# A Study of the Statutory Provisions that facilitate the variation of Labour Standards in South Africa

by

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## ABSTRACT

This dissertation treats the progressive development of labour standards in the South African labour market and it examines the extent to which the current labour standards can be varied by the relevant statutory institutions.

It also endeavours to show

- how *protective standards* have been incorporated into the South African industrial system,
- how *labour standards* are varied by the various statutory institutions,
- how labour market flexibility and protection standards are compatible, and
- how equality and skills are integral to social economic development.

As a corollary it looks at the extent to which South African labour legislation provides protection for atypical workers and other vulnerable categories of workers, such as blacks (Africans, Coloureds and Indians), women and disabled persons.

**List of Abbreviations**

| | |
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| BCEA | Basic Conditions of Employment Act 75 of 1997 |
| ILJ | Industrial Law Journal |
| ILO | International Labour Organisation, based in Geneva |
| ILRA | International Industrial Relations Association |
| LRA | Labour Relations Act 66 of 1995 |
| LRB | Labour Relations Bill as published in 1995 |
| NALEDI | National Labour and Economic Development Institute |
| NEDLAC | National Economic Development and Labour Council |
| NUM | National Union of Mineworkers |
| NQF | National Qualification Framework |
| NSA | National Skills Authority |
| OCED | Organisation for Economic Co-Operation and Development |
| RDP | Reconstruction and Development Programme |
| SACOB | The South African Chamber of Business |
| SADC | Southern African Developing Countries |
| SAMAT | Southern African Multidisciplinary Advisory Team |
| SAQA | South African Qualification Authority |
| SETA | Sectoral Education and Training Authorities |
| UN | United Nations |
| WTO | World Trade Organisation |

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## 1. INTRODUCTION

Modern-day enterprises require labour standards that can be varied in accordance with the current needs of a rapidly changing global economy. However, it is a *sine quo non* for the demands of the global economy to be balanced with the protection employment standards.

Sengenberger[1] distinguishes between three categories of labour standards:

a) *Standards of protection* which "specify, through agreed collective rules and statutory regulations, what are the limits in utilising and deploying the labour force, indicate what must be done and what must not be done and what rules and procedures must be followed to carry out change."

b) *Standards of participation* "provide the rights, institutions and means required for the joint setting and implementation of labour standards by employers, workers and the government and the active involvement of workers in the process of restructuring."

c) *Standards of promotion* are defined as "those which further the productivity of labour, promote the creation of employment, combat unemployment and underemployment and enhance the functioning of the labour market."

As this distinction is useful, I will adopt it for distinguishing between the different categories of standards, of which the *protection standards* are in the majority.

There is an understanding that South Africa's return to the arena of international trade has made it necessary for South African enterprises to develop the capacity to compete with countries where employment standards and social costs of production are very different from our own. Hence the need for greater labour standard flexibility and the need for easier and quicker ways of varying current labour standards. In the place of the old rigid system, the 1995 LRA[2] and the 1997 BCEA[3] have introduced a system of "regulated

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[1] Sengenberger: "Protection – participation – promotion: The systematic nature and effects of labour standards", pages 45 –58, (1994).

[2] The Labour Relations Act 66 of 1995

[3] The Basic Conditions of Employment Act 75 of 1997

flexibility" by protecting and enforcing a revised bedrock of employment standards with different methods of varying these labour standards in both the formal and the informal sectors of the South African labour market.

## 2. THE HISTORICAL DEVELOPMENT OF LABOUR STANDARDS

Labour markets are regulated in the first instance by the interplay of market forces, in the second instance by legislation and in the third instance by "voice regulation".[4] Voice Regulation according to Standing "implies that labour markets practices and changes are managed through bargaining between representatives of potentially conflicting interests, which must embrace those on the margins as well as established vested interests."[5]

In the older industrialised countries a long process of transformation led to what is called the "institutionalisation" of industrial relations, with collective bargaining and labour legislation playing a more prominent role in determining labour standards.

In the early 1900's collective bargaining became an important phenomenon within the industrial relations systems. This development arose when various European countries incorporated collective agreements in their legal systems as a new source of rules and standards for regulating industrial relations.

Cordorva says: "*This process was started by the Dutch Civil Code (1907) and the Swiss Code of Obligations (1911) and followed by the adoption of specific legislation in Norway (1915), Germany (1918), France (1919), Finland (1924) and the Netherlands (1927). This legislation acknowledged that collective agreement constituted a valid and suitable way of determining conditions of employment for a collectivity of workers.*"[6]

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[4] Thompson, C.: Report prepared by Legrel of the ILO for the Department of Labour, Republic of South Africa, 3rd May 1996, as cited by Thompson in "Facing the Challenge in the Asia-Pacific Region", edited by Mitchell and Min Aun Wu, Chapter 2, page 42.

[5] Standing et al: page 10

[6] Cordova, E.: "Comparative Labour Law and Industrial Relations in Industrialised Market Economies", page 152, (1986).

In 1984 Cordorva pointed out that "among the industrialised market-oriented countries, only Australia and New Zealand had placed collective bargaining in a secondary position (next to arbitration awards) as a rule making device."[7]

A more recent practice has emerged: "*One notable initiative which may be viewed as an exception to the general principle on contracting out is the very recent practice whereby legislation permits agreements by parties, almost exclusively under the collective agreement, to agree to different working time schedules than those laid down as standard. The motive behind this phenomenon is to allow a certain measure of flexibility in the labour market. Such flexibility originally focussed on workers concerns toward a shorter working week. Recently, however, the practice has swung in favour of longer and more inconvenient working hours which were agreed to under the collective agreement. This initiative can be identified in some countries of Western Europe, notably Austria, the Netherlands, Germany, Belgium and France.*"[8]

The new trend has resulted in provision being made for a set of basic standards that apply generally, "the standard regulation" and for a degree of variation which may be achieved through collective bargaining between workers and employers and this is termed "the consultation regulation".[9]

Thompson draws a distinction between the variation by "bargaining proper" and the variation by bargaining in "works councils": "*Maximum variation is allowed in the case of bargaining proper between an employer and a union culminating in a collective agreement. Works councils have been permitted to conclude agreements dealing with specific matters such as rest periods and night breaks, but not overall working time (which remains subject to union agreement).*"

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[7] Cordova, E.: "Comparative Labour Law and Industrial Relations in Industrialised Market Economies", page 157, (1986).

[8] Thompson, C.: Report prepared by Legrel of the ILO for the Department of Labour, Republic of South Africa, 3rd May 1996, as cited by Thompson in "Facing the Challenge in the Asia-Pacific Region", edited by Mitchell and Min Aun Wu, Chapter 2, page 43.

[9] Thompson, C.: Report prepared by Legrel of the ILO for the Department of Labour, Republic of South Africa, 3rd May 1996, as cited by Thompson in "Facing the Challenge in the Asia-Pacific Region", edited by Mitchell and Min Aun Wu, Chapter 2, page 44.

So too, one finds that in South Africa the higher levels of collective bargaining, e.g. Bargaining Council Agreements, are allowed to supersede agreements reached by means of collective bargaining at plant level.

## 3. THE ILO AND LABOUR STANDARDS

The International Labour Organisation (ILO) was established in 1919, when international trade was expanding rapidly and creating growing concern over labour standards.[10] The main objective for the establishment of the ILO was "to undertake joint international action to improve labour conditions world wide".[11]

The Preamble to the Constitution of the ILO (ILO, 1919) which refers to the concept of social justice rather than to human or workers' rights in describing its aim, begins with the following excerpt: "*Whereas universal and lasting peace can be established only if it is based upon social justice; and whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled ...; Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries: ...*"

And in the Covenant of the League of Nations in 1919, member states agreed to endeavour to secure fair and humane conditions of labour, both in their local countries and in the terms of the Treaty of Versailles to "all countries to which their commercial and industrial relations extended".

From this an important aspect is obvious. At inception there was a concern for social justice and humanitarian values to be respected and upheld across the globe and the ILO began to emphasise the relationship between workers'

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[10] The volume of foreign trade expanded at about 3.4% per annum between 1870 and 1913. Thereafter, adversely affected by the growth in tariffs, quantative restrictions and exchange controls and war, it expanded by less than 1% per annum until 1950. Hist, P. and Thompson, G.: "Globalisation in question", Blackwell Publishers, United Kingdom, page 21 as cited by Hayter et al, "Globalisation, social norms and worker protection.", page 4, (1996).

[11] Lee, E.: "Globalisation and Labour Standards: A Review of Issues", International Labour Review, Volume 136, (1997).

rights and social justice and to argue the existence of certain "human rights" as moral grounds for labour rights and labour standards.[12]

The ILO then embarked on a process which culminated in the development of a sophisticated system of international labour standards based on the adoption of international conventions which have the force of international law on those countries which ratify them. By 1997 the ILO had adopted 176 conventions which were ratified in varying degrees by the ILO's 174 member states. Labour standards contained in conventions and recommendations adopted by the ILO are considered to be the best reference for defining those labour standards that have been internationally agreed upon. The reason for this is that they have been agreed to in a multilateral forum and have been widely ratified in major ILO conventions.[13] The ILO is therefore the recognised, functioning global system of international labour standards.

Countries that ratify the ILO standards commit themselves to be bound by them. However, the ILO has no vehicle for enforcing these standards which some of the member states have ratified. The ILO, therefore, relies mainly on voluntary compliance. Furthermore, a low percentage of countries have ratified certain ILO conventions.

In this regard Golub writes: "*Less than ten percent of the conventions have been ratified by more than half of the ILO's membership. The United States, for example, has failed to ratify all but eleven of the ILO's conventions, including five of the six that the ILO defines as "core" conventions.*"[14]

Golub further points out that in recent years, the ILO, the Organisation for Economic Co-operation and Development and various national governments have attempted to focus on a few core labour standards, with the object of reaching "widespread agreement" on the following five areas:

- Freedom of association;
- The right to organise and bargain collectively;

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[12] Hayter et al: "Globalisation, social norms and worker protection", Monograph Series 1, Institute of Development and Labour Law, University of Cape Town, (1998).

[13] Leary, V.: "The Paradox of Workers' Rights or Human Rights", as cited by Hayter et al, (1996).

[14] Golub, S.: "International Labour Standards: Are they an appropriate response to global competitiveness?", Economic Perspectives, Volume 3, Number 1, (1998).

- Prohibition of forced or compulsory labour;
- Restrictions on the use of child labour; and
- Guarantee of acceptable working conditions (including maximum hours per week, a weekly rest period, limits on work by young persons, a minimum wage, minimum workplace safety and health standards and elimination of employment discrimination).

What is troublesome is the fifth area which deals with "the guarantee of acceptable working conditions" with some countries wanting to exclude the provision for the elimination of employment discrimination. It is these standards, to which I shall make reference below, which continue to inform and shape the labour standards of most countries, including South Africa.

Lee[15] points out that there is a renewed interest in international labour standards, particularly in the light of the impact globalisation has on labour standards.

The dilemma, of course, is how do we adapt labour standards so as to remain competitive within the global economy, without overlooking the significant pockets of poor and morally unacceptable labour conditions in low-income countries and in developing countries, like South Africa, where there are unacceptable disparities between the 'haves' and the 'have nots'.

In the past two decades the ILO has sought to elicit and promote constructive competition by ensuring rights of collective organisation and worker participation in decision-making.

Heple says: "*During the 1980's and 1990's there has been a general slow-down in the process of ratification of ILO conventions and serious abuses of standards have occurred in several countries.*"[16] In this regard he cites the position in Britain where the Thatcher and Major governments made three grave mistakes. Firstly, they ratified only one of 25 new ILO conventions adopted by the International Labour Conference between 1979 and 1996.

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[15] Lee, E.: "Globalisation and Labour Standards: A Review of Issues", International Labour Review, Volume 136, (1997).

[16] Heple, B.: "Can Collective Labour Law Transplant Work? The South African Example", ILJ, Volume 20, (1999).

Secondly, they denounced a large number of conventions which had been ratified by earlier governments. And thirdly, they did this in order to make it easier to pass legislation abolishing wage councils and to limit the organisational rights of workers, such as the termination of collective bargaining rights for teachers.[17]

The ILO standards have since the mid-forties been predicated on the promotion of freedom of association, collective bargaining and tripartism. These three pillars of the ILO are now being increasingly threatened by the imperatives of the global market. Already, there is empirical evidence of the decline of organised labour unions in the United States, the United Kingdom, Australia, Sweden and France who have all bowed to the forces of global competition, by adopting a system with "flexible" labour market standards. There is therefore clearly a rigorous tension between the traditional protective labour law which the ILO endorses and the new flexibility in the labour market of the global economy.

