THE EXTENSION OF LABOUR LAW PROTECTION TO ATYPICAL EMPLOYEES IN SOUTH AFRICA AND THE UK

Stella Vettori (Professor UNISA)

SOUTH AFRICA

Introduction

There are two main vehicles for the creation of legally binding conditions of work for the protection of legitimate employee interests. One means of creating employee right is through the negotiation and creation of legally binding collective agreements by trade unions representing employees on the one hand and employers or employers organisations on the other. The other means of creating employee rights is through legislation that provides for minimum terms and conditions of employment. Aside from terms and conditions of work, legislation also provides for procedural and substantive fairness on termination of employment and with reference to other labour practices.

The problem for atypical employees is that if they do not qualify as employees in terms of the legislation they generally are not entitled to these rights. Secondly, the LRA provides only employees with the right to freedom of association. This combined with the practical difficulties involved in mobilizing workers in the informal sector and other atypical employees renders collective bargaining an unsuitable and impractical means of extending protection to atypical employees.

Even when atypical employees do qualify for legislative protection, they are often ignorant of these rights, or they are unaware that they are available to them as atypical employees. On top of this, even if they are aware of these rights, the enforcement mechanisms, primarily through the courts and other tribunals are often beyond their financial means. Furthermore, the Department of Labour is incapable of properly policing and enforcing labour standards in the formal economy, let alone the informal economy due to a lack of resources. (Benjamin 2008 at 1587)

Workers and Statutory Employees

Section 213 of the Labour Relations Act 66 of 1995 (hereinafter the 'LRA') defines an employee as 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 any other person who in any manner assists in carrying on or conducting the business of the employer. Despite this relatively broad definition, the South African Department of Labour and the legislature have for a long time been aware of the fact that numerous atypical employees are excluded from the ambit of protection provided by legislation and collective bargaining. (Department of Labour's Green Paper: Policy Proposals for a New Employment Statute (GG 23 Feb 1996)) Section 200A was therefore introduced in the 2002 amendments to the LRA. It provides that a person will be presumed to be an employee if one of the following conditions are met:

- there is control or direction in the manner the person works;
- there is control or direction in the person's hours of work;
- the person form s part of the organisation;
- an average of 40 hours per month has been worked for the last 3 months;
- the person is economically dependent on the provider of work;
- the person is provided with tools or equipment;
- the person only works for one person.

This presumption will only be operative where an employee earns less than a prescribed amount per annum.

This amendment is also found in section 83(A) of the Basic Conditions of Employment Act 75 of 1997 (hereinafter the "BCEA") which contains the same definition of an employee as the LRA. Obviously, the legislature hoped to extend the net of protection to workers who may otherwise have been considered atypical employees as opposed to employees in terms of the legislation and would therefore not have been covered by the protective legislation. In terms of section 83(1) the Minister of Labour has also been given the power to extend the provisions of BCEA to persons who do not qualify as employees in terms of the legislation.

However, this attempt on the part of the legislature to extend the net of protection to atypical employees has not been entirely successful. The fact that the administrative power of extension of the Minister of Labour provided for in terms of the BCEA has never been utilized has been attributed to 'a lack of capacity within the Department of Labour'. (Fischl and Klare 2002 at 91) Secondly, the courts' traditional approach to defining an employee has also been described as 'unimaginative' with the result that there is a certain amount of lack of protection for a 'significant proportion of the workforce'. (Fischl and Klare 2002 at 91) The criteria that are relied upon for the operation of the presumption of being an employee are based on the 'traditional tests' as applied by the courts. As such the criticisms leveled against the common law approach in determining who qualifies as an employee are also applicable to the 2002 Amendments of the LRA.

There is however, a glimmer of hope in that the courts have of late, taken cognizance of the fact that the statutory employee embraces a concept that is broader than the common law employee created in terms of a contract of employment. The Labour Court has held that the definition of employee in labour legislation is not necessarily rooted in a contract of employment and that any person who works for another and receives remuneration falls within the statutory definition in section 213 of the LRA. In other words the employment relationship transcends the contract of employment and is given prevalence. In *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 *ILJ* 1480 (LC), the Labour Court held that despite the fact that the contract of employment contravened immigration legislation, the worker remained an 'employee' in terms of the LRA.

The courts are also inclined to consider the substance of the relationship as opposed to the form thereof. (see for example in *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC) This test has been referred to as the "reality test".

