workplaces. For example, employment equity plans are written at the company / workplace level, thus the content of these plans and their potential for contributing to the transformation of workplaces in a significant way is dependent on negotiations between management and labour. And, legislation does not set targets for the progressive reduction of the wage gap, leaving this matter to collective bargaining and the ECC. For labour, this is a key weakness of the Act.

Skills Development Act

Employment equity legislation helps ensure measures are taken by employers to address discrimination in employment. Of course employment related discrimination is only one factor in the persistence of segmentation. Education and training during the apartheid era, and continued inequalities in both, have resulted in considerable gender and racial divisions in skills and occupational training. Further, the growing skills crisis in the country also has an impact on productivity and economic growth. The Skills Development Act (SDA) was developed as one important mechanism to address labour market segmentation that is linked to gaps and inequalities rooted in skills. In addition, the Department of Labour perceived the low level of skills and lack of investment in training in the country as a contributing factor to slow economic growth and the lack of competitiveness in many industries. Thus, the key purposes of the Act are to develop skills, increase investment in education and training, and assist entry into employment and access to work experience.

The Act establishes a new, multi-tiered institutional framework for training and skills development. Nationally, and at the top of the structure, is the National Skills Authority (NSA) to advise the Minister on national skills development policy and strategy, and to liaise and work with Sector Education and Training Authorities (SETAs) on policies and strategies for skills development. The next level of the institutional framework is the SETAs, established to guide the development and implementation of training at a sectoral level. The core functions of the SETAs are to develop sectoral skills plans within the framework of the national skills development strategy; to implement these plans by establishing learnerships; to approve workplace skills plans; to allocate grants to employers, education and training providers and workers; and to monitor education and training in their sectors (du Toit et al, 2000:

¹³ This is defined as including recruitment procedures, advertising and selection criteria; the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; the working environment and facilities; training and development; performance evaluation; promotion, transfer and demotion; disciplinary measures and dismissal.

50). Below the SETAs are labour centres, established to provide a range of employment services for workers, employers and training providers.

Given the lack of private sector investment in skills development historically, a levy to finance training was necessary. This was done through an additional statute, the Skills Development Levies Act 9 of 1999¹⁴ and through the establishment of the National Skills Fund. The Fund is primarily financed by the levies collected in terms of the Levies Act, and from money appropriated by Parliament. Money from the fund may only be used for projects identified in the national skills development strategy as national priorities, and for other projects related to the implementation of the goals of the Act as the Director-General determines. In addition, funds are used to support the activities of SETAs.

(b) Flexibility vs. Regulation in the BCEA

The new statutes, and the institutions and processes they have established, have gone a long way towards re-regulating the labour market. In contrast to dominant global trends of de-regulation and the erosion or withdrawal of union rights and workers protection, the South African government, largely through the Department of Labour, has put in place the legislative framework for the transformation of the apartheid labour market through increased regulation. Legislation has confronted and begun to address oppression, poverty, and labour market segmentation. Indeed, it has been widely agreed that the new set of labour statutes was generally ‘labour-friendly’: they improved employment conditions; improved and codified organisational rights; extended protection to workers previously excluded; and directly addressed skill levels, discrimination and inequality in the labour market.

Of course the development and implementation of this new regulatory framework for the labour market was no easy task. New labour laws were drafted in the midst of intense political debate regarding the appropriateness of the Department of Labour’s programme of reform. Debate specifically revolved around the degree to which the government should intervene in the regulation of the labour market and the impact that increased regulation would have on economic growth. Negotiations over specific legislation, especially employment standards legislation (the BCEA), sparked heated debate between government, labour and business regarding the need for increased regulation versus flexibility for achieving improved efficiency at the workplace and international competitiveness.

Provisions in the legislation have sought to balance these contradictory strategies. The most obviously way is through the framework of ‘regulated flexibility’, most overtly introduced in the BCEA. Overall, the aim was to introduce flexibility by allowing greater scope for negotiation while at the same time increasing statutory regulation. The BCEA extended and expanded protection for workers but with provision for variation by ministerial or sectoral determination, bargaining council agreement, collective agreement, and individual agreement (as well as specific provisions for temporal flexibility in light of the prospect of progressive lowering of the maximum weekly hours of work). However, certain key protections (or ‘core’ rights) cannot be varied. The premise of this model is that more equity, if flexibly regulated, would

¹⁴ The Skills Development Levies Act was passed by Parliament on 23 September 1999.

contribute to greater efficiency (du Toit et al, 2000: 39). Overall, variation provisions provide for quite extensive forms of flexibility. Indeed, as we shall see, the legislation has gone far to accommodate the needs of business.

Flexibility provided by ministerial and sectoral determinations

Despite claims of ‘rigidity’ in the new legislation, variation provisions have been utilised in exactly the manner provided for in the legislation. Importantly, the first ministerial determination responded to the needs of small businesses. One of the main arguments made by some sectors of business was that the new BCEA was too inflexible with regard to small firms. Indeed, this argument led to the delay of the promulgation of the Act while an investigation was carried out to establish what its likely impact would be on small firms. The Department of Labour commissioned the Ntsika Enterprise Promotion Agency to conduct the impact assessment study.¹⁵

The Ministerial Task Team that evaluated the impact assessment study made a recommendation to the Minister of Labour based on the findings. The recommendation was that a ministerial determination be promulgated for all firms employing less than ten people, which would; (1) increase the limit on overtime to 15 hours per week; (2) reduce the overtime rate to time-and-a-third; (3) include family responsibility leave in the 21 days’ annual leave per year; and (4) allow an arrangement to average hours of work to be reached by agreement rather than collective agreement, with appropriate protection for workers. The Minister referred the recommendation to the Employment Conditions Commission (ECC), (Godfrey and Theron, 1999: 91). Based on the recommendations of the task team the Department drafted the first Ministerial Determination. The end result was Ministerial Determination No. 1: Small Business Sector.

Ministerial Determination No. 1: Small Business Sector provides that a bargaining council agreement or sectoral determination takes precedence over the determination, unless the agreement or sectoral determination provides otherwise. It, furthermore, does not apply to the employment of domestic workers, the public service, any employer who conducts more than one business, and any business formed by the division or dissolution of an existing business. Besides these exclusions, the determination pretty much followed the recommendation of the Ministerial Task Team. The limit on overtime hours was increased to 15 hours; the rate was decreased to time-and-a-third for the first ten hours of overtime but left at time-and-a-half for any overtime in excess of ten hours in a week; an averaging of hours arrangement can be concluded by written agreement between an employer and employee, and may not provide for an average of more than ten hours overtime in a week over the agreed period (as opposed to five hours in the Act); and, an employer and employee may conclude a written agreement to reduce annual leave by the amount of family responsibility leave the employee takes in a year.

The ministerial determination took effect in mid-November 1999.¹⁶ Its publication was in line with the scheme of the Act, namely to provide the means to vary

¹⁵ The Ntsika Enterprise Promotion Agency is a statutory body that was established by the Department of Trade and Industry to assist in the implementation of the National Small Business Strategy.

¹⁶ The coverage of the determination is considerable. The Labour Force Survey for September 2001 conducted by Statistics South Africa estimates that 4 701 000 employees out of a total of 10 833 000

provisions in the Act for the circumstances of particular sectors. It has been accompanied by the following determinations (with month and year of promulgation in brackets):

Sectoral Determinations:

Sectoral Determination No. 1: Contract Cleaning Sector (May 1999)
Sectoral Determination No. 2: Civil Engineering Sector (November 1999)
Sectoral Determination No. 3: Private Security Sector (March 2000)¹⁷
Sectoral Determination No. 4: Clothing and Knitting SA (October 2000)
Sectoral Determination No. 5: Learnerships (June 2001)
Sectoral Determination No. 6: Private Security Sector (30 November 2001)

Ministerial Determinations:

Ministerial Determination No.1: Small Business Sector (November 1999)
Ministerial Determination No.2: Welfare Sector (March 2001)¹⁸
Ministerial Determination No.3: Special Public Works Programmes (January 2002).

In general the sectoral determinations do not provide for major variation from the standards set in the Act.¹⁹ The main intent of these determinations is to introduce minimum wage levels for the relevant sectors. However, the determinations also introduce certain variations on the Act's provisions, some of which are of importance. The Sectoral Determination for the Private Security Sector, for example, provides a definition of a 'casual employee' (i.e. an employee without a fixed contract of employment who works not more than 24 hours in any week). Such an employee is excluded from the provision in respect of meal intervals and is effectively excluded from the annual bonus and family responsibility leave provisions. This variation is significant in that the BCEA has to all intents and purposes eliminated the category of 'casual employee'.²⁰ It is also interesting because it is unclear what circumstances or problems in the security sector led to the introduction of the 'casual employee' category.

The ministerial determinations do not introduce minimum wage levels. Their main intention is to vary particular conditions for somewhat unusual sectors, i.e. not the standard industrial sectors. The Ministerial Determination for Small Business is a case in point. The Ministerial Determination for the Welfare Sector is similar, although it does not just reduce employee protection. While some minimum conditions are reduced, others are improved and some are repackaged differently. For example, it provides for a maximum of 15 hours overtime per week and in an averaging arrangement ten hours overtime in a week; employees regularly on stand-by must be

are employed in businesses with 9 or less 'regular workers' (this estimate includes the self-employed).(2002: 54) So the flexibility that the determination provides applies to about 43 percent of all employees in the country.

¹⁷ Later replaced in its entirety by Sectoral Determination No. 6.

¹⁸ The determination was not numbered when published in the Government Gazette, although it is clear from the dates of promulgation of the ministerial determinations that it should be Ministerial Determination No.2.

¹⁹ Much of the section that follows is drawn from Godfrey and Clarke, 2002.

²⁰ It should be noted that in terms of section 57 of the BCEA the provision in the sectoral determination prevails over the Act.

granted one week's additional annual leave; and although no premium is paid for Sunday work provision is made for additional annual leave when Sunday work takes place.

The Ministerial Determination for Special Public Works Programmes provides for much greater variation on the BCEA, most of which is variation downwards. The determination applies to the following programmes: Working for Water; Community-based public works; Coastal Care; Sustainable Rural Development; Landcare; Community Water and Sanitation; and Arts and Culture poverty relief projects. The determination excludes a large number of the BCEA's provisions from applying to workers employed on the above programmes. Some of these provisions are then re-introduced in the determination in an altered form, but others are not and therefore no longer apply as minimum standards. Still other provisions in the determination vary the equivalent provision in the BCEA.

For example, on the one hand, section 16 of the BCEA, which deals with payment for work on Sundays, is excluded by the determination. But the determination reintroduces a similar provision, which provides that a worker may only work on a Sunday or public holiday to perform emergency or security work. Payment for such work is at the ordinary rate of pay (task- or time-based) for less than four hours worked and at double the ordinary rate for more than four hours worked. On the other hand, the BCEA's provisions in respect of overtime pay, annual leave and pay for annual leave, notice of termination, and severance pay are excluded absolutely. An example of the third form of variation is provided by the hours of work provision. The BCEA's provision is not explicitly excluded by the determination, but the determination makes its own provision for the regulation of hours of work: an employer may not set tasks or hours of work that require a worker to work more than forty hours in any week; on more than five days in any week; and for more than eight hours on any day.²¹

Other notable aspects of the determination are that it provides for task-based pay as well as time-based pay (the provision for task-based pay accounts for some of the alterations in the determination); all workers employed on a special public works programme are employed on a temporary basis; a worker may not be employed for longer than 24 months in any five-year cycle on a special public works programme; and, it excludes all workers on special public works programmes from the ambit of the Unemployment Insurance Act 30 of 1966.²²

Flexibility provided by ministerial variation / exemption

Section 50 of the BCEA makes provision for the Minister of Labour to replace or exclude any basic condition of employment provided for in the Act in respect of any category of workers or employers, or any worker or employer. This provision has been used to allow employers to vary downward certain conditions in the BCEA.

²¹ It is clear that the intention of the determination is that this provision prevails over the equivalent provision in the BCEA. However, section 57 of the BCEA, which deals with conflict between provisions in the BCEA and determinations, refers only to sectoral determinations. So it is a moot point whether a provision in a ministerial determination overrides the equivalent provision in the BCEA.

²² The Unemployment Insurance Act 30 of 1966 has been replaced by the Unemployment Insurance Act 63 of 2001.

During 2002, of the 253 applications for variation received, 182 (72%) were granted while only 6 (2%) were refused. Variation from overtime provisions (section 10) in the Act formed the majority of applications (108 granted). In total, 5 303 302 workers were affected by variations.(Department of Labour, 2002: 38)²³

Taken together, variation provisions provide for extensive flexibility for employers. If variation provisions are examined alongside other forms of *de facto* flexibility (insufficient enforcement and monitoring, lack of coverage for non-standard workers, and non-compliance within the growing informal economy), it becomes difficult to accept the allegations of ‘rigidity’ trumpeted by business. Indeed, an argument can be made that legislation has not gone far enough to protect workers, especially non-standard workers.

(c) Regulating Non-standard and Triangular Employment Relationships

Protecting casual workers

Given the stated objectives of the Department of Labour, and the awareness that vulnerable workers were increasingly those workers in non-standard employment arrangements, how far has the legislation gone in addressing this growing problem and the segmentation it perpetuates? And, how successful has the new regulatory framework been with regard to improving employment conditions of workers, specifically with reference to vulnerable workers and those previously excluded from protection?

Although there was a lack of research and sector specific data on precise employment changes underway, general information regarding employment trends in the labour market was available when new legislation was being negotiated. In fact, background documents and earlier drafts of the BCEA acknowledged the rise of non-standard work (including temporary workers supplied by labour brokers), the lack of regulation for these employment arrangements, and the limited amount of protection available for workers employed in them. For example, in the first draft of the BCEA, it was stated that one of the principal aspects of the new legislation was to “protect vulnerable employees and employees in non-standard employment”.(Green Paper, 1996: 19) To this end, it was proposed that employment standards be extended to ‘dependent contractors’ (ie. workers who fall outside the formal definition of an employee).(Green Paper, 1996: 10)

Despite this recognition of the problem and the government’s commitment to ensure new legislation would regulate atypical forms of work and better protect workers in such employment relationships, the BCEA and subsequent legislation has been weak in addressing these trends. Indeed, although coverage – specifically the inclusion of dependent contractors, part-time and temporary workers – was ardently debated early in discussions over the new legislation, these issues quickly fell aside and other controversial issues, including variation provisions in the BCEA came to dominate negotiations. In fact, the chapter on non-standard employment contained in the first draft of the BCEA (the ‘Green Paper’), released in February 1996, was dropped from

²³ It is unclear whether the number of workers affected by variations includes those covered by ministerial determinations. However, the figure of 5 303 302 suggests that this is the case.

the next draft and from the final Act. Legislation instead tried to extend protection to some workers in atypical arrangements by including casual workers within the definition of employee, but limiting areas of coverage for those who work less than 24 hours per month (see discussion below). However other types of non-standard workers are still excluded from the Act. Dependent self-employed workers, such as homeworkers, owner-drivers and task-workers, fall outside the definition of employee in the Act, and thus are not protected.

In addition, until the recent amendments (discussed below in Section Three of this report), legislation maintained a clear division between employees and independent contractors. Those who fit the definition of employee were covered by legislation, while those who are defined as independent contractors were not. The traditional reading of ‘employee’ has restricted the ambit of protection of labour legislation to employees who have contracted to provide work under a contract of employment and to exclude persons who perform work under a contract of work (a contract regulating work that isn’t employment). A more generous interpretation of the definition of ‘employee’ would include as employees those workers who perform personal services for another irrespective of the form of the contract. In general, as we shall outline later in this paper, the courts have not read a broader category of worker into the definitions of employees in the new LRA or the new BCEA. Thus independent contractors, even those who in reality are dependent workers, have been excluded from the protection of labour legislation.

Further, although casual employment is not defined in the Act²⁴, certain provisions in the BCEA do not apply to employees who work less than 24 hours in any one month.²⁵ For example, leave provisions do not apply to an employee who works less than 24 hours a month. And, section 22 states that the sick leave cycle is ‘36 months employment’ with the same employer’, and that an employee is entitled to ‘an amount of paid sick leave equal to the number of days²⁶ the employee would normally work during a period of six weeks’. However that entitlement is not immediately available: during the first six months of employment the employee is entitled to one day’s paid sick leave for every 26 days worked. Legislation is premised on the view that the employee is in continuous employment and that the entitlement to sick leave arises only *while* the employee is in employment.(Cheadle and Clarke, 2000: 17) Although the Act formally includes casual workers, coverage continues to be based on the notion of continuous employment, whether part-time or full-time. Thus, some casual workers (ie. those on fixed-term contracts²⁷) cannot easily access, or may be effectively excluded from, some of the provisions in the BCEA.

²⁴ The predecessor to the 1997 BCEA, the Basic Conditions of Employment Act 3 of 1983, defined ‘casual employee’ in section 1(1) as an employee who works for a particular employer on not more than three days in any one week. The new BCEA does not define casual employee but does exclude employees who work less than 24 hours in a month from certain of its provisions.