Human rights activists maintain that the workers benefit when labour standards are raised in developing countries. Most economists do not believe that international trade with low-wage countries depresses overall wages and labour standards in developed countries. And, they do accept that trade with the low-wage countries adversely affects certain workers, particularly the unskilled, who compete directly with imports from the developing countries.

However, the human rights activists maintain that the workers in industrial countries benefit more when labour standards are raised in developing countries. In this regard Golub[18] says it is significant to make the crucial difference between "core" labour standards, which are widely accepted as human rights, and "cash" standards, pertaining to remuneration and conditions of work.

Golub goes on to make a further observation: "*Some believe that mandating certain labour market processes, such as minimum wages or limitations on working hours, under conditions where they are inappropriate, may raise the cost of employment or limit the choices available to poor workers and thus be*

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[17] Heple, B.: "Can Collective Labour Law Transplant Work? The South African Example", ILJ, Volume 20, (1999).

[18] Golub, S.: "International Labour Standards: Are they an appropriate response to global competitiveness?", Economic Perspectives, page 28, (1998).

*counterproductive to the ultimate objective of improving labour market outcomes."*[19]

This leads one to accept that the harmonisation of "core" ILO labour standards is more attainable than the harmonisation of "cash" standards such as minimum wages and terms and conditions of employment. Thus what has evolved through the ILO initiatives are internationally recognised workers' rights or labour standards, which the ILO's Director General referred to as "social rules in the game of globalisation".[20]

Hayter[21] makes a seminal point for developing countries to be considered when she writes: "*Much of the debate thus far has focused on the impact of global economic trends on labour markets and labour standards in industrialised countries. The tenor of the debate does not reflect the often divergent experiences of countries at differing levels of development. Any international agreement on "minimum content" for labour standards and social rules need to reflect and address these realities.*"

As a result of growing world trade, the need has arisen for internationally agreed workers' rights and labour standards to be adopted so as to respond positively to two problems: one, the deterioration of labour markets in industrialised countries and two, the growing exploitation of labour in developing countries which are under pressure to rapidly improve their competitive advantage within the arena of international trade. The responses to these two problems led to initiatives to include agreements on labour standards in international trade and commercial treaties.[22]

Concern over the exploitation of workers in countries with low labour standards, led the international labour movement to campaign extensively for the inclusion of a social clause in the GATT / WTO and in various other trade agreements and a number of corporate codes also make provision for minimum content for labour standards. Among these are the OCED

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[19] Golub, S.: "International Labour Standards: Are they an appropriate response to global competitiveness?", Economic Perspectives, (1998).

[20] Report of Director General, ILO to International Labour Conference, (ILO, 1997, a:4)

[21] Hayter, S.: "Globalisation, social norms and worker protection", Institute of Development and Labour Law, Monograph Series 1, University of Cape Town, (1998).

[22] Hayter et al: page 4.

guidelines for multinational enterprises, Levi Global Sourcing guidelines as well as the No Sweat Apparel Agreements in the United States.[23]

This recognition of minimum content for labour standards has been sustained and endorsed at various international fora, such as the G7 conference on employment in Lille in April 1996, the Lyons G7 summit in June 1996 and the Copenhagen Social Summit in March 1995, all of which made specific reference to relevant ILO conventions and fundamental rights of workers across the globe.[24]

## 4. PROMOTION OF LABOUR STANDARDS IN SADC

A number of African countries have relied on legislative action or government intervention to improve their labour standards. Some of these countries, including South Africa, have introduced "relatively ambitious labour codes". According to Kooijmans and Sparreboom[25] this is in sharp contrast to the "Asian or so called "miracle-economies" which have relied less on direct legislative methods and more on sustained high rates of economic growth that have sometimes translated into improved labour standards (although at times this has resulted in a trade off against certain rights and freedoms)".[26]

Kooijmans and Sparreboom concede that both approaches to improve labour standards – the indirect approach through the acceleration of economic growth and the direct approach by legislative action or government intervention – have their strengths and weaknesses and should not be used by countries to justify the neglect of core labour standards. They hold the view that: "Respect for basic workers' rights cannot be made conditional on achieving a certain level of economic development." And they make it clear that "careful

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[23] Hayter et al: page 5, citing Rojot, J.: "The 1984 OCED Guidelines for Multinational enterprises", British Journal of Industrial Relations, 23:3, (November 1985); EIRR: "Including Labour Standards in International Trade Agreements", page 275, (December 1996).

[24] ILO: "Working Party on Social Dimensions of the Liberalisation of International Trade", Geneva, cited by Hayter et al, page 7, (March 1996).

[25] Joost Kooijmans and Theo Sparreboom are members of the ILO Southern African Miltidisciplinary Advisory Team (ILO / SAMAT) based in Harare, Zimbabwe.

[26] Hayter et al.: page 54.

analysis is necessary to establish how labour standards can be improved in the context of a particular region or country".[27]

Kooijmans and Sparreboom make a further crucially important point with regard to the link between productivity and labour standards: "Often, the thrust of the agreement seems to be that the increasing international competitiveness of private industry and adherence to labour standards are of necessity conflicting objectives. The fact that many internationally agreed standards were designed to protect workers' rights actually contribute to productivity, and consequently provide increased scope for economic growth and development, has more often than not been ignored".[28]

An ILO study which was conducted in 1996 has produced empirical evidence from Africa which suggested that substantial foreign investment is not attracted merely by reducing the labour standards. The conclusion, therefore, is that the number of negative effects which accompany the lowering of labour standards do not justify any "marginal gains made by attracting foreign investments through concessions in the area of labour standards".[29]

## 5. INTERNATIONAL PROVISIONS IN THE CONSTITUTION

The 1996 Constitution of the Republic of South Africa[30] is very clear about the extent to which ILO law is part of our law and the extent to which it impacts on the fundamental rights in the field of labour.

The final chapter of the Constitution contains the following relevant sections:

**"CHAPTER 14: GENERAL PROVISIONS**

**"International Agreements**

*Section 231(1)* *The responsibility and signing of all international agreements is the responsibility of the national executive.*

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[27] Hayter et al.: page 54.

[28] Hayter et al.: page 54.

[29] Hayter et al.: page 55.

[30] The Constitution of the Republic of South Africa Act 108 of 1996

(2) *An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*

(3) *An agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without ...[such] approval, but must be tabled ...[in both houses] within a reasonable time.*

(4) *Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*

(5) *The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.*

**Customary International Law**

*Section 232* *Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*

**Application of International Law**

*Section 233* *When interpreting any legislation, every court must prefer any interpretation of the legislation that is consistent with international law over any alternative interpretation that is consistent with international law."*

From the above provisions it is evident that there is much scope for the application of ILO law within South African law in general and labour law in particular.

Section 39 of the Constitution[31] provides that when interpreting the Bill of Rights a court tribunal or forum must consider international law and may consider foreign law.

Section 3(c) of the Labour Relations Act[32] which mandates a reading down of the Constitution in order to ensure compliance with South Africa's public international law obligations, requires any person who is applying the Act to interpret its provisions in compliance with the public international law obligations of the Republic.[33] This in effect gives statutory force to the common law presumption of interpretation, which states that the legislature, in enacting a statute, did not intend to derogate from or legislate in conflict with international principles.

The reference to the public international law obligations of the Republic point unequivocally to those conventions of the ILO which have been ratified by South Africa. Such ratification began prior to the 1964 withdrawal of South Africa from the ILO.[34]

It is from these international conventions (treaties) which South Africa has entered into and from customary international law that South Africa's law obligations arise.[35]

Both the Constitution and the Common law govern South Africa's obligations under customary international law.[36] In terms of Section 234(4) of the Constitution "the rules of customary international law binding on the Republic shall, unless inconsistent with the Constitution or with an Act of Parliament, form part of the law of the Republic". This is an unequivocal expression,

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[31] The Constitution of the Republic of South Africa Act 108 of 1996

[32] The Labour Relations Act 66 of 1995

[33] The Labour Relations Act 66 of 1995 Section 3(c)

[34] Among the conventions ratified by South Africa prior to 1964 are Conventions No 4 of 1919 (Night Work {Women}), No 41 of 1934 (Night Work {Women}), No 19 of 1925 (Equality of Treatment {Accident Compensation}), No 26 of 1928 (Minimum Wage Fixing Machinery), No 42 of 1934 (Workmen's Compensation {Occupational Diseases}), No 45 of 1935 (Underground Work), No 63 of 1938 (Statistics of Wages and Hours of Work) and No 89 of 1948 (Night Work {Women}).

[35] Du Toit et al: The Labour Relations Act 66 of 1995, page 54.

[36] Du Toit et al: Second Editon, page 54.

which confirms the common law rule that customary international law forms part of the law of South Africa.[37]

Du Toit et al points out that a number of ILO conventions, including those on freedom of association,[38] and discrimination in employment and occupation[39] have acquired the status of customary international law and are therefore directly binding on South Africa regardless of whether they are ratified.[40]

It is therefore, imperative for these public international obligations to be taken into account by our courts or tribunals when interpreting our legislation. Moreover, the tripartite, that is Government, Labour and Business, need to take cognisance of the impact these international obligations have on the industrial relations and labour market standards in South Africa.

## 6. CURRENT LABOUR LEGISLATION

In South Africa four new labour laws have been introduced since the installation of the new democratic government in April 1994. They are:

- The Labour Relations Act, which came into effect in 1996[41]
- The Basic Conditions of Employment Act, which came into effect in December 1998[42]
- The Employment Equity Act, which came into effect in 1999[43]
- The Skills Development Act, which came into effect in 1999.[44]

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[37] Dugard, John: "International Human Rights" in "Rights and Constitutionalism", page 190, (1999).

[38] ILO Convention 111 (1958)

[39] ILO Convention 19 (1930) and 105 (1957)

[40] Erasmis, G. and Jordaan, B.: "South Africa and the ILO: Towards a new relationship", SAYIL, page 91, (1993/1994).

[41] The Labour Relations Act 66 of 1995

[42] The Basic Conditions of Employment Act 75 of 1997

[43] The Employment Equity Act 55 of 1998

[44] The Skills Development Act 97 of 1998

These four new laws seek to address working conditions, skills development, labour relations and discrimination. In order to rectify the serious structural problems in the labour market, these laws, with future amendments, are likely to improve industrial relations in South Africa by bringing about social justice and the much needed economic development. Section 1 of the LRA reads: "*The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace ...*".

Naidoo[45] makes a very positive statement about our new labour legislation. He writes: "*The incorrect perception that the new labour laws are not contributing towards labour market "flexibility" needs to be dealt with. This negative, and factually incorrect perception, may adversely influence the investment decisions of local businesses and also of their foreign counterparts.*"

I will make reference to each of these new labour laws with the object of examining the extent to which they facilitate the variation of labour standards in South Africa and to determine the extent to which they help our country to bring about social justice and economic development.

## 7. THE LABOUR RELATIONS ACT 66 OF 1995

The South African Labour Relations Act 66 of 1995 is perceived to be a model of collective labour law. However, contrary to Naidoo's view expressed above, Heple points out that despite the drafters of the new LRA having drawn on the best international practice and having experimented with some original solutions to the problems which are commonly experienced in labour relations in industrialised economies, criticism is still levelled at the new LRA "for having introduced new rigidities into the South African Labour Market, which will make it more difficult, if not impossible, for enterprises to adjust to the intense pressures of global competition, and which may frighten away foreign investment".[46] He says major concern for the critics is: "*How will the LRA*

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[45] Naidoo, Ravi.: "Unions in Transition: Cosatu into the New Millennium", National Labour and Economic Development Institute, (1999).

[46] Heple, B.: "Can Collective Labour Law Transplants Work? The South African Example", ILJ Volume 20, page 1, (1999).

*resist the tidal waves of individualisation and deregulation which globalisation is causing around the world?"*[47]

The new LRA takes a firm collectivist approach to labour relations and encourages sectoral level collective bargaining. This the critics believe ignores developments in other countries such as Britain where neo-liberal legislation after 1979 weakened trade unions and promoted "personal" contracts in place of collective bargaining. They also believe that it ignores developments in New Zealand[48] where the *Employment Contracts Act* replaced the old system of conciliation and arbitration with a framework for the negotiation of contracts either collectively or individually at workplace level. This trend is also followed in Australia and has the effect of curtailing the role of unions in the bargaining process.

