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Non-standard work arrangements in the public sector: the case of South Africa

Jan Theron

Sectoral
Activities
Department

Non-Standard Work Arrangements in the Public Sector

The case of South Africa

Jan Theron

*Working papers are preliminary documents circulated to stimulate
discussion and obtain comments*

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List of Acronyms

BBBEE	Broad-based black economic empowerment
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation Mediation and Arbitration
CCGs	Community care givers
CHWs	Community-based health workers
CWP	Community Works Programme
DCoG	Department of Co-operative Governance and Traditional Affairs
EEA	Employment Equity Act
EPWP	Expanded Public Works Programme
ILO	International Labour Organisation
LEP	Labour and Enterprise Policy Research Group
MSA	Municipal Systems Act
NPO	Non-profit organisation
PSA	Public Service Act
PSC	Public Service Commission
QES	Quarterly Employment Statistics
QLFS	Quarterly Labour Force Survey
SALGA	South African Local Government Association
SAMA	South African Medical Association
SAMWU	South African Municipal Workers Union

Preface

One of the complex challenges associated with new trends in the employment relationship is to improve the working conditions of non-standard workers, whose numbers have grown significantly through use of varying kinds of contractual arrangements, and who are considered more vulnerable to the vicissitudes of labour markets than those who are in standard work arrangements. The Sectoral Activities Department (SECTOR) of the International Labour Organization (ILO) is pleased to present a series of country studies on non-standard work in the public service (initially focused in Brazil, Canada, Germany, Japan, South Africa and the United Kingdom), as part of its strategy to advance the study of changing employment relations. Drawing on the Conclusions of the Recurrent Discussions on Fundamental Principles and Rights at Work adopted by the ILC in 2012, SECTOR has compiled examples from various regions on trends in non-standard work arrangements, to increase understanding of their impact on Decent Work objectives and identify solutions as appropriate.

As a result of the most recent developments in budget constraints due to public service reform and changes in human resource management in public administrations, a growing number of tasks have been performed by workers in non-standard employment arrangements. The ILO's Committee of Experts on the Application of Conventions and Recommendations, in its 2013 General Survey on Conventions No. 151 and 154, expressed concerns regarding trends in labour relations in the public service, like the extension of contracts governed by private sector labour law; the admission of temporary public servants, agency workers, or regular workers on a non-permanent recurrent basis or working part-time; and the use of civil or administrative contracts to provide services specific to public administration¹. The Committee warned of potentially negative repercussions for the independence of public servants and for compliance with constitutional requirements for the recruitment of civil servants.

In response to the General Survey, the Committee of Application of Standards of the 102nd International Labour Conference (2013) underscored that collective bargaining in the public service can maximize the impact of the response to the needs of the real economy, particularly during times of economic crisis, and contribute to just and equitable working conditions, harmonious relations at the workplace and social peace. It can ensure an efficient public administration by facilitating adaptation to economic and technological changes, and the needs of administrative management. The Committee encouraged the Office to provide support for capacity-building and assistance mechanisms to promote the ratification and full implementation of Conventions Nos. 151 and 154.

This series seeks to shed light on this phenomenon and strengthen the understanding of collective bargaining in challenging situations. We hope that the ILO's staff and constituents will find it useful in devising future policy initiatives.

Alette van Leur
Director
Sectoral Activities Department

¹ ILO. 2013.

Foreword

This study is one of a series of country studies commissioned by the International Labour Organisation (ILO) on non-standard work arrangements in the public sector. Its aim is to understand, firstly, the implications of this trend for the decent work objectives and, secondly, to identify appropriate policy responses. In doing so, we have also endeavoured to identify the gender dimension of non-standard work arrangements, and obtain data that is disaggregated by sex.

As understood here, non-standard work (or non-standard employment, as we prefer to term it) takes two different forms. Firstly, it refers to the increased utilisation of part-time and temporary workers, which we will refer to here as casualization, to distinguish it from the second form. The second form refers to the utilisation of contractors or intermediaries to employ the workers required, in this instance, to provide services to government. We refer to this as externalization (Theron and Godfrey, 2000).

In the case of externalisation, the workers providing the service in question are generally employed on a temporary basis (typically the term for which the contractor or intermediary is engaged). Less usually, they may also be employed on a part-time basis. Accordingly, casualization and externalisation overlap. However the implications for decent work objectives are more likely to be negative in the case of externalisation than casualization, particularly where lesser skilled workers are involved. We elaborate on the reasons for this below.

Since this study is supposed to be based on the existing literature and statistics regarding non-standard work arrangements, rather than original research, it is necessary to point out at the outset that there is a dearth of literature on the subject. There is also a dearth of meaningful statistical data. This is because of the difficulties of measuring non-standard employment, which we believe are not unique to South Africa. This is the subject of the next section, Section I. In Section 2 we outline the scope of this paper in the light of these difficulties. Instead of attempting to provide a global picture, we hone-in on illustrative case studies.