Casual workers who work for 24 hours or more per month do however have a measure of legislative protection. All the provisions of the BCEA are applicable to them except for section 27 which provides for family responsibility leave. Therefore they are entitled to paid sick leave and annual leave, unpaid maternity leave of 4 months and certain notice periods on termination of the contract. Whether or not this floor of guaranteed minimum standards is applied in practice to casual workers is doubtful. Usually casual workers are not represented by trade unions and are often ignorant of their rights. In addition to this, their usually desperate plight compounds the imbalance of power between them and the provider of work and places them in no state to demand their rights or negotiate meaningfully.

Agency Workers

Another legislative attempt to cast the net of protection wider to include certain atypical employees is to be found in section 198 of the LRA and section 82 of the

BCEA. These provisions regulate the so-called 'triangular relationships' in terms of which a labour broking firm or temporary employment service (TES), hires out labour to a user company. In terms of the provisions of the legislation, the worker is deemed to be the employee of the TES. However these provisions specifically exclude independent contractors from their scope. Given the almost *sui generis* relationship between the TES the agency employee, the fact that it is often the user company and not the TES that exercises control and discipline over the employee, TES employees may experience some difficulties in proving that they are employees and not independent contractors. The BCEA and the LRA also provide for joint and several liability of the temporary employment service and the client or user company in the case of breach of any collective agreement concluded at a bargaining council, or contravention of any sectoral determination, contravention of the provisions of the BCEA or arbitration award.

The Constitutional Right to Fair Labour Practices

Section 23(1) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that 'everyone' has the right to fair labour practices. As discussed above, although some 'atypical employees' enjoy protection in terms of labour legislation, many of these 'atypical employees' may still not qualify as employees in terms of the legislation and therefore fall beyond the net of protection. These 'atypical employees' can conceivably turn to the constitutional right to fair labour practices. Also since national intelligence and the military are excluded from the ambit of the LRA, these 'workers' may also conceivably turn to section 23(1) of the Constitution for relief. Finally, section 23(1) may possibly also be utilised for relief where the alleged unfair labour practice does not fall within the scope of the definition of an unfair labour practice in terms of the LRA. Section 186(2) of the LRA defines an unfair labour practice as "any unfair act or omission that arises between an employer and an employee involving" unfair conduct of the employer with regard to inter alia, promotion, probation, training, suspension and disciplinary action short of dismissal and an occupational detriment in contravention of the Protected Disclosures Act 26 of 2000.

According to Cheadle, (Cheadle, Davis and Haysom 2002 at 364-365) the subject of the sentence in section 23(1), namely 'everyone' should be interpreted with reference to the object of the sentence, namely 'labour practices'. He argues that since 'labour practices are the practices that arise from the relationship between workers, employers and their respective organisations' the term should be understood in this sense and should only include the persons and organisations specifically named in section 23, namely workers, employers, trade unions and employers' organisations. This interpretation would be in line with an approach that looks to the section as a whole in ascertaining the true intention of the legislature.

SA National Defence Union v Minister of Defence & Another 1999 (4) SA 469 (CC); 1999 *ILJ* 2265 (CC), in considering the meaning of 'worker' the Constitutional Court stressed the importance of its duty in terms of section 39 of the Constitution to consider international law. The Court, in applying the approach of the ILO concluded that even though members of the armed forces did not have an employment relationship with the defence force *strictu sensu*, they nevertheless qualified as workers for purposes of the Constitution.

The crux of the enquiry as to whether a person qualifies as a worker for purposes of section 23 of the Constitution is that the relationship must be 'akin' to the relationship resulting from a contract of employment. What renders such relationship 'akin' to the relationship in terms of the common law contract of service is the presence of an element of dependency on the provider of work.

It could be argued that the word 'everyone' should not be given the same meaning as the word 'worker' which appears in subsections 2 to 4 of the section because the use of the word 'everyone' by the legislature in section 23(1) as opposed to the word 'worker' must have been deliberate. On the other hand, a likely reason for the use of the word 'everyone' is an intention on the part of the legislature to avail not only employees or workers, but also employers or providers of work, of the right to fair labour practices.