There are compelling reasons why South Africa's industrial relations system had to be underpinned by the 1995 LRA that is based on more information, consultation centralised and collective bargaining. It is the specific South African industrial relations context which requires that we follow the participatory model in our new LRA. In support of participation Sumner Slichter writes: *"The very fact that the workers have had an opportunity to participate in determining their working conditions is in itself favourable to efficiency ... Efficiency depends upon consent. Even though the specific rules and policies adopted in particular instances may not be ideal, the process of joint determination of working conditions at least offers the possibility of achieving greater efficiency than could be obtained under rules and conditions dictated by one side."*[49]

Of course, as we go along, we will be compelled to adapt the model so that it may optimally meet the social and labour relations needs of our country. Collective bargaining enables workers to participate in determining features of their work and their work environments. And the institutions which the LRA creates are designed to facilitate worker participation at every level.

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[47] Heple, B.: "Can Collective Labour Law Transplants Work? The South African Example", ILJ Volume 20, page 10, (1999).

[48] Below reference is made to the position in New Zealand and Australia.

[49] Slichter, S.: (1941, page 575) as cited by Pencavel, J. in "The Legal Framework for Collective Bargaining in Developing Economies", a chapter in "Labour Markets in Latin America", edited by Sebastian Lustig, page 27, (1997).

## 8. THE HISTORY OF COLLECTIVE BARGAINING

In the United States of America, from as early as the 1930's collective bargaining provided a floor of rights on wages, work hours and social security.

Kochan[50] points out that between the 1930's and the 1970's collective bargaining served American society well in the following respects:

1) It institutionalised and regularised conflict and its resolution through negotiations, mediations, grievance procedure and arbitration;
2) It developed principles of wage determination that allowed workers to share in the benefit of economic growth; and
3) It reduced wage and income inequality and provided incentives for employers and employees all of which led to acquisition of skills and the improvement of quality, production and the living standards of workers.

In the past decade, the collective bargaining position in America has deteriorated in the performance of the representation election system for organising new union members and bargaining units. Krochan points out that in 1990, only 231 000 workers in America voted in a representative election and only 80 000 workers were organised through the election process.[51]

Fortunately, South Africa has learnt that it is counter-productive to deny workers legitimacy, organisational rights and other concomitant freedoms. A sophisticated worker participation framework has been set in place by the Constitution[52] and the LRA[53]. Now that collective bargaining is more or less settled, what remains is for organised labour to engage with the employers by accepting that workplace forums are appropriate and effective vehicles for bringing about orderly changes in the workplace and for providing a high level of worker participation. It, unfortunately, appears as if it will take a while before unions begin to develop confidence in the belief that workplace forums are mutually beneficial to both employees and employers. I certainly hope

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[50] Kochan, T.: "Labour and Employment Policies in a Global Economy", ILJ, Volume 15, part 4, page 672, (1994).

[51] Kochan, T.: "Labour and Employment Policies in a Global Economy", ILJ, Volume 15, part 4, page 672, (1994).

[52] The Constitution of the Republic of South Africa Act 108 of 1996

[53] The Labour Relations Act 66 of 1995

that the workplace forums, as conceived by the LRA, will take root and become as effective as the Works Councils in Germany and the Netherlands.[54]

For as Krochan rightly writes: "*Management cannot expect to enjoy the flexibility to adapt workplace laws and regulations to fit their unique circumstances unless employees have a voice in designing these adaptations and have access to a fair and efficient dispute resolution system for enforcing their legal rights.*" Therefore, worker participation has a crucially important role to play in the variation of labour standards.

## 9. COLLECTIVE BARGAINING IN SOUTH AFRICA

Labour standards cannot be created by individual employment relations between workers and employers. Instead, labour standards are common rules set by agreement with a large number of competitors and therefore they can only be created by law or collective agreement.[55]

The previous labour laws made no orderly distinction between the regulation of collective labour relations and the individual employment relationship. The unfair labour practice which was introduced into the old LRA in 1979, had the effect of creating an individual employment law jurisprudence in a statute whose primary function was to regulate collective labour relations. This was exacerbated by the introduction of the BCEA in 1983, in the absence of any proper articulation between it and the old LRA. Therefore, the 1995 LRA's primary focus is the regulation of relations between trade unions and employers.[56] There is no statutory compulsion for parties to enter into a permanent or long-term relationship. The duty to bargain has been removed and in keeping with international trends, the new LRA adopts a voluntarist approach to collective bargaining.[57]

The principles of fairness and the right to bargain collectively form the bedrock of a healthy industrial relations system. This is in sharp contrast to the often unequal bargaining power which employers have in the individual

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[54] Du Toit: "The Labour Relations Act of 1995", Second Edition, pages 279 & 288, (1998).

[55] Sergenberger: page 48

[56] Explanatory Memorandum (1995) 16 ILJ, page 282

[57] Du Toit et al: 1998

employment contract which is governed by the common law and whereby the employer is usually in a much stronger bargaining position than the individual worker.

This inequality is even greater in a developing country, such as South Africa, where the majority of workers are unskilled or semi-skilled and where the unemployment rate is relatively high. Therefore, the labour legislation in most countries provides for the formation of unions and employee organisations which have the capacity to bargain with their employers for acceptable conditions of employment.

For this reason the 1996 Constitution, the 1995 LRA and the 1997 BCEA created a legal framework for setting labour standards and collective bargaining (underpinned by the organisational rights in the 1995 LRA and the right to strike which is entrenched in Section 23 of the 1996 Constitution) has been accorded a crucially important role in determining and varying labour standards.

Olivier[58] very aptly says: "*Collective agreements have been the primary vehicle for determining, in particular, terms and conditions of employment and regulating the employment relationship and labour flexibility generally. In fact, the statutory framework existing in South Africa has undoubtedly reinforced and supported the pre-eminent position enjoyed by collective bargaining as far as these matters are concerned.*"

From this one can conclude that collective bargaining laws and minimum labour standards laws are intended to produce a set of fair employment standards.

It can be said that minimum labour standards and collective bargaining seek to achieve the same goal, namely, fair labour standards. The difference, however, is that collective bargaining, in terms of the 1995 LRA, is voluntary[59] whereas the minimum standards in the 1997 BCEA are peremptory. The core rights have to be adhered to.

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[58] Olivier, M.: "TSAR", 1998.3, page 356

[59] Voluntarism eminates from the ILO Convention 98 which deals with the freedom to bargain.

The law of collective bargaining, as it is provided for in the 1995 LRA, creates a broad sophisticated framework for the employers and the employees to develop labour standards or to vary existing labour standards by means of collective bargaining. It is important to note that both minimum labour standards and collective bargaining are intended to deal with power imbalances and to offer protection to the vulnerable workers.

While one understands the need for a core of minimum labour standards, these should be kept to an absolute minimum and the best vehicle to bring about the much needed flexibility is collective bargaining. Because the "one shoe fits all" approach of the BCEA is perceived by organised business to be too rigid. I see collective bargaining, with its capacity to vary labour standards, as the best vehicle with which to create flexibility in the South African Labour Market. Below I will make more detailed reference to the variation of minimum standards by means of collective bargaining. I will also make reference to the various levels of bargaining and I shall show that the current legislation accords sectoral bargaining greater scope to vary minimum standards than the other levels of collective bargaining, such as plant level bargaining.

Standing[60] makes reference to the following six aspects cited by NALEDI in favour of centralised agreements:

1) it can set basic minimum standards on wages and working conditions;
2) it is more efficient for bargaining;
3) it is claimed that centralised agreements allow unions to engage in equality or egalitarian bargaining;
4) it is claimed that a centralised agreement has benefits of economies of scale;
5) it is said to increase the powers of both parties; and
6) it is claimed that centralised agreements promote 'pro-active' strategic unionism, which has the capacity to lead economic restructuring.

From the six reasons listed above there appear to be compelling reasons in favour of centralised representative bodies for employees, employers and atypical workers.

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[60] Standing et al: page 493

Carlos Sebastian, however, points out that in Spain a consequence of centralised bargaining is the tendency to determine wage increases without reference to the actual situation and performance of the companies that have to pay the wages. He says, "*This tends to worsen the financial difficulties of companies that are viable but experiencing temporary difficulties; it also tends to limit the use of compensation schemes to motivate productivity with negative effects on worker effort.*"[61]

Although our industrial relations context is different from that of countries in Europe, we nevertheless need to heed the lessons so as not to repeat the same mistakes in respect of levels of bargaining that are necessary for South Africa to achieve social justice and economic development.

There is, therefore, great merit in pursuing and promoting sectoral accords which are in the best position to set sectoral minimum wages and minimum standards of labour in the various industrial sectors. They could determine working conditions, social security standards, health and safety standards and training standards.

In this regard Standing writes: "*They (the sectoral accords) should set standards while promoting sectoral flexibility, meaning that adjustments should not be costly while they combat unfair competition. ... An argument in favour of sectoral accords is that they can induce a transfer of resources and profit from less efficient to more efficient firms by setting standards and minimum acceptable wages.*"[62]

There are certainly more benefits in sectoral bargaining and the Department of Labour, the Department of Finance and the Department of Trade and Industry should all co-operate and create greater incentives for employers and employees to reach sectoral agreements that will benefit all parties and the country as a whole.

However, the accords should not be limited to the sectoral level, but should be encouraged at all levels, national, regional, sectoral and plant levels, that we may be able to arrive at a more meaningful regulation of the South African

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[61] Sebastian, Carlos.: "Creating Employment in Spain Labour Market imperfections." A chapter in "The Social Challenge of Job Creation", edited by Jordi Gual

[62] Standing et al: page 492, (1996).

labour market and so that atypical workers can be given official representation on voice regulatory bodies, including tripartite institutions such as NEDLAC. In this regard Standing says: "*Those on the margins of economic activity need a voice in order to regulate their labour force involvement. It is not just wage workers and the unemployed who require representation security.*"[63]

I therefore believe that South Africa has much to gain from the very important role that collective bargaining has to play in varying labour standards.

It is estimated that in Germany, collective agreements have an impact on the conditions of employment of 90% of all workers and salaried employees. Quite clearly, South Africa is still far from achieving this very desirable level of bargaining. Like Germany, employers and employees in South Africa need to fully use collective agreements as a tool with which to vary all labour standards that are subject to variation in terms of our current labour legislation.

Because of the prevailing power imbalances at the decentralised level, it is more appropriate for collective bargaining at the centralised sectoral level to vary "permissible" labour standards, through the bargaining Councils and Statutory Councils which are provided for in the 1995 Labour Relations Act and the new BCEA. There is, therefore, sufficient justification for affording sectoral bargaining greater scope to vary labour standards than that which is afforded to other levels of collective bargaining, for example, plant level bargaining.

Despite the limitations of collective bargaining - particularly its scope of coverage, the neglect of minority interests and the fact that not all workplaces have recognised, registered trade unions and collective bargaining – it still remains the single most powerful institution for varying labour standards in South Africa. Both employees and employers have not yet fully realised the full capacity of collective bargaining and the extent to which it can be used to effectively vary labour standards.

Therefore, as our society begins to become normal again, we should endeavour to ensure that collective bargaining is promoted at all levels and that concerted efforts are made to extend collective bargaining to atypical

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[63] Standing et al: page 88, (1996).

employees as well as to other vulnerable categories, wherever that is practically possible.

Regarding the value of collective bargaining Collins[64] says: *"Not only can plant level bargaining tailor rules suitable for the particular firm (or sector bargaining for the industry as a whole) with a view to achieving an efficient level of regulation, but also collective bargaining functions as a policing and enforcement mechanism."*

And in instances where collective bargaining falls short, the legislature should make adequate provision to ensure that reasonable and acceptable standards are set for the "unique" sectors. This can be done by allowing for application to be made for exemptions or for variation by administrative procedure.

## 10. VARIATION UNDER THE 1956 LABOUR RELATIONS ACT AND THE 1995 LABOUR RELATIONS ACT

Under South Africa's previous industrial relations dispensation, the Labour Relations Act of 1956, it was not possible to vary the BCEA by means of collective bargaining. Under the Labour Relations Act of 1956 such variation was only possible if the Minister of Labour granted an exemption.