In section 3 of the paper, we review the literature relevant to the approach we have taken in this study, as well as the relevant regulatory provisions. Section 4 concerns the impact of the use of non-standard working arrangements on the delivery of public services. It is followed by a section on trade union density and collective bargaining coverage, section 5. Section 6 concerns the exercise of the rights of freedom of association and collective bargaining, and section 7 concerns other issues affecting job security and job quality. The subject of section 8 is social dialogue, and policy recommendations flowing out of the analysis are discussed in section 9, under the heading “action points”.

Jan Theron

About the author

Jan Theron is the co-ordinator of the Labour and Enterprise Policy Research Group (LEP), University of Cape Town. The author would like to acknowledge the assistance of Rutendo Mudarikwa and Nailah van der Schyff in preparing his paper.

Introductory comments and key messages

Data about non-standard employment is notoriously difficult to come by, for a number of reasons. Firstly, non-standard employment is not a precise concept, and there is no generally accepted definition of non-standard employment. In particular, the extent to which externalization gives rise to non-standard employment arrangements is poorly understood, and contested.

Secondly, the primary source of data about employment has historically been collected by means of the Quarterly Labour Force Survey (QLFS), a household survey, and is aggregated per sector. However one of the consequences of externalisation is to erode the coherence of the concept of a sector to describe the nature of an economic activity. Accordingly, it is sometimes unclear in terms of which sector employment in non-standard arrangements should be captured (Tregenna, 2009).

This can be illustrated by way of a case study that has been documented, namely the externalisation of the municipal service of waste collection (Cf. Mirafatab, 2004; M. Samson, 2010; Theron and Visser, 2010). This might well be captured in a household survey as employment in a private cleaning service, because this is how the contractor in question chooses to describe his or her business. Objectively, however, the work is undertaken for and on behalf of the local authority, and the workers engaged by the contractor should arguably be regarded as part of the public sector.

Thirdly, and compounding the foregoing difficulty, it is generally not in the interests (or perceived interests) of employers to acknowledge or disclose the number of workers employed in non-standard arrangements. This is particularly the case where employment has been externalised, since the objective of externalisation may be to avoid accountability for the wages and conditions of those who work for them.

In the case of the externalisation of waste collection, for example, it is clear that significant numbers of workers are employed by contractors to provide this service for and on behalf of local authorities. Yet data about the numbers such contractors employed are not readily available. This is presumably because there is no legal compulsion on local authorities to monitor the number of workers they indirectly employ, and because they do not wish to do so.

There is a fourth difficulty with data about non-standard employment. This is that it comprises a spectrum, which ranges from work that fulfils the objectives of decent work, and is akin to standard employment, to work which does not. In the case of externalisation, it ranges

from contractors or service providers that are genuinely autonomous to those which are arguably not.

A key message of this study is therefore the need for fuller disclosure of the range of non-standard employment arrangements entered into by government, and better data about the number of workers employed in these arrangements, and their wages and conditions of work. This would entail, in the case of externalisation, for contractors to disclose the number of workers they employ overall, the number (or estimated number) and gender of workers to be employed on a given contract, and particulars about their wages and conditions of employment.

Scope of the study

Employment in the public sector, in line with the definition of non-standard employment outlined above, must be regarded as encompassing both employment by government, and employment for and on behalf of government (and funded primarily by government). The latter is the case where government engages contractors to provide public services, i.e. the situation of indirect employment.²

It is therefore necessary to maintain a distinction between employment in the public sector and the “public service”, as defined in terms of the Public Service Act (PSA). This refers to those who are employed by government, whether on the “fixed establishment” or “temporarily or under a special contract...whether in a full time or part-time capacity...” (Section 8(1)(c), Public Service Act). It is also necessary to differentiate the public service, as defined in the PSA, from public services, which in the present context refers to all services of a public character.

Even if this study only concerned employment by government, its scope would be very broad. Government, in terms of the South African constitution, comprises three tiers: national, provincial and local (or municipal). Under the Labour Relations Act, wages and other conditions of work of government employees are negotiated centrally at a bargaining council covering employees at provincial and national level, on the one hand, and at a bargaining council for local government employees, on the other. Yet each tier of government remains an employer in its own right.

Since each remains an employer in its own right, the different tiers of government are not obliged to follow the same policies in employment matters, provided they remain within the ambit of collective agreement, and in fact do not do so. To obtain authoritative data about the numbers of workers employed in a temporary or part-time capacity by any given government department it would therefore be necessary to aggregate the data for the national and nine provincial departments.

The position would be even more complex in the case of local government, where the 228 municipalities also fall into three categories, and range from the large metropolitan municipalities to small municipalities whose jurisdiction overlaps with district municipalities. Although subject to the supervision of provincial and national government, and bound by the collective agreement, municipalities would have discretion as to what extent they rely on non-standard employment arrangements.

The most authoritative data regarding the number of persons employed by government are derived by Statistics SA from its Quarterly Employment Statistics (QES) survey. This is not a household survey, but a survey of non-agricultural businesses and other entities which are employers, including the different tiers of government. In 2012, according to Statistics SA, there were 1 934 203 persons employed by government. Of

² Compare Hammouya (1999), who defines the public sector as “all market and non-market activities which at each institutional level are controlled and mainly financed by public authority...”

this number, 258 946 were classified as part-time and the remainder as full-time (Statistics SA, 2013).³

A part-time employee is defined as a permanent, temporary or casual employee who normally works less than 40 hours a week. In other words this definition conflates part-time and temporary employment. There is also no legal basis for the category of casual employees, which is presumably intended to refer to temporary workers who are employed for 24 hours or less a month, to whom the floor of rights provided by the Basic Conditions of Employment Act (BCEA) do not apply.