²⁵ Section 6(1)(c).

²⁶ 30 days in respect of 5 day a week workers and 36 days in the case of 6 day a week workers.

²⁷ In contrast to indefinite contracts, fixed-term or limited duration contracts are contracts that last for a defined period or until a specific job has been completed.

Triangular Employment Arrangements and Temporary Work

Over the past two decades, and particularly over the past five years, there has been an exponential growth of temporary employment and of the agencies that recruit and place temporary workers. As will be discussed in the second section of this paper, there is a wide and diverse range of activities carried out by temporary employment agencies. Labour recruitment is a difficult activity to categorise as there are a range of different companies providing various services. There are well-established firms that recruit and supply skilled and semi-skilled workers (short-term and permanent) to companies. Increasingly, there are also a large number of temporary help agencies that specialise in recruiting and supplying short-term or contingency staff to companies who have reduced their permanent workforce and draw extensively on the services of temporary help agencies to supply workers on a regular basis. In addition, there has been a growth in a variety of small and very small enterprises, including some that are survivalist or informal in character, that supply temporary workers (often semi-skilled or unskilled day workers) to different sectors of the economy.

In South Africa these agencies are generally categorised as either: private employment placement agencies, recruiting organisations, and labour brokers. As we shall see in section two, the proliferation of recruiting agencies is closely linked to the dramatic rise in temporary employment. Currently, the provisions in legislation that apply to labour recruitment are:

- Labour Relations Act: The LRA of 1995 defines a ‘temporary employment service’ (TES), formerly referred to as a labour broker, as “*any person who, for reward, procures for or provides to a client other persons (a) who render services or perform work for the client; and (b) who are remunerated by the TES.*”²⁸
- Skills Development Act (SDA): Although the SDA was introduced after the LRA, it does not refer to TESs. Instead it introduces a requirement that “*any person who wishes to provide employment services for gain must apply for registration...*”²⁹ The registration form is basic, requiring little more than the address and particulars of the applicant.³⁰ The application must be forwarded to the Director General of Labour. If satisfied that the prescribed criteria have been met, the Director General may register the applicant as a ‘private employment office’. However, as yet no criteria have been gazetted. Furthermore, as will be discussed in more detail later, many temporary help agencies are not registered and the DoL has done little thus far to enforce its system of registration.
- Basic Conditions of Employment Act: The BCEA provides the same definition for a ‘temporary employment service’ as does the LRA. Under section 82 of the Act both the temporary employment service and its client are rendered jointly and severally liable if the former contravenes the provisions of the BCEA.
- Employment Equity Act (EEA): The EEA does not provide a definition of temporary employment services. However under section 57 (1), a person whose

²⁸ Section 198(1)(a) and (b).

²⁹ Section 24.

³⁰ Annexure 5, SDA.

services have been procured by a temporary employment service will be deemed to be an employee of the client if that person's services are utilised by the client for longer than three months. The client will thereafter be liable for any unfair discrimination against the employee. Prior to that (3 months), the labour broker and the client are jointly and severally liable for any unfair discrimination against employees supplied by the temporary employment service (section 57 (2)).

The government's reluctance to regulate these new forms of employment is evident in the LRA and the Skills Development Act. Section 82 of the BCEA and section 198 of the new LRA provides that temporary workers are the employees of the temporary employment service (TES). In terms of both the new LRA and BCEA, the TES and the client are jointly and severally liable in respect of breaches of collective agreements and arbitration awards regulating terms and conditions of employment. This is an improvement over past legislation but still doesn't go far enough in ensuring that such employment arrangements don't deprive workers of their rights. For example, section 198 retreats from the original proposal contained in the Labour Relations Bill that a TES and its client would also be jointly and severally liable for contraventions of the new *LRA itself*. If this provision had been contained in the final Act, a client could have been held responsible for, amongst other things, the unfair dismissal of an employee by the TES. Instead of regulating TESs, legislation has focused on minor reforms to definitions (i.e. designating labour brokers as TESs) and clarifying certain rights surrounding this employment relationship.

The Skills Development Act is also weak with regard to regulating labour brokers and other temporary employment agencies. For example, the requirement in the old LRA that labour brokers register with the Department of Labour was dropped from the new LRA.³¹ This requirement has, however, continued in part because agencies are now required to register with the DoL in terms of the new Skills Development Act. However, according to the DoL itself, this is merely a 'paper exercise' and it is not intended to monitor agencies with regard to workers' rights and employment conditions. Even if the purpose of registration had been to monitor agencies and ensure that workers rights were enforced, it is doubtful whether the DoL had the capacity to achieve this. Weak monitoring mechanisms and the poor definition of 'private employment services', taken from the old Manpower Training Act and inserted into the Skills Development Act, are out of date with current developments in temporary employment. As a result, a large percentage of labour brokers have failed to register with the DoL. Even if registered, the activities of these temporary employment agencies continue to be largely unregulated.

(d) Monitoring and Enforcement of Legislation

One of the key issues with regard to the protection of workers is the strength of monitoring and enforcement of legislation. New legislation introduced significant

³¹ The 1956 LRA defined a 'labour broker' as a person who conducts or carries on a labour broker's office. A 'labour broker's office' was defined as any business whereby a labour broker for reward provides a client with persons to render such service to or perform work for the client or procures such persons for him, for which service or work such persons are remunerated by the labour broker. Section 63 of the Act required the registration of a labour broker's office. Labour broker's offices were obliged to retain records and make records available for inspection. Failure to comply with section 63 of the Act was an offence.

changes with regard to enforcement. Following the LRA in its decriminalisation of labour legislation, the new BCEA introduced new monitoring and enforcement procedures. The different inspectorates (eg. Labour Relations, Health and Safety) have been restructured into a single inspectorate, with inspectors now responsible for the enforcement of all labour legislation. The main function of inspectors is to monitor compliance with the Act by conducting inspections. Inspectors have the power to enter workplaces and demand information, but they cannot enter private homes except by agreement of the owner or unless authorised by the Labour Court. While clearly the privacy of individuals must be respected, this limitation has raised questions about the extent to which inspectors will be able to monitor compliance for employers of domestic workers and farmworkers. The primary enforcement mechanism is the compliance order issued by a labour inspector. Employers are given a certain amount of time to comply with the order or to appeal it. Non-compliance means the compliance order must be made an order of the Labour Court, and failure to comply can then result in fines. In cases where a court order is not adhered to, the employer can be found in contempt and imprisoned.

With the de-criminalisation of enforcement under both the LRA and BCEA, bargaining council agreements are no longer enforceable by criminal courts, but are now enforceable civilly through arbitration. Under the new system conciliation must first take place before the resort to arbitration. Then, if an employer does not comply with an arbitration award, the award must be made an order of court before it can be executed. If the employer still does not comply with the award, the bargaining council must institute contempt proceedings. The new enforcement system thus far has proven weak and ineffective – processes continue to be extremely slow, and employers can deliberately delay them even more or undermine the system by refusing to comply with the arbitration award. Several provincial offices of the DoL report ongoing frustration with the new system, drawing attention to the long delays in enforcing compliance orders through the courts.

Overall, the introduction of new statutes has placed increased pressure on the DoL and its provincial offices. Even before new legislation was implemented, the capacity of the Department to effectively monitor compliance with legislation was weak. For example, the number of inspectors staffing provincial offices was often far below the number of posts available. These problems have been accentuated with the introduction of new legislation, as the increased workload within the Department has not been accompanied by adequate increases in staffing levels. For example, both the EEA and the SDA require substantial monitoring and ongoing administrative work to ensure their implementation and effectiveness, yet most provincial offices report that they still have vacancies for inspectors³². The DoL confirmed that this was an ongoing problem during a recent Parliament Portfolio Committee briefing on Occupational Health and Safety for 2002, when it was reported that the staff shortage in the DoL is about 41% (Parliamentary Monitoring Group, 20 August 2002).

Our preliminary research on the capacity of provincial offices demonstrates the problem of staff shortages. For example, of the 120 inspector posts in Gauteng North, there are currently 53 vacancies (45% of the posts are vacant), in Limpopo province

³² Telephone interviews with the Inspection and Enforcement Services in nine provincial offices, June – August 2002.

there are 72 out of the 104 positions filled.³³ As a result of staff shortages and general capacity problems, many offices reported that inspections tend to be reactive – responding to complaints – rather than proactive; and often proper follow-up is difficult as there are too many other pressures on inspectors. Along with serious understaffing of the inspectorate, are press reports of disputes between inspectors and the Department, demoralisation amongst inspectors, and (as one would expect) numerous resignations.³⁴

In addition to staff shortages, many offices face a range of other problems that make effective monitoring and enforcement difficult. One common issue facing inspectors from all provincial offices was the problem of gaining access to employees working on private property (domestic and farm workers). According to the Eastern Cape office, some farmers have jointly planned ways to limit access onto farms, such as placing security guards and ‘booms’ at the gates to keep inspectors off the farms. Most provincial offices reported similar problems to the following, recounted by an official of the Free State Provincial Office: “Employers in the domestic sector refuse inspectors access onto the premises. Then they have to return with the police, but then the employers are not there and the inspectors cannot enter the premises. They have to set up appointments but the employers do not honour these. We really can’t enforce the legislation for farm or domestic workers right now”.³⁵ The scope for either partial or absolute non-compliance with the BCEA and other labour regulations that the Department must enforce therefore appears to be enormous.

In addition, the development of appropriate strategies to improve enforcement is made difficult with the disparate systems of data collection in provincial offices. An internal report on the “Deliverables in the Inspection and Enforcement Services” argued that information within provincial offices is not readily or easily available.³⁶ According to the author of the report, “data collection in the department is absolutely appalling. There is no uniform standard and in some provinces there is just no information because it either has not been collected or has not been stored. It’s anyone’s guess how effective we are, or are not!” He went on to plead, “Can’t the ILO help us with this enormous problem?”³⁷

Although some provincial offices do not break complaints down per statute, and different data collection systems result in poor national statistics, the table below provides an overall picture of the nature of complaints received by each of the provincial offices.

³³ Telephone interviews on 10 July 2002 (Limpopo Province) and 12 July 2002 (Gauteng North).

³⁴ See, for example, ‘Labour department faced with mass exodus’, Mail & Guardian, July 14 to 20, 2000.

³⁵ Telephone interview, Inspection and Enforcement Services (Free State Provincial Office), 11 July 2002.

³⁶ At the time of writing the report was still to be submitted to the Minister of Labour. The copy of the report that we obtained (August 2002) was therefore not yet official. The report analysed information covering the period January to June 2002 that was gathered from all provincial offices. The data is organised according to cases and complaints within each sector and province.

³⁷ Telephonic interview, 12 July 2002.

Table One. Inspection and enforcement: Complaints received per province³⁸

PROVINCE	BCEA	UIA	COIDA	EEA	LRA	OHS	TOTAL
Eastern Cape	976	209	160	0	522	13	1 880
Free State	2 016	947	7 610	14	0	9	10 596
Gauteng North	9 840	2 528	2 533	15	308	200	15 424
Gauteng South	6 491	4 110	5 494	14	3 095	740	19 944
Kwazulu Natal	13 430	3 039	310	10	0	56	16 845
Limpopo	4 689	3 364	6 123	3	458	1	14 638
Mpumalanga	6 332	1 738	187	10	639	64	8 970
Northern Cape	6 629	302	21	0	0	1	6 953
North West	0	0	0	0	0	0	6 242*
Western Cape	2 857	562	4 093	52	0	225	7 789
TOTAL	46 587	15 086	24 811	106	4 814	1 176	109 281
Average per month	776	251	413	2	80	20	1 821

The Department is aware of the above problems, and is currently attempting to enhance its enforcement capacity. Recently, the DoL initiated an extensive restructuring, first through reorganising the inspectorate into one unit to make it more effective, then through developing and implementing an ‘inspection enforcement strategy’. Importantly, as part of this strategy the Department was focusing attention on improving the capacity of provincial offices to monitor and enforce legislation, both through increasing the number of officers in each region and providing ongoing and targeted training to all staff in order to substantially upgrade their skills. In addition, after several well-publicised cases of some employers’ complete lack of adherence to any legislation, many provinces have carried out ‘targeted blitzes’ to focus on problematic sectors. Although provincial offices welcome restructuring, in the short term it is adding to the problem of understaffing and workload.³⁹

Given the enormity of these problems, it is unlikely that the restructuring introduced thus far will be sufficient to address the weakness, and lack of capacity in the Department. As we shall outline below in the section on informal work, the dramatic rise in informal employment and the lack of compliance with legislation makes the situation even worse. As a result, the level of enforcement and inspection in many sectors is likely to remain extremely low – especially for those workers on private property, such as agricultural and domestic workers, and for those in vulnerable employment. Effective enforcement and monitoring of new laws clearly requires even

³⁸ Information supplied by author of report: Deliverables in the Inspection and Enforcement Services.

* Complaints were not broken down per individual statute.

³⁹ For example, on several occasion during our telephone interviews we were unable to reach anyone in many of the provincial offices as most of the staff, except for the receptionist and a handful of other staff, were away on training for several days.

greater changes to increase the capacity of the Department of Labour and provincial offices. Until that happens it is unlikely that these laws will be effectively enforced.

Section Two: Labour Market Trends

Labour markets develop in tandem with social and political institutions and policies (Peck, 1996). Apartheid economic, social and labour market policies created a highly segmented labour market and a dual system of industrial relations. The key characteristics of the labour market under apartheid included: high and rising unemployment, and a relatively small informal sector; extreme inequality of income and wealth; and a very high degree of poverty (much of which could be attributed to the level of unemployment and income inequality). Given systemic racism and sexism, unemployment, income inequality and poverty were distributed very unevenly by race, gender and location. The combination of these imbalances produced extreme conditions for African females and Africans in non-urban areas.

One of the most significant changes in the post-apartheid labour market has been the restructuring of work and employment, and the proliferation of new forms of employment. As we shall see, some of the loopholes and weaknesses in the legislation are contributing to this growth in non-standard and unprotected work. Increasingly, divisions in the labour market correspond to contractual trends: a shrinking group of protected workers with permanent, full-time jobs in core sectors of the economy are protected by legislation and benefit from increases in wages and working conditions, while a growing number of workers in precarious employment are situated at the expanding margins of the economy. The majority of these workers are African and a large proportion is female. So, despite the introduction of new legislation, the post-apartheid labour market remains segmented along gender and racial lines.

Alongside new forms of employment and contractual arrangements, has also been the re-emergence of 'old' forms of casual and contractual employment – some continuing along similar lines as those that characterised the apartheid labour market, while others have been re-shaped to conform to the modern, advanced capitalist (post-apartheid) economy. Restructuring in South Africa is nationally specific and in some ways differs considerably from international trends, but the general rise in atypical forms of employment parallels global experiences. This section of the paper will trace two key trends in the post-apartheid labour market: the growth of informal employment, and the increase in various forms of non-standard employment.

(a) Contours of the Post-Apartheid Labour Market: Formal and informal employment changes⁴⁰

It is generally acknowledged that South Africa had a small informal economy under apartheid. However, this needs to be qualified. First, there were few official attempts to measure the size of informal employment. Second, there were numerous methodological challenges that cast doubt on the estimates produced by the studies

⁴⁰ This section draws on research conducted as part of a comparative project funded by the UK Department for International Development. See, Clarke, Marlea, Shane Godfrey and Jan Theron. 'Globalisation, Production and Poverty: Macro, Meso and Micro Levels Globalisation, Democratisation and Regulation of the South African Labour Market'. 2002.

that were done. Still, all indications are that non-African informal employment was very low, as was urban African informal business activity and employment (largely because of the apartheid education system and restrictions on African business activity). Certainly, in relation to the size of the informal economies in countries at a comparable level of development, South Africa's informal economy was very small.

In 1994 the October Household Survey (OHS) made a contribution to a better understanding of the size of the informal economy, but definitely did not solve all the problems around measurement. The improvements in labour market statistics continued with the October Household Surveys of 1995, 1996, 1997, 1998 and 1999. This allowed for a better understanding of developing trends in the labour market, although changes to definitions and categories in the course of the surveys have created difficulties for time-series analysis. In 2000 a new six-monthly survey started: the Labour Force Survey. These surveys produce data on the labour market for February and September of each year. Again, changes in methodology and definitions make comparisons difficult across the October Household Surveys and the Labour Force Surveys for some categories, but the data is a vast improvement on what existed a decade ago. Below we briefly outline the contours of the post-apartheid labour market.

Over the period between 1995 and 2002 employment increased from 8 069 000 to 10 833 000, a gain of 2 764 000 jobs (34 percent). However, over the same period the economically active population grew from 9 713 000 to 15 358 000, an increase of 5 645 000 people (58 percent). Job creation therefore continues to be outstripped by job shedding and the inflow of new entrants to the job market, which means that unemployment is continuing to rise. In 1995 there were, using the narrow or 'official' definition, 1 644 000 people unemployed (16.9 percent) and in 2001 there were 4 525 000 unemployed (29.5 percent). The expanded definition gives rates of 29.2 percent in 1995 and 41.5 percent in 2001 (Central Statistical Service, 1998: 28-29; Statistics South Africa, 2002: iv and xii).