The situation under the 1995 Labour Relations Act is very different and collective agreements acquire legal force in terms of Section 23 of the 1995 Labour Relations Act. In terms of Sections 1(d)(i)-(ii) one of the primary objectives of the Labour Relations Act is "to promote:

- orderly collective bargaining; and
- collective bargaining at sectoral level."

Section 23(3) of the 1995 Labour Relations Act provides "that a collective agreement varies any contract of employment between the employer and the employee who are both bound by the collective agreement".

The level of bargaining should always be determined by practical realities. A case in point is the 1997 Agreement between the Chamber of Mines and the National Union of Mineworkers on Wages and Conditions of Employment in

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[64] Collins, H.: 'Objectives and Justifications of Legal Regulation of the Employment Relation', paper presented at W.G. Hart legal workshop 1999

the Coal Industry. The Chamber of Mines of South Africa and the National Union of Mineworkers reached agreement on wages and other conditions of employment relating to the 1997 wage review as far as colliery members of the Chamber were concerned. The agreement covered conditions applicable to NUM members employed in the category 1 to 8 bargaining unit on coal mines that are members of the Chamber. Negotiations on the gold productivity deal were still continuing at mine level. That was the first year that an agreement for coal had been concluded separately from the gold negotiations. Such an approach makes good sense because the circumstances of gold and coal mines are increasingly divergent, which calls for agreements specifically targeted at the needs of the particular industry.

Three noteworthy features of the 1995 Labour Relations Act are:

- it fosters sectoral level bargaining by granting advantages to bargaining agents that have the capacity and the will to participate in centralised bargaining forums;
- it avoids the debilitating effects of fragmentation and proliferation of unions within sectors; and
- it offers a good measure of inducements to unions who act jointly as the representatives of the majority of workers in a sector or a workplace.[65]

Given the endemic social and economic imbalances in our society it is generally accepted that there is a need for limitations to be placed on the outcomes of collective bargaining, so that the dual statutory purpose of advancing economic development and social justice may be realised. Below I will examine the most important limitations that are placed on the outcomes of collective bargaining as an instrument for varying labour standards and I will examine the capacity collective bargaining has to vary labour standards under South Africa's current labour legislation and the relevant provisions of the new Constitution.

In present-day South Africa, employers and employees have the freedom to bargain about any lawful matter. However, there are a number of statutory minimum conditions of employment which apply to all employers and employees, regardless of what might be contained in an individual contract of employment or a collective agreement. These core, minimum standards are inviolable and may not be varied to the detriment of the employee.

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[65] Du Toit: "The Labour Relations Act 1995", Second Edition, page 132, (1998).

## 11. THE RATIONALE FOR MINIMUM LABOUR STANDARDS

The Basic Conditions of Employment Act and the Employment Equity Act set minimum labour standards which transcend "formal equity" and dwell in the realm of what has come to be known as "substantive equality".

They are standards which are born from an "expansive and substantive conception of equality which encompasses the need to remedy inequality". Albertyn and Kentridge draw the following distinction between "formal equality" and "substantive equality": *"Formal equality presupposes that all persons are equal bearers of rights within a just social order. On this view inequality is an aberration which can be eliminated by extending the same rights and entitlements to all in accordance with the same "neutral" form or standard of measurement. Formal equality is blind to entrenched, structural inequality. Hence it ignores actual social and economic disparities between groups and individuals and constructs standards which appear to be neutral, but which in truth embody a set of particular needs and experiences which derive from socially privileged groups. Substantive equality, on the other hand, requires us to examine the actual social cost and economic conditions of groups and individuals in order to determine whether the constitution's commitment to equality is being upheld."*[66]

Both the new Constitution and the 1995 Labour Relations Act list the advancement of "social justice" as one of their purposes.[67] Thus the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 1998 have emerged from the positive Constitutional duty which requires the State to pass legislation and to create institutions (such as collective bargaining) which are designed to play a positive and corrective role with regard to the inequalities and power imbalances which are still prevalent in South African society.[68]

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[66] Albertyn, C. and Kentridge, J.: "Introducing the right to equality in the Interim Constitution", 2 SAJHR 152-3, (1994).

[67] The Constitution of the Republic of South Africa Act 108 of 1996 Section 1 and the Labour Relations Act 66 of 1995 Section 1.

[68] Creamer, K.: "Towards Asymmetrical Parity in the Regulation of Industrial Action.", ILJ, Volume 19, part 1, page 11, (1998).

## 12. THE GREEN PAPER ON POLICY PROPOSALS FOR A NEW EMPLOYMENT STANDARDS STATUTE

The Green Paper on Policy Proposals for a new employment Standards Statute, which preceded the new BCEA, says the following in respect of the variation of labour standards by means of collective bargaining: "*Collective bargaining is the preferred method of regulating the labour market. One of the purposes of any employment standards legislation must be to encourage collective bargaining. It can do this by permitting collective bargaining to vary basic employment standards by collective agreements. It can promote collective bargaining in workplaces where there are representative trade unions by requiring agreement as a necessary condition for administrative exemption or ratification.*"[69]

In order to give effect to the new Governments' vision of "regulated flexibility", the Green Paper proposed the following four methods for varying labour standards:

- Collective Bargaining;
- Sectoral wage determinations by the Employment Conditions Commission;
- Expeditious administrative procedures for exemptions; and
- Individual contracts of employment.

Each of the above methods is limited in respect of what rights it can vary. Collective bargaining in particular is regulated in a number of ways. Firstly, fundamental rights, like the prohibition against child labour, cannot be varied by collective bargaining. Secondly, variations which are not *contra bones mores* and do not conflict with the relevant statutory provisions may be varied by collective bargaining. Variation of employment standards, which are not core standards may be varied by means of collective bargaining. What has to be determined is which labour standards should be subject to this form of variation. The new Basic Conditions of Employment Act[70] provides clarity on this aspect.

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[69] "The Green Paper on Policy Proposals for a new Employment Standards Statute", Volume 368, Number 17002, (1996).

[70] The Basic Conditions of Employment Act 55 of 1997

## 13. MINIMUM EMPLOYMENT CONDITIONS IN THE BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997

Lombard and Van Eck[71] say that the 1983 Basic Conditions of Employment Act had no effect on the basic conditions of employment which were regulated in terms of collective agreements. They further point out that such a provision was consistent with the purpose of the new Labour Relations Act of 1995. The old Basic Conditions of Employment Act (section 1(c)) merely created a framework within which collective bargaining could take place in order to conclude collective agreements in respect of wages and other conditions of employment.

The new Basic Conditions of Employment Act provides a number of core employment conditions which cannot be negatively varied by individual employment contracts or by collective bargaining.

A collective bargaining agreement concluded by a bargaining council only has the capacity to provide conditions that are as good as, or better than the following minimum statutory entitlements:

a) the duty to arrange working time with regard to the health and safety and family responsibility of employees (Sections 7, 9 and 13);

b) reduce the protection afforded to employees who perform night work (Section 17(3) and (4));

c) reduce the annual leave to less than two weeks (Section 20);

d) reduce entitlement to maternity leave (Section 25)

e) reduce entitlement to sick leave to the extent permitted (Sections 22 – 23); and

f) prohibition of child and forced labour (Section 48).

With reference to these minimum employment standards, the following provisions of the Basic Conditions of Employment Act are applicable:

- Collective agreements and individual agreements may only replace or exclude basic conditions of employment to the extent permitted by the Act or a sectoral determination (Section 49).

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[71] Lombard and Van Eck, De Jure, pages 133 – 143, (1998).

- Subsection (1) of this section states that a bargaining council collective agreement may vary any condition of employment except core rights.
- Subsection (2) provides that other collective agreements may vary conditions as permitted by the Act – and indirect reference to the various "guideline" clauses specifying limits throughout the Act.
- Subsection (3) specifies that individual agreements or contracts of employment may vary conditions as permitted by the Act – once again in indirect reference to the "guideline" clauses.

A summary of these limits appears in the table at the end which I have called Appendix I.

The Minister of Labour may make a determination to vary or exclude a basic condition of employment. This can also be done on application by an employer or employers' organisation (Section 50). However, a determination may not be granted unless a trade union representing the employees has consented to the variation or has had the opportunity to make representations to the Minister. A copy of any determination must be displayed by the employer at the workplace and must be made available to employees (Section 50).

## 14. THE PURPOSE OF THE BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997

The Basic Conditions of Employment Act 75 of 1997 consolidates and replaces the Basic Conditions of Employment Act 3 of 1983 and the Wage Act 5 of 1957. The new BCEA does not only prescribe a set of minimum standards of employment as was the case with the Basic Conditions of Employment Act of 1983, but instead it makes provision for the establishment of basic conditions of employment through sectoral determinations in sectors where collective agreements do not exist (Section 51 - 58).

The main purpose of the new BCEA is to advance economic development and social justice by fulfilling the following primary objectives of the Act:

- to give effect to and regulate the right to fair labour practices conferred by Section 23(1) of the Constitution;
- by establishing and enforcing basic conditions of employment;
- by regulating the variation of basic conditions of employment; and

- to give effect to obligations incurred by the Republic as a member state of the ILO. (Section 2 of the Basic Conditions of Employment Act 75 of 1997).

Despite the limitation in that the 1997 Basic Conditions of Employment Act does not allow too much scope for employers and employees to contract themselves out of the basic conditions of employment provided for in the Act, it is a vast improvement on the 1983 Act, as the scope and application of the 1997 Act is much wider and it provides protection for "employees" who were formerly not given protection by the 1983 Act.

The Old Act in Section 1(2) expressly excluded the following categories of persons: those who work for the State, Parliament, Atomic Energy Corporation of South Africa, the South African Reserve Bank, the South African Broadcasting Corporation, the South African Bureau of Standards, the South African Council for Scientific and Industrial Research, the South African Medical Research Council and those who are employed in educational institutions which are maintained by State funds.[72]

In terms of Section 3(1) of the Basic Conditions of Employment Act 75 of 1977 the Act applies to all "employees" and "employers" with the exception of "members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, unpaid volunteers working for an organisation serving a charitable purpose and persons employed on vessels at sea in respect of which the Merchant Shipping Act 57 of 1951 applies".

The definition Section (Section 1) of the Basic Conditions of Employment Act 75 of 1977, hereinafter referred to as the New Act, defines the term "employee" as follows:

a) "any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive any remuneration; and

b) any other person who in any manner assists in carrying on or conducting the business of an employer."

The scope of application of the new Act is the same as the application of the Labour Relations Act 66 of 1995, except that the Labour Relations Act in its

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[72] Rycoft and Jordaan: "A Guide to South African Labour Law", pages 300 – 304, (1992).

application does not exclude volunteer workers or persons employed on vessels at sea in respect of the Merchants Shipping Act.

The new BCEA, unlike the old Act which was silent on the matter, defines the concept "basic conditions of employment" as "a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment". (Section 1 of the Basic Conditions of Employment Act 75 of 1977). And Section 4 of the Basic Conditions of Employment Act 75 of 1977 says: "*A basic condition of employment constitutes a term of any contract of employment except to the extent that –*

*a) any law provides a term that is more favourable to the employee;*

*b) the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of this Act; or*

c) *a term of the contract of employment is more favourable to the employee than the basic condition of employment.*"

## 15. THE VARIATION OF BASIC CONDITIONS OF EMPLOYMENT

The new Act contains specific provisions regarding the variation of basic conditions of employment and it specifies the extent to which basic conditions of employment may be varied by agreement. The 1997 Basic Conditions of Employment Act Section 49(1) reads: "*A collective agreement, concluded in a bargaining council may alter, replace, or exclude any basic conditions of employment*", and Section 49(2) reads: "*A collective agreement, other than an agreement contemplated in Subsection (1), may replace or exclude a basic condition of employment, to the extent permitted by this Act or a sectoral determination*".

And in terms of Section 49(4)(a)&(b): "*A collective agreement supersedes an individual contract of employment (Section 23(3) of Act 66 of 1995) and a collective agreement concluded in a bargaining council supersedes an ordinary collective agreement*".

From the above it is clear that the new BCEA, Section 49, specifically provides for the variation of the basic conditions of employment by means of three types of agreements:

- collective agreements concluded by a bargaining council;
- other collective agreements; and

- individual contracts between an employer and an employee.