Despite these and other definitional difficulties, the data does indicate that significant numbers of non-standard employees that are directly employed (258 946 employees represent thirteen per cent of the total). Moreover this category has more than doubled over the previous decade, and in the case of national and provincial government has more than tripled (Statistics SA, 2013). Unfortunately, however, this data is not disaggregated by gender. There is also no indication as what proportion is in managerial, skilled, semi-skilled or unskilled positions.

The Department of Labour has data disaggregated by gender and occupation, based on submissions by employers in terms of the Employment Equity Act (EEA), Act 55 of 1998. But whilst its reports in terms of the EEA contain considerable detail about the gender composition of various managerial levels, including the public sector, they contain no information whatever regarding the gender composition of the workforce below the level of skilled workers. They also contain no information about non-standard employment, despite the fact that, on its own data, “temporary employees” makes up twelve percent of the national workforce (Department of Labour, 2011-12 and 2012-13).

However neither the Statistics SA nor EEA data include people employed on public works programmes in terms of government’s Expanded Public Works Programme (EPWP). Between 1 April and 30 September 2012, the EPWP reported that it created 577 575 “work opportunities”. This represents almost double the number of “part-time” employees. The sectors in which the EPWP is involved range from infrastructure development to social services. There does not appear to be any well-founded reason for not regarding them as part of the public service.

The “work opportunities” EPWPs provide represent temporary employment (except in the case of CWPs, discussed below). This is typically between four and six month’s duration. The percentage of women employed on EPWPs varies according to sector, but ranges between 51 per cent (in the case of infrastructure development) to 85 per cent (in the case of the so-called social sector).

The Community Works Programme (CWP) represents a new component of the EPWP. In response to the criticism that EPWP provides only temporary employment, the CWP provides part-time employment on a continuous basis. However, according to the Department of Co-operative Governance and Traditional Affairs (DCoG), which is

³ National government employs 451 356 of the total number of government employees. However this figure is somewhat misleading, since it excludes employees of provincial departments of national government. 1 086 937 were employed by government in the provinces (including employees of provincial departments of national government) and 257 460 were employed by local government. An additional 138 450 are employed by “other government sectors”, including parastatal institutions and tertiary educational institutions.

responsible for CWPs, there is an “implementing agent” who is responsible for the overall management of the project, and a “local implementing agent” who manages CWP projects at a local level. Evidently “manage” in this instance is a euphemism for “employ”, and the implementing agencies are NGOs. This can therefore be regarded as a form of indirect employment. It is not apparent from the EPWP reports how many of its other projects represent indirect employment.

Even without taking into account the number employed by EPWPs, it is probable that the number of workers indirectly employed by government is greater than the number that are directly employed in non-standard arrangements. This is because externalisation rather than casualization has been the dominant trend in South Africa. There can be no doubt that preferential procurement policies in the public sector feed into this dominant trend.

Preferential procurement is especially important in the context of South Africa, given its perceived role in “empowering” sections of the population that were discriminated against or disadvantaged during the apartheid era. There is thus a close affinity between preferential procurement and policies and legislation whose objective is “black economic empowerment” or, in its most recent formulation, “broad-based black economic empowerment” (BBBEE).

In summary, it is clear that a very wide scope of activities could be considered relevant to this enquiry. A variety of approaches are possible as to which activities should be included or excluded, depending both on how the public sector and non-standard employments arrangements are defined. It is not possible or useful in the circumstances to present a global picture as to non-standard employment arrangements in the public sector. What is feasible, is to identify illustrative case studies.

The illustrative case studies we have decided to focus on are two public services, one performed by local government and the other by national government. The first is waste management, including both waste collection and recycling (or waste minimisation). The second is health services, which are provided by both national and provincial government. Both these services are major employers of lesser skilled workers, and in the case of the health sector, a major employer of women.

A review of the relevant literature and regulations

There is a voluminous literature about non-standard employment, which is sometimes also described as “contingent”, “precarious” or “casualised” (Cf. Delsen, 1995; Kalleberg, 2000; Fudge and Owens, 2006). It is defined by what it is not, which is a model of standard employment which is assumed to have been dominant. Definitions of standard employment vary, but there appears to be consensus on at least two criteria: it is continuous employment, for an indefinite period, and it is full-time. If, however, non-standard employment encompasses externalisation, as we have said it will in this study, then at least one more criteria must be admitted. Standard employment takes place at the workplace of the employer.

There appear to be relatively few studies on non-standard employment in the public sector (Cf. Mastracci and Thompson, 2005, on the USA). This is curious, since in many countries employment by government is regarded as proto-typical of the standard job, not only in that it complies with the above criteria, but because it is regarded as secure employment, and is associated with benefits such as medical and pension cover that afford a high degree of social protection.