The Constitution does not define 'fair labour practice'. In *National Union of Health and Allied Workers Union v University of Cape Town and Others*(2003) 24 *ILJ* 95 (CC) the Constitutional Court held that the word 'everyone' in section 23(1) of the Constitution is broad enough to include employers and juristic persons. As such it is possible for an employee to commit an unfair labour practice. The court expressed the view that the focus of section 23(1) of the Constitution is the relationship between the employer and the worker and its continuation, so as to achieve fairness for both parties. In order to achieve balance between the conflicting interests of the parties these interests should be accommodated. With regard to giving content to the constitutional right to fair labour practices the court stated that the concept of fair labour practice is incapable of precise definition and "what is fair depends upon the circumstances of a particular case and essentially involves a value judgement". The Court also referred to "domestic experience" to be found "in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA…" (Par. 33) Similarly, the court in *Denel (Pty) Ltd v Vorster* 2004 *ILJ* 659 (SCA) at 667 held that the constitutional dispensation introduced into the employment relationship 'a reciprocal duty to act fairly'.

Although these cases may shed some light on the meaning to be attributed to the right to fair labour practices, the concept, like that of *bona fides* remains incapable of precise definition.

The broad terms used in section 23(1) of the Constitution in describing not only the rights accorded but also the beneficiaries of the right to fair labour practices (namely 'everyone' and 'workers') have prompted the suggestion that an extensive interpretation of the definition of these words is possible, and that if such an extensive interpretation were to be accepted, it would lay the foundation for the possibility of the Constitutional Court finding the exclusion of some workers from other labour legislation to be unconstitutional. (Fischl and Klare 2002 at 79-80)

With regard to the interpretation of the Bill of Rights, section 39(1)(a) provides that when interpreting the Bill of Rights, a court, tribunal or forum "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom". Section 39(2) provides further that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." Given the vast number of atypical employees who are excluded from labour protection, a broad interpretation of the word 'everyone' in section 23(1) of the Constitution so as to include a broad range of atypical employees, may be necessary in order to promote "human dignity, equality and freedom' and the "spirit, purport and objects of the Bill of Rights" as required in terms of section 39(1) and (2) of the Constitution.

THE UNITED KINGDOM

Workers

The English legislature has attempted to provide some sort of protection for the atypical employee by extending the ambit and application of certain protective labour legislation to workers who would not necessarily qualify as 'employees'. This has been done by making some legislative provisions applicable to 'workers'. The legislature has chosen to use the term 'worker' to denote not only a standard or typical employee, but also a work relationship that falls somewhere between an independent contractor and a standard employee. 'Worker' has been defined in the various pieces of legislation as:

"… an individual who has entered into or works under (or, where the employment has ceased, worked under) -

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

The rights which this legislation has extended to 'workers' include the right to receive remuneration which is above a certain minimum threshold, the right not to suffer unauthorized deductions from one's salary, the right to be accompanied at grievance and disciplinary procedures, the right to annual leave and rest periods, the right not to work more than a certain amount of hours and, for part-time workers, the right not to be treated less favorably than comparable full-time workers, who also do not qualify as employees.

It seems that the English legislatures' attempts to spread the net of protection provided by legislation further, have not met with a great measure of success. The English legislature and judiciary has fallen into the same trap as their South African counterparts by the adoption of the same criteria that are required in terms of the traditional common law tests applied by the courts in order to qualify as an employee. The fact that in terms of the statutory definition of 'worker' the 'worker' is required to 'personally' do or perform the work or services, is the same requirement for a traditional, standard contract of employment. Unfortunately, despite older cases that have held that a limited power to appoint substitutes is not inconsistent with a contract of employment,(*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515) more recent decisions have taken a more rigid approach to this requirement. One such case is *Express and Echo Publications Ltd v Tanton* [1999] ICR 693. In this case the putative employee was a driver. In terms of the contract he was empowered to appoint a substitute if he was 'unwilling or unable' to perform the services himself. The Court of Appeal found this term of the contract inconsistent with a contract of employment. However, in *Byrne Brothers (Formwork) Ltd v Baird and others* [2002] ICR 667 where delegation was only permissible in circumstances where the individual was unable to do the work himself, and the employer's permission was required for such delegation, the EAT held that a limited power to delegate was not inconsistent with a contract of employment. In *Redrow Homes (Yorkshire) v Wright* [2004] IRLR 720 the contract provided terms to the effect that the contractor 'must at all times provide sufficient labour to maintain the rate of progress laid down from time to time by the

company…On each site where the work is in progress the contractor must maintain a competent foreman who has complete control of all labour engaged on the work.' Despite these provisions the Court of Appeal upheld a decision of the EAT, that it was the intention of the parties at the time of entering into the contract, that the contractors would personally perform the work. This conclusion was reached by consideration of inter alia the basis of the 'scheme of payments' and the terms of the contract as a whole.