Employment trends by sector for the period 1995 to 1999 are examined in Table Two. It shows that jobs were created in the mining, manufacturing, construction, trade, transport, finance and domestic service sectors, with trade and finance recording by far the biggest gains. Jobs were lost in the agricultural, utilities and community services sectors, with the latter recording the biggest drop in absolute terms. When disgregated by occupational category, the losses are concentrated primarily in the 'clerical' and 'elementary occupations' categories (Bhorat, 2001: 3-6).

Table Two. Employment trend by sector: 1995 - 1999

Sector	Employment gains/losses
Agriculture	-39 397 (-3%)
Mining	+45 263 (+10%)
Manufacturing	+94 500 (+7%)
Utilities	-5 559 (-7%)
Construction	+136 197 (+31%)
Trade	+458 871 (+28%)
Transport	+73 893 (+16%)
Finance	+357 612 (+61%)
Community services	-143 424 (-7%)
Domestic services	+179 777 (+22%)
TOTAL	+1 157 733 (12%)

(Bhorat, 2001: 3)

The employment trends broken down by race (for the period 1995 to 1999) show that Coloured workers have made the biggest gains (a 16.4 percent increase in employment), followed by Asians (12.8 percent), Africans (12.2 percent) and Whites (7.8 percent). However, when one compares the employment growth by race to the growth of the economically active population by race, it is evident that Africans have fared worst. The African economically active population grew by 27.2 percent over the period, as against 22.1 percent growth for Asians, 18.3 percent for Coloureds, and 10 percent for Whites. So, despite employment growth in the order of 737 834 for Africans, the number of African people unemployed increased by 1.8 million, resulting in an unemployment rate of 43.7 per cent in 1999 (Poswell, 2002: 5-6).

Employment growth by gender tells a similar story. Employment for males and females grew between 1995 and 1999. However, the economically active population for both grew significantly more. While male employment grew 7.8 percent, the economically active population grew 18.5 percent; the corresponding figures for females are 18.3 percent and a remarkable 29.8 percent. Unemployment therefore rose for both males (from 22.7 percent to 29.7 percent) and females (from 37.3 percent to 42.8 percent) over the period. It is apparent from this data that the number of women entering employment increased over the period, but this increase was well below the increase in the number of females entering the labour market (Poswell, 2002: 7-8).

Location continues to play an important part in the distribution of employment and unemployment. In fact, over the period 1995 to 2001, unemployment rose more rapidly in non-urban areas than in urban areas. The 1995 OHS gives an unemployment rate of 34.3 percent unemployment (expanded definition) in non-urban areas, as against an overall unemployment rate of 29.2 percent and an urban unemployment rate of 27.0 percent. The 2001 (September) Labour Force Survey estimates unemployment in non-urban areas at a rate of 51.3 percent compared to an overall rate of 41.5 percent and an urban rate of 35.8 percent. Over the six years the non-urban unemployment rate therefore increased by 17.0 percent while the urban

rate increased by 8.8 percent (Central Statistical Service, 1998: 28-29; Statistics South Africa, 2002: 9-10).

For some reason the 1994, 1995 and 1996 October Household Surveys included only domestic workers, the self-employed and employers in its definition of the informal economy, but from 1997 'employees' (including domestic workers) were also counted. However, the change means that the earlier estimates cannot be compared with the 1997 OHS and later surveys. We shall therefore focus on the period 1997 to 2001 below.

Table Three traces the growth of informal employment by sector, compared to the growth of formal employment, and the changing formal/informal employment composition of sectors.⁴¹ It shows that overall informal employment increased from 1 838 000 people (24 percent of total employment) in 1997 to 2 351 000 people (22 percent) in 2001. This constituted a 28 percent increase (compared to a 48 per cent increase in formal employment).

Table Three. Growth of formal and informal employment compared: 1997-2001

Sectors	1997 (OHS)			1999 (OHS)			2001 (LFS: Sept)		
	Formal	Informal	Total	Formal	Informal	Total	Formal	Informal	Total
Agriculture, hunting etc.									
Employment (000s)	455	182	637	803	296	1099	666	359	1025
% change	-	-	-	+76	+63	+73	+46	+97	+61
Formal/informal split	71	29	100	73	27	100	65	35	100
Mining & Quarrying									
Employment (000s)	-	-	-	470	6	476	484	0	484
% change	-	-	-	-	-	-	-	-	-
Formal/informal split	-	-	-	99	1	100	100	0	100
Manufacturing									
Employment (000s)	1096	80	1176	1309	189	1498	1384	199	1583
% change	-	-	-	+19	+136	+27	+26	+149	+35
Formal/informal split	93	7	100	87	13	100	87	13	100
Electricity, Gas & Water									
Employment (000s)	91	6	97	75	3	78	93	0	93
% change	-	-	-	-18	-50	-20	+2	-100	-4
Formal/informal split	94	6	100	96	4	100	100	0	100
Construction									
Employment (000s)	268	102	370	324	243	567	319	258	577
% change	-	-	-	+21	+138	+53	+19	+153	+56
Formal/informal split	72	28	100	57	43	100	55	45	100

⁴¹ The table is calculated from the data of the 1997 and 1999 October Household Surveys and the 2001 Labour Force Survey.

Wholesale & Retail Trade									
Employment (000s)	915	168	1083	1386	693	2079	1427	937	2364
% change	-	-	-	+51	+313	+92	+56	+458	+118
Formal/informal split	84	16	100	67	33	100	60	40	100
Transport & Storage, etc									
Employment (000s)	328	56	384	446	93	539	429	104	533
% change	-	-	-	+36	+66	+40	+31	+86	+39
Formal/informal split	85	15	100	83	17	100	80	20	100
Financial & Business Services									
Employment (000s)	462	41	503	871	60	931	890	77	967
% change	-	-	-	+89	+46	+85	+93	+89	+92
Formal/informal split	92	8	100	94	6	100	92	8	100
Community & Social Services									
Employment (000s)	817	830	1647	1813	171	1984	1812	163	1975
% change	-	-	-	+122	-79	-20	+122	-80	+20
Formal/informal split	50	50	100	91	9	100	92	8	100
Private Households									
Employment (000s)	753	-	753	38	929	967	916	127	1043
% change	-	-	-	-95	-	+28	+21	-	+39
Formal/informal split	100	0	100	4	96	100	88	12	100
Unspecified/Other									
Employment (000s)	526	373	899	129	23	152	19	127	146
% change	-	-	-	-75	-94	-83	-96	-66	-84
Formal/informal split	59	41	100	85	15	100	13	87	100
Total									
Employment (000s)	5711	1838	7549	7664	2706	10370	8439	2351	10790
% change	-	-	-	+34	+47	+37	+48	+28	+43
Formal/informal split	76	24	100	74	26	100	78	22	100

This table shows that in 1997 informal employment made up a significant proportion of total employment in the agricultural, construction, and community and social service sectors. By 2001 the proportion of informal employment had grown in the former two sectors (agriculture had a 97 percent increase in informal employment and construction a 153 percent increase). In addition, the proportion of informal employment had grown significantly in the wholesale and retail sector and the transport sector (informal employment in the former sector grew by a massive 458 percent), as well as the manufacturing sector.

Certain of these figures, however, need to be treated with caution, which in turn requires caution with regard to the totals. A significant proportion of the increase in formal employment over the period appears to be accounted for by improved

measurement. The most obvious example of this is the mining sector, which was not surveyed in 1997 and therefore makes a substantial impact on the employment figures for 1999 and 2001. Because much of the mining employment is recorded as formal, the inclusion of the sector in 1999 and 2001 also influences the relative gains of formal and informal employment, i.e. it inflates the increase in formal employment. A similar caveat can be made with regard to employment in the private household sector (i.e. domestic workers), which is in the main categorised as formal employment (and shows significant growth over the period). It is unclear why domestic workers are treated as formally employed; it is arguable that the majority of domestic workers are in employment circumstances that are better categorised as informal. Again, this impacts significantly in the relative gains of formal and informal employment. The huge drop in informal employment in the community and social services sector and the ‘unspecified/other’ sector also need explanation. Taken together, we believe that these problems in the data lead to the growth in informal employment being undercounted, both in absolute terms and relative to formal employment.

In Table Four below we try to discount the influence of some of the above problems, focussing on the contribution that informal employment made to employment increases in selected sectors.⁴² The table shows that the increase in informal employment between 1997 and 2001 accounted for 45 per cent of the overall increase in employment in these sectors.

Table Four. Contribution of formal and informal employment increases to employment change: 1997-2001⁴³

Sector	Total	Formal (%)	Informal (%)
Agriculture, hunting, etc.	+388 000	+54	+46
Manufacturing	+407 000	+71	+29
Construction	+207 000	+25	+75
Wholesale and retail trade	+1 281 000	+40	+60
Transport and storage, etc.	+149 000	+68	+32
Financial and business services	+464 000	+92	+8
Private households	+290 000	+56	+44
Total	+3 186 000	+55	+45

Informal employment growth played a significant role in overall employment growth in the agricultural (46 percent), construction (75 percent), and wholesale and retail

⁴² We excluded those sectors where there had been a decline in employment (e.g. the utilities sector), where there were large unexplained shifts in formal or informal employment over the period (i.e. the community, social and personal services sector), and where certain data was missing (i.e. the mining and quarrying sector).

⁴³ The table is calculated from the data presented in Table Three.

trade sectors (60 percent). Substantial contributions were made by informal employment growth in the manufacturing (29 percent) and transport (32 percent) sectors.

While one cannot compare the above figures in Table Three and Four with those produced in Table Two because of the different time periods, it seems to be clear that a significant proportion of the employment growth reflected in Table Two is made up of informal employment growth. Given the growth of informal employment, it is important to understand what are the features of such employment. Informal employers generally do not comply with most or all labour regulations. The new set of labour statutes, and the rights and benefits they provide, therefore do not impact on such employment. The objective of the statutes, namely to transform the apartheid labour market, is not being met in these employment arrangements. It is therefore likely that the contours of the apartheid labour market are being replicated in the post-apartheid informal economy.

The informal economy is dominated by Africans and is well out of proportion to their employment in the formal economy. The table below compares the distribution of employment in the formal and informal economies by race in 1997 and 2001.

Table Five. Formal and informal employment by race: 1997-2001

	1997			2001		
	Formal	Informal	Total	Formal	Informal	Total
	%	%	%	%	%	%
African	54.3	80.5	60.6	55.5	86.4	64.8
Coloured	16.9	12.8	15.9	13.7	7.8	11.9
Asian	7.5	1.6	6.0	5.8	1.3	4.5
White	21.3	5.1	17.3	24.7	4.1	18.6

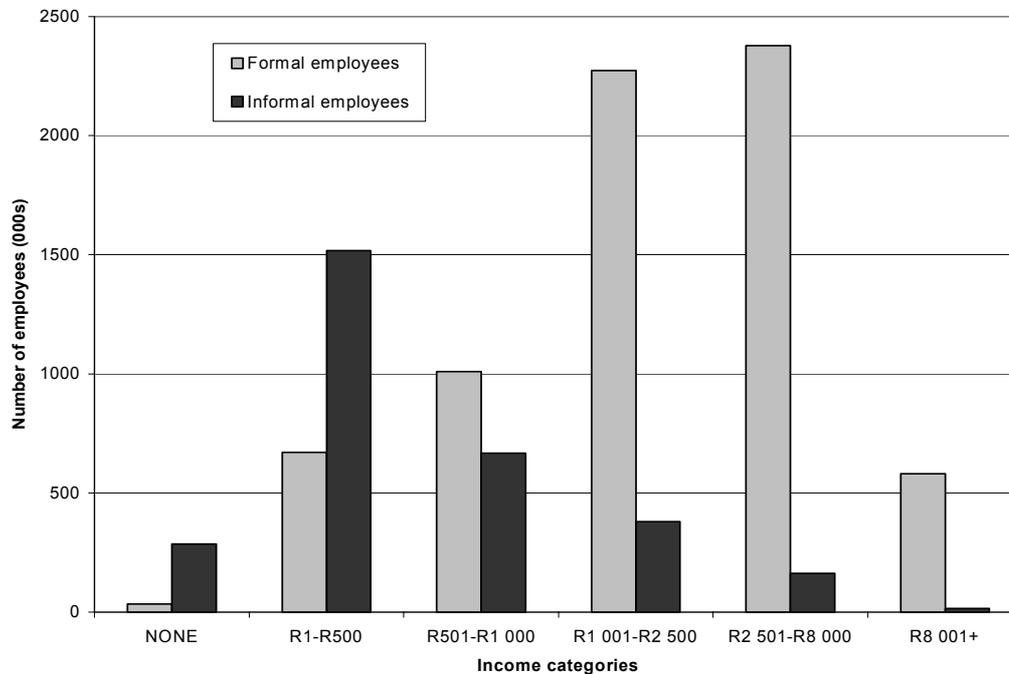
The number of Africans in the informal economy is therefore increasing considerably faster than the number of Africans in employment in the formal sector (Central Statistical Service, 1998: 55; Statistics South Africa, 2002: 28-31).

If one includes domestic workers in the count of informal employment, one finds that in 2001 female workers predominate (59 percent females as against 41 percent males). The proportions remain virtually unchanged over the period 1997 to 2001 (the split was 58 percent females and 42 percent males in 1997). The informal employment proportions compare to a breakdown of 62 percent males and 38 percent females in total employment in 2001 (Central Statistical Service, 1998: 54 and 60; Statistics South Africa, 2002: 29-31).

It goes without saying that informal employment provides little security, lower income and poorer non-wage social benefits. The 2001 LFS (September) provided data on monthly income levels of formal and informal employees, which reveals that the vast majority of informal employees are in the lower income categories, i.e. R1 000 per month or less.(Statistics South Africa, 2002: 32) With regard to social benefits, one finds that medical aid or health insurance coverage is as skewed as income distribution. While about 37 percent of formal employees have some form of

medical aid or health insurance, only 4 percent of informal employees have such coverage (Statistics South Africa, 2002: 49-51).

Graph 1. Formal and informal employment by income category: 2001



(b) Changing Patterns of Employment

Although official statistics don't reflect it, alongside the growth in informal employment, recent research has highlighted the growth in non-standard forms of employment in all major industries in the country over the last decade, but especially in the last five years (see Theron and Godfrey, 2000; Cheadle and Clarke, 2000). In particular, there has been rapid growth of casual employment, triangular employment arrangements, independent contracting, and outsourcing/sub-contracting. Sector specific studies support these claims (see Clarke and Kenny, 2002; Kenny, 1998; Hemson, 1996; Klerck, 1994; and, Valodia 1991). Increasingly workers are employed in jobs that lack the benefits typically associated with the standard employment relationship. Evidence of casualisation can also be found in the increase of short-term or fixed-term contracts, and temporary and seasonal work.

The Labour Force Survey (LFS) conducted in September 2001 estimated that of a total of 8 767 000 employees (the total excludes employers, the self-employed and those working without pay), 979 000 are 'temporary' (11.2 percent), 586 000 are 'casual' (6.7 percent), 297 000 have fixed term contracts (3.4 percent), and 67 000 are seasonal (0.8 percent). Together such employees make up just over 22 percent of the total workforce (Statistics South Africa, 2002: 46). Historical data does not exist so it is not possible to establish what the trend is with regard to such arrangements. However, sector-specific research points to a rising trend and also indicates that in

some sectors such employment arrangements are far more prevalent than the above data suggests.

Some observers have argued that the number of workers in these forms of non-standard employment still represent a small percentage of the overall workforce. Certainly, since part-time work is included in this data, this percentage is considerably smaller than the percentage of the workforce in non-standard forms of employment in Europe and North America. A number of points need to be made in response. First, most national data originates from household surveys and likely fails to adequately capture a range of important changes taking place in many sectors. Second, there is a lack of clarity around the different categories of employment (and no definitions were provided in the LFS); thus what is captured is largely respondents' own understanding of their employment. Third, the lack of national employment data on different categories of employment over the last few decades makes it very difficult to map trends, and to demonstrate the extent to which full-time permanent employment has been replaced by various forms of non-standard employment. Fourth, the prevalence of the standard employment relationship in a few large sectors might result in survey data overstating its dominance within the national labour force.

Based on our own research and recently conducted sector specific studies, we would conclude that national data is likely underestimating the size and recent rise of non-standard (or 'atypical') employment. Although the Labour Force Survey does provide far better data than previously, it still fails to adequately measure various types of employment and their pervasiveness. Recent data offers little more than a tentative, general 'snapshot' of the labour market and should be viewed in conjunction with sector-specific research in order to gain a fuller picture of employment trends. As this section of the paper will briefly outline, sector-specific research indicates that non-standard employment arrangements are far more prevalent than the above data suggests. Overall, full-time, permanent employment in core sectors of the economy is slowly being replaced by workers employed on temporary contracts, hired either by the firm itself or increasingly being hired and placed at the firm by a temporary employment agency. Further, new contractual arrangements have resulted in non-employment, with 'contracts for service' replacing employment contracts.