In terms of Section 49(1), "*collective agreements concluded by a bargaining council may alter, replace or exclude any basic condition of employment, if the collective agreement is consistent with the purpose of this Act and if the collective agreement does not reduce the protection afforded to employees*" by the bedrock of core rights. These minimum core rights are inviolable and are given full protection in that the 1997 Basic Conditions of Employment Act stipulates that the provisions of collective agreements concluded by a bargaining council may not:

a) breach an employee's right to safe and healthy working conditions (Section 7(a)&(b) and Section 13);

b) be in conflict with the Code of Good Practice on the Arrangement of Working time published in terms of the new Act (Section 7(c));

c) provide for a longer working week than 45 hours (Section 9);

d) reduce the protection afforded to employees who perform night work (Section 17(3)&(4));

e) reduce an employee's annual leave to less than the prescribed 21 days per year (Section 25);

f) reduce an employee's entitlement to sick leave (Section 22 - 24) or maternity leave (Section 25);

g) be in conflict with the chapter prohibiting employment of children and forced labour (Chapter 6); and

h) must have due regard to the family responsibilities of employees (Section 7(d)).

Apart from collective agreements concluded by bargaining councils, other collective agreements Section 49(2) and individual contracts of employment Section 49(3) also have the capacity, in terms of the Act to vary conditions of employment, subject to the condition that such variations do not conflict with the provisions of the 1997 Basic Conditions of Employment Act. (See Appendix I)

Collective agreements, including those not concluded by bargaining councils may provide for:

a) ordinary hours of work and overtime to be averaged over a period of four months or less (Section 12(1));

b) shorter notice periods for the termination of contracts of employment than those prescribed by the new Act (Section 37(1)&(2));

c) the resolution of certain disputes through arbitration which has the effect that a labour inspector may not issue a compliance order in respect of an employee who is covered by such a collective agreement (Section 70(a)); and

d) vary the number of days and the circumstances under which leave is to be granted for family responsibilities (Section 27(7)).

From the above it is clear that the provisions of the new BCEA supersede any form of agreement in respect of the employees' list of protected core rights.

The Minister of Labour's authority to vary conditions of employment is dealt with in Sections 50 and is based on a limitation of the Minister's right to vary certain core rights. In terms of Section 50 the overtime rate, night work and maternity leave conditions can be varied by the Minister of Labour in terms of a sectoral determination. Section 50 also states that the weekly hours of work provision may not be varied by a bargaining council agreement, the Minister or by means of a sectoral determination.

Schedule I of the new BCEA states the procedures which have to be followed for the progressive reduction of maximum working hours. At NEDLAC it was agreed that the goal would be a 40-hour working week and an eight-hour working day. It was also agreed that collective bargaining and sectoral determinations would be the vehicles for bringing about these changes.

Abrahams makes the following interesting observation in this regard: "*In the event of the issue of the reduction of maximum working hours being raised as a subject for negotiation during collective bargaining on terms and conditions of employment, Art 2 of the schedule directs that the parties must negotiate (bargain) on the issue – this despite the fact that the Labour Relations Act, which regulates collective bargaining imposes no duty to bargain nor does it categorise any issue over which the parties must bargain (except workplace forums).*"[73]

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[73] Abrahams, G.: "Basic Conditions of Employment Act 75 of 1997" in "1998 Annual Survey of S.A. Law".

## 16. THE RATIONALE FOR BASIC EMPLOYMENT STANDARDS

The common law contract of employment affords no real protection to employees in respect of aspects such as minimum wages, minimum maternity leave, minimum holiday pay, or maximum working hours. This often results in employees entering into employment contracts which seriously prejudice them. A classic example is a contract of employment which states that the employee will work for long hours without a break.[74]

It is to counter such abuse that the BCEA was promulgated. The primary object of the legislation is to protect employees by prescribing a bedrock of core minimum standards which are inviolable under any circumstances.[75] According to Grogan[76] the effect of the minimum standards in the BCEA is to limit the contractual freedom of the parties to the employment contract in that the individual contracts of employment are trumped by the BCEA and must comply with the basic conditions of employment provided for in the legislation in the BCEA and the Employment Equity Act.

The Employment Equity Act prohibits unfair discrimination and imposes requirements on employers to draw up employment equity plans, with sanctions against those who do not comply. The statute's ambitious objective is "to encourage equity in the workplace in ways that help improve the overall distribution of income while fostering a more productive economy."[77]

Heple[78] says: "*There are, therefore, good economic reasons to believe that the market alone cannot eliminate discrimination. In particular, discrimination tends to persist where there is an incentive to make maximum profits, or there is a monopoly of power, or where employers impose indirectly discriminatory requirements which are not job related, or there is an over-*

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[74] Du Plessis, Fouché, Jordaan and Van Wyk: "A Practical Guide to Labour Law", page 25, (1996).

[75] Thompson, C.: Report prepared by Legrel of the ILO for the Department of Labour, Republic of South Africa, 3rd May 1996, as cited by Thompson in "Facing the Challenge in the Asian-Pacific Region", edited by Mitchell and Min Aun Wu, chapter 2, page 43.

[76] Grogan: page 54, (1998).

[77] Green Paper: (1996).

[78] Heple, B.: "Equity Laws and Economic Efficiency", ILJ, page 559, (1997 or 1998).

*supply of labour. These features of the market are part of the justification for anti-discrimination laws."*

Thus in a country with a history which has been characterised by the harassment and abuse of certain categories, such as black people, women and disabled people and the degradation and humiliation of these categories of persons, there is compelling justification for the inviolable labour standards which have been introduced by the new BCEA and the Employment Equity Act. The standards set in the Employment Equity Act are also inviolable and may not be varied by individual contracts or collective bargaining.

Bob Heple, based on experience in the United States and Britain, makes two important points in this regard. Firstly, the law must establish a clear standard. The starting point is the constitutional principle of equality and the individuals right not to suffer from unfair discrimination. To be effective, the standards set by the statute must be regulatory standards; i.e. any person applying or interpreting the statutes must be bound to take them into account. Secondly, there needs to be a vigorous enforcement mechanism which ensures that those who violate the standards are penalised and that those who comply are rewarded.[79]

## 17. COLLECTIVE BARGAINING AS A CATALYST FOR LABOUR MARKET FLEXIBILITY

The new BCEA requires the employer to get agreement from the employees in respect of the following:

- overtime work;
- Sunday work;
- work on public holidays; and
- a longer working day than 9 hours.

As I have illustrated above, the BCEA makes very limited provision for the variation of the provisions of the Act through individual or collective agreement. It, however, makes sufficient provision for the variation of conditions of employment by means of bargaining council agreements. This in effect means that Bargaining Councils may vary any provision of the Act,

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[79] Heple, B.: "Equity Laws and Economic Efficiency", ILJ, page 606, (1997 or 1998).

with the exception of the core rights which were referred to above. Moreover, the new BCEA promotes collective bargaining generally and sectoral bargaining in particular.

Collective agreements concluded within bargaining councils may vary all employment standards enshrined in the Act, except the inviolable core labour standards. The bias towards bargaining council agreements seems to be in conflict with the primary aims of the 1995 Labour Relations Act, which is to "promote and facilitate collective bargaining". Barker[80] points out that even the Government's own Labour Market Commission and the International Labour Organisation favour the regulation of minimum standards through bargaining between employees (and their unions) and employers (and their associations or organisations).

There is no dispute about the State's need to set certain minimum standards in the interest of justice and fairness. However, there are compelling reasons, such as the need for greater flexibility, that require sufficient scope for collective bargaining or individual agreement to vary the minimum employment standards.

The primary objectives of the original Bill of the Basic Conditions of Employment Act, as stated in the explanatory memorandum are:

- to ensure that working conditions of unorganised and vulnerable workers meet minimum standards and are socially acceptable in relation to the level of development of the country; and
- to remove rigidities and inefficiencies from the regulation of minimum conditions of employment and promote flexibility.

With reference to the above two objectives Barker is of the view that the new BCEA goes further than envisaged by the first objective and that it fails to meet the second objective, namely, to remove rigidities and to promote flexibility in respect to the variation of labour standards.

In terms of the new BCEA collective agreements have the capacity:

- to average the working hours over a period not exceeding four months;

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[80] Barker, F.S.: "Best Conditions in the Basic Conditions of Employment Act", Contemporary Labour Law, Volume 7, (1997).

- to vary family responsibility leave; and
- to permit a shorter notice period.

## 18. REVIEW OF BCEA BY THE MINISTER OF LABOUR

Godfrey and Theron, based on a survey of the impact of the BCEA on small business make the following statement: *"The impact of the new Act on small businesses covered by employment regulations may be limited further if conditions which are to be varied downwards. In terms of the new Act, the conditions which are to be varied will have to be specified."*[81]

The Ministry of Labour has already begun to look at new provisions for specific classes of businesses in terms of broad criteria such as the number of employees employed by a particular employer.

After the Ministerial Task Team had evaluated the impact assessment study which was conducted by Ntsika[82], it recommended that a ministerial determination be promulgated for all firms which employed less than ten people. In terms of the proposed determination the following provisions would be varied for the specified firms:

- the overtime limit would be increased to 15 hours per week;
- the overtime rate would be reduced to time and a third;
- family responsibility leave would form part of the 21 days' annual leave per year; and
- firms would be allowed to average hours by agreement, with appropriate protective mechanisms to prevent the wilful abuse of workers by employers.

The Department of Labour, in its Fifteen Point Programme of Action, has expressed its commitment to ensuring that South Africa's Labour Legislation is compatible with governments' goal of maximising employment creation.

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[81] Godfrey and Theron: "Labour Standards vs Job Creation?", Institute of Development and Labour Law, Monograph Series 1, University of Cape Town, (1999).

[82] Ntsika Report: Report by the Task Team appointed by the Minister of Labour to investigate the impact of the BCEA on small business, (1998).

After various discussions and deliberations with key stakeholders from organised labour and the business sector during 1999, the Minister of Labour identified a number of areas for legislative revision and is currently engaged in a process which will culminate in amendments that would improve the efficiency of the labour market and create employment.

Among the provisions that are being amended are the following that have direct relevance to labour standards:

- conditions of employment when companies change hands;
- provisions in the BCEA on Sunday work and notice;
- the role of the Minister and sectoral determinations to vary core rights in the BCEA; and
- improving the efficiency of some of the institutions set up to regulate the labour market.[83]

## 19. EMPLOYMENT STANDARDS LEGISLATION IN AUSTRALIA AND NEW ZEALAND

On 1st March 1993, the Victorian Government's *Employee Relations Act 1992* signalled the watershed in the deregulation of industrial relations in Australia. The main effect of the legislation was to do three things:

- eliminate compulsory arbitration;
- abolish the state award system; and
- introduce a system of collective and individual employment agreements, which are negotiated directly between employers and employees.

In essence the *Employee Relations Act* reflects the international trend towards decentralisation and deregulation of industrial relations. However, the criticism against this trend is that decentralisation is strongly associated with greater inequality in wages, which arises from the fact that the more vulnerable groups of employees, such as atypical employees, are often in a weaker bargaining position.

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[83] Fifteen Points Programme of Action of the Ministry of Labour 1999 – 2004, (1999).

The South African position is in sharp contrast to the Australian position and it would appear that the South African Legislature has been strongly influenced by the equity implications which impact very strongly on collective bargaining at a decentralised level.

Prior to the *Employee Relations Act,* bargaining in Australia was centralised at the national and industry levels, with some enterprise–level bargaining in the automotive and telecommunications industry. However, in the mid 1980s, there began a process which culminated in the *Employee Relations Act* which "represented a radical shift in the level, structure and units of bargaining, together with a significant reduction in the minimum standards for terms and conditions of employment."[84]

The Victorian government perceived the *Employee Relations Act* as: "a system in which everyone can benefit. Employees have the opportunity to negotiate better pay rates and conditions and in return employers can improve work practices, productivity and competitiveness ... whatever the outcome, the agreement is developed through a voluntary process, without duress and in the spirit of consultation and co-operation of the parties."[85]

And Naughton[86] and O'Neill[87] point out that the *Employee Relations Act,* which was promulgated 18 months after New Zealand's *Employment Contracts Act 1991,* contained the following features of the New Zealand Act:

- "freedom of choice" in bargaining arrangements;
- the capacity of individuals to negotiate directly with employers or through a bargaining agent;
- the marginalisation of unions; and
- the provision of a bare minimum safety net of guaranteed terms of employment.

The *Employment Contracts Act 1991,* established an entirely new framework for industrial relations in New Zealand. Its aim was to facilitate labour market

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[84] Bertone and Doughney: page 47

[85] Department of Business and Employment, page 3, (1995).