The requirement of mutuality of obligation can result in an insurmountable obstacle to qualifying as a 'worker'. This is especially true of part-time and casual employees since mutuality of obligation in the employment context 'requires a commitment to on-going relations.' (Brodie 2005 at 254) The case of *O'Kelly and others v Trusthouse Forte Plc* [1983] IRLR 369 illustrates this fact. The banqueting department of a hotel company kept a list of about 100 people who were known as 'regulars'. These 'regulars' could be relied upon by the company to offer their services on a regular basis. In exchange the company gave them preference in the allocation of available work. Three of these 'regulars' who had no other source of income complained to an industrial tribunal that they had been unfairly dismissed. The industrial tribunal dismissed their claim on the basis that even though the facts demonstrated that the arrangement between the 'regulars' and the company had many of the characteristics of a contract of employment, the absence of mutuality of obligation barred the 'regulars' from qualifying as employees. Consequently, they could not be unfairly dismissed. The Court of Appeal, upholding the industrial tribunal's finding, held that the absence of an undertaking on the part of the company to offer work, and the lack of an undertaking on the part of the 'regulars' to accept' work meant that there existed no mutuality of obligation and therefore there was no contract of employment.

By contrast, in *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984] IRLR 240 the Court of Appeal, relying on the fact that the relationship between the parties had endured for a number of years, was able to conclude that this gave rise to an expectation on the part of the applicants that the company would continue to provide work and a corresponding expectation on the part of the company that the applicants would continue to do the work. Consequently there was found to be mutuality of obligation. On this basis the Appeal Court found that the applicants were employees. This is despite the fact there were many facts that pointed to a situation of atypical employment: Gardiner and others worked from home sewing pockets onto trousers manufactured by the company. They were not paid by hour, but rather according to the amount of work they did. There were no fixed hours of work and they were not obliged to accept any particular quantity of work. The Appeal Court held that the mere fact that the home worker could arrange his own hours of work, the amount of work he did, and his holidays did not detract from the fact that as a result of the fact that a mutuality of obligations could be implied into the relationship, there was in fact a contract of employment.

Brodie's view is that the requirement of mutuality of obligation should be done away with as a necessary criterion for an employee and for a 'statutory worker'. (Brodie 2005) Davidov (2005 at 65) suggests that instead of being a 'prohibitive threshold requirement' the presence of mutuality of obligations should merely be one of the factors taken into consideration in determining the degree of the worker's dependence on the working relationship.

The ease with which employers can insert clauses that negate mutuality of obligation and thereby avoid statutory obligations renders the position of atypical employees precarious and limits the effects of the legislature's attempts to spread the net of

statutory protection to the 'statutory worker'. Unfortunately, despite the fact that some decisions have given precedence to the reality of the relationship as opposed to a formal reading of the terms of the contract, some decisions have preferred to uphold the formal wording of the contract. (See *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437)

Temporary Employment Services

The estimated number of agency workers in the UK is between 1.1 million and 1.5 million and the UK also has a larger proportion of agency workers than any other EU country. (*Agency Working in the UK: A Review of the Evidence* BERR, October 2008). Unlike South Africa, there is no legislative provision in England that deems the TES to be the employer of the agency worker. Instead, there is a line of court decisions that impose liability on the user company on the basis of an implied contract of employment between the agency worker and the user company.(See *Cable & Wireless PLC v Muscat* [2006] IRLR 354 and *Royal National Lifeboat Institution v Bushaway* [2005] IRLR 674) Although commending cases that give prevalence to the substance of the relationship rather than the form of a contract and thus disregard shams designed to rob employees of their rights, some have questioned the appropriateness and practicality of imposing liability on the user company. (Wynn and Leighton 2006 at 301) Some of the arguments put forward by these authors relate to the contractual requirement of mutuality of obligation. Often the relationship between the user company is sporadic and intermittent thus excluding mutuality of obligations. On the other hand the relationship between TES and worker can be more stable and long term. Secondly it is often the TES and not the end user that has the right to discipline and dismiss the agency worker. Thirdly, TES's are also often responsible for training the workers. Also it is usually the TES that is obliged to remunerate the worker. Consequently, there is no direct contractual nexus between the user company and the agency worker. The authors cite inter alia the EAT decision in *Stephenson v Delphi Systems Ltd* [2003] ICR 471 where the absence of an obligation to pay and to provide work excluded mutuality of obligation.