Two dominant trends in the labour market will be highlighted this section: externalisation (ie. through the growth of independent contractors) and casualisation (specifically through the rise of temporary work). The next section will use sector specific case studies to explore these trends.

Externalisation / Casualisation

Casualisation⁴⁴ is running alongside (and often intersecting with) a process known as externalisation, which sees work increasingly being conducted in terms of a

⁴⁴ Casualisation is taking place through the reduction of permanent, full-time staff and the increase in part-time and casual employees. In addition, downward pressure on wages and working conditions, and the prevalence of jobs with irregular work schedules reveals that a process of casualisation is underway in South Africa. While there is a great deal of overlap between the process of casualisation and externalisation, we use the term externalisation to distinguish those processes that result in having goods or services supplied in terms of a commercial contract rather than in terms of an employment relationship. Thus, those who in reality are dependent workers are placed outside the protection of

commercial contract rather than an employment contract. Examples of externalisation are homework, independent contracting, outsourcing, and self-employment. Externalisation and casualisation are also taking place through intermediaries such as temporary employment services or labour brokers (discussed below).

In many cases, processes of externalisation result in a decrease in the number of persons employed, and a corresponding increase in the number of persons who are dependent on the sector in some way other than through an employment relationship. Externalisation also encompasses the following: a transfer of assets to employees or former employees in any part of the sector, whereby such employees own or manage such assets or enterprise themselves; the outsourcing of services or operations; sub-contracting; an increase in the proportion of small and very small enterprises in the sector, or an increase in the proportion of informal enterprises. (Theron and Godfrey, 2000: 18-19)

General and sector specific research indicates that all the above are on the increase. Both the construction and mining industry have witnessed a significant rise in sub-contracting. In both sectors certain operations have traditionally been sub-contracted to 'specialist' companies. However, alongside retrenchments and the overall decline in total employment has been a rapid increase in sub-contracting, with sub-contracting now incorporating a wide range of operations, including those previously seen as 'core' functions. Similar trends are also apparent in the clothing manufacturing sector, the food retail industry, and the catering and accommodation sector. For example, linked to massive retrenchments in the clothing industry, there has been a marked growth in informal production of garments. Homeworking has grown in recent years with many manufacturers and retailers sourcing directly from homeworkers. In addition to replacing full-time permanent workers with casual and part-time employees, many retailers are increasingly outsourcing some of their activities to smaller companies, or to businesses in the informal sector or homeworkers (ie. home-based delicatessen food producers). Labour brokers are also making inroads into this sector, supplying, for example, workers responsible for merchandising in the stores.

As the brief case studies below highlight, these employment trends in the labour market have continued and even accelerated since new legislation was introduced. Within the context of high and rising unemployment, the failure of other government policies⁴⁵ to create and sustain jobs, increased pressure on businesses to become more internationally competitive. As a result, employers have continued to introduce restructuring initiatives aimed at reducing their labour costs and increasing 'flexibility'. Legislation has failed to contain or regulate these practices. Businesses are continuing to restructure their workplaces and workforces, with employers increasingly implementing initiatives aimed at changing employment arrangements in order to bypass legislation. The overall consequence of flexibility provisions in the legislation, inadequate monitoring and enforcement of legislation, and loopholes and weakness in the statutes, has been creation of an environment in which these practices flourish. Indeed, despite significant gains made on paper with the introduction of new legislation, more workers are situated on the growing margins of the economy, outside formal regulation and protection.

legislation due to having a contract for services, rather than a contract of employment. (see Theron and Godfrey, 2000).

⁴⁵ For example, the failure of the government to develop a coherent trade and industrial strategy.

From workers to 'independent contractors'

The exclusion of 'independent contractors' from labour legislation has also facilitated the processes of externalisation and casualisation. Employers have exploited this loophole by converting 'workers' into independent contractors or self-employed workers in order to bypass legislation. There is evidence that employers in different sectors have convinced their employees to sign contracts converting them into independent contractors – even when their work remains unchanged.⁴⁶ Clothing manufacturers have continued make use of COFESA⁴⁷ to restructure their workforce, converting employees into 'independent contractors'. As reported in the previous ILO South Africa country report, by 1999 COFESA, an employers' organisation set up to assist employers in 'restructuring their workforce', claimed to have converted over 25,000 clothing workers in the province of Kwa-Zulu Natal into independent contractors. Although these claims are clearly inflated, this has been a growing problem in the clothing industry and in other sectors. As noted earlier, employees in the transportation sector have also been converted into self-employed people through 'owner-driver' schemes or as 'driver-salesmen'. The conversion of employees into 'independent contractors' or 'self-employed workers' allows employers to bypass minimum standards labour legislation and collective bargaining agreements as neither category of workers are considered 'employees' under current legislation.

These practices have continued and even accelerated over the last few years. COFESA and other labour consultancies have assisted employers in exploiting the loopholes in the legislation, finding 'legal' ways to externalise their workforce. In contrast to other organisations, COFESA actually assists companies in restructuring, shifting workers from 'employees' of the company to independent contractors. COFESA-organised firms no longer have to adhere to collective agreements, to minimum wages, or contribute to medical aid, sick pay, pension, unemployment and training schemes or funds. According to Skinner and Valodia (2002), it is estimated that COFESA firms can achieve an immediate 30% reduction in labour costs.

COFESA continues to grow, both in membership and influence. In 2001 their annual report stated that they represented over 100 000 employers from a wide range of sectors. The founder and current director estimated that there are about 5 million 'independent contractors' operating in South Africa, with at least 2 million converted into independent contractors through the assistance of COFESA⁴⁸. Recent growth, according to him, has been in the following sectors: security, leather, furniture and retail. While these estimates are almost certainly exaggerations, the figures are nevertheless indicative of a growing trend in converting employees to 'independent contractors'.

⁴⁶ For example thousands of workers in the clothing industry have been converted into independent contractors. Despite this 'conversion', they report to work at designated times and carry out the same task in the same manner that they did when they were employees of the company. These practices have correctly been called a sham, as workers remain dependent employees of the employer regardless of the new designation of 'independent contractor'.

⁴⁷ The Confederation of Employers South Africa (COFESA) was established in 1990 as both a labour consultancy and employers' organisation.

⁴⁸ Telephonic interview, August 30, 2002.

Temporary Work and Triangular Employment Arrangements

Although there is no reliable data available, our research demonstrates that temporary employment agencies and labour brokers have grown significantly in recent years, now supplying temporary help in all sectors of the economy, and for a range of different jobs. Indeed, temporary help has increased to such an extent that this industry is probably the fastest growing sector in the country. The increase in temporary work has been presented as a successful ‘job creation’ strategy offering new employment opportunities for workers. It is also presented as the result of larger numbers of workers (especially women) seeking more flexible working arrangements. Some agencies do little to hide the fact that temporary or contract staff provide a way for employers to duck labour laws, or bypass unions by retrenching unionised staff for ‘operational requirements’ and replacing them with un-unionised temporary workers. Take for example the advertisement below for temporary workers to ‘solve staffing problems’ employers may have:

“Guest House Temps., Marvellous Maids, Choose-a-char offer ‘WONDERFUL WORKERS’ available for your selection at a nominal fee: domestics, chars, housekeepers, kitchen hands, restaurant workers, cooks, childminders, nurse aids, clerks, receptionists, drivers, cashiers, labourers. Make one phone call to find staff to fit your requirements, one call can *solve any staffing problem* you might have.”⁴⁹

Alongside the growth in the industry have been important changes in the role temporary help agencies play in the labour market. In contrast to merely recruiting and placing contract staff in a small range of industries, agencies and labour brokers are now playing a more prominent role as ‘employers’, and are operating in most sectors of the economy. It is not uncommon for agencies to place a human resource person or supervisor at workplaces where they supply a large percentage of the company’s workforce. Although administrative work still forms a large part of the placements agencies make, agencies have actively expanded into a range of different ‘non-traditional’ sectors and are supplying workers in various job categories. Computerisation has facilitated this growth, both allowing agencies to rapidly increase the number of workers on their database, and allowing businesses to restructure their workplaces and staffing arrangements. For example, agencies have been securing large contracts with clients who effectively ‘outsource’ entire departments or sections of their company. An important ‘push’ in this development has been the establishment of call centres by companies, many of which are staffed by agencies.

Size of the Industry

Policies and legislation distinguish two categories of labour recruitment service: temporary employment services and private employment agencies. It is not clear whether this distinction is useful. According to the annual report of the Services Sector Education and Training Authority (SETA), there are 1500 employers in labour recruitment. However a Services SETA brochure claims there are about 4500 employers. This is indicative of the imprecise nature of labour recruitment, and the

⁴⁹ Advert for temporary workers circulated around various workplaces, including the University of Cape Town. June 1999. Our emphasis added.

fact that nobody knows its extent. The number of employees employed by, or placed by these agencies is unknown. Indeed, part of the problem of determining the number of employees is determining who is an employee – and this is a matter of ongoing debate and struggle.

Pockets of the industry are well organised and represented in national organisations. For example there are several employers' organisations with an interest in labour recruitment associated together under the Confederation of Associations in the Private Employment Sector (CAPES). These include the Association of Personnel Service Organisations (APSO), the National Staffing Association (NSA), comprising some of the larger established temporary employment services, the Contract Cleaners Association (CCA), which of course belongs under the Cleaning Chamber of the SETA, and the Construction Employers Association (CEA). However there are likely hundreds of small and medium size agencies and labour brokers operating in the country that aren't part of these national organisations.

History of the Industry

In large part, the growth of the industry in the late 1980s and early 1990s was linked to broader processes of labour market reform. The collapse of influx control and reform of other apartheid policies limiting labour market mobility in the 1980s has contributed to significant changes in employment patterns in South Africa. Migrant labour, though still important in some sectors, plays a less important role as workers are drawn directly from nearby cities and towns. As Crush notes, the advent of inflexible migrancy in the 1980s marked a significant change in previous patterns of migrancy. In contrast to the past, by the 1980s miners were increasingly employed on fixed annual contracts with fixed periods of leave, often returning to the same mine each year to work with the same work gang (Crush 1987: 283). Further, more competitive national and international markets have led companies to restructure their workplaces, with one of the goals being the reduction of labour costs. At the same time, the introduction of new labour laws, industrial relations systems, and trade union organising has led many employers to find 'easier' ways of organising their workplaces. Replacing full-time, permanent employees with temporary workers was one way of reducing labour costs and evading increased labour market regulations. Indeed, some temporary help agencies use this as a marketing tool, offering clients, as one agency puts it: "a way to solve all your labour problems".

The 'modern' temporary help industry (including 'traditional' agencies and labour brokers) is quickly replacing the old system. The temporary employment relationship that emerged during the 19th century was strongly rooted in colonial and later in apartheid labour market policies. Many workers that were recruited by labour market intermediaries were migrant workers and lacked the political and legal rights that white South African workers enjoyed. Contracts provided to temporary workers often had extremely rigid terms and conditions for workers, contributing to limiting the mobility of black workers in the South African labour market. Agencies recruited a very particular group of workers (African men from the rural areas, homelands or surrounding countries) and placed them in a limited number of industries – mostly in the mines, the docks and in the agricultural sector.

Although unable to be hired in a permanent capacity, and always without the rights and status of a regular worker, many employees placed in these industries were however de facto 'permanent' workers. Many 'temporary' workers did not regularly shift to different employment sites, and often had contracts of a year at a time, renewed at the end of the year. Many dock workers and mine workers did the same, or similar jobs their whole life in the same sector. Their status remained that of a temporary worker, not because of the temporary nature of their job, but because apartheid labour market policies defined them as 'non-citizens' and as temporary residents and workers. Contracts offered to workers by labour brokers today don't seek to confine workers in the same way that these early labour market intermediaries did.

The 'traditional' temporary help agency (ie. white-collar agencies placing mainly female secretaries and administrative staff) shaped temporary work in a similar way in South Africa, though it emerged here later than it did in Canada, the United States and European countries. Similar to trends in these countries, the temporary help industry that emerged in South Africa in the late 1960s was highly gendered and racialised. Temporary help agencies initially recruited women (white women) for clerical work, and placed them in a fairly narrow range of industries. Their 'role' was often cast in very sexist language, reinforcing the image that women were best suited to temporary work due to (natural) family and domestic responsibilities. Agencies got a fee from the client (often a % of the workers salary or a placement fee), and workers often were placed in various different workplaces for short-term assignments. The last decade or so has seen a shift in the 'temporary' nature of this employment. Workers are increasingly placed for long periods of time at one client, suggesting the relationship is really better described as a triangular employment arrangement, rather than a temporary employment relationship.

Summary of temporary agency case studies

Based on interviews with several temporary help agencies (Peterson, Kelly-Girl, Quest Flexible Staffing Solutions, and The Temp. Shop), the following general trends can be noted:

- The number of requests for permanent workers from clients to agencies has dropped significantly over the past few years (especially for junior and entry level jobs).
- At the same time, requests for temporary workers have increased considerably.
- The industry is becoming more competitive, with new smaller companies entering the market. It is felt that many of these newer companies put downward pressure on wages and employment conditions of temporary workers in the industry by undercutting rates of established companies.
- The sector is changing: in the past clients used temporary workers to fill gaps in staffing (ie. to fill a temporary vacancy when someone goes on maternity leave, or to temporarily increase the staffing levels during busy times of the year). Now companies are increasingly using temporary workers to avoid commitments (ie. training) and legal obligations to employees. Recruitment officers at each of the four companies noted that clients use their agencies to "avoid all the labour issues".

- Increasingly agencies are requested to provide workers to a whole section of a company ('traditional' areas such as HR, accounting or payroll, and now also non-traditional areas like cleaning), thus allowing the company to essentially 'outsource' these functions to a temporary help agency.
- Agencies are moving into new areas and sectors, and are placing a range of different workers in a wide range of non-traditional placements. For example, while women still make up the majority of workers registered with the temporary employment agencies, a growing number of men are placed with clients in a temporary capacity.

(c) Sectoral Case Studies

*Construction*⁵⁰

The building sector has historically been well regulated by regional bargaining councils, although the itinerant nature of building work has always made monitoring of compliance and enforcement difficult. The evidence on the sector points to about one-third to half of all employees working for unregistered employers, and therefore effectively not protected by any labour regulations.

The nature of the sector and the product it produces has meant that there has always been sub-contracting, with certain building operations (e.g. ceilings, plastering and tiling, joinery and electrical installation) traditionally sub-contracted to 'specialist' sub-contractors. Although there are some large and well-established sub-contractors, they often tend to be small businesses (and suffer from the ills of small businesses, such as limited management infrastructure and administrative capacity, etc.). Historically, a lot of these small sub-contractors (and small builders) have not registered with bargaining councils. However, these builders tended to be at the margins of the formal industry and their non-compliance did not threaten the formal industry or undermine bargaining councils.

In recent years an entirely new form of sub-contracting, generally referred to as labour-only sub-contracting (LOSC), has emerged. LOSC is qualitatively and quantitatively different from the 'traditional' or 'specialist' form of sub-contracting. While specialist sub-contractors are highly skilled, retain considerable discretion as to how to do a particular job, and supply the materials necessary to do the job, the LOSC performs a narrowly defined task, usually not requiring a great deal of skills and with materials supplied by the main contractor. Generally the LOSC is not registered with a bargaining council and does not comply with any other labour regulations, and the status of employees of LOSC varies from working on fixed-term contracts to working as 'independent contractors' or the even more vague 'partners'. Furthermore, the LOSC phenomenon has grown so rapidly in the last decade that it now almost equals the formal industry in size and is undermining long-standing bargaining councils.⁵¹

⁵⁰ This section draws heavily from research conducted by the authors of this paper and published in 2000. See Theron and Godfrey, 2000.

⁵¹ For example, the Gauteng Building Bargaining Council has collapsed and the bargaining council in the Western Cape went through a number of years of instability due to employer dissatisfaction and threats to withdraw.

Outsourcing/sub-contracting has increased substantially, especially since 1995, due to the LOSC phenomenon. Corresponding with this growth of LOSC, there has been an increase in the proportion of small and very small enterprises in the sector, although in some cases this growth seems to be more confined to the informal part of the industry. In particular, there are the so-called 'bakkie builders', who exist only as a bakkie and a telephone number and employ casuals from street corners on a daily basis. Labour broking, on the other hand, does not exist in the sector to any degree.⁵²

Catering and Accommodation

In the hospitality sector security, general cleaning, laundries, gardening and maintenance have been outsourced fairly extensively. However, most hotels have not outsourced beyond these functions. Contrary to this trend is the more extensive outsourcing carried out by Southern Sun hotel group.⁵³ With the aim of outsourcing all aspects of running the hotel that do not form part of its core business – defined as the marketing and administration of letting rooms – the hotel group has outsourced a wide range of its functions. Besides security, general cleaning, laundries, etc. much of the food and beverage function (including room service) has been outsourced, as has transport and the porter service. The company that food and beverage functions have been outsourced to uses a labour broker to supply the vast majority of its staff. Furthermore, the housekeeping function at a number of its hotels has been 'insourced' (i.e. the function has been outsourced to employees who have been set up in 'independent' close corporations).

