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Future pathway for labour brokers and temporary employees



Who is the employer of a temporary employee once the three-month employment period has lapsed - the client, the labour broker or both?

This issue has been debated over the past few years, resulting in the conclusion that a dual employment relationship applies, namely that employees appointed for more than three months and earning less than R205 433 per annum is deemed to be employed by both the client and the labour broker. However, in a recent Constitutional Court judgement it was found that once the three-month employment period had lapsed, the temporary employees will become the employees of the client.

This article provides further clarity and a practical view as to whom the employer is of temporary employees placed in employment through the services of labour brokers.

Assign Services (Pty) Limited v NUMSA and Others

On 26 July 2018, the Constitutional Court handed down its judgement in the matter of *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*, clarifying the conflicting interpretation of *section 198A(3)(b)* of the Labour Relations Act (LRA), relating to temporary employees.

The Constitutional Court was faced with two interpretations: Does *section 198A(3)(b)* indicate a dual employment relationship where the employee is employed by both the client and the labour broker, or a sole employment relationship between the client and the employee?

In terms of *section 198* of the LRA, Assign Services qualifies as a 'labour broker' which provided the client (Krost Shelving and Packaging) with the services of 22 temporary workers. The consequences of *section 198A(3)(b)* of the LRA resulted in a dispute between Assign Services, NUMSA and the client.

Assign Services was of the opinion that *section 198A(3)(b)* serves as a dual employment relationship, meaning that the employee is employed by both the client and the labour broker as Temporary Employment Services (TES). NUMSA, on the other hand, favoured the interpretation of a sole employment relationship, where the client will be promoted to become the employer of the employee once the three-month temporary employment period has lapsed.

As background, it should be mentioned that the CCMA Commissioner was in favour of the sole employer interpretation. The presiding judge of the Labour Court ruled in favour of the dual employer interpretation, while the Labour Appeal Court (LAC) found that the sole employer interpretation offered the best protection to the rights of the TES employees.

The Constitutional Court weighed up the dual and sole employment relationship approaches and concluded that the sole employment relationship is more advantageous and provide more protection to employees as the dual employment relationship causes employment insecurity and uncertainty, and that 'there would be different claims and different employers arising from the same set of facts.

The practical impact of *Assign Services* judgement

The role of TES will be to pay the salaries and govern the HR aspects of the employment of the placed workers. The role of the client will be to assess the placed workers' performance and administer their duties.

In practice this means that in terms of the LRA, the placed worker can seek relief from the client, while in terms of the BCEA relief may be sought from the client or the TES or both.

In conclusion

The Department of Labour emphasised its support for the Constitutional Court's ruling, stating that the ruling was aimed at introducing additional protection for vulnerable workers and limiting genuine temporary employment to a period of three months.

Labour brokers can be assured that while there is a contractual agreement between the client and themselves, the TES will remain in operation as a business if it continues to remunerate the placed workers.

SERR Synergy guides and assists businesses in a practical and supportive way with regard to the required processes and procedures to ensure labour legislation compliance and to minimise the risk that the business is exposed to when employing staff.

About the author: Lané Boshoff obtained her *BA Law* and *LLB* degrees from the University of Pretoria. She joined *SERR Synergy* in July 2018, where she is currently employed in the Labour department.

Acknowledgement to the following sources:

1. *Assign Services (Pty) Limited v NUMSA and Others (CCT194/17) [2018] ZACC 22* (26 July 2018).
2. *Assign Services (Pty) Limited v NUMSA and Others*, par 28; 35.
3. <http://www.labour.gov.za/DOL/media-desk/media-statements/2018/labour-department2019s-dg-welcomes-constitutional-court-ruling-on-labour-brokers>

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