Yet there are those who argue that even in the global North standard employment was never as dominant a model as this literature suggests. Certainly it has never been the norm in the global South, where the distinction between formal and informal employment has more traction. In South Africa, standard employment was arguably only ever the norm in the public service and sections of manufacturing. Its real significance has been in informing the model on which labour legislation is premised.

The relation between standard employment and labour regulation is not, in our opinion, sufficiently emphasized in the literature about non-standard employment. A description of non-standard employment as comprising a multitude of “protean forms” is typical of a tendency to exaggerate its diversity (Summers, 1997). Externalisation, of course, can take as many diverse forms as the contract between a client and a contractor or service provider can. However these different forms are amenable to legal classification and regulation.

Article 1 of the Labour Clauses (Public Contracts) Convention, No. 94, (1949) sets out in simple terms how such contracts in the public sector might be classified. However South Africa has never ratified this Convention. The furthest its legislation goes toward imposing a restraint on government’s capacity to appoint an external entity to provide a public service is a provision in the Municipal Systems Act (MSA), Act 32 of 2000, which prescribes the procedure it must follow before doing so. Ostensibly this is a fairly onerous procedure, that includes conducting an assessment that takes into account the “likely impact on development, job creation and employment patterns” and consultation with the local community and organised labour, amongst others (Section 78). In practice, however, it does not appear that these provisions of the MSA are rigorously complied with, if at all.

Perhaps this is not surprising, given that government’s preferential procurement policies are concerned primarily with advancing the interests of persons who have been disadvantaged by racial and gender discrimination in the past. These formerly disadvantaged persons will in most instances be employers or potential employers. However, the preference point system which Section 2(1) of the Preferential Procurement Policy Framework Act introduced in 2000 did not take account of the conditions of work of their employees who will be undertaking the work in question.

There are at root and base only two forms casualization can take: part-time or temporary employment. Temporary employment is employment for a specified term, while Art. 1(a) of the ILO’s Part-time Work Convention, 1994 (No. 175) defines a part-time worker as “an employed person whose normal hours of work are less than comparable full-time workers.” In each instance regulation plays a critical role in defining the form non-standard work plays, and its extent.

The establishment of CWP’s underscores the importance of differentiating between temporary and part-time employment. For workers in lesser skilled occupations, part-time employment is preferable, since it is continuous. Although the rationale for the establishment of the EPWP’s was to equip participants with skills that would make them more employable, it is questionable whether this is realistic given the comparatively short period that they are employed, and the low level of skills utilised on EPWP projects.

On the other hand temporary contracts for professionals or persons in relatively skilled positions, such as are employed in the health sector, are in all probability for a period of years. In such cases, non-standard employment is akin to standard employment. Such posts appear to comprise a significant proportion of the staff establishment of the

national Department of Health, and at least one of the provinces (Kwazulu Natal), which somewhat paradoxically refers to “permanent” employees on contract.

A further indication of the extensive utilisation of temporary contracts is that the most common reason for staff to leave the employment of the Department, both at national level and Kwazulu Natal, is the expiry of their contracts. This is also the case in the Western Cape which claims that 92 per cent of its staff is employed on “a full time permanent basis” (Department of Health, 2011-12).⁴ This represents another paradox. Clearly research is needed in these and other respects, but there is also a need for fuller and better disclosure of information concerning employment.

There is also greater transparency needed regarding employment in services that have been externalised, particularly in lesser skilled positions such as cleaning. Here, too, there is no consistent approach between the different provinces, either as to which functions are externalised, or how data relating to the externalised enterprises is reported. The indications are, for example, that externalisation has been more far reaching in the Western Cape than in Kwazulu Natal. This would of course put a different perspective on Western Cape’s claims about providing employment on a “full time permanent basis.”

Where there has been research done, is regarding the evolution of lay health worker involvement in the way in which health care is organised and delivered. This development has in large part been in response to HIV/AIDS, and represents a parallel programme, in partnership with government (Van Pletzen et al., 2013; Schneider and Lehmann, 2010; and H. Schneider et al., 2008). A recent audit conducted by the national Department of Health found there were 2 800 community based non-profit organisations (NPOs) operating countrywide. Most of these received funding from the Department. These NPOs in turn employed over 72 000 community-based health workers (CHWs) (Department of Health, 2011). CHWs provide a community outreach service to households, and their number includes community care-givers (CCGs) providing home-based care on a part-time basis.

The parallel service provided by the NPOs is a form of indirect or externalised employment, and there is evidently some debate as to whether the Department should directly employ CHWs. It is in the context of policy dilemmas such as this that the ILO’s concept of decent work may have relevance. The first strategic objective of the ILO’s decent work agenda is creating decent and productive jobs.⁵ In the case of CCGs, unlike the case of cleaning in a public hospital, the job in question did not exist prior to the programmes instituted by the NGOs. The question is whether it would be sustainable if rendered by someone on the permanent establishment of the Department.

