

A Synthesis of Current Issues in the Labour Regulatory Environment

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1. Introduction

The paper provides a synopsis of the body of research that has developed around the debate of the efficiency of the labour regulatory environment in South Africa. It incorporates the inputs made at a workshop held in November 2007, involving stakeholders from government, business and labour. This policy brief seeks to provide overview of the issues in the Working Paper (DPRU Working Paper 09-135).

2. Context

When discussing the labour market regulation and reform it is important to note the broader legal context as well as the evolving labour market environment in South Africa.

2.1 *The International Labour Organisation*

South Africa is a member of the International Labour Organisation (ILO) and has therefore ratified a number of ILO conventions. Amongst others, these obligations include upholding the rights to freedom of association, to engage in collective bargaining, to equality at work and to eliminate forced labour and child labour.

2.2 *The Constitution*

South Africa has a Constitution with a Bill of Rights that entrenches various rights that have to be taken into account when labour regulation is drawn up and implemented.

2.3 *Labour Legislation*

The immediate period following after the election of the first majority government was characterised by a frantic process of recasting the country's labour regulatory environment. Four key pieces of legislation emerged. These are: The Labour Relations Act (LRA) of 1995, the Basic Conditions of Employment Act (BCEA) of 1997, the Employment Equity Act (EEA) of 1998 and the Skills Development Act (SDA) of 1999. These acts provide the legal foundation for the South African labour market.

2.4 *The Changing Labour Market Environment*

The South African A economy has witnessed a steep increase in atypical employment since the mid-1990s. A-typical employment includes arrangements such as outsourcing, labour brokering and part-time contracts, as well as informal employment and self-employment. Workers engaged in atypical forms of employment generally enjoy very limited or no protection under the current labour legislation.

One of the key problems is that atypical employment can take such a variety of forms and each of these "types" presents its own challenges. These include evidence that temporary employment services are used by employers who want to circumvent labour regulations.

Another feature of the changing labour market environment has been increasing concern, in some quarters, about the regulatory burden on small, medium and medium and micro enterprises (SMMEs). This issue has been the subject of much debate. It is critical that the exact extent of the burden on SMMEs be established and how it may inhibit their growth.

3. Unfair Dismissals and Unfair Labour Practices

Some of the most widely debated issues in the labour regulatory environment revolve around the provisions for and remedies against unfair dismissals and unfair labour practices in the LRA.

3.1 Unfair Dismissals

The LRA, in conjunction with the Code of Good Practice: Dismissal, provides the course of action that has to be followed when an employer wishes to dismiss a worker. The LRA defines what can be considered a “fair” reason for dismissal – that is, reasons related to misconduct, incapacity and operational requirements. The LRA also requires that any dismissal must be done in accordance with “fair procedure” by following the guidelines set out in the Code of Good Practice.

3.1.1 Dismissal for Misconduct and Incapacity

It has been argued that the way in which employers have been interpreting the requirements for procedural fairness is overly strict and results in complex pre-dismissal hearings in the workplace. These employers are often influenced by labour consultants, lawyers, arbitrators and judges who continue to follow the procedures developed under the old LRA. While these onerous requirements of procedural fairness place huge burdens on employers (particularly SMMEs), they do not play any role in promoting workers’ rights.

It appears that the main beneficiaries of this approach may indeed be the providers of advice and services to employers and employees. It has also been suggested that the overly strict interpretation of procedural

fairness has contributed to employers increasing their use of atypical employment in order to avoid dealing with the perceived requirements.

It has been suggested that managers and skilled workers should be excluded from the laws on unfair dismissal. An earnings threshold, similar to the one used in the BCEA, may be an appropriate way to identify who should fall outside the ambit of the dismissal laws.

3.1.2 The Code of Good Practice: Dismissal

A number of problems have been identified with the above Code. The most critical is that the Code of Good Practice has not been updated to keep up with the new decisions and judgements by the CCMA and the Labour Court. As a result, the Code has become outdated and one of the key recommendations that labour lawyers make is that it should be updated as a matter of urgency. Some lawyers argue that a separate Code of Good Practice be drawn up for SMMEs.

3.1.3 Dismissal for Operational Requirements

Dismissal for operational requirements refers to retrenchment. An employer may retrench workers if there is a fair reason based on operational requirements. The test of substantive fairness has been interpreted in different ways by the Labour Court and the Labour Appeals Court, varying from retrenchment being recognised as a legitimate way to increase profits to it being allowed as a measure of last resort. It is expected that this debate will continue in the courts. When employees are retrenched, certain guidelines and procedures have to be followed.

The procedures to be followed to retrench workers include extensive requirements for notification of and consultation with workers. International standards allow for requirements of notification and

consultation to be limited to when the proposed number of workers to be retrenched is above a certain threshold. It has therefore been suggested that South African legislation be amended to limit the requirements of notification and consultation when less than a certain number of employees are to be retrenched in a certain time period. In addition, it has also been suggested that SMMEs should be excluded from the more complex and cumbersome procedures.

There is also agreement that the Code of Good Practice for retrenchments should be updated urgently.

3.2 *Probation*

The level of protection that workers should enjoy during the probation period is currently a much debated issue. But it has been suggested that this is a perceived rather than an actual issue in practice and that the introduction of a “qualifying period” may be a way to deal with the current challenges around probation.

3.3 *Unfair Labour Practices*

Residual unfair labour practices refer to unfair treatment in relation to the following: promotion, demotion, training, benefits, discipline short of dismissal, suspension and failure to reinstate or re-employ a former employee in terms of an agreement or contract.