[86] Naughton: page 286, (1994).

[87] O'Neill: pages 27 – 29, (1996).

flexibility through a framework which makes it possible for employers and employees to work together to produce high quality goods and services in a co-operative environment. All this was designed to reverse the slow growth, declining real wage levels, and very high rates of unemployment.

The labour law which was applicable before the *Employment Contracts Act 1991,* was one which arbitrarily restricted employers and employees from making arrangements that they mutually agreed to, approved occupational awards which had been negotiated by unions that had little or no understanding of the real needs of individual work-places, and extended awards through blanket coverage to a business sector which did not participate in the negotiations. All these are considered to be factors that inhibit labour marked flexibility, growth and economic efficiency.

The *Employment Contracts Act* is a radical departure from the industrial relations systems which prevailed prior to its implementation. It dispenses with the rigid bargaining structures of the past such as compulsory unionism, blanket coverage of awards and monopoly union coverage. Instead, the new legislation grants the employers and employees the freedom to establish bargaining arrangements that are most appropriate for their specific work places.

## 20. THE UNITED STATES MODEL

Through the ILO, the WTO and other mechanisms, the United States supports a core set of international labour standards. Among these are the prohibition on forced labour, discrimination, exploitative child labour, freedom of association as well as the very important organisational and collective bargaining rights. With reference to these rights Herman says: "*We believe that these rights are universal, that they support development and growth and that all nations should view them as indispensable to the functioning of their labour markets*".[88]

In South Africa the business sector has argued that excessive labour regulation has been the primary cause of job losses and they have agitated for

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[88] Herman, A.M., U.S. Secretary of Labour: "Workers meeting the challenge of change", Economic Perspectives: An Electronic Journal of the United States Information Agency, Volume 3, Number 1, page 8, (February 1998).

government to create greater flexibility. Some of the critics of the South African labour legislation (the LRA and the BCEA in particular) have cited first world models such as the performance of the United States economy and its ability to reduce its unemployment rate to 4.9% in 1997 and the fact that since 1993 more than fourteen million new jobs were created, the majority of which are classified as "good" jobs.[89] They also point out that the two-thirds of net job growth during this period occurred in high-wage positions in industries such as financial services, health care and computer and accounting services.

Moreover, the critics have highlighted the following essential features of America's job creation model referred to by the United States Secretary of Labour, Alex Herman.[90]

- An economic model that reflects fiscal discipline, targeted investment in workers and open markets,
- Workers who have the education and training they need to allow them to identify beneficial opportunities and to exploit them as they arise,
- A strong belief in the principle that government exists to support individual initiative and to ensure every man and woman are given the tools and freedom they need to prosper in pursuit of their dreams,
- A system of unemployment compensation that provides workers with the support they need to be prepared for and to find new jobs, and
- Market based and institutional mechanisms, including unions and minimum wages, that ensure that workers are fairly compensated for their labour while being responsive to the needs of employers.

What is very evident about the United States model is that the government has realised that in order to remain a major player in the global economy it has to make a considerable investment in the skills of its people. And the United States government has passed labour legislation which facilitates skills development.

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[89] Thompson citing Freeman, R.: "Working under different rules", (1994), chapter 2, points out that America produced the jobs but also a marked increase in inequality. Poverty increased and also the ranks of the working poor.

[90] Herman, A.M., U.S. Secretary of Labour: "Workers meeting the challenge of change", Economic Perspectives: An Electronic Journal of the United States Information Agency, Volume 3, Number 1, page 7, (February 1998).

Herman argues that government has an important role to play in helping workers adjust and meet the new emerging opportunities of the global market: "*This is not an either/or position – government intervention and support versus individual initiative. Rather, it is a balanced equation in which government functions as a facilitator to enable and stimulate workers to exploit their own initiative and opportunities to the fullest extent possible.*"[91]

This is a notable statement, one worthy of pursuit, however, as a developing country with limited resources and a legacy of inequality, a sharp disparity in the distribution of jobs, occupations and incomes and a pattern of neglect of the vulnerable categories of workers such as women, black people, the disabled and atypical employees, great circumspection and careful agreement needs to be negotiated by the tripartite body of labour, business and government. And those who readily cite the positive attributes of the American model should also take cognisance of the limited power of employees at work and in the larger American society.

The criticism of the United States model is dealt with by Roy Marshal, Former United States Secretary of Labour, who writes: "*Indeed, American workers have weaker voices at work than their counterparts in the other major industrial countries, where labour organisations are stronger and workers have legal rights to participate in corporate and workplace decisions. Workers' interests consequently are not adequately represented in the workplace or in the larger society. This has become a national problem because of evidence that worker participation improves productivity and because economic policies are not likely to be sustainable unless they reflect workers' interests. There is strong evidence that protective labour laws would be more effective with worker participation in their administration, as is the case in most other industrial economies.*"[92]

This is wise counsel which South Africa as a fledgling democracy has to heed: "a free and democratic society is not likely without strong and democratic worker organisations". Workers everywhere must have the opportunity to

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[91] Herman, A.M., U.S. Secretary of Labour: "Workers meeting the challenge of change", Economic Perspectives: An Electronic Journal of the United States Information Agency, Volume 3, Number 1, page 8, (February 1998).

[92] Marshall, R., Former Secretary of Labour: "Is the United States Socio-economic System the Model for Other Countries?", Economic Perspectives: An Electronic Journal of the United States Information Agency, Volume 3, Number 1, (February 1998).

exercise their basic rights. To organise and bargain collectively, without government interference.

## 21. THE PLIGHT OF THE ATYPICAL EMPLOYEES

According to Cordorva[93] the growth of atypical kinds of employment certainly presents a serious dilemma for the proponents of collective bargaining as a tool for varying labour standards. The reason is that many of these new forms of workers (migration workers, part-time workers, casual workers, home workers, mini-enterprises) do not readily lend themselves to collective bargaining and neither do they subscribe to the practice of concluding collective agreements. By 1986 this sector of workers had been characterised by low rates of unionisation and it was evident that they had concluded very few collective agreements.

The new BCEA, compared with the old BCEA, extends protection significantly in that it makes almost all the provisions of the Act applicable to employees who work at least 24 hours in a month for an employer. This in fact provides protection for almost all casual, part-time, temporary and seasonal employees.

However, despite the progress in the extension of protection to atypical employees, Olivier correctly points out that: "*Little if any accommodation is made for the voice of the atypical labour force to be heard at institutional level ... if one analyses the present scenario in South Africa, it is clear that, in particular, non-wage earner atypical workers are not officially represented as separate categories on voice regulatory bodies, including tripartite institutions such as* NEDLAC."[94]

In South Africa atypical employees have for far too long been a neglected species within the framework of general employment and social protection regulation in South Africa. Moreover, prior to the new BCEA, the legislature's response to the plight of the atypical worker has, to a large extent,

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[93] Cordova, E.: "From full-time wage employment to atypical employment: A major shift in the evolution of labour relations.", International Labour Review. Volume 125, Number 6, (November – December 1986).

[94] Olivier, M.: "Extending Labour Law and Social Protection: The Predicament of the Atypically Employed", ILJ, Volume 19, part 4, pages 684 – 685, (1998).

been haphazard, unimaginative, unstructured and completely void of a principled treatment of issues affecting the atypical employees.

There are compelling social and economic reasons which require that we look critically at the social labour dispensation of atypical employees within our current labour legislation. The reason for this exercise should be to highlight and remedy any shortcomings and inconsistencies which may exist.

## 21.1 ATYPICAL WORKERS: PROVISIONS IN THE NEW BCEA

The new BCEA has heralded major statutory changes regarding atypical employees. The new BCEA in effect extends protection significantly, particularly in respect of the personal scope of application. A direct consequence of this is that a much wider category of atypical workers now enjoy the comprehensive protection provided by the BCEA.[95]

The new BCEA provides greater flexibility in arranging working hours, increased overtime pay (one-and-a-half instead of one-and-a-third, the normal pay), longer maternity leave, family leave periods and greater protection for night workers.[96]

There is one significant exception in respect of family responsibility leave in the BCEA. In terms of the Act the minimum requirement to grant at least three days' paid leave per annum does not apply to an employee who has worked for a particular employer for less than four months and an employee who works for an employer for less than four days a week.[97]

Another welcome development is that the new BCEA, for the first time in our industrial relations history has provided for independent contractors and home workers who do not fit the definition of "employee".

The 1995 LRA defines an "employee" as follows:

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[95] Olivier, M.: "Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed", ILJ, Volume 19, page 680, (1998).

[96] Chapters 2, 3 and 4 of the BCEA 75 of 1997.

[97] The Basic Conditions of Employment Act 75 of 1997 Section 27(1)

a) "any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any renumeration; and

b) any other person who in any manner assists in carrying on or conducting the business of an employer."[98]

Despite the exclusion in the above definition of the 1995 LRA, Section 55(4)(g) of the new BCEA stipulates that a sectoral determination by the Minister of Labour on the recommendation of the Employment Services Committee may in a sector or area prohibit or regulate task based work, piece work, home work and contract work. The immediate observation and criticism is that the new BCEA does not directly regulate the protection of these atypical workers such as independent contractors and home workers, who do not fall into the LRA definition of "employee". Instead the Act leaves it to the Minister of Labour acting on the recommendation of the Employment Services Committee or the advice of the Commission. The BCEA of 1997 provides that a sectoral determination by the Minister of Labour may specify minimum conditions of employment for persons other than employees.[99]

In order to provide sufficient coverage, Section 83 of the new BCEA further permits the Minister of Labour, on advice of the Commission, to deem any category of persons specified in a notice published in *The Government Gazette*, to be employees for purposes of the Act or any sectoral determination.

Despite the fact that the new BCEA has not directly regulated the protection of all atypical workers, one has to concede that a reasonable measure of flexibility has been built into the regulation of the position of independent contractors and other non-employee atypical workers.

Unions, because of the way they have hitherto organised themselves, are generally not adept at recruiting casual, part-time and other 'non-standard' employees. Therefore, unless unions begin to conceive imaginative ways of

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[98] The Labour Relations Act 66 of 1995 Section 213

[99] The Basic Conditions of Employment Act 75 of 1997 Section 55(4)(k)

organising atypical employees, they will become 'isolated enclaves' with a shrinking membership of full-time workers.[100]

Naidoo points out the current changes in employment practices: "*Labour markets all over the world are changing: the types of jobs being created are different to what they used to be. Fewer regular, full-time jobs are being created and more casual jobs are being created. This is the case in the United States, Brazil, South Korea, the European Union and South Africa.*"[101]

The reality is that employers are increasingly making use of atypical employees in order to cut costs and escape the social security obligations which they have in respect of full-time employees. It is therefore imperative that, in the light of a growing number of atypical employees, South African trade unions develop a coherent and viable strategy that will enable them to recruit and organise atypical employees in the labour market.

## 22. LABOUR LEGISLATION THAT TREATS INEQUALITY

South Africa has the most unequal distribution of income in the world. In its 1995 Country Review, the ILO concluded that South Africa had the highest levels of inequality of any country in the world for which the ILO had data. The nature and extent of these inequalities are spelt out in greater detail in the ILO Country Review (1996) as well as in the Labour Market Commission (1996).

This disparity in income levels was also highlighted by the Green Paper on Employment and Occupational Equity (1996) which preceded the Employment Equity Bill and the Employment Equity Act. It pointed out that a third of Blacks earn below R500 per month, compared to under 5% for whites. The Green Paper also showed that a white male South African was 5000 times more likely than an African woman to be in a top management position.

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[100] Naidoo, Ravi.: "Unions in Transition: Cosatu into the New Millennium", National Labour and Economic Development Institute, page 3, (1999).

[101] Naidoo, Ravi.: "Unions in Transition: Cosatu into the New Millennium", National Labour and Economic Development Institute, (1999).

Inequality is a central feature of the South African labour market. This inequality is most apparent from the statistics which show that black unemployment is six times the level of white unemployment.

Naidoo[102] makes reference to a NALEDI study which shows that senior managers in South Africa earn, on average, 36 times what a worker earns. This is in stark contrast to the wage gap between managers and workers in South Korea.

The gender aspect of inequality continues to be a serious problem, with women, particularly black women, occupying the lowest paying jobs. Moreover, they are given the least protection, with many of them comprising by far the largest number of part-time, casual, or temporary workers.