⁴ In 45 per cent of cases this was the reason for termination of employment, whilst the next most common ground (41 per cent) was resignation. In the case of Kwazulu Natal, in 63.9 per cent of cases the reason for termination of “permanent” employees was expiry of their contract, with the next most common ground being resignation. It seems very few employees in standard jobs in the health sector are dismissed. Cf. Kwazulu Natal Department of Health, 2011/12, p. 21; Western Cape Department of Health, 2012/13, p. 309.

⁵ This strategic objective is defined as “Building societies and economies that generate opportunities for investment, entrepreneurship, skills development, job creation and sustainable livelihoods.” ILO, 2014, p. 4. The three other objectives of decent work are guaranteeing rights at work, extending social protection and promoting social dialogue.

I have elsewhere pointed out the potential tension between the creation of decent and productive work and guaranteeing rights at work, as well as the absence of guidance as to how its objectives can be implemented in circumstances in which employment has been restructured, as a consequence of externalization (Theron, 2013). In the case of CCGs, this potential tension can be explained as follows: the mere fact that CCGs are employed by NPOs rather than government, and on a part-time basis, suggests that it will be difficult for government to accommodate such a position on its permanent establishment. There a number of reasons why this would be so, including cost. It is common knowledge, for example, that a significant portion of the cost of creating posts on government's permanent establishment are "social wage" provisions such as pension and medical aid cover. It would therefore surely not be sustainable for CCG workers to enjoy the identical benefits of workers on the permanent establishment. The "rights at work" to which CCG are entitled would have to be formulated in the context of the service they provide.

There is a great risk of simplifying the policy dilemma when attempting to quantify the compliance with the objectives of decent work, without regard for the context. I therefore argue that attempts to develop objective indicators of decent work are of limited usefulness.⁶ Decent work is better understood as a qualitative concept, in which the circumstances of each case have to be evaluated. Clearly the circumstances in the case of CCGs are entirely different from that of cleaners in a public hospital, or the case of waste collection.

In the case of waste collection, it is first of all necessary to develop criteria to differentiate the function of waste collection from and specialist waste management functions which might warrant engaging external expertise, such as the management of hazardous substances. Then it is necessary to evaluate the specific strategies municipalities have adopted to collect waste.

From the literature on waste collection already alluded to, which is focused primarily on the large metropolises, it emerges that widely differing strategies have been adopted. In Johannesburg a separate municipal entity has been established. In Cape Town, by way of contrast, whether waste is collected by workers employed by the City authority itself, or by a contractor engaged by the City, depends whether an area is designated 'formal' or 'informal' (Samson, 2010; Theron and Visser, 2010). In the metropolitan area Tshwane, which includes Pretoria, heavy reliance was placed on a temporary employment agency, commonly known as a labour broker, at the time of one study (Rees, 2009). The position may well have changed since.

Each of these strategies has different employment consequences, and non-standard work arrangements are often fluid, as the case of Tshwane suggests. A further complication is the utilisation of EPWPs by local authorities to collect waste. This arguably represents a misuse of EPWPs, and undermines the objectives of the programme. A recent study by National Treasury recommended this practice be reviewed, without clearly indicating what the recommended outcome of the review should be (Madubula and Makinta, 2013). As with other forms of externalisation, data as to how extensively this occurs is not readily available.

⁶ For examples of studies which seek to develop quantitative indicators, see Ghai, 2003; Bescond et al., 2003.

The aforementioned study by National Treasury is an indication of the interest that policy makers have begun taking in waste management issues, because of its perceived potential for creating “green jobs”. But the potential for new jobs (as opposed to the transfer of functions formerly performed in-house to external service providers) is primarily in the area of the recycling of waste. This is also an activity in self-employed waste-pickers, either individually or organised into associations or co-operatives, operate. This raises another policy dilemma, in respect of which decent work, interpreted with regard to circumstances, might offer some guidance.

The impact of the use of non-standard working arrangements on the delivery of public services

It is clear from the above review that it is not possible to generalise about the impact of non-standard work arrangements, and that it is necessary to differentiate between the impacts of different forms of non-standard employment. In the case of skilled workers in the public sector and positions above that level, non-standard work arrangements appear primarily to take the form of casualization, in the form of temporary contracts.

There are probably a variety of rationales for the utilisation of temporary contracts, and it does not appear that the salaries and working conditions of the workers concerned are adversely affected. Workers in these positions are also not particularly vulnerable, by virtue of the skills they command. They are eligible for membership of trade unions or professional associations, and such organisations exist. The SA Medical Association (SAMA), for example, represents professionals in the health sector and is also represented on the bargaining council.

In the case of less skilled workers, the preference of the employer appears to be to externalise employment. Here, too, one needs to differentiate between the situation of where the same public service is being rendered both by government and by contractors, and the situation of EPWPs and CWPs. In the sectors we have focused on in this study, waste collection is the clearest example of a public service that rendered both by government and by contractors. This has a negative impact on the maintenance of labour standards, in that workers in doing equivalent work are not being treated alike. The impact on the exercise of the freedom to associate and collective bargaining is profound, as is discussed more fully below.