The limited services concept (pioneered by the City Lodge hotel group) has meant that other newer hotels are designed in such a way that certain functions traditionally performed by hotels have from the outset been contracted out to independent companies. The limited services hotels have therefore not had to outsource because the limited services hotel never, in the first place, provided many of the services other hotels have recently been outsourcing. The downscaling of the food and beverage function in many hotels has also meant that a range of the foods that the hotel serves are now sourced from outside contractors rather than being made in-house (eg. breads and confectionery).

Outsourcing seems to generally be to existing enterprises (although the 'insourcing' introduced by Southern Sun in housekeeping and the outsourcing of the porter service is clearly to newly-created enterprises made up of ex-employees). The existing enterprises generally supply many hotels (but the 'insourcing' of housekeeping and outsourcing of the porter service by Southern Sun has created enterprises that provide services only to one hotel).

Outsourcing/sub-contracting does not seem to have taken place to any marked extent in the restaurant/catering sector. Industrial catering, on the other hand, is essentially a sub-contracted service, since industrial catering companies provide services to companies that previously did catering in-house. The fortunes of this sector are

⁵² The consensus was that there was so much labour available 'at the gate' that there was no need for labour brokers.

⁵³ Reported in the 2000 South Africa Country Study. Our recent research has not identified any other hotel groups that are following this route. However future research needs to be conducted on the sector to confirm recent trends.

therefore a barometer of outsourcing of catering functions by a wide range of businesses and institutions. An interview was conducted with a manager at one of the major industrial catering firms. The company has grown enormously in the last few years and provides catering services to business and industry, private education and health care institutions, the tertiary education sector, and the public sector. According to the interviewee, the outsourcing of catering has accelerated in the last five years.

While the company has been established to respond to the externalisation of non-core functions by businesses, it is not contributing to a process of casualisation. The vast majority of its employees are permanent, and the proportion of non-permanent to permanent employees has not changed in the last 10 years. Non-permanent employees are utilised primarily for special functions or events (when employment requirements exceed the full-time capacity of the company), and the company only uses employment agencies to a very limited extent (for temporary office staff). Non-permanent employees are also not discriminated against as regards employment conditions and benefits. The company also bargains with a range of unions (depending on the sector that they are operating in).

Retail

Casualisation and externalisation are taking place in the retail industry. In contrast to other sectors, overall employment has not dropped in this industry. However employment growth in the retail sector is occurring mainly through non-standard employment arrangements. Rather than increasing the number of temporary employees, retail stores (especially large grocery retailers) are increasingly replacing full-time permanent staff with casual workers. As the 1983 BCEA was in place when employment changes began to emerge (ie. in the 1980s and early 1990s), most stores defined their casual employees (even if they had worked at the company for many years) as employees who work less than 24 hours per week.⁵⁴ Stores generally had a large pool of casuals to staff their stores during peak hours – holidays, weekends and late night shopping. Over the last decade employers have increasingly relied on casual labour.

In contrast to 10 years ago when at least 70 percent of store employees were permanent, approximately 70 percent of employees in many large retail stores are now casual (Clarke and Kenny, 2002). In addition, there has been a substantial increase in the size of the informal component of the sector. By February 2002 well over a third (38 percent) the workforce employed in the retail sector were workers in informal retail firms. (Statistics South Africa, 2002: 47-48) Alongside the growth of retail trade in the informal economy, the proliferation of non-standard employment has meant that the retail sector has become increasingly unregulated, with a large percentage of workers in the sector falling outside formal protection from legislation and the new wage determination.⁵⁵

⁵⁴ The old Wage Determination for the sector (Determination 478) was in place until early 2003. The definition of casuals in this determination is the same as the old BCEA – those who work less than 24 hours per week. The determination has been replaced by Sectoral Determination No. 9.

⁵⁵ As from 1 February 2003 wages and working conditions for workers in the retail and wholesale industry were set by the new Sectoral Determination No. 9.

Many stores have two categories of casuals, those they consider 'regular' casuals and a second category of more temporary casuals. In reality, the majority of the first group should be defined by their employers as part-time workers as they have been employed by the store for many years (some for as long as 10 years), regularly work weekend shifts and are treated by the stores as 'permanent' employees although they were hired as casuals (Kenny 2000; Clarke and Kenny 2002). This group of employees (the 'part-timers') generally work about two-thirds of the hours full-time workers do, and receive reduced wages and benefits. The second group work less regular hours and more unstable hours, many averaging below 24 hours per week. These practices have been allowed to flourish at many stores, either due to the lack of monitoring by the Department of Labour, due to exemptions from the current Wage Determination (No. 478), or linked to agreements signed between the union and employer. In the cases of one large grocery retailer (Shoprite) the union supported the store's applications for exemptions from the wage determination in exchange for greater job security for permanent workers (Kenny 2000).

Several grocery stores already rely on labour brokers or temporary help agencies to supply workers during busy peaks for distributing ('pick and pack'), and many stores use these agencies to recruit workers on a temporary basis to work in the warehouses as shelf-packers and as stock takers. Management is not concerned about what effects such a process will have on work performance and customer service as this comment reveals: "Our cashiers aren't friendly or committed to the company now, but we have to pay them anyway. If we outsource, service can't get any worse and we won't have the hassle and pay problems".⁵⁶ Recently, many retailers have begun to outsource some of their activities (such as transport, security and cleaning) to smaller companies. Subcontracted workers, particularly merchandisers, are increasingly employed directly by labour brokers contracted by suppliers. The conditions and wages vary dramatically, though in general these subcontracted workers are subjected to low wages, no benefits and high job insecurity (particular when contracts change).

Food retailers are also shifting food packaging and preparation away from 'in-house' production to small informal producers. One of the large grocery retailers reports that they are now buying about 20 percent of their deli foods from small businesses – many of which are exempt from labour legislation.⁵⁷ The tendency of replacing full-time workers with casuals or temporary employees recruited by labour brokers, and the move toward sourcing products directly from small producers, have both contributed to the downward pressure on wages and working conditions. These trends, combined with increased competition from convenience and franchise stores, have resulted in the expansion of insecure and precarious jobs in the sector.

Women and African workers have been especially affected by employment changes in the retail sector, as they are disproportionately found among those workers in non-standard jobs. For example, Africans account for the majority of employees in low-skilled occupational categories, and women workers (especially African women⁵⁸) are

⁵⁶ Interview with the human resources manager in the head office of a large retail store, March 2001.

⁵⁷ Interview with the human resources manager of a food and clothing retail store, March 2001.

⁵⁸ According to the Wholesale and Retail Trade SETA, Africans account for 57 percent of those employed as service, shop and market sales workers in retail trade. Of these, 54 percent are women and 46 percent are men. In contrast 45 percent of the managerial staff in retail trade are white, with men

generally employed in jobs (such as service, shop and market sales) that are increasingly being converted into casual or temporary positions. In addition, retail trade has one of the highest levels of self-employment. Approximately 32 percent of employees in elementary occupations (sales and services) are self-employed and thus fall outside coverage of labour legislation (Wholesale and Retail SETA, 2000: 16). As a result of employment changes the retail sector has become increasingly unregulated, with a large percentage of workers in the sector falling outside formal protection from legislation and the current wage determination.

Agriculture

Historically the agricultural sector relied heavily on permanent workers that lived⁵⁹ and worked on the farms. Farmers are increasingly moving away from employing permanent (and resident) workers and instead are employing seasonal and temporary workers. For example, in the early 1990s it was already reported that Western Cape wine farms were employing tens of thousands of pickers on a seasonal and casual basis during the late summer grape harvest.(Cameron, 1990: 87) This trend has continued with more farmers, especially those that have been unable to replace labour with new or additional machines, responding to rising input costs by re-organising their workforce in order to optimise productivity and reduce labour costs.(Hamman, 1996). Typically, permanent workers have continued to form the core (albeit the ever shrinking core) of the workforce, usually receiving skills training and responsible for tasks (such as pruning) that require high skill levels.

Linked to apartheid policies and the perpetuation of racial and gender stereotypes, core jobs in the Western Cape fruit and wine farms have generally been reserved for coloured⁶⁰ male workers, with coloured female workers employed in less-skilled, lower paid permanent jobs. Seasonal workers are usually African male (and some women) workers, paid a lower wage and given little training. Recent research on the agricultural sector reveals that these trends are continuing, with farmers increasingly moving away from permanent employment, and thus “shrugging off the social responsibilities they have traditionally carried”.(Du Toit and Ally, 2001: 1).

Similar to other sectors, jobs are being shed at an alarming rate and employment relationships are continuously being restructured. Official statistics note that there was a loss of 114 000 regular jobs in commercial agriculture between 1988 and 1996, with a 19 percent decline in the number of permanent jobs recorded in 1994 alone.(Du Toit and Ally, 2001: 1). Casual workers (either on-farm casuals or temporary workers recruited from the labour pool off the farm) make up a growing percentage of the total workforce on many farms. This drop in regular and permanent jobs in the agricultural

making up 64 percent of those in this occupational group. Research shows that employment changes to date have had little impact on demographic patterns at the managerial level.

⁵⁹ Historically permanent farmworkers were provided with accommodation on the farms. Although living conditions have generally been very poor, pressure exerted on farmers throughout the 1980s resulted in increased spending on social benefits and housing. More farmers began to contribute to medical care, pension funds and to the upgrading of on-farm housing (Ewert and Hamman, 1996).

⁶⁰ Apartheid policies divided the South African population into different ‘racial’ groups: white, Indian, coloured and African. Although these classifications are no longer officially used, racism continues and the previous racial classifications still play a significant role in the particular patterns of segmentation in the South African labour market today.

sector has been accompanied by a growing presence of labour brokers⁶¹ supplying seasonal and temporary work to farmers. Although research is still sketchy, farmers appear to be increasingly using the services of labour brokers to recruit and place lower skilled workers paid at exceptionally low wages for short-term tasks (i.e. picking during the harvest season). Although tasks that require high skill levels still tend to be carried out by permanent workers, research has noted a growing tendency to make use of sub-contracted labour.(Hamman, 1996).

Segmentation by race and gender is apparent in both the permanent and casual workforce. As noted above, coloured male workers dominated permanent employment in agricultural sector in the Western Cape. Where African workers have been successful in accessing permanent jobs in the sector, their status, wages and benefits are generally lower than their coloured male counterparts. As casuals or temporary workers, their wages are even lower and employment security non-existent. Linked to casualisation has been the feminisation of employment. Hamman's (1996) research suggests that alongside the shift from permanent to temporary labour has been an increase in the number of women (often farmworkers' wives) employed in the sector. Like African men, women workers' wages and benefits tend to be lower, thus allowing farmers to reduce their wage costs by replacing men with women workers. Still, even as the shrinking core of permanent workers becomes increasingly feminised, men still make up the majority of the permanent workforce while women dominate the temporary labour pool.

Section Three: Assessing the Regulatory Framework

This section will provide a brief overview of the role of the labour courts and CCMA in interpreting and enforcing legislation (with particular reference to the independent contractor issue, temporary help agencies and labour brokers). Thus far the courts and CCMA have played a fairly limited role extending protection to non-standard workers. First, the courts have not read a broader category of workers into the definitions of 'employee' in the LRA or the BCEA. The traditional reading of the definition of 'employee' in labour legislation restricts the ambit of legislation to employees who provide work under the common law contract of employment. Those persons who perform work under the common law contract of work (ie. independent contractors) are excluded. A more generous interpretation of 'employee' would include workers that are dependent on or subordinate to their employers – regardless of the form of the contract. Second, the system isn't very accessible to non-standard workers. Very few cases involving informal workers have made it to the CCMA or the Labour Court. Unfair dismissal cases involving temporary employment agencies form the bulk of the cases concerning non-standard work.

⁶¹ Agencies that recruit and place temporary workers are moving into less 'traditional' sectors, such as the agricultural sector. Based on research we have conducted, there has been a substantial rise in the use of labour brokers to supply temporary workers to the farms. Agencies involved include the more well-established brokers as well as the 'fly-by-night' operations of a 'bakkie with a cell-phone' variety (ie. an informal operation run by one or two individuals from their vehicle).

(a) Role of the Labour Court and CCMA: A survey of cases concerning temporary employment services⁶²

Temporary Employment Services and Unfair Dismissals

In the period from 1997 until November 2001 there were 39 arbitration awards handed down by the CCMA concerning cases of unfair dismissal where the employer was described as being either a labour broker or a temporary employment service (TES).⁶³ In most cases where the arbitrator found the applicant was indeed dismissed, the dismissal was unfair. There were eleven such cases (28 percent of awards analysed) compared with two that were found to be fair.

However in the majority of cases the application was dismissed for jurisdictional reasons, either because the employee had failed to establish s/he was in an employment relationship with the employer cited, or because it was held there was no dismissal. There were 24 such cases (61 percent of cases analysed).

The outcome in two cases was inconclusive, insofar as the arbitrator was called upon to rule on a preliminary point, and did not finally determine the disputes. Nevertheless the nature of the points raised, and the nature of the arbitrator's ruling in these two cases serve as a useful introduction to the kind of conceptual tangle the triangular employment relationship generates.

The Reason for Dismissal

An employee referring a dismissal dispute to the CCMA is required to state the reason for dismissal. The importance of the reason relates to the peculiar hierarchy the LRA establishes, in terms of which only the Labour Court has jurisdiction to determine disputes concerning dismissals for operational reasons. It also relates to the question as to whether legal representation is allowed and, in terms of recent amendments, to the procedure to be followed by the CCMA.⁶⁴

It is thus the allegation of the employee that determines in the first instance whether it is the CCMA or the Labour Court that has jurisdiction in any matter.⁶⁵ But an allegation that is clearly wrong can surely not found jurisdiction. What is less clear is where the allegation is justifiable but nevertheless found to be wrong in the final analysis. Surely the CCMA cannot determine an operational requirements dismissal, if that is what it finds the real reason was for the dismissal? As a consequence, at the conclusion of a possibly protracted hearing, a CCMA commissioner who found the reason was operational would have to direct the parties to the Labour Court.

This difficulty was raised in one of the cases where the outcome was inconclusive. The applicant was employed by a labour broker on an oil rig. The owners of the rig

⁶² This section draws extensively on Theron and Lewis (2003).

⁶³ The term labour broker was more commonly used by arbitrators, notwithstanding the provisions of section 198 of the LRA.

⁶⁴ Legal representation is not allowed as of right in unfair dismissal cases where the reason relates to conduct or capacity. In terms of the amendments due to come into force on 1 August 2002, these cases may also now be 'fast-tracked' in a so-called 'con-arb' procedure.

⁶⁵ Section 191 (5).

informed the broker they no longer required the worker's services because his performance was not up to scratch. The applicant contended he had been dismissed for poor performance. But this was not the reason the notional employer, the broker, gave when it dismissed him. At the time it had no vacancies where the applicant could be placed. It would contact him if anything came up. It was therefore a reason related to the operational requirements of the employer, it contended. To avoid having to have a full hearing to determine whether this was so, the arbitrator gave a ruling in which he in effect invited the parties to refer the matter to the Labour Court. The eventual outcome is unknown.

This illustrates how the triangular employment relationship feeds into the jurisdictional quagmire the LRA has created. It is not clear how poor performance could ever be the reason for a TES dismissing an employee in these circumstances. The TES as notional employer does not set the performance standard an employee is expected to meet. If it is suggested that the standard an employee is expected to meet is deemed to be the standard set by the client, the question arises as to how it will be possible to assess whether the dismissal was fair without the evidence of the client, as the 'real employer'. Yet clients use TESs, amongst other reasons, to avoid precisely this eventuality.

Who is really the Employer?

In the other matter where the outcome was inconclusive, the preliminary point raised by the employer was that it had transferred the employment contract of the applicant to a labour broker years before. Accordingly the wrong employer had been cited. However it did not appear the employee was ever consulted about this transfer, and up until his dismissal still regarded himself as employed by his original employer (now the labour broker's client). As a consequence the hearing was adjourned, and the employer directed to "*bring along Efficient Labour Brokers cc if practical, ...to clarify this issue of who the real employer is...* ".⁶⁶

The difficulty in identifying the real employer was a common feature of dismissal cases involving TESs. In one matter the applicant failed to appear on the second day of the hearing. But this was after her application to be represented by a 'fellow employee' was refused, on the grounds that this person was in fact an employee of the client, and could not be deemed to be a fellow employee for the purposes of representing her.⁶⁷

In most cases where the worker(s) failed to establish that there was an employment relationship with the respondent, the wrong party had been cited. In a situation where an applicant does not know which of two parties his real employer is, it is obviously appropriate that both parties are cited as respondents.⁶⁸ But until relatively recently, there was no provision for joining another party as respondent in CCMA proceedings.⁶⁹

⁶⁶ Ramabele v Gardens of Italy, GA 17050, 14 March 2001.

