

## Temporary Employment Services

### NUMSA vs Assign Services

By Alex Davies

#### INTRODUCTION:

Vast numbers of employees have historically been employed by temporary employment service (TES) providers (labour brokers) who placed the employees at their clients as and when required. The TES system was highly popular largely because employers were able to secure a workforce without the risks and responsibilities associated with an employment relationship.

The 2015 amendments to the Labour Relations Act<sup>[2]</sup> (LRA) implemented additional regulation of the TES relationships.

#### LEGAL FRAMEWORK FOR TES RELATIONSHIPS

Provision is made in section 198 of the LRA for TES employment relationships in general as described above although certain TES relationships have been prohibited.

Section 198(4) imposes joint and several liability on both the TES and their client for any breaches of collective agreements, arbitration awards, the Basic Conditions of Employment Act (BCEA)<sup>[3]</sup> or sectoral determinations. Employees were further given the option of electing whether they instituted action against the TES or the client or both due to the joint and several liability.

The LRA limits the scope within which a TES relationship for employees earning less than the BCEA threshold<sup>[4]</sup> can be used to placements for less than three months, as a substitute for a temporarily absent employee, in a position designated as temporary service in terms of a collective agreement<sup>[5]</sup>/ sectoral determination or Notice published by the Minister.

Employees earning less than the BCEA threshold and falling outside the parameters for legitimate TES relationships are *deemed* to be the employees of the client<sup>[6]</sup>. This provision has led to significant confusion on the nature of the employment relationship that such employees are subject to, specifically whether there is a single or dual employment relationship and by whom is the employee employed.

#### NUMSA vs ASSIGN SERVICES (LAC)

The NUMSA judgment of the Labour Appeal Court is presently the highest authority available on this aspect of the law although it is anticipated that the issue will be referred to the Constitutional Court in due course.

The factual background of the matter is briefly that Assign Services is a TES provider who supplied labour to a client (Krost Shelving and Racking (Pty) Ltd). The employees placed at Krost wanted to be absorbed into Krost's permanent workforce in consequence of the deeming provision in the LRA. The employees were represented by their union NUMSA and referred a dispute to the CCMA seeking to become employees of Krost. An Award was issued by the CCMA which was reviewed in the Labour Court and appealed to the Labour Appeal Court resulting in the present judgment.

The court in essence found that employees who fall within the scope of the deeming provision become the employees of the client. It found further that there is a single employment relationship between the client and the employee, effectively removing the TES from the relationship.

Unfortunately, notwithstanding the findings of the Court there are a lot of unanswered questions which remain. From a practical perspective there are a number of aspects of day to day employment such as taxation and compliance with other similar statutory requirements which will be problematic with an acceptance of a single employer relationship.

#### CONCLUSION:

Based on the current law employees who are placed at a client by a TES and fall inside the scope for the application of deeming employment become the employees of the client and not the TES after a period of placement of three months.

<sup>1</sup> Unreported judgment of the Labour Appeal Court handed down on 10 July 2017 under case number JA96/15

<sup>2</sup> Act 66 of 1995

[3](#) Act 75 of 1997

[4](#) The current threshold is R205 433.30.

[5](#) Concluded under the auspices of a bargaining council

[6](#) Section 198A(3)(b)(i) of the LRA