The rationale for EPWPs should be that they are, by and large, rendering a public service that government is not able to provide. To the extent that EPWPs are being utilised for purposes such as waste collection, it undermines this rationale, as well as having a negative impact on labour standards, for the same reasons as mentioned above. Apart from this circumstance, it is necessary to differentiate between EPWPs where employment is externalised, and EPWPs where employment is temporary as opposed to part-time, as in the case of CWPs.

The impact of part-time employment is less negative than temporary employment, particularly where it is on relatively short-term contracts. In the case of CCGs, externalised part-time employment can arguably have a positive impact, particularly in poor, rural communities where the need for such service is acute.

Trade union density and collective bargaining coverage

Trade union density and collective bargaining coverage are examples of quantitative indicators of decent work. Wages and conditions of employment of persons employed by government are negotiated centrally. Negotiations take place at four sectoral bargaining councils, for the education sector, the public health and social development sector, the safety and security sector, and at the “General Public Service Sectoral Bargaining Council.” The last mentioned council covers employees who are not covered by the other councils, such as non-teaching staff in the education sector. In addition, there is co-ordinating bargaining council.

There are eighteen trade unions of varying size that are regarded as sufficiently representative represented on the council. The largest of these is a teachers’ union, the South African Democratic Teachers Union. In total, the trade unions claim a membership of 1.2 Million (PSC, 2012). This might represent as much as 75 per cent of those who, according to the Statistics SA figures, are employed by government, if those who would probably not be eligible for membership are excluded.⁷

Amongst those who would probably not be eligible for membership are what Statistics SA refers to as “part-time” workers. The reason for believing they are in fact excluded is, firstly, that the bargaining council agreements do not define either part time or temporary work. They also do not seek to regulate non-standard work arrangements, such as the utilisation of temporary employment agencies. Secondly, trade unions may not consider it in their interests to disclose the existence of categories of employees they do not represent, since it would jeopardise their representivity.

Further and in any event, the scope of the public sector as defined in this study is broader than those who are directly employed by government. There is no information regarding trade union membership of workers who, like the cleaners in public hospitals or CHWs, are delivering a public service that is wholly or largely paid for by government. It does, however, seem highly improbable that any significant number of these workers would be organised by any public sector trade union. A further indication of this is that there are no resolutions of the Public Service Coordinating Bargaining Council that address the utilisation of non-standard employment in the public sector, including categories that are known to be utilised, such as labour broking or temporary contracts.

The discrepancy between the organisation and representation of workers employed by government and those working for and on behalf of government is perhaps even more glaring in local government, because of the large numbers involved in waste collection. In the case of local government, the employers are represented at the national bargaining council by the SA Local Government Association (SALGA) and two trade unions, that claim to represent 195 000 workers. This represents 75 per cent of the 257 460-strong workforce, according to Statistics SA. However there is no data about how many workers are employed for and on behalf of municipalities.

⁷ Employees in “other government sectors” would probably not be eligible for membership of public sector unions. It is unclear in which government sectors the “part-time” category is employed.

In the case of waste collection, it is undeniable that workers perform essentially the same service as municipal workers. However although there has been some trade union involvement in issues affecting these workers, there are no successful attempts to organise them documented. Needless to say, they are not represented or covered by the local government collective agreement. The indications are there is a substantial difference between what they earn compared with a municipal employee doing equivalent work, and even more so when the social wage (medical and retirement cover, amongst other benefits) is taken into account (Cf., e.g., Theron and Visser, 2010).

There have been instances where the dominant trade union, SA Municipal Workers Union (SAMWU), has negotiated on behalf of these workers. However there has been no collective bargaining as such, and there is no realistic prospect in the foreseeable future either of the existing collective agreement being extended to such workers (because the fiscal implications of doing so would be massive) or of a separate bargaining council being established.⁸ The question that arises is rather whether a bargaining council such as South Africa's labour legislation envisages is an appropriate forum in the circumstances.

A similar question arises regarding the form of representation. Although it may be appropriate for workers employed by a private contractor to join trade unions, in the case of activities such as recycling (which, as indicated, forms part of the broader municipal function of waste management) the appropriate form of organisation may be an association or co-operative. A co-operative negotiates on behalf of its members, amongst other things, but this is not collective bargaining as it conventionally understood. It ought to be possible to realise the goals of decent work through a co-operative as well as through a trade union.

Given that trade unions and collective bargaining have thus far had limited impact on the situation of workers in non-standard employment in South Africa, it is necessary to develop additional or supplementary quantitative indicators of decent work, such as the existence of other kinds of organisations, and fora where workers in non-standard employment may be represented, other than the bargaining fora recognised in terms of labour legislation. In the context of local government, for example, it would be perfectly possible to constitute a forum where private contractors engaged by local government and their workers were represented, even though the LRA does not provide for this.

The exercise of the rights to freedom of association and collective bargaining

Freedom of association is critical to the exercise of rights at work, in accordance with the second objective of decent work. In the case of workers, their exercise of this freedom entails forming (or joining) organisations that represent their interests. In the case of workers in an employment relationship, this will generally be a trade union, although it is important to bear in mind that this freedom extends to other forms of organisation, as indicated above.

⁸ Section 32 of the LRA envisages collective agreements negotiated at bargaining councils being extended by the Minister of Labour to so-called non-parties. However, we have not found evidence that this has been done.