The inequalities induced by both race and gender also apply to income. According to the ILO Country Review, women's incomes are substantially lower than men's incomes. However, the average income for African men is less than that for white women.

To overcome these various forms of discrimination and inequality, the legislature has passed specific pieces of legislation. I will deal with each of them below.

The Employment Equity Act was promulgated in 1999. Its primary objective is to eradicate discrimination in the workplace and promote employment equity in respect of black people, women and people with disabilities..

## 22.1 EMPLOYMENT EQUITY ACT 55 OF 1998

On 1st December 1999 "Chapter Three", the main pillar of the Employment Equity Act was promulgated. This chapter is intended to remove discrimination and to bring about employment equity for blacks, women and people with disabilities.

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[102] Naidoo, Ravi.: "Unions in Transition: Cosatu into the new Millennium", National Labour and Economic Developmene Institute, page 41, (1999).

Section 2 of the Employment Equity Act provides:

*"The purpose of this Act is to Achieve equity in the workplace by –*

*a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination, and*

*b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce."*

There have been two views expressed on the purpose of the Act. The one view is that the Act is objectionable on account of its unwarranted intrusion into the market economy, and because it has a races basis. The proponents of this view maintain that the Act would impede the creation of jobs, an aspect which will have serious consequences for the economy of the country. The other view holds that the protections which the Act gives to persons who are not from "designated groups", would not result in the corrective action that is intended by the Act.[103]

Despite these detracting views, there is no gainsaying the fact that the Act extends the prohibition against unfair discrimination to virtually every aspect of the employment relationship.

The definition of "employment policy or practice" contained in Section 1 provides:

a) "recruitment procedures, advertising and selection criteria;

b) appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissals; and dismissal."

Labour Minister, Membathisi Mdladlana, told business, labour and government representatives at the launch that the government was obliged to

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[103] Van Niekerk, A.: Employment Equity, in "Current Labour Law", chapter 4, page 51, (1998).

hasten the change as racism and sexism continued to prevail in the workplace. He said: "*In reality, millions of Africans, Coloureds and Indians continue to suffer the aftermath of apartheid discrimination which denied blacks, women and those with disabilities access to education, employment opportunities, promotion and wealth creation.*"[104]

The Act requires employers who employ more than 50 workers and those tendering for State contracts to prepare equity plans and report to the Department before 1st December 2000.[105]

The Employment Equity Act is a piece of legislation that was developed through a process of intense negotiations by government, business and labour, at NEDLAC and it is intended to bring about greater social justice for South Africa's labour force.

## 22.2 SKILLS DEVELOPMENT ACT 97 OF 1998

There is a significant demand for skilled labour in the individual countries as a result of globalisation and workers are compelled to adapt to new technology and new work patterns.

The World Employment Report 1998 – 1999 says the following in this regard: "*Rapid globalisation and fast-paced technological progress also present new challenges that are common to all countries. The heightened competition and economic change that result from the combined forces of global economic integration and technological advance can cause instability and difficulties in maintaining the employability of large segments of a country's labour force. At the same time, these new economic forces provide new opportunities for economic growth and employment expansion. The level and quality of skills that a nation posses are becoming critical factors in taking advantage of the opportunities as well as minimising the social costs which rapid technological transformations and the transition to a more open economy entail.*"[106]

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[104] Sowetan: 24th November 1999

[105] The Employment Equity Act 55 of 1998, Section 20 and Section 21.

[106] World Employment Report 1998 – 1999, page 182

The Skills Development Act[107], which came into effect in 1999, requires companies to pay 0.5% of their salary bill to the South African Revenue Service by February 2000. The levy will increase to 1% in 2001. Companies and institutions can recover these payments provided they are able to prove that training was undertaken in accordance with the provisions of the Skills Development Act.

Clearly, the Skills Development Act has been designed to ensure that South Africa has a well-trained and adaptable workforce that can improve our economic competitiveness.

This is an important step in the right direction as it puts into action the findings of empirical evidence which points to the conclusion that a better trained labour force can increase competitiveness, ensure better complimentarity between human and physical capital, reinforce economic growth, improve job prospects and ease the process of adjustment which is brought about by globalisation and technological advancement.

This evidence is further reinforced by the ILO's 1998 – 1999 World Competitiveness Report whose findings confirm that "the best results are achieved in an overall growth promoting environment and when training decisions are taken in close consultation between government, employers and workers".

Naidoo[108] says that because of the inherited structure of the economy, the skills deficit in South Africa will take at least a generation to overcome.

In order to overcome the poor performance by industries, the low levels of investment and the low level total factor productivity in the economy, the Department of Labour in conjunction with the Department of Education have shown they are determined to improve our country's human resources by enhancing the skills of the labour force.

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[107] The Skills Development Act 97 of 1998

[108] Naidoo, Ravi.: "Unions in Transition: Cosatu into the New Millennium", National Labour and Economic Development Institute, page 2, (1999).

Through the establishment of a National Qualifications Framework (NQF) under the South African Qualifications Authority (SAQA), South Africa has laid the foundation for an integrated approach to education and training.

According to the Department of Labour, the implementation of the Skills Development Act is intended to:

- upgrade the skills of the workforce so that they are able to meet the challenges of globalisation and the changes in the nature of production;
- facilitate infrastructural delivery and the development of micro-, small and medium scale enterprises;
- increase the level of investment in education;
- enhance the employment prospects of vulnerable sectors of the community, such as youth, rural women and atypical workers;
- ensure that the institutions set up by the Skills Development Act, such as the National Skills Authority (NSA) and the Sectoral Education and Training Authorities (SETAs) and the National Skills Fund function effectively;
- ensure that the initiatives of the Labour Department are adequately co-ordinated with those of the Department of Education to produce an effective human resource development strategy for the country.[109]

## 22.3 FIFTEEN POINT PROGRAMME OF ACTION

In its Fifteen Point Programme of Action the Ministry of Labour has set itself the following priorities in respect of vulnerable workers:

- Setting minimum wages for farm and domestic workers at levels that will endeavour to protect jobs while curbing extreme levels of exploitation;
- Considering deeming categories of workers as employees where the relationships is one of substantial dependence and subordination so that they can be entitled to labour protection;
- Researching and implementing measures to improve the health and safety of workers in small business and the informal sector;

[109] Fifteen Point Programme of Action of the Ministry of Labour, page 30, (1999).

- Promulgating a Code of Good Practice in relation to workplace disability so as to facilitate the entry of disabled people into employment and protect those in employment;
- Promulgating a Code of Good Practice in relation to HIV / AIDS to prevent discrimination of people with HIV / AIDS and ensure that workplaces have programmes to prevent the spread of HIV / AIDS.

This five year programme of action which the Ministry of Labour introduced in respect of vulnerable employees will certainly have a positive effect on the South African labour market.

## 23. LABOUR MARKET FLEXIBILITY

The general view within the Department of Labour as articulated by the director general, Sipho Pityana, is that despite some "inherited rigidities", the labour market in South Africa is sufficiently flexible and that government's legislative programme has the necessary capacity to establish an appropriate balance between flexibility and protection of labour standards.[110]

This confirms the statement made by an ILO economist who after completing a review of the South African labour market said the following about labour market flexibility: "*South Africa has a flexible labour market. In some respects it may be too flexible. ... It is almost comical to describe South Africa as having employment inflexibility. Many workers have little employment protection, retrenchments are fairly easy and widespread, notice periods are short or non-existent, and most firms can resort to temporary or casual labour and, if need be, labour contracting – the world's most flexible labour system and spreading like wildfire.*"[111]

Despite this view, the South African Chamber of Business (Sacob), over a protracted period, has criticised the governments' new labour regulations. They contend that the new labour legislation favours social equity at the expense of employers. Sacob has made numerous representations to government to revise labour regulations so that the labour market may become

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[110] Address at 12th Annual Labour Conference held in Durban in July 1999.

[111] Naidoo, Ravi.: "Unions in Transition: Cosatu into the New Millenium", National Labour and Economic Development Institute, page 45, (1999).

more internationally competitive. Gerrie Bezuidenhout, the director of Labour Affairs at Sacob, said the government had "gone too far" and that "these regulations favour workers and trade unions at the expense of employers, and they create problems for business when they have to do such things as adjust their employment levels".[112]

And in 1999, Raymond Parsons, the director general of Sacob, said business had the following three sets of concerns in respect of the current labour market regulation: "*The first is that the new labour laws do not have sufficient regard for their economic consequences and successive layers of regulation have raised the unit cost of labour relative to South Africa's competitors.*
*The second set of concerns is that the new labour laws are overly presciptive and impose obligations upon the parties that are far better left to collective agreement and local regulation.*
*The third set of concerns was that the new laws were not flexible enough to accommodate the changing requirements of the workplace and limited the scope of variation permissible in any particular set of circumstances.*"[113]

Because of mounting pressure from business and the need to attract foreign investors, Government, at the highest level, agreed to embark on a labour market review process that began early in 1999. President Thabo Mbeki committed Government to this process at the opening of Parliament in 1999, at the 1999 Presidential Job Summit and again at the opening of Parliament on 4th February 2000.[114]

In 1998 the Department of Labour commissioned the Ntsika Enterprise Promotion Agency to conduct an impact assessment of the BCEA, particularly on small business, (See Appendix I).[115]

The Ntsika Report found that the BCEA would not have an adverse effect on the economy. It did, however, show that the BCEA would significantly affect sectors that worked extended hours and those that would be adversely affected by rising labour costs. The Ntsika Report also showed that certain sectors, such as catering and accommodation, transport, service stations, security services, general dealers, cleansing and personal services would have

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[112] Cape Times, Business Report, 9th June 1999.

[113] Cape Times, Business Report, page 5, 26th February 1999

[114] Cape Argus, page 1 and 2, 4th February 2000.

[115] Ntsika Report, (1998).

difficulty complying with those provisions in the BCEA which regulate overtime rates, working hours, Sunday work, night work and maternity and family responsibility.

The Department of Labour then appointed a tripartite ministerial task team to study the Ntsika Report and the Employment Conditions Commission made recommendations to the Minister. It proposed the promulgation of a special determination by the Labour Minister which would strike an appropriate balance between his commitment to protect the rights of workers employed in small business and to create a flexible environment in which small business can grow and create jobs.

The task team report, which was presented to the Minister of Labour during 1999, proposed that employees employed by small business should be allowed to work 15 hours overtime instead of 10, the payment of time-and-a-third for overtime instead of time-and-a-half, and a total of 21 days leave including family responsibility, instead of 21 days leave and an additional 3 days of family responsibility leave. Moreover, the task team recommended that an employee's working hours could be averaged for up to four months by a written individual agreement.[116] This is a significant departure because in the BCEA, averaging is only permitted by collective agreement.

The Minister adopted the recommendation of the task team and on 15th November 1999 gazetted the determination which relaxes major aspects of the BCEA for businesses which employ 9 or fewer employees, as identified by Ntsika.

There has been mixed reaction from both business and organised labour regarding the Minister of Labour's decision to relax certain provisions in the BCEA. Cosatu has reserved the right to take legal opinion on whether the new ministerial determination was constitutional or not.[117] Sacob, on the other hand, welcomed the ministerial determination, but they sought to shift the barriers even more. Their spokesperson, Janet Dickman said: "*This shows the government is taking into account the importance of small business, but we are disappointed the changes only apply to micro-enterprises.*"[118]

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[116] Task Team Report on the Basic Conditions of Employment Act, 1999

[117] Cape Times, Business Report, page 10, 17th November 1999

[118] Cape Times, 7th November 1999

Minister Mdladlana said the "variations"' which the determination would bring about, would in no way deprive workers of their rights nor would they remove the protection of the law or the constitution.

It is difficult to gauge the consequences, but one thing is clear, the government would have to continue engaging both business and organised labour in negotiations which would lead to a shared vision on the process for reviewing South Africa's current labour legislation. And the goal would have be to balance the need for workers' rights to be respected while at the same time responding to the imperatives of the global economy and the need to become more economically competitive.

The benefits of social partnerships were highlighted by Kieren Mulvey, CEO of Ireland's Labour Relations Commission, at the 12th Annual Labour Law Conference held in Durban in July 1999. Malvey explained how Ireland's economic recovery was facilitated by a social partnership model which was based on agreements reached between labour, government and business, and whereby all parties in the tripartite were required to vigorously pursue aspects relating to wages, tax, job creation, health, education and social security.