However, the authors also point that it is also not easy to establish mutuality of obligation between TES and agency worker and that "virtually all cases on employment status involving agencies have held that there is no 'mutuality' in the agency relationship."(Wynn and Leighton at 319) This is because the TES does not undertake to provide work and the worker does not undertake to accept work when offered. The authors inter alia suggest that the employment relationship, asopposed to the contract of employment should be the determining factor as to whether a person qualifies as an employee. This is in line with recent South African case law discussed above and with Brodie's view that the requirement of mutuality of obligation should be done away with asa necessary criterion for an employee and for a 'statutory worker'.

The Implied Term of Mutual Trust and Confidence

The question whether the implied term of trust and confidence should also apply to contracts entered into by atypical employees is not certain. The rising number of atypical employees has led academics as well as the judiciary to conclude, on public policy grounds, that the term of trust and confidence should also be implied in contracts involving atypical employees. (Mr justice Lindsay, 2001 at 1)

Does a statutory recognition of the provision of statutory labour rights to atypical employees justify an extension of common law rights of employees to atypical employees? Brodie has suggested that the fact that both mutuality of obligation and that the work be performed personally are normally required in order for an individual

to qualify as not only an employee but also as a 'statutory worker', renders the 'statutory worker' analogous to an employee. Consequently, the implied term of mutual trust and confidence should also be applicable to 'statutory workers'.

The fact that in developing the common law the courts have recourse to legislation as well as the policy considerations underlying the legislation in order to ensure consistency (Beatson 2001 at 247-251), lends support to the proposition that the creation of the 'statutory worker' grants the courts license to imply terms that are implied into contracts of employment into at least some forms of atypical employment.

Considerations of policy alone, without necessarily having recourse to analogous statutory developments have led the courts to impose duties on certain parties which may not otherwise have existed. In *Lane v Shire Roofing Company (Oxford) Limited* [1995] PIQR 417 the Court of Appeal held that the defendant owed the appellant duties which employers owe employees. This is despite the fact that the appellant was trading as a one-man firm, that he was considered to be self-employed for tax purposes, that the defendant had purposefully not entered into a contract of employment with the appellant, and that the appellant was being paid for the completion of a task, (all factors that indicate that the appellant was an independent contractor). Consequently the appellant was allowed to claim damages for injuries sustained while performing work for the defendant. This conclusion was based on policy considerations

In *Spring v Guardian Assurance Plc* (1994) *ICR* 596 Spring was employed as a sales director and office manager by a firm of estate agents. At the same time, he sold insurance policies for Guardian Assurance on a commission basis. Guardian Assurance took over the firm of estate agents where Spring worked. Spring applied for a post as a company representative at another insurance company. Guardian Assurance wrote a job reference for Spring with respect to his work selling policies for Guardian Assurance. Despite the fact that the judges of the House of Lords were uncertain as to whether Spring was an employee of Guardian Assurance, they held that Guardian Assurance owed Spring a duty of care in providing a reference so as not to negligently cause damage by diminishing his chances of obtaining employment. This duty of care is an implied duty applicable to contracts of employment. The House of Lords held that this duty could either arise from the law of delict, or alternatively it could arise as a duty implied into the contract between the parties. The significance of this decision lies in the fact that the House of Lords imposed an obligation owed by an employer to an employee on Guardian Assurance, despite being unable to categorically classify the relationship at hand as one between an employer and an employee.

Conclusion

The English case law provides some cause for optimism concerning the possible extension of the application of implied terms, including the implied term of trust and confidence to contracts with atypical employees. The cases that have extended the application of certain implied terms have generally done so without justifying themselves by analogy to statutory developments. It is hoped that the recent creation of the 'statutory worker' will provide the judiciary with the necessary support and license to further extend the application of these common law implied terms to atypical employees.

English case law in support of the implication of a contract of employment between the user company and agency worker might extend protection to agency workers sorely in need thereof. However, as explained, this may not be good in law and it

also may prove impractical in the light of the extensive use of agency workers for the sake of labour market flexibility.

The fact that recent South African case law has placed an emphasis on the employment relationship as opposed to the existence of a valid contract of employment, provides some scope for optimism regarding the extension of the concept of statutory employees.

The scope of the broadly worded right to fair labour practices that is available to 'everyone' in terms of the South African Constitution has the potential to be of great relevance not only in the development of rights for employers and employees, but also for the development of rights applicable to certain atypical employees.

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