This is particularly so where an employment relationship is ill-defined or non-existent. An example of this would be a worker co-operative engaged in recycling. The local authority in this situation may not be the employer of the members. However, the control it exercises over the flow of recyclables, and the policies it adopts towards self-help initiatives of this kind, could profoundly affect the sustainability of such a co-operative (Cf. Theron and Perez, 2012).

Despite the South African government's commitment to freedom of association, and the right of workers to form or join a trade union, it is arguably complicit in supporting non-standard work arrangements which make the exercise of these rights difficult, and which are arguably calculated to frustrate the exercise of trade union rights. In the case of EPWPs, whilst government acknowledges the right of workers employed on the programme to join trade unions, all indications are that trade unions have not recruited them as members. There is also little incentive for workers to join trade unions when wages and conditions of work are determined by the Minister of Labour, and there is no prospect of collective bargaining. There is also no obvious justification for government to engage NGOs to act as the employer, in a programme funded with public money.⁹

Trade union rights, in the case of South Africa, are underpinned by organisational rights. These are rights exercised at the workplace, which enable the organisation to consolidate itself, or function effectively. However, the LRA (Part A, Chapter 3 and Section 213) extends organisational rights only to trade unions which are "sufficiently representative" of workers employed by the same employer in the workplace. The workplace is in turn defined as the place or places where the employees of an employer work.

However, in the context of services, the place or places where workers actually work is usually on the premises of a client. A case in point is cleaners working for a private entity in a public hospital. Arguably, their workplace should be regarded as the premises of the hospital. However, their employer has no capacity to grant them the right to meet on the hospital premises, or to allow officials of their organisation access, since he or she is not in control of the premises. In this manner, both in the public and private sector, externalisation has eroded the worth of organisational rights.

In absence of organizational rights, the capacity of organisations to bargain is limited. It is even more profoundly limited where the person who is accountable for the conditions under which they work is not party to the process. This is invariably the case where employment has been externalised. The person for whom they work is not their employer. Collective bargaining as conventionally understood may also not be appropriate where workers prefer to form an organisation other than a trade union.

It follows that it is necessary, if the right to bargain collectively is to be effective, to investigate mechanisms for extending bargaining to all the workers who deliver the services in question. In a situation in which waste collection has been externalised, and the workers concerned are not party to the negotiations, collective bargaining can aggravate inequities between those who are directly and indirectly employed. Arguably this is what has happened in local government where, as indicated, the bargaining council

⁹ Since the right to form and join a trade union is a constitutional right, as well as a right protected by labour legislation, it goes without saying that government could never admit to a scheme to frustrate the exercise of trade union rights.

agreement covers only those who are directly employed by the local government, and does not extend to contractors engaged by local government to provide municipal services (Theron and Visser, 2010; Theron and Perez, 2012).

The primary obstacle to the exercise both of the freedom of association and the right to bargain collectively, perhaps, is a lack of information. It is not known how many workers are employed in non-standard arrangements, and what kind of arrangements there are, because there is no requirement on government to disclose such information. The general public also does not know about the extent of labour market informality, despite South Africa's much vaunted labour legislation.

The above analysis suggests that closer attention should be paid to the manner in which labour legislation defines the workplace, and the manner in which public services are defined. The workplace ought to be regarded as the place(s) where workers actually work, in recognition of the reality that in the contemporary workplace there are increasingly a multiplicity of employers, each employing its own workforce. Where that workforce is engaged in rendering a public service, mechanisms need to be devised for their inclusion in bargaining forums for the public sector.

Issues affecting job security and job quality

For workers, the exercise of freedom of association and organisational rights depends to a considerable extent on their having job security. For this reason, special provisions have been enacted prohibiting any worker from being prejudiced as a result of his or her membership of, or activities on behalf of, a trade union (LRA Section 5). This would of course encompass the dismissal of such a worker. Further, South Africa has allocated considerable resources to a dispute resolution system largely focused on establishing a right not to be unfairly dismissed. This is the system administered by a quasi-independent body known as the Commission for Conciliation Mediation and Arbitration (CCMA).

The system the CCMA administers is generally regarded as providing an effective remedy for violations of this right, and has been subjected to very little critical scrutiny. This is because it has been responsive as an institution, and operates relatively efficiently on its own terms. However an unintended consequence of the success of the dispute resolution system, arguably, has been to provide an incentive for employers to utilise temporary contracts or to externalise employment, so as to minimize the extent to which the employer may be held accountable when jobs are terminated.¹⁰

This is because when a contract expires, there is no dismissal in law. The only basis an aggrieved worker will be able to bring a claim of unfair dismissal is if he or she had a reasonable expectation it would be renewed. Reference has already been made to the fact

¹⁰ A study on labour broking or agency work shows an exponential increase in the establishment of agencies coinciding with the introduction of the LRA, and states that, although it would be simplistic to attribute this increase to a single cause, "there is much anecdotal and other evidence to support the proposition that labour broking, along with other forms of externalisation, is motivated by a desire to avoid labour legislation. More specifically, the desire is to avoid unfair dismissal proceedings..." (Theron, 2005: 626). The other aspect of labour legislation that may be perceived as problematic is where collective agreements are extended to non-parties. However this is not relevant in the context of the public sector.

that the most common reason for the termination of employment in the Department of Health, to gauge from data for the Head Office and two provinces, is the expiry of the contract. This, of course, does not take into account indirectly employed workers whose contracts expire.