⁶⁷ Monnathoko v Dada t/a Risk Control Services, GA 37121, 12 January 1999.

⁶⁸ See also Richard's Bay Iron and Titanium (Pty) Ltd t/a Richard's Bay Minerals and another v Jennifer Eugene Jones and another. Unreported case no. D81/97.

⁶⁹ In civil litigation parties who have a material interest in proceedings can be 'joined'. In the case of dismissal proceedings in a triangular employment relationship, it is clearly appropriate to join the client

In 2000 the CCMA introduced rules regulating its proceedings, amongst them a rule that states as follows: “*If a party to any proceedings has been incorrectly or defectively cited, the Commission may, on application and on notice to the party/parties concerned, correct the error or defect.*”⁷⁰ Yet even though arbitrators frequently noted the difficulty employees faced in identifying the correct employer, there was no single case in which this rule was invoked.

Take the case of the worker who maintained she was an employee of the service station where she worked, and was oblivious to the fact that the legal ownership of the service station had changed. “*Although I sympathise with [the applicant] for finding herself at the raw end of the stick because of the legal intricacies in which she is presently caught up, I am constrained to find she has cited a wrong and arguably even non-existent legal entity*”, the arbitrator concluded.⁷¹

In another matter the applicant was employed by Workforce, a prominent labour broking group. The group was represented at arbitration, where it raised two preliminary points. Firstly, the applicant had cited a subsidiary of the group in his referral (according to the applicant, because the name of the subsidiary appears on his pay-slip). Secondly, he had given the incorrect address of the employer, namely the address of the client. The commissioner dismissed the application on the basis that it was not properly referred, without indicating to the applicant that he could rectify the defect.⁷²

When Does Termination of a Contract Constitute Dismissal?

In several cases where the arbitrator found there was no dismissal, the reason given was that the employee had been on a fixed-term contract. The law concerning the expiry of a fixed-term contract is relatively clear. The expiry of the contract does not constitute a dismissal, unless there is a reasonable expectation it will be renewed. However the question that arises is what constitutes a reasonable expectation in the context of a triangular employment relationship.

Hardly any of the cases involved a fixed-term contract in the sense in which it is commonly understood, where period of employment is specified in weeks or months or years. But even where a period of time was specified there were cases where the TES has been allowed to terminate prematurely, on the basis that the client no longer required the services. In one such case, three employees were part of a group of twenty that signed fixed term contracts with Workforce to work for Telkom. However, after some months Telkom decided it needed seventeen employees, not twenty. The employees stated the contract was for one year. It appears to have been

of the broker. However the LRA makes no such provision. It is also debatable whether the CCMA was entitled to make its own rules to remedy this situation, since the LRA gives it no such power. This is a situation the recent amendments to the LRA seek to remedy.

⁷⁰ See rule 12.4.

⁷¹ *Moleke v Dakota Service Station*, FS 11504, 23 February 2000.

⁷² *Thulare v FADS (Pty) Ltd*, GA 218601, 17 July 2001.

the employers' argument that notwithstanding the term, the contract terminated if the client (Telkom) no longer required their services.⁷³

Commonly the period or duration of the contract was defined in terms of the time it takes to complete a specific task. One such case concerned a steel welder and Privest Personnel Outsourcing, which was held to be the real employer despite a written contract to the contrary with the client.⁷⁴ The contract states that employment "...shall cease once the specific work is completed in terms of the duration of the project or a specific section thereof or a portion thereof, whichever being the first to materialise."⁷⁵ It is entirely unclear what the specific task was, and the TES or client had virtual *carte blanche* to determine when the contract expired.

In fact the TES did not even attempt to justify its decision to dismiss in these terms. As TES it was simply subject to the direction of its client, and in no position to argue when the services of certain employees became superfluous. So the arbitrator proceeded to construct a rationale in terms of which the decision to dismiss could be reconciled with the contract. That he was prepared to go to such lengths is stranger still, in that there was undisputed evidence suggesting the real reason for dismissal related to the applicant's role in a strike.⁷⁶

Does Termination by the Client entail Termination by the Broker?

It was clearly the client's decision to terminate employment in most unfair dismissal cases referred to the CCMA. The question this gives rise to is whether termination by the client necessarily means termination by the broker. The easy answer is that it depends on the circumstances of each case, and specifically on the terms of the agreement between the broker and his employee. But even where these are broadly comparable, it appears that arbitrators have adopted contradictory approaches.

These contradictory approaches are evident in cases where the application was dismissed because it was held there was no dismissal. In some this conclusion was arrived at because the employment relationship was considered to endure despite termination by the client. In others the arbitrator considered that the termination by the client constituted a valid termination of the contract with the TES.

Amongst the cases where the arbitrator considered the employment relationship had endured despite termination by the client, was the case of two welders working for the engineering company Consani's, on a construction site. After having shifted the

⁷³ The employer was the Workforce Group. However the Respondent cited in the award is one Sean Momberg. This appears to be in error. See *Grootboom and 2 Others v. Momberg*, EC 8953, 31 March 1999. The arbitrator concluded that the reason for dismissal could only be operational, and that it was therefore appropriate that the Labour Court determine whether the employees had been dismissed.

⁷⁴ It was also the client the employee approached for a job in the first instance. See *Montgomery v. Privest Personnel Outsourcing*, EC 21190, 17 November 2000.

⁷⁵ "There is nothing inherently wrong or unfair about the contract or its terms", the arbitrator said, "and it is readily apparent why it is necessary and suitable for projects such as the one in question."

⁷⁶ The following quote from the award gives some flavour of this " ...a redefinition of the scope of work of a subcontractor is not necessarily a mala fide (sic) or illegitimate course of action...I am not satisfied that the evidence before me is such that the conclusion is warranted that Fabinox was simply abusing the fixed-term contracts of employment as a convenient device for breaking a strike."

employees from one task to another, the foreman announced that their welding work was finished. There was no prior notice.⁷⁷

“There was no employment relationship between the employee parties and Consani’s at the time”, said the arbitrator. *“...employment with Consanis was in terms of a contractual agreement between Consani’s and the employer party [the broker]. The duration of this contract was solely within Consani’s discretion and it could terminate the employee parties’ services without reason or notice. The termination of the employee parties’ services by Consani’s did not simultaneously cause their employment with the employer party to terminate. Their relationship with the employer party was ongoing....”*⁷⁸

The reason the arbitrator found the employment relationship ongoing was that there was evidence (disputed, as it happens) that the broker had offered the applicants alternative work when Consani’s terminated, on the basis that they were still ‘registered’ with it.⁷⁹

However the arbitrator reached the opposite conclusion in the case of a managerial employee assigned by Cozens Recruitment Services to work for M-Tel. M-Tel terminated his assignment, apparently because he had refused to sign a temporary employment contract. The applicant contended he was nevertheless employed by the recruitment agency.

The fact that the employee was retained on the books of the TES was not enough to create an employment relationship, the arbitrator ruled. The status of the broker as employer was a fictional one, created by section 198 of the LRA. *“Clearly there was no actual employment relationship subsisting between applicant and [the broker] after termination of the assignment...as with all labour broker arrangements, ...it was never within the contemplation of the parties that respondent, a labour broker and procurer, would supply actual employment to applicant other than through its clients....The broker’s status as employer is a fictional one created by statute and adopted by all three contracting parties including the client who is the ‘de facto’ employer.”*⁸⁰

However it is problematic to hold that the TES’s status as employer is fictional. What are the consequences of this fictitious status, and specifically what rights and duties exist? It is also not clear how this view is reconcilable with ILO Conventions recognising that a TES may be an employer.⁸¹

In the case of 33 farm workers engaged to put in poles on a vineyard, the arbitrator was of the opinion that someone who accepts employment with a TES *“does so, as a general proposition, on the basis that he or she is willing to render services to a client if and when such services are required. It is therefore inherent in this form of*

⁷⁷ Compare the Privest case cited above, where it would appear that the client (or the broker- it is not clear from the award) is required to give notice of one shift.

⁷⁸ Stellenberg v. ABC Recruitment (Pty) Ltd, GA 1622, 25 February 1997.

⁷⁹ There was also evidence (undisputed) that the applicants had a good relationship with the broker, and had in fact initially referred a dispute with Consanis.

⁸⁰ Dick v Cozens Recruitment Services (2001) 22 ILJ 276 (CCMA).

⁸¹ Convention No. 96 (Revised).

employment that there will be periods when there is no work available, during which the employee's services are not required. He or she nevertheless remains an employee, and is accordingly protected by the Act. A similar situation prevails with seasonal employees. A seasonal employee may be laid off during periods of short-time, without forfeiting his or her status as an employee."

As authority for the above proposition, he referred to Labour Court case of *NUCCAWU v Transnet*⁸² in which the court reached a similar conclusion with regard to 'casual' employees employed on a day-to-day basis, selected from a pool of such workers. 'The fact that they would be considered for the day-to-day employment' the Court said, 'is as a result of their being part of a pool of people...and being part of the pool they were thus entitled to be considered for the day-to-day employment. In effect what we have is that applicant's members constitute a special class of employees who were not guaranteed that they would be employed but had the right to be considered for employment on a day-to-day basis, if the respondent had a need for them...I come to the conclusion because the definition of the 'employee' in the Act is wide enough to include persons who are retained on the books of an employer to render services, albeit on an ad-hoc basis.'

The Question of Notice

The BCEA lays down the minimum period of notice that must be given to terminate a contract 'that is terminable at the instance of a party to the contract.' The periods vary according to the period of service of the employee, but the minimum is one week.⁸³ A collective agreement may permit a shorter notice period than prescribed. However it would not be permissible for a TES to agree with an individual employee that a shorter period applies.⁸⁴

Yet in practice contracts between TESs and employees routinely state that the contract of employment terminates automatically upon termination by the client. Moreover in some of the cases discussed above contracts were terminated summarily, and arbitrators did not say anything about it. Recall that the BCEA applies to all employees (although those who work less than 24 hours a month are excluded from most sections).⁸⁵ There should be no question that the BCEA applies in full to the employee of a TES who works more than the minimum number of hours.

If therefore termination by the client terminates the employment relationship with the TES, the TES should be liable to give the worker notice. However, in the case of the 33 farm workers the arbitrator found the employment subsisted. There could therefore not be a question of notice of termination, but a notice of a temporary lay-off or short-time. There are collective agreements that provide for such notice. However the BCEA does not do so.

⁸² *Ltd t/a Portnet (2000) 21 ILJ 2288 (LC)*

⁸³ Section 37(1).

⁸⁴ Section 37(2). A collective agreement is defined in section 1 as a written agreement between one or more trade unions and one or more employers, or one or more employers' organisations, or both.

⁸⁵ Section 36, BCEA.

Joint and Several Liability

The TES and the client are jointly and severally liable if the TES, in respect of its employees, contravenes a collective agreement concluded in a bargaining council, or an arbitration award regulating terms and conditions of employment, or the BCEA, or a sectoral determination.⁸⁶ However there are no reported cases of clients being found liable, probably because the provisions to enforce these instruments are perceived to be weak and ineffective. It could also be the case that such disputes are settled with the intervention of Department of Labour or bargaining council inspectors.

The notion of joint and several liability in terms of the statute is limited, both in terms of the matters in respect of which it can be applied, and in that the object is to hold the client liable for the actions of the TES. However, there is no inherent reason why this notion could not have developed in terms of the unfair labour practice jurisdiction, on the basis that the TES was liable for the actions of the client. Be that as it may, there are cases where the dismissal was found to be unfair on the basis of an application of such a principle.

In some instance this is not explicit. For example, a chef placed by a TES in a city hotel was summarily ejected from the premises. The arbitrator held the TES liable for the unfair conduct of the client, commenting that “*this case illustrates the difficulties experienced by employees of labour brokers..*”⁸⁷ The TES was ordered to reinstate the client at a different site (which is arguably an order that is not enforceable). In another matter, a case of constructive dismissal, after ‘piercing the corporate veil’ the arbitrator ordered the client to reinstate.⁸⁸

In the case of a nursing auxiliary whose placement at the nursing home was terminated by the agency at the instigation of nursing home, the arbitrator deemed the agency liable for the unfair conduct of the nursing home.⁸⁹ This was justified on the basis of her “long standing engagement” at the home, and that the termination would affect her professional standing, even though the agency had not actually terminated her employment, and offered her other placements.⁹⁰

(b) The Distinction between Independent Contractor and Employee

The trend on the part of some TESs to enter into contracts in terms of which the workers provided to clients are designated ‘independent contractors’ rather than employees, has been considered in some CCMA awards, and most recently by the Labour Court and Labour Appeal Court.⁹¹ It is accepted that the approach to such matters should be to investigate and determine the true nature of the relationship. However, it will always be open to interpretation and debate as to the extent to which a contract between the worker and the TES (or a worker and employer) reflects the true nature of the relationship.

⁸⁶ Section 198(4), LRA.

⁸⁷ Mahlo and Foundation Group, GA 112045, 25 June 2001.

⁸⁸ Dlamini and Maestro Housing, GA 66694, 16 February 2000.

⁸⁹ NEHAWU and another v Nursing Services of South Africa (1997) 10 BLLR 1387 (CCMA).

⁹⁰ This decision has been criticised: See Hutchinson and Le Roux, 2000.

⁹¹ See Labuschagne v WP Construction (1997) 9 BLLR 1251 (CCMA).

A recent Labour Appeal Court judgment in the matter of *LAD Brokers (Pty) Ltd v Mandla* gives a new twist to this debate.⁹² It is also the first reported judgment of this Court on the provisions of section 198, and specifically the provisions of section 198(3) excluding a person who is an independent contractor from being an employee of the TES. Mandla, the worker, had been recruited by a company operating an off-shore oil rig, on the basis that he would be employed through a TES. However the contract with the TES stipulated he was an independent contractor. By a process of reasoning which exemplifies the conceptual difficulties the triangular employment relationship creates, it was held that he was an employee of the client, and also in an independent contractor relationship with the TES.

Because the worker was in an employment relationship with the client the TES was still liable. *“The legislature clearly intended labour brokers and the like who pay remuneration to be held liable as employers ...To determine whether the service provider is an independent contractor of the temporary employment service is therefore as an end in itself a futile exercise. Even if he is, should he not also act as an independent contractor vis a vis the client, the exclusionary sub-section (3) does not apply...”*⁹³

The case clearly indicates the challenges that the triangular employment relationship poses for regulation and the difficulty faced by the labour courts and CCMA in adjudicating disputes around such relationships.

Section Four: Amendments and New Policy Initiatives

The previous sections have outlined the range of problems emerging with regard to protecting workers in non-standard employment arrangements and regulating atypical work. The first section provided a brief overview of new legislation introduced since 1994. As highlighted, legislation was aimed at transforming the labour market and addressing the legacy of the apartheid labour market. However, as we argue in the second section, while legislation did go a long way towards re-regulating the labour market, it didn't go far enough. Loopholes and weakness in the legislation, weak monitoring and enforcement, combined with the failure of other policies to create and maintain jobs, has created an environment in which non-standard employment is growing. Employers continue to restructure their workplaces in ways that will reduce labour costs, often doing so by exploiting any loopholes available in order to place workers outside the protection of legislation. Unemployment continues to grow, as does informal and atypical employment. As a result, despite new legislation the post-apartheid labour market continues to be characterised by deepening segmentation and income polarisation. In response to these problems, the government has recently introduced amendments to the BCEA and LRA, and has initiated a process to better regulate temporary and triangular employment arrangements. This last section will provide an overview of these processes, and reflect on how effective these interventions might be with regard to better protecting vulnerable workers.

⁹² (2001) 22 ILJ 1813 (LAC).

⁹³ At 1820 J to 1821 C.

(a) Regulating Temporary Work: Developing an Employment Services Act

Beginning in the mid 1990s, the Department of Labour began to explore how to better regulate labour brokers and temporary employment agencies. These discussions were part of broader debates surrounding the appropriate approach to labour market reform that began under the new ANC-led government in 1994, which initially focused only indirectly on the rise of triangular employment arrangements and the role of these agencies in such employment relationships. It was recognised that non-standard employment was increasing in South Africa and more workers were falling outside of legislative protection because of their status as temporary workers, or because of other hiring practices that meant they fell outside the formal definition of an ‘employee’.