Labour lawyers generally agree that the current definition in the LRA of what constitutes an unfair labour practice should be reconsidered. Labour law experts do not, however, agree on how this should be done. Some suggest that all the unfair labour practices should be removed from the LRA, except suspension, while others prefer adding guidelines to the LRA or drawing up a separate Code of Good Practice to deal

with unfair labour practices. Suspension pending disciplinary action is, however, very problematic, and requires immediate review, particularly given the abuse of suspension in the public sector.

4. Labour Market Institutions

4.1 Bargaining Councils

Bargaining Councils are the primary institutions involved in the statutory system of collective bargaining.

4.1.2 Criticism of Bargaining Councils

One of the main criticisms levelled at bargaining councils is that the agreements reached between labour and business in these forums are extended to non-parties to the negotiations. It is said that large firms dominate the employer party bargaining during negotiations, and that the extension of these agreements to non-parties hurt SMMEs.

4.1.3 Response to Criticism of Bargaining Councils

Legislation allows for exemption from bargaining council agreements. Research shows that for 44 councils in 2003 and 37 councils in 2004 almost 80 percent of applications for exemptions were granted. In addition, extended bargaining council agreements cover a very small share of the labour force. The extension and exemption arrangements appear to work well and bargaining council membership is generally not associated with higher wages.

4.1.4 The Promotion of Collective Bargaining at Sectoral Level

The Department of Labour should play a more pro-active role in promoting collective bargaining at the sectoral level. It has been suggested that sector level collective bargaining is the only way in which atypical employees (those in casual or informal employment as well as the self-employed) can be afforded some protection in the labour market.

4.2 The CCMA

The LRA created the Commission for Mediation, Conciliation and Arbitration as one of the main institutions to deal with labour disputes. The LRA prescribes the process that should be followed by the CCMA in resolving labour disputes.

4.2.1 Challenges Facing the CCMA

The efficiency of the CCMA has been the subject of much debate and a number of specific challenges have been identified. The most important of these is the extremely high number of referrals. In addition, there are: the delays in reaching settlement, the time taken to resolve disputes, too big an emphasis on procedural fairness, and inconsistencies in the relationship between the Labour Court and the CCMA.

The CCMA is faced by a much higher number of referrals than initially anticipated and the accreditation of private agencies should be encouraged. It has been suggested that increasing financial support for the dispute resolution functions of bargaining councils will also relieve some of the pressures on the CCMA.

4.3 *The Labour Courts*

The Labour Courts (consisting of the Labour Court and the Labour Appeals Court) were the second set of new institutions created by the LRA specifically for the resolution and settlement of labour disputes.

4.3.1 *Challenges Facing the Labour Courts*

The Labour Court is very dependent on acting judges and this reliance has been subject to substantial criticism.

Draft legislation in 2003 proposed that the jurisdiction of the Labour Court should be transferred to the High Court where its functions would be performed by judges taken from a list of judges with expertise in labour law. It was also proposed that the functions of the Labour Appeals Court be transferred to the Superior Court of Appeals. Both business and labour representatives registered their objection to these proposals and the feeling is that the integration of the Labour Courts into the High Court system will severely undermine the rights of both workers and employers. This issue remains unresolved and the uncertainty has stalled the appointment of additional full-time judges to the Labour Courts.

5. Conclusion

Certain issues stand out as areas that need attention:

5.1 *Need to Update the Code of Good Practice*

One of the key issues that appear common to all debates concerning unfair dismissals, unfair labour practices as well as the efficiency of the labour market institutions is the urgent need to update the Code of Good Practice to reflect recent decisions and judgements of the CCMA and the Labour Courts.

5.2 *Focus on Procedural Issues*

There is a need to address the overly strict interpretation of the requirement for procedural fairness when dismissing employees for misconduct or incapacity.

5.3 *Exemptions from Dismissal Laws*

It has been suggested that managers and skilled workers should be excluded from dismissal laws as they enjoy adequate protection under contractual law. When it comes to retrenchments, it has been suggested that requirements with regard to notification can be limited when less than a particular number of workers is retrenched.

5.4. *Review of Unfair Labour Practices*

There is general agreement that the LRA's definition of what constitutes an unfair labour practice with regard to promotion, demotion, training, benefits, discipline short of dismissal, suspension and failure to reinstate or re-employ, should be reviewed.

5.5 *Bargaining Councils*

It has been shown that there is no evidence to support the claims that bargaining councils contribute to inefficiencies in the labour market. It has been suggested that the Department of Labour should become more pro-active in supporting sectoral collective bargaining. Additional financial support for bargaining councils to fulfil their dispute resolution functions will also relieve some of the pressure on the CCMA.

5.6 *Pressure on the CCMA to Settle Cases Quickly*

Against a background of a high number of referrals, there is pressure on CCMA commissioners to settle cases as quickly as possible. This means that they generally do not have the time to engage with the underlying causes of a dispute. This has highlighted the importance of accrediting private agencies and assisting bargaining councils to undertake dispute resolution.

5.7 *Uncertainty Created by Labour Courts*

The Labour Courts have not succeeded in providing proper supervision and clear guidance to the CCMA commissioners in terms of the correct processes to follow when resolving disputes. Widely different judgements from the Labour Court have contributed to inconsistency and uncertainty. The Labour Courts should provide clear and consistent guidelines for the CCMA.