Externalisation, as already noted (Theron and Godfrey, 2000), gives rise to temporary employment. However in this instance the term of the contract is typically the term for which government engages the contractor. If government were to terminate the contractor's engagement for any reason, the employment of the workers would probably be regarded as terminating automatically. In any event, the workers would have no claim against government.

The contrast between the security enjoyed by those employed by government and those employed by contractors engaged by government is stark. In local government, for example, the collective agreement provides for a formal hearing before anyone can be dismissed. There is recourse to the bargaining council if a dismissal is alleged to be unfair, and the bargaining council is accredited to fulfil the same function as the CCMA. Although empirical data is lacking, anecdotal evidence suggests that the higher up in the municipal hierarchy, the better protected an employee is. Cases of employees who are suspended pending disciplinary hearings for periods exceeding one year are public knowledge (Theron, 2013).

From a policy perspective, and for the ILO, one way to address the inherent insecurity of workers in externalised employment would be to establish more effective policies and procedures regarding the terms on which external entities are engaged to render public services, and the terms on which such contracts are terminated by government. Another approach would be to more vigorously promote alternatives to externalisation, where these are feasible. In this regard we suggested more could be done to promote part-time employment.

Apart from job security, the issues affecting workers in non-standard employment in the public sector are as various as those affecting any other category of vulnerable employee. A recent statement issued by a body that calls itself the Community Care Forum speaks of the "terrible" working conditions of CCGs (referred to here as community care workers):

On 25 May [2013] in a Public Health Forum in Cape Town, a community care worker (CCW) shared her story of how she contracted XDR TB while attending to a dying patient in a shack in Khayelitsha....Thousands of these workers, the vast majority women, work in the homes of the poorest of the poor bringing basic wound care, TB and HIV treatment, empathy, care and rehabilitation to those in desperate need. CCWs often work without protective face masks, gloves and other basic materials. These heart-breaking stories of community care workers using plastic bags for gloves, homemade clothes for dressings, risking physical harm make a mockery of our health system, government and society (CCWs Forum, 2013).

The statement in question provides no information regarding the employment status of the CCGs it refers to, but as indicated above, CCGs are generally employed part-time. Promoting part-time employment requires promoting also effective ways in which these kinds of complaints can be remedied. This ought to be easier to do than for temporary forms of employment, because of its continuous nature. It ought also to be easier for workers in part-time employment to organise themselves, and voice their needs without fear of reprisal.

The role of social dialogue

The fourth objective of decent work is to promote social dialogue. The rationale of social dialogue is, amongst other things, to avoid disputes and build social cohesion. But this will not happen unless there are effective organisations representing all the key stakeholders. If, moreover, workers employed in non-standard employment arrangements are not included in the process of dialogue, the danger is that it will aggravate inequities, in much the same way as can happen in collective bargaining.

It is not clear what the status of the aforementioned Public Health Forum is, other than that 50 organisations were represented there. The delegates present believed that even though the workers they represented were mostly part-time, the work they do should be decent work (Theron, 2013). But they will obviously need to engage with government, both in its capacity as employer and custodian of the public health system, if the circumstances that gave rise to one of their members contracting a deadly disease are to be addressed.

The establishment of local forums where workers such as these can engage with relevant stakeholders is a pre-condition for social dialogue. It is at local government level, perhaps, that the need for such a forum is most obvious. This should be a forum where all workers providing municipal services are represented, and able to raise issues affecting them. This would also be a way to begin to ameliorate a situation in which collective bargaining is aggravating inequities between workers.¹¹

At a policy level, and for the ILO, a more critical and less formalistic approach to collective bargaining is needed.

Action points

A number of policy recommendations flow out of this analysis. Firstly, at a policy level, it is necessary to clearly distinguish part-time and temporary employment. At the same time it is necessary to identify the interventions that are needed to realise the objectives of decent work, for those who are constrained to accept employment on this basis, or choose to do so.

The August 2014 amendments to the Labour Relations Act recognise non-standard employment as a category, and within it, define part-time and temporary forms of employment. This will go some way toward clarifying policy in this regard. The same amendments also go some way to addressing the situation of agency workers, and the exercise of organisational rights in the workplace of the client.

However these amendments will not assist workers engaged in waste collection exercise organisational rights, or cleaners in a public hospital, although arguably such workers face the same issues as agency workers. Policy is needed to classify the different forms externalisation takes, but it does not appear government has the political will to seek to regulate it. This is probably why it has not ratified the Labour Clauses (Public Contract) Convention.

¹¹ This proposal is mooted in Theron and Perez, 2012.

To build political will, fuller and better information is needed. Information as to the contractors that government engages, the number of workers they employ, what those workers earn, and whether there is compliance with labour legislation is in the public interest.

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