These issues were identified as key challenges facing the labour market when the new BCEA was being discussed. Indeed, the Green Paper on Employment Standards Reform released in February 1996 contained a whole chapter on ‘non-standard employment’. This chapter acknowledged that temporary employment was on the rise. It also recognised that many employees - although actually in regular, ongoing employment - were classified by their employers as temporary workers. However, new legislation then seemed to back away from addressing these trends, and ensuring temporary and non-standard employment relationships were properly regulated. Indeed, there is little in the BCEA to address the specific problem of triangular employment relationships and the role of labour brokers and temporary employment agencies (TEA) in facilitating these arrangements. The assumption, as actually stated in this chapter in the Green Paper, was that “the unfair dismissal provisions and the residual unfair labour practice will offer protection against this type of abuse”. But, as was outlined in previous sections, the new legislation has provided numerous gaps that have allowed these employment arrangements to flourish.

At the time the new BCEA was being negotiated, private employment agencies (labour brokers and the ‘traditional’ temporary employment agencies) were regulated by the Guidance and Placement Act of 1981. These Acts were repealed when the Skills Development Act of 1988 was passed. This Act defines private employment agencies as “any person wishing to provide employment services for gain”. Although the Act does impose some requirements on these agencies, these are largely limited to issues of registration. Legislation is largely silent on a range of other issues related to the specific activities of temporary employment agencies (TEA), and the protection and employment conditions of work-seekers and temporary workers placed at client firms by these agencies.

Although an initial attempt was made by the Department of Labour in 1994 to explore effective mechanisms for regulating TEAs, little progress was made in this regard. The new Skills Development Act (SDA) essentially maintained the status quo by carrying forward the sections relevant to temporary employment agencies from previous legislation into the new SDA. However, inadequacies in the old legislation (specifically related to compliance and monitoring) became apparent to the Department throughout the process of constructing the new SDA. In addition, the Department has become aware of the dramatic rise of temporary employment in recent years and the related growth in the temporary help industry. For example, it is estimated that the temporary help industry is one of the fastest growing industries in the country, having likely doubled in the last five years. Yet, confusion regarding the

requirement that these agencies register with the department under the Skills Development Act of 1998, or the deliberate avoidance to do so, has meant that few agencies have registered. By the end of 2000, only 683 agencies were registered with the Department of Labour. (Department of Labour, 2001).

Further, even if agencies register, the Department's capacity to actually monitor compliance with legislation is extremely limited. Rather than carrying out any form of inspection or investigation as part of the registration process, once an agency applies for registration the Department merely issues a registration certificate, valid for 24 months. There is also no liaison between the section that issues the registration certificate and the inspectorate regarding employment conditions. Given this registration process, monitoring the activities of labour brokers and TEAs has continued to be extremely difficult. In addition, there is no pro-active monitoring so investigations only happen if there is a complaint.

These problems, plus the lack of knowledge and information in the Department about triangular employment relationships in South Africa, has led the Department to think concretely about ways to better regulate the temporary help industry. Public hearings were held in 2000, and in 2001 the Human Sciences Research Council (HSRC) was commissioned to investigate the sector. It was hoped that by October 2001 the Department would have developed new regulations, but the process was delayed and research only began in July 2001.

The objectives of the study carried out by the HSRC were threefold:

1. To analyse the current situation in the employment services sector, with a specific focus on:
 - Identifying and defining different domains in the employment services sector,
 - Identifying problems experienced in the sector,
 - Ascertaining views on the efficiency of the operation and regulation of the sector, and its future development;
2. To review some international scenarios in order to map out trends in employment services; and,
3. To propose a draft framework for the regulation and development of the employment services sector.

Research took place in three phases and involved interviews with private and public agencies and other stakeholders, data collection to map out international trends, and research workshops held in ten different locations throughout the country. The information gathered was compiled into a research report and these findings presented at a second series of workshops in selected cities in the country. The final report was presented to the Department of Labour in November 2001. The Department is currently reviewing research findings and recommendations, with the goal of developing an Employment Services Act and an Employment Services Council, rather than just implementing new regulations for the sector.

According to the Department,⁹⁴ the proposed Employment Services Act would:

- Promote the principles and practices of current legislation (ie. the LRA, BCEA, EEA, SDA)
- Ensure best practices in the sector
- Promote labour market flexibility
- Provide proper protection for clients (workseekers).

The legislative framework would provide for:

- Definitions of private employment agencies rendering two types of services (permanent and temporary)
- The determination of the status of private employment agencies in accordance with the law and practice
- Requirements for licensing or certification
- The promotion of practices free of discrimination on the basis of race, colour, sex, religion, political opinion, social origin or any other form of discrimination such as age or disability
- A framework for determining fees
- Appropriate procedures for investigation of complaints
- Adequate protection of workseekers using either the services of public or private agencies
- The establishment and review of conditions to promote cooperation between public employment services and private employment agencies.(Department of Labour, 2002(b))

Based on the recommendations of the HSRC report, the Employment Services Council would play two central roles. The first would focus on the regulation of employment and labour standards for workers in the sector. Drawing on the existing Code of Conduct developed by the Association of Personnel Service Organisations of South Africa (APSO), the second form of regulation would focus on ensuring the ethical behaviour of all agencies in the sector. For example, the Council would play a role in monitoring the activities of agencies with regard to providing support services (such as skills development). A request has recently been made by the Department of Labour to the ILO for technical assistance to draft this Act. It was hoped that by early 2003 a draft Employment Services Act would be released for public discussion and negotiation within NEDLAC.

Will this Act be adequate to deal with the range of problems that have emerged with regard to temporary employment, and the triangular employment relationship in particular? It is unlikely. First, as noted above, labour recruitment is a difficult activity to categorise and includes a wide range of organisations. Second, it is an incredibly diverse sector, with large well-established companies, some of which belong to national associations and are well organised and represented at a regional and national level. However there are large national companies that choose not to belong to such associations. There are also small and very small enterprises that, by and large, are not amenable to organisation or regulation. And, union organising in the sector has not

⁹⁴ Directorate Employment Services, DoL, "Arising to New Challenges: A discussion document on the Employment Services Act". 2002.

accompanied the organisation of employment agencies, thus workers remain unprotected and unrepresented by trade unions. Third, thus far the emphasis in the process initiated by the Department has been on facilitating the growth of this sector, and providing regulations for agencies within it, rather than seeking ways to ensure temporary workers placed in short-term contacts are adequately protected. Lastly, unless overall monitoring and enforcement mechanisms in the Department are greatly strengthened, the effective enforcement of any legislation (including the new Act) is unlikely.

(b) Amendments to the LRA and BCEA: A new direction?⁹⁵

The review of labour regulations

Some of the weaknesses and loopholes in the legislation were exposed soon after the new laws were implemented. At the same time that labour was drawing attention to some of these problems, business was expressing increasing dissatisfaction with the regulatory framework. Claims regarding the apparent rigidities in the labour market were once again made. The response was to amend the legislation. In his opening address in Parliament in 1999, the President announced that, due to the “considerable comment” that labour market regulation had attracted with regard to “its actual or perceived impact on investment and job creation”, the Department of Labour would undertake a review of labour regulations.⁹⁶ It appears that the idea of such a review had its roots in the 1998 Presidential Job Summit and then took shape in the course the Department of Labour developing its Fifteen Point Programme of Action.⁹⁷ The objectives of the review were to identify the aspects of the regulatory framework that were having ‘unintended consequences’ and/or impacting negatively on investment and employment creation, and to produce appropriate amendments. The President indicated that the following areas would receive particular attention: probation; remedies for unfair dismissals, dismissals for operational requirements, the extension of bargaining council agreements and certain provisions of the Basic Conditions of Employment Act.⁹⁸

The review consisted mainly of consultations and stakeholder representations. According to the Department of Labour submissions were solicited from organised business, organised labour, the black business council and community organisations. There were also consultations with the Labour Court, the CCMA and bargaining councils on issues that related to these institutions. The Department also undertook an “internal review”. (Department of Labour, 2000: 1) It is unclear exactly what this comprised. The stakeholder submissions were mainly in the form of arguments in support of particular changes and generally did not provide empirical evidence of the impact that the labour statutes were having on the labour market. These inputs were synthesised into a list of key areas, which effectively constituted the brief to the legal drafting team that was appointed to work on the amendments. The proposed

⁹⁵ This section draws on Godfrey and Clarke, 2002; as well as Du Toit et al, 2003.

⁹⁶ Speech to open Parliament on 25 June 1999.

⁹⁷ Presentation by Paul Benjamin, a member of the legal drafting team at a seminar on the Final Labour Law Amendments held on 3 May 2002 at the University of Cape Town.

⁹⁸ Op cit.

amendment bills that resulted from this process were published by the Department of Labour for public comment and tabling in NEDLAC in July 2000.⁹⁹

When announcing the amendments, the Department of Labour stated that the review had shown that “the fundamentals of our labour market policy are sound and... the overall thrust of the legislative framework is correct”. However, the review identified certain aspects that “would require amendment to meet the following objectives:

- Increase the sensitivity of our legal framework to the imperative to create jobs;
- Address unintended consequences of some provisions of the laws;
- Improve the application of the laws; and
- Ensure the effective alignment of the laws with the changing labour market environment.(Department of Labour, 2000: 1)

The amendments provide something of a watershed. After the huge gains made by unions and workers in terms of labour regulation since the 1994 elections, the concept of a review and the amendments that flowed from it, signalled that business was on the offensive and had the ear of government. This is certainly the impression given by the stated reasons for the review and some of the amendments that were proposed, particularly those to the BCEA.

The proposed amendments

The most fertile statute was the LRA; over 50 amendments were proposed. The more important of these fell into the following areas: operational requirements dismissals, procedures for dismissals and the functioning of the dispute resolution system; probation; protection for employees when businesses are transferred; the functioning of bargaining councils; workplace forums; registration of trade unions and employers’ organisations; and a supplement to the definition of ‘employee’. There were far fewer amendments proposed to the BCEA, but some of them were significant, and almost all downgraded standards. The amendments dealt with variation of ‘core’ rights; provisions in respect of overtime, the weekly rest period, and Sunday pay; the notice period; the conversion of existing wage determinations into sectoral determinations; and the same supplement to the definition of an employee as proposed for the LRA.

With regard to improving protection for workers, especially those in atypical employment arrangements, the most important proposed amendments to the LRA were as follows:

(i) Operational requirements dismissals

This was probably the most contentious of all the proposed amendments. It was motivated by labour’s concerns, in light of the massive restructuring and job-shedding process that firms had gone through, that the existing provisions in respect of retrenchments did not provide sufficient protection to workers. In particular, labour believed that the requirement that consultation take place followed by adjudication was not adequate; labour wanted to be able to negotiate and, if necessary, strike over

⁹⁹ The bills were published in the Government Gazette on 27 July (GG No. 21407) and the Minister of Labour tabled the bills at NEDLAC on the same day.

retrenchments (the adjudication of such disputes by the Labour Court meant that in principle such a strike would be unprotected).

The proposed amendment did not give labour what they wanted but sought to reach a compromise position. Firstly, a new section (s 189A) provided that an employer who wished to retrench more than 500 employees in any 12-month period must inform the Minister of Labour. This is in line with the Social Plan Agreement reached at the Presidential Job Summit. Secondly, the CCMA must appoint a facilitator to assist the parties in any consultation process regarding a proposed retrenchment. In terms of the amendment the facilitator would chair all consultation meetings and would have the power to determine disclosure of information disputes. The parties could, furthermore, agree to give the facilitator the power to make an advisory award or a final and binding award on any matter. The purpose of this new provision, according to the Explanatory Memorandum that accompanied the amendments, was to resolve retrenchment disputes through consultation “in a manner that promotes job retention and job creation rather than by adjudication”.

In an attempt to deal with some of the substantive legal problems arising from retrenchment disputes – the Labour Court had adopted the position that if a management decision in respect of a retrenchment was commercially justified it would not overturn it because it was not the optimal decision in the circumstances – an amendment was proposed to allow, firstly, for the appointment of assessors to advise the Court and, secondly, for the appointment of persons to conduct investigations into any aspect of an operational requirements dismissal.

(ii) Transfer of a business

The amendments propose a redraft of the existing section (s 197) dealing with the transfer of a business as a going concern and the inclusion of a new section that would deal with transfers when an employer is declared insolvent (s 197A). Major changes were not proposed to section 197; the primary objective of the amendment was to clarify a number of areas of uncertainty that existed in the original section.

(iii) Bargaining councils

In order to increase the sensitivity of bargaining council agreements to the circumstances of non-parties (many of which are small and micro firms), an amendment was proposed that an agreement would not be extended unless the Minister was satisfied that non-party employers had been given an opportunity to make representations to the council concerning the agreement. According to the Explanatory Memorandum this would allow the Minister to take into account, in a structured manner, the views of non-parties when deciding whether to extend the agreement or not.

It was also proposed that the powers of the designated agents of councils (who are appointed to enforce bargaining council agreements) would be significantly enhanced, notably their powers to investigate alleged contraventions of an agreement. In brief, agents would have the same powers as those of Department of Labour inspectors in terms of the BCEA. The way in which councils’ enforce their agreements was also clarified in the proposed amendments. This was aimed at overcoming a loophole in

the LRA that made it difficult for bargaining councils to enforce their own agreements.

(iv) Definition of employee

The existing definition of employee in the LRA and BCEA draws a sharp distinction between an employee and an independent contractor. It is a high stakes distinction: if a person does not qualify as an employee s/he is excluded from the protection of the statutes (and all other labour legislation). The courts have used a number of tests to try to deal with the growing grey area between an employee and a genuine independent contractor, eventually arriving at the 'dominant impressions' test to answer the conundrum. The latter test has been criticised because it does nothing more than state that the court will take account of all facts in making its decision. It became increasingly clear that there needed to be legislative intervention to clarify the issue and provide guidance to the courts.

It was proposed to introduce a new section (s 200A) that would supplement the definition of an 'employee'. The amendment provided seven rebuttable presumptions, any one of which would, if met, qualify a person as an employee. There are seven factors listed. These range from '*the manner in which the person works is subject to the direction and control of another person*' and whether '*the person's hours of work are subject to the control or direction of another person*' to whether or not a person is '*provided with the tools of the trade or work equipment*'. One factor deserves special mention because of its extraordinary breadth. This is the factor whether '*the person is economically dependent on the other person...*'.

It follows that '*if any one or more of the following factors is present*' the person is an employee, unless the 'employer' is able to rebut the presumption. It remains to be seen what weight will be given to a contract to the effect that someone is engaged as an independent contractor. But it will surely be difficult to place exclusive or even primary reliance on such a contract, since the section expressly states that a person will be presumed to be an employee '*regardless of the form of the contract of employment.*'

The proposed BCEA amendments: Strengthening workers' protection or eroding rights?

While the amendments proposed for the LRA provided a mixed bag for unions and employers, as well as aiming at improving the functioning of institutions, the proposed BCEA amendments were almost all in favour of employers. Probably the most significant amendments were those that widened the powers of the Minister and bargaining councils to vary provisions in the BCEA. These sought to fundamentally alter the model of 'regulated flexibility' that informs the design of the BCEA, ie. a set of 'core' standards that cannot be varied and a surrounding set of standards that can be varied by the Minister and bargaining councils (a still smaller set of standards can be varied by collective agreement and individual agreement).

The proposal was that in future the Minister would be able to vary any provision in the Act, either by way of a ministerial or sectoral determination, and a bargaining council would be able to vary the provisions in respect of weekly and daily ordinary

hours of work. If effected, the amendments would have significantly tilted the balance between 'core' standards and variation to one that favoured more flexibility.

Most of the remaining amendments that were proposed dealt directly with particular standards. With regard to hours of work, a key change was the dropping of the premium for Sunday work (the BCEA provided a Sunday rate of time-and-a-half or double-time depending whether Sundays are ordinarily worked). Other changes were the removal of the daily limit on overtime (although the maximum limit on daily working hours, ordinary and overtime, was retained), and dropping the requirement that the weekly rest period must include Sunday. Another important proposed amendment was to increase the qualification period for two weeks' notice from four weeks' employment to six months' employment. This meant that notice of one week could be given to all employees with less than six months' service.

A proposed change that excited little comment, but which had important implications, was the provision that all wage determinations and amendments to wage determinations in force (such determinations were produced under the old Wage Act and remained in force in terms of the transitional arrangements of the new BCEA), would be deemed to be sectoral determinations made in accordance with the BCEA. Such a change would re-introduce the notion of a 'casual' employee (in most case a person who works three or less days per week for an employer) to the BCEA, creating a confusing array of workers with varying degrees of more limited protection than contained in the Act. The change appears to have been forced on the Department of Labour because of the painstaking progress that it had made with introducing new sectoral determinations to replace the wage determinations.

Finally, as noted above, the same provision to supplement the definition of an employee that was proposed for the LRA was included in the BCEA amendments.