We could glean much from Ireland's competitive edge in relation to company tax, tax breaks, high skills levels and lower wage rates, compared to the rest of Europe. The Irish model is worth examining as it could enable South Africa to look more critically at the incentives it creates for both business and labour to agree to policies which would set the country's economy on a positive growth path, with social stability and significant tangible benefits for labour, business and the entire country.

## 24. CONCLUSION

Now that South Africa has demonstrated its ability to achieve basic human rights and equality for all its citizens[119], a genuine voice for organised labour and a reasonable measure of economic and social progress, the government, through its co-operation with labour and business, needs to steer the economy toward increased competitiveness within the global market economy. This it should do by astutely managing the social and workplace tensions that will accompany the social and economic development of a country that has

[119] The Bill of Rights in 1996 Constitution and the Employment Equity Act 55 of 1998.

achieved a political miracle and that is poised to achieve a social and economic miracle with economic growth, the creation of good quality jobs and the improvement of labour standards for all employees, including atypical employees and vulnerable categories.[120]

The imperatives of an international globalising economic system has made it absolutely necessary for South Africa to strike a balance between the market economy and the social interests of workers. South Africa is under an obligation to view workers' rights from a broader perspective than simply the international commitment to the enforcement of core labour standards. South Africa's Labour policy makers and the legislature should consider more than the protection of jobs and working conditions. They should in effect increase the protection economic and social rights for workers, including atypical workers and those in vulnerable categories.

There is no doubt that South Africa, through the State, organised labour and the business sector, has to find innovative ways with which to search for answers to the social and economic challenges which the global economy presents.

While it has to be recognised that globalisation could adversely affect specific sectors and groups, for which targeted policy measures are required, a more integrated world economy appears to offer benefits and growing opportunities for economic growth and employment expansion to both the industrialised countries and the developing countries.

The real success of the South African industrial relations system will depend on the extent to which it can win the confidence of international investors through the creation of effective institutions and practices which will best serve the interests of both labour and business. It is going to be a walk on a tight rope which will require our government to display an exceptionally high quality of leadership, with a strong attainable vision that is clearly articulated and carefully pursued.

Social dialogue at all levels has a pivotal role. The experience in South Korea and other South East Asian countries has shown that there is a clear and

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[120] Kochan, Thomas, A.: "Labour and Employment Policies for a Global Economy", ILJ, Volume 15, part 4, pages 689 – 690, (1994).

definite link between a well-developed social dialogue, (with significant investment in social development), and increased productivity (with an increased competitive advantage). Moreover, it has been shown that social dialogue has numerous benefits at both plant and sectoral level and that it increases industrial peace which in turn contributes to the economic growth of a country.

Feys[121] points out that research in South Africa has indicated that the lack of consultation and good communication between management and workers contributed to a decrease in productivity.

In order to remedy the lack of dialogue, the Report of the Presidential Commission stated:

"*A co-operative approach to productivity requires both the participation of and the sharing of gains of all elements of the workforce and management. Productivity enhancement must be recognised as the source of increased income and therefore a principal and common tripartite objective.*"[122]

From this it is clear that the South African government realised the need to co-operate fully with the established tripartite bodies, which it acknowledged should have real bargaining power which would facilitate the process of transforming labour standards and the various modes of production.

The new democratic government has shown through all the recent labour legislation referred to above that it fully believes that social progress with "fair" labour standards are a prerequisite for economic progress and that that is the path which it intends to pursue.

So increasingly the South African government through dialogue in the NEDLAC tripartite will ensure that the necessary statutory institutions have the capacity to design social policies that are suited to the country's particular circumstances.

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[121] Feys, T.: "Labour Standards in Southern Africa in the context of Globalisation: The need for a common approach", ILJ, page 1478, (1998).

[122] Restructuring the South African Labour Market, Report of the Presidential Commission to Investigate Labour Market Policy, page 78, (June 1996).

All this augurs well as South Africa seeks to meet both its objectives, namely to attain economic growth, and social justice. One can only hope that the tripartite will become stronger and that government, labour and business might develop a shared vision about suitable labour standards as well as the need for South Africa to find its place within the global economy.

Finally, with the South African legislature having indicated in the 1995 LRA that it intends to increase collective bargaining coverage and that it is committed to promoting sectoral level bargaining, there is a need to retreat from the "one-shoe-fits-all" approach in the BCEA. The process, which the Minister of Labour began in 1999, of reviewing sections of the BCEA needs to continue and the role players in business and labour need to be persuaded about the need to review and adapt a number of non-core regulations, standards and levels which have resulted in "unintended consequences".

If the legislature is serious about extending bargaining coverage to atypical employees and other vulnerable categories it should ensure that sectoral agreements are designed in a manner which would facilitate such "flexible" coverage, and the Department of Labour, through the appropriate mechanisms, should continue to review its current regulations and policies so that ultimately South Africa is able to maintain basic labour standards while facilitating job creation and general economic development.

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| Sec | Condition Of Employment | Individual Agreement Limits | Collective Agreement Limits | Bargaining Council Collective Agreement Limits | Minister Variation Limits | Ecc Determination Limits |
|---|---|---|---|---|---|---|
| 7 | **Regulation of working time**<br>A provision establishing certain core principles in this regard | *May not reduce protection by implication* | *May not reduce protection by implication* | May not reduce protection<br>Sec 49(1) | May not make a determination in this regard<br>Sec50(2) | May not make a sectoral determination<br>Sec 55(6) |
| 9 (See also 13) | **Ordinary hours of work**<br>45 in a week<br>9 hours per day for a five day week<br>8 hours per day for a six day week | May be extended by agreement for 15 minutes on a day to help customers.<br>Subject to a max. of 60 minutes in a week.<br>Sec 9(2) | *May not reduce protection by implication* | May not reduce protection<br>Sec 49(1) | May not make a determination in this regard<br>Sec50(2) | May not reduce protection<br>Sec 55(6) |
| 10(1) | **Overtime limits**<br>Not compulsory to work<br>Three hours per day limit<br>Ten hours per week limit | Agreement may provide for compulsory overtime. Such an agreement concluded at the start of employment lapses after a year and will have to be renewed.<br>Sec 10(5) | *May vary as for individual agreements*<br>*Sec 49(2)* | *May Vary* | *May Vary* | *May Vary* |
| 10(2) | **Overtime payment**<br>Paid at time and a half<br>Must be paid within one month of overtime work | Agreement may provide for<br>Full pay and half the time worked off on full pay; or<br>for one and a half times the time worked off on full pay<br>Agreement may provide for payment up to a year after the overtime was worked.<br>Sec 10(3) and 10(4)(b) | *May vary as for individual agreements*<br>*Sec 49(2)* | *May Vary* | *May Vary* | *May Vary* |
| 11 | **Compressed working week**<br>Merely allows modification of daily limits specified in sec 9 | An agreement in writing may provide for daily limits for ordinary hours to be extended to 12 hours. Subject to -<br>45 hour limit per week<br>ten hour overtime limit per week; and<br>a five day week. Sec 11 | *May vary as for individual agreements*<br>*Sec 49(2)* | *May vary* | *May vary* | *May vary* |

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| 12 | **Averaging of hours**<br>Permits variation of working hours | *May not vary* | Hours of work and overtime may be averaged over a four month period by agreement subject to maintaining an average of<br>45 ordinary hours per week<br>5 hours overtime per week<br>The first two such agreements lapse after a year and will have to renewed.<br>Sec 12 | *May Vary* | *May Vary* | *May Vary* |
| 14 | **Meal intervals**<br>One hour meal interval after 5 hours | Agreement in writing may<br>Reduce the meal interval to 30 minutes<br>Dispense with the meal interval in the case of a six hour or shorter work day.<br>Sec 14(5) | *May vary as for individual agreements*<br>*Sec 49(2)* | *May Vary* | *May Vary* | *May Vary* |
| 15 | **Daily and weekly rest period**<br>12 hour rest period per day<br>36 hour rest period per week including Sunday | Agreement may omit Sunday from the weekly rest period.<br>By written agreement the daily rest period of an employee who lives on the premises and has a three hour lunch may be reduced to 10 hours.<br>A written agreement may provide for a 60 hour rest period every two weeks or for the shortening of one rest period by up to eight hours if the next one is extended accordingly.<br>Sec 15(1)(b), 15(2) and 15(3) | *May vary as for individual agreements*<br>*Sec 49(2)* | *May Vary* | *May Vary* | *May Vary* |

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| 16 | **Pay for work on Sundays**<br>If Sunday is a normal working day then paid at time and a half else paid at double time - but subject to a minimum of one days' wages.<br>Payments must be made within one month of the Sunday work to which it applies. | By agreement paid time off may be traded for the equivalent payment in respect of Sunday work.<br>By agreement in writing the period within which payment must be made can be extended by up to 12 months<br>Sec 16 (3) and 16(6)(b) | *May vary as for individual agreements*<br>*Sec 49(2)* | *May Vary* | *May Vary* | *May Vary* |
| 17 | **Night work**<br>Night work is work between 18:00 and 06:00 and is not automatically permitted | Night work can be worked only by agreement if additional compensation is paid and suitable transport to and from work is available.<br>Sec 17(2) | *May vary as for individual agreements*<br>*Sec 49(2)* | *May vary* | *May vary* | *May vary* |
| 17 (3) | **Late Night Work**<br>Special provisions relate to work between 23:00 and 06:00 aimed at protecting health and safety of the workers. | *May not vary* | *May not vary* | May not reduce protection<br>Sec 49(1) | May not make a determination in this regard<br>Sec50(2) | May not reduce protection<br>Sec 55(6) |
| 18 | **Public Holidays**<br>Working on a holiday is not compulsory. | By agreement an employee may be required to work on a public holiday. | *May vary as for individual agreements*<br>*Sec 49(2)* | *May vary* | *May vary* | *May vary* |
| 20 | **Annual leave**<br>21 days per year; or<br>one day for every 17 days worked; or<br>1 hour for every 17 hours worked. | Agreement may be reached on when leave may be taken but if no agreement the employer will decide.<br>Sec 20(10) | *May vary as for individual agreements*<br>*Sec 49(2)* | May not reduce annual leave to less than two weeks.<br>Sec 49(1) | *May vary* | *May vary* |
| 21 | **Pay for annual leave**<br>Payment for the leave period must be made at the start of the leave | By agreement payment may be made on the normal pay day. | *May vary as for individual agreements*<br>*Sec 49(2)* | *May vary* | *May vary* | *May vary* |
| 22 | **Sick leave**<br>Six weeks sick leave in a 36 month cycle.<br>During first six months 1 day's sick leave for every 26 days worked.<br>Sick leave paid at normal daily rate. | An agreement may reduce the payment for sick leave by up 25% if a commensurate increase in the amount of sick leave is provided for.<br>Sec 22(6) | *May vary as for individual agreements*<br>*Sec 49(2)* | May not reduce protection<br>Sec 49(1) | *May vary* | *May vary* |

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| 25 | **Maternity leave**<br>Four consecutive months of maternity leave. | *May not vary* | *May not vary* | May not reduce maternity leave<br>Sec 49(1) | *May vary* | *May vary* |
| 27 | **Family responsibility leave**<br>Three days paid leave for birth or illness of child or death of immediate family. | *May not vary* | May vary the amount of family responsibility leave and the circumstances under which it may be taken.<br>Sec 27(7) | *May vary* | *May vary* | *May vary* |
| 37 | **Notice of Termination of employment**<br>The following notice must be given -<br>One week during first four weeks of employment<br>Two weeks during remainder of first year (four weeks in the case of farm and domestic workers)<br>Four weeks after the first year | *May not vary* | A Collective agreement may vary the period of notice<br>Sec 37(2) | *May vary* | *May vary* | *May vary* |
| 41 | **Severance pay**<br>One weeks pay for every year of service | *May not vary* | *May not vary* | *May vary* | *May vary* | *May vary* |
| 43 | **Prohibition of child labour**<br>No employment of persons under 15 | *May not vary* | *May not vary* | May not reduce protection<br>Sec 49(1) | May not make a determination in this regard except to govern child labour in performing arts and sports<br>Sec50(2) | May not make a sectoral determination except to govern child labour in performing arts and sports<br>Sec 55(6) |
| 48 | **Forced labour**<br>Forced labour is prohibited | *May not vary* | *May not vary* | May not reduce protection<br>Sec 49(1) | May not make a determination in this regard<br>Sec50(2) | ???? |

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