(c) The Negotiation Process

The initial public responses of the main parties to the proposed amendments indicated that negotiations in NEDLAC were going to be difficult. It was therefore not surprising that the negotiating committee reached an impasse at its second meeting. Thereafter a 'one-a-side' contact committee comprising one government, one business and one labour representative was set up by the parties. Somewhat unexpectedly a parallel negotiating process then emerged at the recently formed Millennium Labour Council (MLC).¹⁰⁰ The MLC process differed from NEDLAC in two respects: firstly, it did not involve the state as a party and, secondly, it aimed to achieve broad consensus on the issues rather than negotiating the details of the amendments.¹⁰¹ The two negotiating processes, i.e. in the MLC and the NEDLAC contact committee, went on for a number of months. They eventually resulted in an 'in-principle' agreement between business and labour towards the middle of 2001. The agreement, produced at

¹⁰⁰ The MLC grew out of an initiative of the International Labour Organisation and was founded in June 2000. It comprises 12 leaders from each of business and labour. It was established with the objective of fostering dialogue between business and labour with the aim of developing "a shared analysis" of and solutions to the economic crisis and unemployment.

¹⁰¹ Business however argued that it was drawn into detailed negotiations over the amendments in the MLC, something for which it believes the MLC is not designed. (South African Labour Bulletin, 2002: 17)

the MLC, was presented to the negotiating committee at NEDLAC and by the end of July agreement had been reached at the latter forum on most of the amendments. The MLC agreement revealed a number of changes to the original set of amendments produced the year before, and further changes were made by the NEDLAC negotiating committee.

A legal drafting team was then appointed to turn the agreement into bills (i.e. one for the LRA amendments and one for the BCEA amendments). On 16 November 2001 the bills were passed by Parliament after further changes at the portfolio committee stage. After further minor changes were made by the National Council of Provinces (NCOP), the bills were passed into law 6 March 2002. The Acts were promulgated on 1 August 2002.¹⁰²

(d) The Impact of the Negotiations and the Final Amendments

The original amendments proposed to the LRA were a response to both labour's and business' concerns and provided benefits for both. On balance, labour made the best use of the negotiations. It was able to negotiate changes to those amendments in favour of labour that brought them more into line with what labour originally demanded. And labour was able to win back some ground in respect of those amendments proposed to the LRA that favoured business. Labour even secured a few new changes that had not been part of the original set of amendments. The gains by labour with regard to the amendments proposed to the BCEA are even more impressive. Almost all of the more important amendments in favour of business were dropped or considerably toned down. The final BCEA amendments also saw some additions in favour of labour that were not part of the original amendments.

The final amendments to the LRA are as follows:

(i) Operational requirements dismissals

The most contentious amendment to the LRA was, not surprisingly, subject to much to-ing and fro-ing in the course of negotiations. The end result retains the basic outline of the original proposal but with some important changes. Firstly, the final amendment elaborates on the requirement to 'consult': the parties involved in a consultation over proposed retrenchments must "engage in a meaningful joint consensus-seeking process and attempt to reach consensus" regarding various aspects of the retrenchments. If agreement can't be reached a union or employees can, if certain conditions have been met (see below), strike over the retrenchments. The threat of strike action clearly seeks to bolster the consultation process. Consultation is further bolstered by an amendment that allows a consulting party to apply to the Labour Court for an order compelling the employer to comply with a fair procedure. Quite where this leaves the distinction that unions believe exists between 'consultation' and 'negotiation' is unclear,¹⁰³ but the ability to strike in certain circumstances probably resolves the problem in practice for unions.

¹⁰² The Labour Relations Amendment Act 12 of 2002 and the Basic Conditions of Employment Amendment Act 11 of 2002.

¹⁰³ Some commentators argue that there is no difference between consultation and negotiation in terms of the LRA.

Secondly, the new section (s 189A) is retained with certain major changes. This section applies to all employers that employ more than 50 employees, but the section only kicks in if the number of employees that will be retrenched is 10 or more (the latter requirement is further linked on a sliding scale to the number of employees the employer employs). For the purposes of this section, the number of employees retrenched in the last 12 months are counted. A facilitator must be appointed by the CCMA if either of the parties to the consultations makes such a request, or by agreement between the parties. If a facilitator is appointed and the dispute remains unresolved after 60 days, the employer can go ahead with the retrenchment, and the union or employees can elect to give notice of a strike or refer the dispute to the Labour Court. If a facilitator is not appointed and the dispute remains unresolved, the above options are the same but the procedure differs slightly. The employer is given the right to lock-out if notice of strike action has been given.

Section 189A differs from the original amendments with regard to how it deals with the Labour Court's approach to adjudicating the fairness of retrenchments. Instead of appointing assessors and investigators, the final amendment attempts to give content to what will be a fair reason for the retrenchment. The amendment obliges the Court to find an operational requirements dismissal to be fair if it was "to give effect to a requirement based on the employer's economic, technological, structural or similar needs", and "was operationally justified on rational grounds". Further considerations are that there had to be proper consideration of alternatives to retrenchment and the selection criteria were fair and objective. It remains to be seen how the Labour Court interprets this amendment.

(ii) Transfer of a business

The proposed amendments are retained in a similar form. The amended section to a large extent constitutes a revision in accordance with the way that the Labour Court interpreted the original section, with an attempt to avoid other areas of uncertainty. Unfortunately, a key area of contention, namely whether the outsourcing by an employer of a certain operation(s) or service(s) is a transfer of part of a business as a going concern, is not clarified. It will therefore be left to the courts to decide this question.

(iii) Bargaining councils

The proposed amendments to bargaining councils were a mix of strengthening enforcement and putting pressure on councils to accommodate small business interests. The final amendments drop the latter aspect and retain the former with some additions to bolster the council system. The amendments to increase the investigative and enforcement powers of bargaining council agents and to facilitate the enforcement by councils of their agreements are retained. In addition, a new amendment was agreed to which provides bargaining councils with two powers they did not have before. The first is to "provide industrial support services within the sector" (s 28(1)(k)), and the second is to "extend the services and functions of the bargaining council to workers in the informal sector and home workers" (s 28(1)(l)). While both new powers are clearly aimed at enhancing the role of councils in sectors and thereby strengthening them, it is unclear exactly what they will mean in practice. Finally, the proposal that a council must allow for non-party employers to make representations

regarding an agreement before the Minister would extend the agreement, was dropped from the final amendments.

(iv) Definition of employee

The amendment introducing seven presumptions of employment is retained but an additional subsection excludes persons earning above a certain amount (about R90 000 per annum). Another important addition to the amendment is that any person earning below or equal to this amount may approach the CCMA for an advisory award to establish if they are employees (both contracting parties may make such an approach). This will provide an avenue to persons wishing to proactively clarify their employment status.

The changes to the BCEA amendments are as follows:

Firstly, and most importantly, labour was able to reverse almost all the changes proposed with regard to variation of 'core' standards. All the standards that the amendments proposed that the Minister would be allowed to vary have been restored to their non-variable ('core') status (with some additions), except for provisions in respect of ordinary daily and weekly hours of work. The Minister will, however, only be able to vary such provisions if a number of restrictive conditions are met. Furthermore, the proposed amendment to allow bargaining councils to vary daily and weekly hours of work provisions has been dropped in its entirety.

A number of the amendments proposed to minimum standards were also dropped in the course of negotiations. The proposal to remove the premium for Sunday work was dropped, as was the amendment to the requirement that the weekly rest period include Sunday. In both cases the Act remains unchanged. Labour were not able to get any concessions regarding the removal of the daily overtime limit (although the daily limit on hours of work means that this is not particularly important), or with respect to the increase in the qualifying period for two weeks' notice of termination of employment. Also surviving the negotiations, with minor changes, is the amendment that all wage determinations and amendments in force will automatically become sectoral determinations.

Somewhat surprisingly, labour was able to introduce changes to a number of areas not dealt with in the original amendments. Amendments in respect of certain particulars of employment and remuneration for domestic workers, time periods for payment of contributions to benefit funds, severance pay for employees retrenched due to the insolvency of the employer, and some technical aspects of the enforcement procedure, were all introduced in the course of negotiations. None of these changes are significant, but they do indicate that labour did not focus only on winning back lost ground in the negotiations.

It was noted above that the same supplement to the definition of employee that was proposed for the LRA was proposed for the BCEA. The final form of this amendment is identical to that for the LRA. However, the BCEA had an interesting provision that allowed the Minister to deem any category of persons to be employees (s 83). The original amendments did not propose any changes to this, but the final amendments expand the powers of the Minister: s/he can now deem any category of persons to be

employees for the purposes of the whole or any part of the BCEA as well as any other employment law besides the Unemployment Insurance Act of 1966¹⁰⁴. The power that this provision gives the Minister to deal with dependent workers falling in the grey area between ‘employee’ and independent contractor is considerable. Whether this power will be utilised remains to be seen. To date the Minister has not used the provision despite a great deal of opportunity to do so.

Conclusion

The message of the *LAD Brokers* judgment will certainly be to discourage the designation of employees as independent contractors, to avert the consequences of labour legislation. Recent amendments to labour legislation will have the same effect. As outlined above, the important new sections (*‘presumption as to who is an employee’*) added to the LRA and BCEA will help to deal with problems that emerged under the previous legislation. But, as the heading indicates, the section concerns no more than a presumption. Until the contrary is proved, a person who works for, or renders services to, another will be presumed to be an employee *‘if any one or more of the following factors is present...’*

However the scope of the amendments adopted is limited. Neither the amendment discussed above nor the other amendments adequately address some of the problems discussed with regard to the triangular employment relationship. There is also some debate as to whether it is possible to address such problems within the scope of the LRA and BCEA, or whether separate legislation is required. It is telling that the founder and director of COFESA stated with regard to the amendments that they might make “the conversion of workers into independent contractors more difficult, [but they] won’t make it impossible and certainly won’t stop it!”¹⁰⁵

There are no ready solutions for problems that originate in the triangular employment relationship. They can also not be addressed by employers in isolation, without the input of organised labour. Thus, whereas a proposal that organised agencies within the temporary employment industry draft a code of conduct for their members is to be welcomed, it is unlikely that organised employers will be able to resolve all these problems on their own. There is also no simple solution for the small and very small enterprises that are presently operating on the fringes of the informal economy, if they are not actually part of the solution. The problem with regulating TESs has always been a definition that takes account of the variety of forms this activity takes. It appears this difficulty was also the root of the problem with the ILO’s proposed convention on contract labour.

Overall, while these amendments are a step in the right direction, they still do not go far enough. In general, regulation hasn’t adequately responded to labour market trends. It has maintained a specific definition of ‘employee’ that uses the standard employment relationship as a normative model of employment despite the inappropriateness of both. Thus, given the dramatic growth of informal and other non-standard employment arrangements, legislation excludes the growing group of

¹⁰⁴ The Unemployment Insurance Act 30 of 1966 has been replaced by the Unemployment Insurance Act 63 of 2001.

¹⁰⁵ Interview, 30 August 30, 2002.

workers situated on the margins of the economy. Further, the lack of capacity of the Department of Labour to monitor and enforce legislation has resulted in the rapid proliferation of non-standard employment. Weaknesses in the contractual regime underlying new legislation and weak enforcement systems have meant that stronger protection in law has not translated into improved employment standards and working conditions for most workers in reality. This is especially true for workers previously excluded from protection due to apartheid labour market policies. As a result, inequality and labour market segmentation has continued, and even increased. Even with the introduction of new labour statutes and recent amendments, the labour market hasn't been fundamentally transformed; rather it has been reconfigured, with new pressures and policies now shaping inequality, poverty and marginalisation. Despite labour's victory with the new amendments, reforms to labour legislation are unlikely to reverse these trends, particularly where they do not impact on monitoring and enforcement mechanisms.

Bibliography

Bhorat H. 2001. 'Labour Market Challenges in the Post-Apartheid South Africa: A Country Profile'. Study commissioned by the International Labour Organisation.

Cameron E. 1990. 'Casualties of the Workplace: Casual and Fixed Term Employees'. *Employment Law*, Vol. 6 No. 4.

Central Statistical Service. 1998. *Employment and Unemployment in South Africa: October Household Survey, 1994-1997*. Statistical release PO317.10. Central Statistical Service: Pretoria.

Cheadle H and M Clarke. 2000. *Employment Standards in South Africa: A Country Study*. Commissioned research report for the International Labour Organisation.

Clarke M and B Kenny. 2002. 'Falling out of the loop: Protecting casual workers in South Africa's retail sector'. In *Bargaining Indicators*, Vol. 7, Labour Research Service, Cape Town.

Clarke M, and S Godfrey and J Theron. 2002. *Globalisation, Production and Poverty: Macro, Meso and Micro Level Globalisation: Democratisation and Regulation of the South African Labour Market*. Research report commissioned by the Department of International Development, United Kingdom.

Crush J. 1987. 'Restructuring Migrant Labour on the Gold Mines', in G Moss and I Obery (eds.), *South African Review* 4. Ravan Press: Johannesburg.

Department of Labour. 2000. *Labour Law Review: Summary of Issues and Amendments to the Labour Relations Act, Basic Conditions of Employment Act and Insolvency Act* (<http://www.labour.gov.za>).

Department of Labour. 2001. *Annual Report: 2000*.

Department of Labour. 2002(a). *Annual Report: 2001/2002*.

Department of Labour. 2002(b). 'Arising to New Challenges: A discussion document on the Employment Services Act'. Drawn up by the Directorate Employment Services.

Du Toit A and F Ally. 2001. *The Externalisation and Casualisation of Farm Labour in Western Cape Horticulture*. Centre for Rural Legal Studies, University of the Western Cape.

Du Toit D, and D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie. 2000. *Labour Relations Law: A Comprehensive Guide* (3rd edition). Butterworths: Durban.

Du Toit D, and D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, with C Bosch. 2003. *Labour Relations Law: A Comprehensive Guide* (4th edition). LexisNexis Butterworths: Durban.

Ewert J and J Hamman. 1996. 'Labour Organisation in Western Cape Agriculture: An Ethnic Corporatism?' *Journal of Peasant Studies*, Vol. 23 Nos. 2/3.

Godfrey S with J Theron. 1999. *Labour Standards versus Job Creation? An investigation of the likely impact of the new Basic Conditions of Employment Act on small businesses*. Development and Labour Monograph 1/99. Institute of Development and Labour Law, University of Cape Town.

Godfrey S and M Clarke. 2002. 'The Basic Conditions of Employment Act Amendments: More Questions than Answers'. *Law, Democracy and Development*, Vol. 6 (1).

Green Paper: Policy Proposals for a New Employment Standards Statute. Government Gazette No. 17002, February 1996.

Hamman J. 1996. 'The Impact of Labour Policy on Rural Livelihoods on Western Cape wine and fruit farms', in De Klerk, Lipton and Lipton (eds.), *Creating Rural Livelihoods in the Western Cape*. Indicator Press: Durban.

Hemson D. 1996. 'Beyond the "Frontier of Control": Trade Unionism and the Labour Market in the Durban Docks'. *Transformation*, 30.

Hutchinson W and PAK Le Roux. 2000. 'Temporary Employment Services and the LRA'. *Contemporary Labour Law*, Vol. 9 No. 5.

Kenny B. 1998. 'The Casualisation of the retail sector in South Africa'. *Indicator South Africa*, Vol. 15 No. 4.

Kenny B. 2000. 'We are nursing these jobs: the implications of labour market flexibility on East Rand retail sector workers and their households.' Unpublished paper presented at the South African Sociological Association Annual Conference, 2-5 July, University of the Western Cape.

Klerck G. 1994. 'Industrial Restructuring and the Casualisation of Labour: A case study of subcontracted labour in the process industries'. *South African Sociological Review*, 7 (1).

Parliamentary Monitoring Group. Minutes of Labour Portfolio Committee, Occupational Health and Safety: Briefing, 20 August 2002. (www.pmg.org.za).

Peck J. 1996. *Work-Place: The social regulation of labour markets*. The Guilford Press: New York.

Poswell L. 2002. *The Post-Apartheid South African Labour Market: A Status Report*. Development Policy Research Unit, University of Cape Town.

South African Labour Bulletin. 2002. 'Did the MLC go beyond itself?' Vol. 26 No. 2.

Skinner C and I Valodia. 2002. 'Labour market policy, flexibility, and the future of labour relations: the case of the KwaZulu-Natal Clothing Industry. Transformation, 50.

Statistics South Africa. 2000. October Household Survey 1999. Statistical release PO317. Central Statistical Service: Pretoria.

Statistics South Africa. 2002. Labour Force Survey: September 2001. Statistical release PO210 dated 26 March 2002.

Statistics South Africa. 2002. Labour Force Survey: February 2002. Statistical release PO210 dated 25 September 2002.

Theron J and S Godfrey. 2000. Protecting Workers on the Periphery. Development and Labour Monograph 1/2000. Institute of Development and Labour Law, University of Cape Town.

Theron J and P Lewis. 2003. A Legislative and Policy Review of the Services Sectoral Education and Training Authority. Commissioned research report for the Services SETA.

Valodia I. 1991. 'Increase in Casual and Temporary Work: The case of shopworkers'. South African Labour Bulletin, Vol. 15.

Wholesale and Retail SETA. 2000. Wholesale and Retail Trade Sector Skills Plan. Draft 1.1. W&RSETA: Pretoria.